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Journal of astern-European Criminal Law could stand out as a unique publication, at least in this part of the world, as an outcome of the partnership between specialists in criminal law and criminal procedure law from the law faculties of the West University in Timisoara and the University in Pecs, who aimed at presenting, in a different language from their own, the serious amendments of criminal legislation that occurred in their countries in the post-communist era, an essential requirement for the rule of law. We envisage this journal, published semesterly, to be open to all researchers in the academic environment from the former communist countries, to professors, PhD students, but also, to magistrates and other professionals interested in the evolution of criminal legislation and in the more and more firm response to be given to the criminal phenomenon, while observing the fundamental HUMAN rights.

Our concerns aim at enlisting the Journal in additional databases, others than the ones in which the magazine is presently indexed, namely Social Science Research Network (SSRN), EBSCO and HeinOnline. Also, the site of the Journal - JEECLe-uvt.ro – shall have a new format.

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The paper shall be written exclusively in English, and shall be accompanied by an abstract in English (10-15 lines).

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LAUDATIO

In Honorem Magistri ROBERTO E. KOSTORIS

Distinguished Members of the Senate of the West University of Timișoara,
Dear esteemed guests,
Dear colleagues, dear students,
Honored audience,
Highly esteemed Professor Dr. ROBERTO E. KOSTORIS,

I am extremely privileged to deliver the *Laudatio* Speech in honor of Professor ROBERTO E. KOSTORIS, one of the most renowned specialists of Criminal Procedure in Italy, a leading figure of the international academic world, on the occasion of his being awarded the honorary degree of *Doctor Honoris Causa Legum Scientiae*, the highest honorary award of the West University of Timișoara, upon proposal of the Faculty of Law.

Professor ROBERTO E. KOSTORIS is a Full Professor of Criminal Procedure at the Faculty of Law, University of Padua (Italy), the head of the PhD School of Law, University

of Padua, as well as the Vice-President of the Italian Association of Scholars of Criminal Proceedings "G.D. Pisapia". He is also an Honorary Professor of the Franz-Leopold University of Innsbruck (Austria) and a corresponding fellow of the Italian Scientific Academy - "Istituto Veneto di Scienze, Lettere ed Arti".

Professor ROBERTO E. KOSTORIS was invited to give lectures at the Leopold-Franzens University of Innsbruck (Austria) and Queen Mary University of London (United Kingdom); at the Humboldt University of Berlin (Germany), the Complutense University of Madrid (Spain), at the Jagellonian University of Krakow (Poland), and at the Beijing Normal University (China). Additionally, Professor Kostoris was appointed as *Rapporteur* for Italy at the XVIIIth International Congress of Criminal Law in Istanbul (Turkey), in September 2009 – whose topic was "*Special Procedural Measures and the Protection of Human Rights"*.

Professor KOSTORIS started his academic career in 1975, when he graduated *Magna cum Laude* in Law at the University of Trieste (Italy). In 1978 he was granted one of the ten fellowships provided that year in Italy by the CNR (the National Research Council) in the area of political and legal sciences.

In 1982, he became Assistant Professor of Criminal Procedure at the Faculty of Law of the University of Trieste, and, in 1992, after having won a national competition for the office of Associate Professor, he served this office by teaching Penitentiary Law at the Faculty of Law of the University of Trieste.

In 1993, Professor KOSTORIS won the national competition for the academic office of Full Professor of Criminal Procedure. In 1994, he started to serve as Full Professor of Criminal Procedure at the Faculty of Law of the University of Sassari (Italy).

Between 1998 and 2002, Professor KOSTORIS received a teaching appointment for General Procedural Law at the Faculty of Law of the University of Udine (Italy).

In 2000, Professor KOSTORIS was unanimously appointed to the Chair of Criminal Procedure at the Faculty of Law - now the School of Law - of the University of Padua (Italy), where he currently serves in this quality.

In the above-mentioned University he has obtained many academic appointments from 2001 to 2011, and starting with 2011, Professor KOSTORIS has been Director of the PhD School of Law at the University of Padua. Serving this office, he has consolidated the academic partnership with other European universities, promoting, among others, a joint PhD program with the Franz-Leopold University of Innsbruck (Austria), while supporting and encouraging the collaboration with the Faculty of Law of the West University in Timişoara (Romania).

Professor dr. ROBERTO E. KOSTORIS is the author of more than 200 articles, which address almost all the topics related to criminal procedure law, and an author or editor of 14 books, most of which have been translated into other European languages.

The most important contributions of Professor KOSTORIS, as a sole author or editor, are:

- La rappresentanza dell'imputato, Giuffrè, 1986.
- I consulenti tecnici nel processo penale, Giuffrè, 1993.
- Il giusto processo, tra contraddittorio e diritto al silenzio (Ed.), Giappichelli, 2002.
- Commentario breve al codice di procedura penale, (Ed. cu G. Conso and V. Grevi), Cedam, 2005.
- La ragionevole durata del processo. Garanzie ed efficienza della giustizia penale (Ed.), Giappichelli, 2005.

- Contrasto al terrorismo interno ed internazionale, Giappichelli, 2006 (Ed.,cu R. Orlandi).
- Giurisprudenza europea e processo penale italiano, Giappichelli, 2008 (Ed., cu A. Balsamo).
- Le impugnazioni penali: evoluzione o involuzione? Controlli di merito e controlli di legittimità, (Ed.) Giuffrè, 2008;
- Le intercettazioni di conversazioni e comunicazioni. Un problema cruciale per la civiltà e l'efficienza del processo e per le garanzie dei diritti, (Ed.) Giuffrè, 2009;
- Processo penale e giustizia europea. Omaggio a Giovanni Conso, (Ed.) Giuffrè, 2010.
- Manuale di procedura penale europea (Ed.), Giuffrè, 2014
- Commentario breve al codice di procedura penale, (Ed. cu G. Conso and G. Illuminati), Cedam, 2014.
- Manuale di procedura penale europea (Ed.), Ediția a-II-a revizuită și adăugită, Giuffrè, 2015.
- Il nuovo 'pacchetto' antiterrorismo (Ed., cu F. Viganò), Giappichelli, 2015.

Professor KOSTORIS is a member of the board of editors of several Italian legal journals in Italy (*Rivista italiana di diritto e procedura penale*), as well as in Romania (*Dreptul*, *Revista de Drept Penal* and *Journal of Eastern-European Criminal Law*), and has served as a scientific advisor of the law review "*Rivista italiana di diritto e procedura penale*", and of some legal series and monographs (Law Seminar of the University of Bologna, Law Seminar of the University of Verona and Law Seminar of the University of Milano Bicocca).

At an international level, Professor KOSTORIS is a Member of the Board of Directors of the Italian Group of *AIDP* (Association internationale de droit pénal), an Honorary Member of the Romanian Association of Criminal Law, as well as a Member of *ECLAN* (European Criminal Law Academic Network).

Professor KOSTORIS has contributed to the enhancement of the relations between the Faculty of Law, West University of Timisoara, and the University of Padua, by facilitating a series of training and research sessions for young Romanian scholars in Italy, and has accepted to support several Romanian legal journals, such as The Law (Dreptul), edited by the Association of Romanian Jurists, the Criminal Law Journal (Revista de drept penal), edited by the Romanian Association of Criminal Sciences, and especially the Journal of Eastern-European Criminal Law, co-edited by the Faculty of Law in Timișoara and the Faculty of Law in Pecs (Hungary).

The honorary degree that is today awarded to Professor ROBERTO E. KOSTORIS is yet another concrete example of the relationships that the West University of Timișoara has had with similar academic institutions at an international level, as well as a testimony of the fact that science is a bonding instrument, which becomes the most important element meant to coagulate mankind.

We are honored that, by awarding this honorary degree, we can contribute to the enhancement of relations between our institutions and to a better mutual understanding. We are privileged that we can thus honor the professionalism of a specialist who is famous in Italy and in the international academic community.

Taking into account the above-mentioned, we consider that the proposal submitted by the Faculty of Law within the West University of Timișoara, as to the awarding of the honorary degree of *Doctor Honoris Causa Legum Scientiae* to Professor ROBERTO E. KOSTORIS, is fully justified.

Distinguished Professor ROBERTO E. KOSTORIS,

We are glad that today you are in the middle of our academic community in order to receive this honorary title that the West University of Timişoara grants upon you in recognition of your special merits of developing a strong academic partnership between our institutions.

The *Laudatio* Academic Board appointed to award the honorary degree of *Doctor Honoris Causa*

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Fairness, Criminal Proceedings, European Law. Notes of a Civil Law Scholar

Prof. dr. Roberto E. Kostoris
Full Professor of Criminal Procedure at the Faculty of Law,
the Head of the PhD School of Law, University of Padua,

1. An ancient model becomes new again.

Contemporary law, and for our purpose criminal procedure, are facing a moment of complex transition. The multiplicity of sources and their strict intertwining, their various legislative and case-law nature, their multilevel character, domestic, European, international, the hybridization between the two cultures of civil law and common law they produce pose great challenges. In this juridical Babel there is a strong need to find minimum common grounds. Such grounds will be inevitably more and more represented by European law, today also in criminal proceedings, at least for the binding strength of European law towards domestic legal systems and for the consequent harmonizing effect that it can derive, directly or indirectly.

Among the most significant principles of European law regarding criminal proceedings, the principle of fairness has hold a central role. It is a concept that is new for our modern culture, but that it seems to be also a very ancient one, as from different points of view it recalls Aristoteles's *eipeikeia* and foremost the *aequitas* of the classic and medieval ages. Conversely, such a concept is abandoned in civil law systems for the whole modern age[1], while it flows through the *aequitas canonica* to the English common law[2]. Finally, common law values have inspired the conventional fairness.

In the ECHR system fairness is considered a fundamental principle from which, also through the case law of the European Court, a multiplicity of procedural safeguards has developed. For its part, EU law requires compliance with procedural fairness in all its recent harmonization directives on procedural safeguards[3]. The central role of fairness places this principle as a key landmark also for civilian jurists. Nevertheless, it must be highlighted that these jurists were grown in the cultural *mileu*, represented by modern legal positivism, which has always rejected the idea of fairness being applied in criminal proceedings. Therefore, it is clear that these jurists could have some difficulties to

[1] Of course, separately the revolutionary soviet law and the concept of "socialist juridical conscience", that there was fixed as judgment criteria for courts, should be considered (see. V. Frosini, *Equità (nozione), Enc. dir.,* XV, 1966, 75 fol.).

[2] J.L. Barton, *Equity in the Medieval Common Law*, in (R.A. Newman ed.) *Equity in the World's Legal Systems. A Comparative Study dedicated to R. Cassin*, Bruylant, Brussels, 1973, 139 fol.

[3] See Article 2.2 of Directive 2010/64 *on the right to interpretation and translation in criminal proceedings*; Article 6 of Directive 2012/13 *on the right to information in criminal proceedings*; Article 8 of Directive 2013/48 *on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty*; Article 10 of Directive 2016/343 *on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings*; Article 2.6 of Directive 2016/800 *on procedural safeguards for children who are suspects or accused persons in criminal proceedings.*

manage the implications of this approach, which requires a radical change of paradigm compared to the traditional one.

2. Legal forms conceived as procedural safeguards in modern codes of criminal procedure.

It is useful to start precisely from this traditional way of thinking to discover its cultural roots.

For the modern civilian criminal procedure jurist – even if I refer especially to the Italian jurist –the couple fairness and criminal procedure appears to be almost an oxymoron. Criminal proceedings must be conducted in strict compliance with the rules provided for in the code; undoubtedly, these rules are expression of values considered by the legislator worth of safeguard; but, such values are crystallized in these rules from the moment in which the latter are created by the law. Therefore, these procedural rules must be applied strictly, as they represent a value as such. A legislator that would make room for fairness into a criminal trial would conflict with such a logic, because he would allow these rules not to be complied with, even if only partially. Such legislator would open to discretional choices of the judge, and would entrust his wisdom qualities. However, in doing so – whether considering fairness with regard to decisions on the merits or with regard to the procedure itself – he would contradict to a duty of safeguard.

In fact, while fairness can be acceptable in private law, where economic interests, which are naturally subject to negotiations and compromises, are at stake, and where an approach to reliance (as the concept of good faith shows) and to a balanced management (as the concept of reasonable and prudent man demonstrates) is applied, and where the figure of the "arbiter" plays a role of growing importance, criminal trial must firmly exclude any application of fairness. It is easy to understand why. Criminal trials deal with future and freedom of the person. It is here that the relationship between State authority and citizen freedom becomes more conflictual, as it is here that is exercised one of the highest expression of state sovereignty with its charge of violence, which is represented by the power to punish. Therefore, in this context, the safeguard of the accused person must be realized only through a strict compliance with the law; indeed, only in this way the person can be effectively safeguarded against abuses[4], which could be conversely the result of fairness assessments.

This way of reasoning substantially summarize the Enlightenment thinking, which, heir of natural law doctrine in promoting the human persons, promoted also the accused person, who in the inquisitorial system of the *Ancien Règime* had almost no protection[5]. However, such conferral of rights to him was carried out in the context of the typical abstract approach of the Enlightenment philosophy, which postulated an abstract person in an abstract 'state of nature' and an abstract law that regulates his life and relationships[6]. And an abstract law led to abstract legal forms. It was a general phenomenon, common to every area of law, but which with regard to criminal procedure assumed a peculiar meaning. Indeed, compliance to legal forms had the

[4] C.L. de Secondat de Montesquieu, *L'esprit des Lois* (1748), IV, II

[5] R.E. Kostoris, *Le fonti*, in R.E. Kostoris (ed.), *Manuale di procedura penale europea*, 2° edizione riveduta e ampliata, Giuffrè, Milano, 2015, 2 fol.

[6] P. Grossi, *L'Europa del diritto*, Laterza, Roma/Bari, 2007, 100 fol.

significance of a safeguard of the accused's freedom, because, by granting equality of treatment and procedural legality, it determined a marked reversal of perspective compared to the judge's despotism in the *Ancien Règime*[7]. It is a remarkable concept, which continues to be invoked as an achievement of civilization, even if intermittently, in the history of criminal proceedings over the last two centuries in continental Europe. Of course it must be stressed that such a concept recalls a precise image of law, grounded, according to the canons of modern positivism, on the state law (the code), which is posed on the top of the sources and has the monopoly of legal production; a law that represents the highest expression of the State sovereignty and which the judge must passively and scrupulously execute[8]. Law is considered as a *scientia iuris*, or, in other words, a theoretical science, dominated by formal rationality, syllogism reasoning, deductive method, binary choices (true-false, all-nothing, legal-illegal). However, such a legal model appears self-referential, as it limits any reasoning on the law and on the proceedings to problems linked only to legal provisions, without any consideration for the particularities of the case to which they are applied[9]. Therefore, this model implies a clear break between the world of law and the world of facts.

Undoubtedly, it must be added that over time the purity of this model has been strongly compromised by various elements: by the acknowledgment of the creative role of case law; by the enactment of modern post-war constitutions, which are sources of law establishing 'principles', contrary to the codes that establishes rules[10], but to which those rules must comply with; and in addition, by a series of reforms and of new provisions included in contemporary criminal procedure codes that led to non-formalistic views of justice. Let's think about the Italian Criminal Procedure Code of 1988, the first European code that has abandoned the Napoleonic model of mixed proceedings and has embraced an adversary structure, but which can be considered at the same time still a product of modern culture, as it is nonetheless conceived with a logic-abstract view. Well, one of its central aspects is represented by the principle of adversarial evidence gathering, that revitalized the ancient instruments of rhetoric aimed to the search of a probable truth, which replaces the idea of the search for the material truth typical of inquisitorial systems. In addition, that code, mostly in the more recent reforms on the mechanisms allowing anticipated settlement of proceedings, contains instruments that are characteristic of fair justice such as dismissal for irrelevance of the fact, probation, and, above all, criminal mediation, where the State even waives to exercise criminal jurisdiction by promoting out-of-court restorative justice mechanisms.

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[7] It is important not to forget that during the French revolution period the English experience was looked at with high interest to adopt ideas and institutions of common law accusatory trial, going as far as importing jury in France: see. F. Cordero, *Procedura*, Giuffrè, 9° edition, 2012, 50 fol.

[8] It is the Enlightenment concept of the judge considered as the "*bouche de la loi*": See C. Beccaria, *Dei delitti e delle pene* (1764), IV, *Interpretazione delle leggi*

[9] R. Dworking, *Taking Rights Seriously*, Cambridge (Mass.), Harvard University Press, 1977, Italian edition, *I diritti presi sul serio*, Il Mulino, Bologna, 1982, 83 points out that for positivism the complex of valid legal rules represents the whole law, and, therefore, if a case is not regulated by them, such case cannot be decided by the "application of law".

[10] R. Dworking, *ib.,* 93 fol. Points out that the difference between rules and principles is represented by the fact that rules apply in the form of all-or-nothing and provide legal consequences that follow automatically when the provided conditions are met, while principles are direction indicators that do not provide immediate legal consequences and are measured, differently from rules, for their weight and importance.

3. Law as a 'practical science' and Middle Ages *aequitas*.

However, it is necessary to highlight that this modern concept of criminal trial, even if sometimes hybridized as we have just mentioned, does not represent the immanent features of trial, but it is the result of a specific culture that belongs to civil law systems and concern a specific historical period. Indeed, there is a different concept of law that is opposed to this approach, which roots in the classic and early Middle Ages antiquity, and that today revives again and is imposed to the contemporary jurist: the one, already conceived by Aristotle, which considers law as a practical science[11], that concerns a human action (*praxis*), and has as his object a good act, namely, an act according to justice (*eû prattein*). In this view, knowledge is no more considered an objective by itself, an objective of 'truth', as it happens in theoretical sciences that belong to the world that does not change and cannot change[12], and to which law was linked during the modern era as we have already seen. This knowledge is aimed to the perspective of the action. This means – and this is the key aspect – that law becomes a kind of knowledge always oriented toward values; therefore, we have to call it *fronesis* and not *episteme,* or, in Latin, *iuris-prudentia*, and not *scientia iuris*.

In this view, law can no longer represent something extraneous or impenetrable to facts, as claimed by modern positivism, exactly because it completes itself in contact with the facts. Therefore, law consists not only in legislative rules, even if it cannot be reduced to a mere collection of cases either; instead, it represents a moment of connection between rules and facts, meaning that rules remain the non-removable starting point but they concretely live only when they are considered in relation with the cases, which represent the problematic matters that request to be solved by the law[13]; in other words, this happens when the cases discover new possibilities of application for the rules[14]. But, as we said, this contact between law and facts must be oriented by values. In the Aristotelian doctrine, such a basis of the action according to justice (the *eu prattein*) is represented by the *eipeikeia*; for early Middle Ages law it is represented by the *aequitas*. This latter is named in the ancient sources as '*rerum convenientia*', meaning 'harmony', mutual order and substantial equality. Middle age civilization aspires to establish itself in an order of which God is the guarantor and the *aequitas* is the ordering tool. In the Middle Ages this harmony is not considered a result of human mind, but '*in rerum consistit*' and from them it reflects itself on human beings. Therefore, law presents a strong factual imprinting, is grounded on a continuous exchange between the world of facts and the world of legal forms, whose vehicle is *aequitas*, which grants harmony between facts and rules, and factual basis for each rule[15].

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[11] Aristoteles, *Nicomachena Ethics*, 1095 to 6.

[12] Aristoteles, *ib.*

[13] G. Zagrebelsky, *Il diritto mito. Legge diritti giustizia*, Einaudi, Torino, 1995, 187 fol.

[14] G. Zagrebelsky, *ib*. clarifies well how the case relates to the legal rule, specifying how the case by itself, in its simple historical-material reality, is mute; and that, therefore, it is first and foremost necessary to understand its 'meaning', to categorize it. This is achieved by relating it to the consequences that it is considered suitable of adjudicating in a specific social context. Once determined its sense and value, the case presses on the law so that the appropriate solution is achieved: this could require legal reforms, or even only new interpretative reconstructions of the existing law, even if legal formulas would remain unchanged.

[15] For all these considerations see P. Grossi, *L'ordine giuridico medievale*, Rome/Bari, Laterza, 2003, 176 fol.

From the point of view of criminal procedure, the Middle Age *aequitas* is at the basis of forms of reparative negotiable justice[16]. Indeed, by repairing the damage and the offence caused by the crime to the victim or to the group, to the community to which it belongs through transaction, reconciliation, mediation, expiation instruments, the natural order is re-established. But even trial by ordeal and judicial duel, submitting the outcome of the judgment directly to God, show, finally, the same aim to the re-composition of a superior order violated by the crime.

Such an image of the criminal trial is gradually undermined with the development of inquisitorial proceedings starting from the XIII century, which promote an authoritative vision of criminal justice, where it is important no longer the re-composition of the violated order, but conversely the punishment of the guilty[17]; therefore, the value of truth replaces the value of *aequitas*. And, at the same time, the idea of criminal trial as a practical science, whose purpose is to act according to justice (i.e., obtaining the reconciliation between the victim and the offender, the re-composition of the violated order, in line with the beliefs at that time) is abandoned; the method of theoretical sciences is applied to the criminal trial, given that its purpose becomes the ascertainment of truth, considered in its objective character, which therefore can rightly be achieved through torture[18].

4. European law and procedural fairness: the hybridization of criminal trial between rules and principles.

Let us now relate this reasoning that is here only briefly summarized, but that would require a more in-depth analysis, to the contemporary framework.

As we have already noted, the first great institutional event of our time that we can call "post-modern"[19], to distinguish it from legal modernity, was the enactment of Constitutions after the second world war. In them, law is built by principles. In the Italian Constitution there are numerous principles dedicated to criminal trial. Fairness is not expressly included among them, but it can be somehow implicitly derived from the concept of 'reasonableness', that the Italian Constitutional court derived from the principle of equality established in Article 3 of the Constitution. Reasonableness means reasonable balance of values, adjustment between multiple needs. And this is by itself a suitable method to achieve a renewed practical dimension of law.

The second great event of post-modern time is represented by the more and more massive and pervasive advent of European law, even in the area of criminal justice. In

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It has been highlighted how factual issues and legal issues were so strictly linked that it wasn't possible to distinguish the former from the latter, as there wasn't a division between proof of facts and interpretation of law, i.e. between establishing fact and rule: A. Giuliani, *Il concetto di prova. Contributo alla logica giuridica*, Giuffrè, Milano, 1971, 223 fol.

16 On negotiated justice in middle-age criminal proceedings, see M. Sbriccoli, *Giustizia negoziata, giustizia egemonica. Riflessioni su una nuova fase degli studi di storia della giustizia criminale*, in M. Sbriccoli, *Storia del diritto penale e della giustizia. Scritti inediti (1972-2007)*. Giuffrè, Milano, 2009, 1236 fol.

17 M.Sbriccoli, *ib*, 1240.

18 A. Giuliani, *ib*, 185 observes that the issue of legal torture was substantially conceived as a "logic" issue, whose content was the suitability of torments as a tool to find out the truth.

19 P. Grossi, *Novecento giuridico: un secolo pos-moderno*, in P. Grossi, *Introduzione al novecento giuridico*, Roma/Bari, Laterza, 2012.

this context, a special focus must be reserved, in our perspective, to the role played by the European Convention of Human Rights, given that it expressly includes in Article 6.1 ECHR the principle of trial fairness, conceived as the key of a new European 'order'. The ECHR adopts the name fairness in order to underline that this principle does not especially concern decisional aspects (which are obviously implied therein, but that are not its main object) as much as correctness, integrity in conducting the trial, considered as values by themselves. Fairness in ECHR must be intended as an issue of method; the method to which States parties through their legislative and judicial bodies must conform to, both in regulating and in managing concretely national criminal trials. In the Middle Ages, *aequitas* was intended as an order that was immanent in the nature of things, in an harmony which was reflecting a higher divine harmony. Today that order, that method, is represented by an ideal heritage of common values that roots in the enlightenment season, but that must be adapted to the needs of a pluralistic society such as the contemporary one. ECHR can be considered the interpreter of this heritage, that for its part even European Union has recognized both in a text of primary law, such as the European Charter of Fundamental Rights, and among its founding principles together with the safeguards originating from the common constitutional traditions of Member States (Article 6 TEU).

It remains still to clarify more precisely in what this method enshrined by the ECHR, represented by procedural fairness, consists.

In this view, it must be considered under two dimensions: for its content and for its application.

Focusing on its content, fairness consists – in Article 6 ECHR and moreover in a wide series of 'clinical cases' elaborated by the European Court of Human Rights[20] - in a plurality of 'methodological' safeguards that must characterize a criminal proceedings, as independence, impartiality and previous establishment of the judge, the right of the accused to a decision of a judge on the merits of the criminal charge against him, the right of equality of arms, the right to evidence and to adversarial proceedings, this latter to be intended as the right of the accused to the hearing of his claims, the right not to self-incrimination, the right of the reasonable time of the proceedings, and the right to legal certainty, that includes the duty of States to avoid and prevent as much as possible interpretative conflicts by the tribunals. In addition, presumption of innocence and the specific defensive safeguards regulated by Article 6 ECHR par. 2 and 3 shall be deemed a direct expression of trial fairness. In particular, with regard to the presumption of innocence a sort of convergence between fairness in proceedings and fairness in deciding can be seen, given that the rule of judgment imposing acquittal when guilt is not fully proven (i.e. proven beyond any reasonable doubt, according to the well-known common law formula) derives from it.

As we said, these are safeguards that are overall rooted in the common cultural heritage of European states, even if the numerous judgments of the European Court of Human Rights show that certain States are still far from respecting them.

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[20] Therefore, the contents of conventional fairness are the result of a 'normativization' in numerous aspects due to a 'source case law' (for this expression, see M. Donini, *Europeismo giudiziario e scienza penale. Dalla dogmatica classica alla giurisprudenza-fonte*, Giuffrè, Milano, 2011, 49 fol.). This phenomenon is recalled – now also by many acts of the European Union – when reference is made to conventional rules 'as interpreted' by the Court of Strasbourg.

But the real qualifying and original aspect of European trial fairness, which links it to a renewed practical dimension of law, is represented by its applicative profile, which can be considered by itself a method and a principle. We refer to the fact that fairness is conceived in a markedly factual dimension. And this under three aspects: first, because fairness must not be considered in abstract but must always be considered in relation to a specific judicial case. The safeguards mentioned above are general principles, but it is necessary to verify if they are respected in a specific context and in light of the specific features of that context. Second, because such an assessment must be made in a holistic and not fragmented way, meaning that, for a diagnosis in terms of fairness, the single judicial case has to be evaluated as a whole; so, for example, a violation of defensive safeguards in a specific procedural phase could be compensated by safeguards offered in a following phase.[21] Finally, because it is required that the violation is 'substantial'. This means that the person that claims to be victims of a violation must demonstrate to have suffered a significant disadvantage due to it. Well: it must be highlighted how much all these three aspects can conflict with a criminal trial designed on the strict respect of procedural forms as the ones regulated in modern criminal procedure codes.

This brings us back to the scenario we started from. We live in a difficult moment of transition where the legislative tools of the past must interact with the new tools of the European law, hybridizing strongly in contact with them, and where the order and certainties – often idealized – which remain from the modern age are subverted by the chaotic overlapping of legislative and case law sources of different origin. Certainly, a law more and more set up on principles is imposing itself on a law set up on rules, even in the sacred area of criminal justice. This has an important consequence: a law construed on principles grants more discretionary powers to the judge: he becomes again the custodian of an order of values. But higher powers open the door to the risk of an arbitrary use of them. It is the everlasting problem. And even the loss of a commonly shared framework of values in a pluralistic society as ours makes such a situation more difficult[22]. Will the spread of the culture of reasonableness, of reasonable balancing, of which European procedural fairness shows to be an intrinsic expression, be able to reduce the risks of an excess of interpretative pluralism?

[21] E.g. Eur. C. 9/6/1998, *Twalib v. Greece*. For some critical remarks based on the fact that '*fairness of the proceedings as a whole test*' would not always be used by the European Court, which, notwithstanding its statements, sometimes carries out fragmented assessments, see R. Goss, *Criminal fair trial rights. Article 6 of the European Convention on Human Rights*, Hart Publishing, Oxford and Portland, Oregon, 2014, 124 fol.

[22] G. Zagrebelsky, *ib.*, 201 fol.

The Challenges of International Cooperation in Criminal Proceedings in the Light of Harmonization of E.U. Law and States' National Law

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Abstract:

Current issues and realities of the European Union legislation development related to international cooperation in criminal proceedings are analyzed in the article. The content of the European Union competence, its scope while regulating the judicial and police cooperation is revealed.

The authors, in accordance with the currently existing legal provisions, legislative ideas and the prevailing practice of legal cooperation in criminal matters, ask if one of the segments of international cooperation in criminal proceedings – free movement of evidence – corresponds to the initial ideas of the so-called cornerstone - mutual recognition, or, however, the current issues force to admit that this segment is still in search – discovery-search stage.

This Article draws attention to the fact that in reality the harmonisation process of the European Union law and the Member State national law is not as smooth as it is intended to demonstrate in program provisions, declarations and legislative initiatives.

Keywords*: Judicial and police cooperation, principle of mutual recognition, principle of subsidiarity, competence in criminal proceedings.*

1. Principal issues of European Union law and national law harmonisation, regarding international cooperation in criminal proceedings

The context of criminal justice, relationships between European Union member states are viewed as one of the elements in the process of Europeanisation, which makes

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us think of ways to turn this element into an effective and productive tool aimed at strengthening the human rights protection mechanism. The recent dynamic Europeanisation of criminal justice became an object of scientific discussions. It is often viewed apologetically and is highly criticized for the efforts to harmonise and simplify the criminal proceedings of the European Union member states by choosing the quickest and most effective way to achieve the goal.

Establishment of the European Union (hereinafter – EU) and its further growth reveals the development of its regulated areas and competence. The significance of the legislation adopted by the EU institutions and the significance of the decisions made by the Court of Justice of the European Union (hereinafter – the Court of Justice), which explains this legislation, is undeniable for the Member States. It complements the national legal regulation of the Member States. Consequently, over time the criminal justice got into the range of many areas, which are regulated by EU. On the one hand, the aim of coordinating of the sphere, which exclusively belongs to the national law, has the negative shade, on the other hand, in the absence of regulation of the unified international cooperation, investigations of criminal cases with an international element would stagnate.

All these issues are becoming more important as the increasing need to regulate the quite sensitive assessed area of law is observed. Although Member States have provided the EU institutions the right to adopt the legislation, which is binding for Member States and thereby have limited their sovereign rights in certain areas, Member States seek as much as possible to maintain their traditions, culture and national identity.

1.1. General overview of the mechanisms for international cooperation in criminal proceedings under the EU legal regulation context: free movement of evidence

The origins of the EU can be seen from the foundation of the European Coal and Steel Community. The primary reason for creating of the European Coal and Steel Community was cooperation and acting collectively in the economic and social fields. These objectives are declared in the Treaty establishing the European Coal and Steel Community of 18th April 1951. This Treaty is considered to be the significant impulse towards European integration. The purpose of the Treaty establishing the European Economic Community and the Treaty establishing the European Atomic Energy Community, which were signed in Rome on 25th March 1957, was to create the common market, based on freedom of movement of goods, people, the capital and services.

As regards the basics of the criminal justice in the EU, it is indispensable to mention the European Union, i.e. the Maastricht Treaty of 7th February 1992, which was not limited to the incentive of harmonious and sustainable economic and social progress, but the discussion was started about implementation of common foreign and security policy, judicial and police cooperation in criminal proceedings while preventing and combating terrorism, trade of illicit drugs and other complicated forms of international crime. The three-pillar system according to which the EU acted was created by this Treaty. It is clear that the outline of the Community changed while expanding the regulatory spheres, incorporating criminal justice issues. At that time such a step was considered as a very big achievement

According to the Treaty of Amsterdam of 2nd February 1997, even more ambitious objective was raised – to create conditions for the free movement of persons while ensuring safety and security of the nations in accordance with the provisions of this agreement creating space of freedom, security and justice. This agreement is significant also because the third pillar has been called the basis of judicial and police cooperation in criminal proceedings after this agreement. Thus, the EU's intentions to take practical actions aligning Member States' criminal justice have gained momentum.

The absence of the border control of the EU countries facilitated the free movement of people and capital, meanwhile possibilities for criminals to act more freely across borders were extended. This meant that the same criminal offence could be done in the territory of several states, the citizens of several states could do the offence, the data, which are significant for investigation of the offence could be gathered in the jurisdiction of different countries and justice[3]. It is obvious that when the international element is in the criminal case, it is inevitable that one state delivers various requests for legal assistance to the other foreign state[4] in order that the implemented criminal proceeding would not get into the situation with no way out (lat. – *faucibus premor*).

So, when the emerging threats were realized, the measures were taken to implement the objective to cooperate effectively and efficiently during investigation of criminal cases. Of course, such cooperation was possible only by recognizing the principles of mutual assistance and mutual recognition. The latter principle is considered to be the cornerstone of international cooperation during investigation of criminal cases.

Measures, which are based on the principle of mutual legal assistance, are reflected in the European Convention on Mutual Assistance in Criminal Matters[5], also in the Schengen Agreement[6], which complements it[7]. Meanwhile elements of mutual recognition could be seen even from the European Council's meeting in Tampere, 1999, during which the objectives were raised for assurance that the international cooperation in the fight against crime among the EU Member States, would be based on the mutual recognition principle as the foundation implementing the Community and the Member States' interests. The ideas, which initially sounded as the ideological ideas, gained momentum and the Council adopted a Programme of Measures to Implement the Principle of Mutual Recognition in Criminal Matters in 2001[8]. Ensuring that the evidence

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[3] Belevičius, L. Tarptautinis teisinis bendradarbiavimas ir Europos Sąjungos baudžiamasis procesas: aktualijos, perspektyvos, lūkesčiai. *Baudžiamojo proceso tarptautiškumas: patirtis ir iššūkiai*. Mokslo studija. 2013 01 170*

[4] Jurka, R. Tarptautinis bendradarbiavimas baudžiamajame procese: įrodymai ir jų priimtinumas Europos Sąjungoje. *Baudžiamasis procesas: nuo teorijos iki įrodinėjimo (prof. dr. Eugenijaus Palskio atminimui)*. Vilnius Mykolo Romerio universitetas, 2011, p. 89-128.

[5] European Convention on Mutual Assistance in Criminal Matters of 20 April 1959. at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800656ce

[6] Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders. Available at: http://www.refworld.org/docid/3ae6b38a20.html

[7] Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union, 29 May 2000. Available at: http://eur-lex.europa.eu/legal-content/LT/TXT/?uri=CELEX%3A42000 A0712(01)

[8] The programme of measures to implement the principle of mutual recognition of criminal decisions envisaged in point 37 of the Tampere European Council Conclusions and adopted by the Council on 30 November 2000. *Official Journal C 12 E, 15/1/2001 P. 10*.

would be acceptable, prevention of their destruction, facilitation of the execution of search and seizure, the quick use of evidence in the criminal case were provided in this programme.

On the 13th of June, 2002 there were adopted Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States also 22nd July 2003 Council Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence[9], the main purpose of which was to secure evidence and confiscate property, which is easily movable, also, transfer the evidence to the other Member States. The subsequent documents of the EU fostered the international cooperation. Namely, it is pointed out in the paragraph of the judicial cooperation in criminal proceedings of the Hague Programme[10], 2005, that the further improvement of the judicial cooperation in criminal proceedings is essential for foresight of adequate further activities of law enforcement authorities of the Member States and Europol investigation. Also, the attention to the mutual recognition is emphasized, affirming, that the detailed program of the measures, which are designed to implement the mutual recognition principle of judicial decisions in criminal matters, that includes the judicial decisions in all stages of criminal procedure or otherwise related with these processes, for example, the evidence collection, the adequacy, collision of jurisdictions and *ne bis in idem* principle[11] and the execution of final sentences of imprisonment or other (alternative) sanctions, should be finished and the attention should be paid to the additional offers of this area.

Council Framework Decision on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters was adopted on 18th December 2008[12] (hereinafter – EEW). Although the EEW regulation opened the way for free movement of evidence among the EU states, however, at the same time, restrictions, which do not ensure the thorough international cooperation, are specified. It is visible from the content of the EEW mechanism, that the EEW is issued only for obtaining existing collected evidences, which are in the executing State. The latter order has become an obstacle to the collection of new evidences that are not collected in the executing State.

Seeing the EEW mechanism shortcomings, the European Council adopted the Stockholm Programme[13] on 11th December 2009, which declared the objective to

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[9] Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence. *Official Journal L 196, 02/08/2003 P. 0045-0055.* Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003F0577

[10] The Hague programme: strengthening freedom, security and justice in the European Union. Official Journal 2005/C 53/01. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri= CELEX:5 2005XG0303(01)

[11] The *ne bis in idem* principle is often viewed as a prohibition to impose a repeated punishment for the same crime, also as a prohibition to initiate repeated criminal prosecution for the same crime or all of the above prohibitions in their entirety. The *ne bis in idem* principle is found in *Lex Talionis*. It has never been forgotten within the framework of the European Union criminal justice and is gradually gaining in importance.

[12]Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters. Official Journal 2005/C 350/72. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32003F0577

[13] The Stocholm Programme – An open secure Europe serving and protecting citizens. Available at: http://eur-lex.europa.eu/legal-content/LT/TXT/PDF/?uri= CELEX:52010 XG0504 (01)&from=EN.

optimise the admissibility of the evidence in criminal proceedings, which take place in the EU Member States. The shortcomings, which were mentioned above, are taken into consideration, one of the shortcomings was the negative attitude of the States to the unconditional application of the mutual recognition principle. Feeling such concerns of the States, the European Council promotes mutual trust, calls for all necessary measures that the measures, which were agreed on the European level, would be moved into the national law. Of course, the shortcomings are specified in the program too, suggesting that the current legislation does not create a unified system. The attention is drawn to the fact that "A new approach is needed, based on the principle of mutual recognition but also taking into account the flexibility of the traditional system of mutual legal assistance. This new model could have a broader scope and should cover as many types of evidence as possible, taking account of the measures concerned"[14]. In this way, the European Council called for the detailed, comprehensive system, which would essentially replace the legal instruments, that are used in this area, including the European arrest warrant and the EEW, include more types of evidence, as it is possible, consolidate the deadlines of implementation and the basics of non-recognition and non-enforcement would be sufficiently limited.

Soon afterwards, i.e. on 23rd June 2010 the group of European Union Member States – Austria, Belgium, Bulgaria, Estonia, Spain, Slovenia and Sweden presented to the European Council the initiative regarding the European Parliament and the Council directive for the European Investigation Order in the criminal matters[15]. The uniqueness of this initiative was that it was oriented not only for obtaining of evidence, which were collected in advance in other Member States but for performing the steps in finding, collecting and obtaining evidence. Using the tools that are offered by this initiative, it is aimed to break the deadlock, when many documents create the fragmented application of the mutual recognition principle, setting such objectives: to accelerate the procedure, ensure the admissibility of evidence, simplify the procedure, maintain a high security level of fundamental rights (especially procedural rights), reduce financial costs, increase mutual trust of the Member States, intensify their cooperation and maintain features of legal culture of the national systems and the Member States. According to this initiative, it was offered to replace all existing documents using "the European Investigation Order", which would be applied to all types of evidence.

It seems that the objective for achieving that international cooperation would be more efficient and faster, becomes more and more realistic. The European Parliament and the Council adopted the Directive 2014/41/EU regarding the European Investigation Order (hereinafter EIO) in the criminal proceedings on 3rd April 2014[16]. The advantage of this Directive is that rules are set for execution of the investigation tool on the purpose of collection of the evidences in all stages of the criminal procedure, including the stage of the course of the proceeding. *Inter alia*, this Directive provides perhaps the most important thing for international cooperation that EIO should be issued for execution of one or several specific investigative measures in the state, which

[14] The Stocholm Programme, *supra* note 16, 3.1.1 p.

[15] Proposal for a Council Directive regarding the European Investigation Order in criminal matters detailed statement. Available at: http://www.statewatch.org/news/2010/jun/eu-coucil-investigation-order-det-statement-9288-add2-10.pdf

[16] Directive 2014/41/EU of The European Parliament and of The Council of 3 April 2014 regarding the European Investigation Order in criminal matters. Available at: http://eur-lex.europa.eu/legal-content/LT/TXT/?qid=1408184536208&uri=CELEX:32014L0041

implements EIO, in order to collect evidence. It should be added that obtaining of the evidence, which have already been received by the executing authority, is included. It is declared in the Directive that the majority of the attention should be paid to enforceable investigation instrument in the EIO. However, the prerogative is left for the issuing authority to decide by itself, what investigation measure should be applied.

So, although the adopted provisions of the directive raise many controversial questions, which should be discussed more widely, the significance of this document to the international cooperation is undeniable. It can be stated that the adopted document requires a lot of efforts of the Member States in order that aims and objectives, which are stated in it, would become the efficient practice. This document must be transposed into national law compulsorily until 22nd May 2017, transferring to the Commission the text of the provisions, according to which the obligations imposed under this Directive are transposed to the national law.

It is clear that the initial objectives, which formed during the course of the operation of the European Union for the efficient, smooth and productive cooperation while investigating the criminal matters, become a reality. However, such reality forces to think about how far and how deep these areas can be "controlled" by the European Union.

2. The challenges for legal regulation of judicial and police international cooperation

The EU Member States are increasingly concerned about the EU initiatives, which extend regulation in the area of judicial and police cooperation. The former third pillar was not distinguished by the supranational principle in the area of judicial and police cooperation in criminal proceedings. This means that this pillar was based on cross-border cooperation. The fundamental objective of this cooperation – to make decisions by consensus of the institutions, which represent the Member States. The decisions could not be taken by a majority of votes while resolving issues which have been assigned to this pillar. Instead, coordination, cooperation and consultation principles have been applied for resolving of the third pillar's issues.

The situation has changed over time. The EU competence in the area of the criminal procedure law gradually expanded. For example, in Part 1 of Article 5 of the EU Treaty it is pointed out that the establishment of spheres of competence of the Union is based on the principle of conferral. It means that the Union shall act only within the limits of competence, which was conferred by the Member States achieving the objectives, which were stated in the Treaties. All competence, which is not conferred to the Union in the Treaties, is controlled by Member States. However, it is to be noted that implementation of the Union competence is based on subsidiarity and proportionality principles. For this very reason the subsidiarity principle is derived considering "the principle of conferral", i.e. it can be applied only in such case, when the EU has the competence to act in the respective area[17].

The principle of proportionality is of particular importance, when the EU institutions decide to take one or another decision in a particular area. In this case, it is

[17] Report from The Commission annual report 2013 on subsidiarity and proportionality. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014DC0506

necessary to evaluate if the content and the form of it do not exceed the issues, which are necessary to achieve the objectives of the Treaties. So, for evaluation whether those principles actually work in the area of judicial and police cooperation, it is necessary to reveal the regulation of this area.

As it is stated in the Article 82 of Treaty on the Functioning of the European Union, judicial cooperation in criminal matters in the Union shall be based on the principle of mutual recognition of judgments and judicial decisions and shall include the approximation of the laws and regulations of the Member States in the areas referred to in Paragraph 2 and in Article 83. The Paragraph 2 of current Article states, that to the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern: (a) mutual admissibility of evidence between Member States; (b) the rights of individuals in criminal procedure; (c) the rights of victims of crime; (d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.

As can be seen above, the list of issues, which can be influenced by the EU is not finished, so, if the need arises, minimum rules can be set for the issues, which are not defined in the Treaty regarding actions of the EU. But still it is provided that the acceptance of the minimum rules in the scope of above mentioned issues does not prevent from maintenance or instituting higher-level protection of persons by the States Members. This shows that the possibility is left for the States Members to provide higher standards of the protection of individuals in their national law.

Treaty on the Functioning of the European Union is not limiting only on judicial cooperation. Article 87 Paragraph 1 of this Treaty states, that the Union shall establish police cooperation involving all the Member States' competent authorities, including police, customs and other specialised law enforcement services in relation to the prevention, detection and investigation of criminal offences. For implementing this provision it is stated, that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may establish measures concerning: (a) the collection, storage, processing, analysis and exchange of relevant information; (b) support for the training of staff, and cooperation on the exchange of staff, on equipment and on research into crime-detection; (c) common investigative techniques in relation to the detection of serious forms of organised crime. By the way, Paragraph 3 of current Article states, that the Council, acting in accordance with a special legislative procedure, may establish measures concerning operational cooperation between the authorities referred to in this Article. The Council shall act unanimously after consulting the European Parliament.

Subsidiarity and proportionality principles in the discussed scope of EU legal provisions create an illusory image. It is determined by the certain ambiguity of legal provisions. For example, since the area of freedom, security and justice depends on shared competence[18], the subsidiarity principle is valid, this principle provides the right

[18] Treaty on the Functioning of the European Union, the 26th, October, 2012, OJ, C 326, 26/10/2012, p. 53.

of the States Members to act in the areas of that competence, if they manage to perform it independently. Meanwhile, the EU starts to act only in case when the States Members cannot achieve the objectives of the intended action properly on the central, regional and local level and on the Union level regarding the extent of the intended action or the impact the objectives could be achieved better.

So the question arises if the EU must take measures and regulate, harmonise one or the other areas especially judicial and police cooperation? Although the guidelines what should be assessed for regulation of the issues of the certain area are specified in Article 5 of the Protocol No 2 of the EU Treaty, they are only of evaluative nature. It can be said, that when the EU expresses concern about the particular matter, it is presumed, that the states cannot adjust their own legal systems and the EU starts acting in accordance with the same principle of subsidiarity. It is obvious that Member States have quite limited possibilities to oppose to the initiated legislative processes. The jurisprudence of the Court of Justice indicates it. In one of the brand new cases[19] the Court of Justice has stated, that „It follows that the principle of subsidiarity cannot have the effect of rendering an EU measure invalid because of the particular situation of a Member State, even if it is more advanced than others in terms of an objective pursued by the EU legislature, where, as in the present case, the legislature has concluded on the basis of detailed evidence and without committing any error of assessment that the general interests of the European Union could be better served by action at that level." Although this case was not related to the judicial and police cooperation, from this case it is possible to judge about the common EU position regarding its competence limits.

The EU tone is not so strict in the area of the judicial and police cooperation in criminal matters. Rather, this tone is limited. The EU expands the competence in this area with caution, i.e. it tries to indoctrinate the aforementioned mutual recognition principle. The latter principle is considered to be the foundation of all pursued effective cooperation in criminal matters. However, this principle becomes only, at best, a dream, at worst - a nightmare. The question arises, if this principle really enhances mutual confidence between Member States? Confidence in this case consists in the fact, that when the requesting Member State submits the application for information provision, data collection and presentation, the executing State would not doubt the legitimacy of such request. The executing State, completely trusting the legal system of the requesting State, eventually the judges, should refuse even to perform such control of the request. Meanwhile, upon receipt of information from a foreign country, the question regarding legality and permissibility of receiving of this information should not arise. Thus, mutual trust is implemented in the case, when the states assess the information, which is gathered in its state or in the foreign country equally, substantially as uniformly legitimate.

Mutual recognition as a way to overcome conflicts of exercise of jurisdiction in criminal proceedings that are simultaneously ongoing in several member states is to be viewed as a way to affect the national law and as a feature characteristic of the European Community and recognised to be a cornerstone of judicial cooperation that stipulates an important shift towards a more flexible legal regulation. The science of European criminal justice says that the principle of mutual recognition on the European Union level is characterised by the fact that it enables court decisions in criminal cases to be directly enforced throughout the Community. Mutual recognition enables to believe that

[19] Judgment of the Court of Justice of the EC of 18 June 2015, case C-508/13, para 54.

there is no need to adapt the final decision of the national court of the member state that passed it to the national laws of the member state which will recognise and enforce it[20]. Scientific literature also says that the origins of mutual recognition stem from the development of the Community's internal market, especially with the decision of the European Union Court of Justice in the case of *Cassis de Dijon* dealing with the *free movement of goods* within the Community. The court said that mutual recognition is perceived as one of the key regulatory principles of the Community law ensuring that all fundamental rights are entrenched. Based on this precedent, K. Karsai developed the theory of free movement of court decisions in criminal cases[21] and claimed that all decisions in criminal proceedings of international nature must be based on this theory to avoid cases when proceedings themselves become a burden to member states and the entire Community, because the theory helps make the best use of the proceedings as an economic, effective and quick tool. Based on this idea it is possible to claim that the conflict of exercise of jurisdiction in criminal proceedings must also be based on free consultations, good will and mutual trust.

The jurisprudence of the European Court of Justice states that Member States have to trust each other's criminal justice systems and that each of them must recognize the criminal law that exists in the other state even if the results (consequences) would be different after applying rules of the existing law of their state[22]. However, still remembering the conclusions of the Tampere meeting, their essential idea was that mutual trust cannot be regarded as a condition[23].

In summary, it is possible to affirm, that competence of the EU expands according to one or another form. Limits of competence in the area of the judicial and police cooperation depend on integrity and persistence of each Member State in order to preserve their national identity[24] and thereby the rational approach to the undeniable need to communicate efficiently and smoothly in order to ensure the safety and well-being of every Member State separately and all citizens generally.

Conclusions

1. It is possible to affirm undeniably that harmonisation of the European Union law and the national law of Member States in the criminal proceedings of international cooperation is not identical in the contexts of aspiration and reality. Although the legislative ideas actually illustrate perspectives of effective cooperation, however the real implementation of these ideas often becomes only one more intermediate step towards further searches.

2. Theoretical and practical provisions of free movement of evidence allow to state that in the perspective this issue should become the issue not of efforts of the national

[20] Jimeno-Bulnes, M. European Judicial Cooperation in Criminal Matters. *European Law Journal* 9(5) (2009), p. 623.

[21] Karsai, K. The Principle of Mutual Recognition in the International Cooperation in Criminal Matters. *Зборник радова Правног факултета у Новом Саду* 1-2 (2008), p. 949.

[22] Judgment of the Court of Justice of the EC of 11 February 2003 – Joined Cases C-187/01 and C-385/01 – Gözütok & Brügge, para. 33.

[23] Gless, S.: Free Movement of Evidence in Europe. In: DEU, T. A. – INCHAUSTI, F. G. – HERNEN, M. C. et al.: El Derecho Procesal Penal en la Union Europea. Madrid : Colex, 2006, p. 130.

[24] Jurka, R. Europos teisės įtaka Lietuvos baudžiamajam procesui. *Baudžiamojo proceso tarptautiškumas: patirtis ir iššūkiai. Mokslo studija*. Vilnius, 2013, p. 14.

law of the Member States but the issue of creation and implementation of the legal decisions of the European Union. It is possible to affirm that the enthusiasm of the European Union in this area not "unfortunately" but "finally" became the required passkey dealing with challenges of the European Community in the fight against crime.

3. The discussed legal mechanisms, which help to ensure the idea of free movement of evidence, perhaps, are not the end of a long search. The legal regulation on the implementation of the European Investigation Order, which currently is at the appropriate apogee and one of the most promising steps in law, is determined not only by apologetics or criticism, it is determined by implacable desire to search for constructive, realistic and effective improved mechanism in international cooperation.

References

1. Belevičius, L. Tarptautinis teisinis bendradarbiavimas ir Europos Sąjungos baudžiamasis procesas: aktualijos, perspektyvos, lūkesčiai. *Baudžiamojo proceso tarptautiškumas: patirtis ir iššūkiai*. Mokslo studija. 2013.

2. Convention established by the Council in accordance with Article 34 of the Treaty on European Union, on Mutual Assistance in Criminal Matters between the Member States of the European Union, 29 May 2000. Available at: http://eur-lex.europa.eu/legal-content/LT/TXT/?uri=CELEX%3A42000A0712(01)

3. Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders. Available at:

4. Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence. *Official Journal L 196, 02/08/2003 P. 0045-0055.*

5. Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters. Official Journal 2005/C 350/72.

6. Directive 2014/41/EU of The European Parliament and of The Council of 3 April 2014 regarding the European Investigation Order in criminal matters. Available at: http://eur-lex.europa.eu/legal-content/LT/TXT/?qid=1408184536208&uri=CELEX:32014L0041

7. European Convention on Mutual Assistance in Criminal Matters of 20 April 1959. Available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090 000 16800656ce.

8. Gless, S.: Free Movement of Evidence in Europe. In: DEU, T. A. – INCHAUSTI, F. G. – HERNEN, M. C. et al.: El Derecho Procesal Penal en la Union Europea. Madrid : Colex, 2006.

9. Jimeno-Bulnes, M. European Judicial Cooperation in Criminal Matters. *European Law Journal*, 9(5) (2009).

10. Judgment of the Court of Justice of the EC of 18 June 2015, case C-508/13, para 54.

11. Judgment of the Court of Justice of the EC of 11 February 2003 – Joined Cases C-187/01 and C-385/01 – Gözütok & Brügge, para. 33.

12. Jurka, R. Europos teisės įtaka Lietuvos baudžiamajam procesui. *Baudžiamojo proceso tarptautiškumas: patirtis ir iššūkiai. Mokslo studija*. Vilnius, 2013.

13. Jurka, R. Tarptautinis bendradarbiavimas baudžiamajame procese: įrodymai ir jų priimtinumas Europos Sąjungoje. *Baudžiamasis procesas: nuo teorijos iki įrodinėjimo (prof. dr. Eugenjijaus Palskio atminimui)*. Vilnius Mykolo Romerio universitetas, 2011.

14. Karsai, K. The Principle of Mutual Recognition in the International Cooperation in Criminal Matters. *Зборник радова Правног факултета у Новом Саду* 1-2 (2008).

15. Proposal for a Council Directive regarding the European Investigation Order in criminal matters detailed statement. Available at: http://www.statewatch.org/news/2010/jun/eu-coucil-investigation-order-det-statement-9288-add2-10.pdf.

16. Report from The Commission annual report 2013 on subsidiarity and proportionality. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014DC0506.

17. Treaty on the Functioning of the European Union, the 26th, October, 2012, OJ, C 326, 26/10/2012.

18. The Hague programme: strengthening freedom, security and justice in the European Union. Official Journal 2005/C 53/01. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri= CELEX:5 2005XG0303(01).

19. The programme of measures to implement the principle of mutual recognition of criminal decisions envisaged in point 37 of the Tampere European Council Conclusions and adopted by the Council on 30 November 2000. *Official Journal C 12 E, 15/1/2001 P. 10*.

20. The Stocholm Programme – An open secure Europe serving and protecting citizens. Available at: http://eur-lex.europa.eu/legal-content/LT/TXT/PDF/?uri=CELEX:52010 XG0504 (01)&from=EN.

In the Labyrinth of Pain There Is No Such Thing as Selected Victims: the Evolution of Trafficking in Human Beings' Definition

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Abstract

Defining phenomena has always been necessary for successful making of a general picture of what we encounter. If we have a definition it will be easier to encounter such phenomena, explain their internal structure, understand it and find out solutions for its suppression and prevention.

Trafficking in human beings is only a small part of the phenomena for which international community still hasn't formed a mutually acceptable definition. It must be admitted that forming a definition is a long process, process in which a phenomenon must be explained from different theoretical approaches and brought into the social value system.

The paper gives a chronological review of the process of creating today's trafficking in human beings definition which is part of the Palermo Protocol. Making such an overview would help us understand its complexity, but also the complexity and length of such processes.

Key words: *definition, international documents, process, term, trafficking in human beings.*

Introduction

The problems within the evolving trafficking discourse are particularly troubling as regards two key issues: significant definitional uncertainty regarding the crime; and a striking lack of quantitative and qualitative data on actual trafficking practices. These problems are not simply areas of intellectual discord. Instead, they threaten the coherence and value of the preventative and punitive potential of anti-trafficking policies.[4]

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[4] Cherif Bassiouni, *Addressing International Human Trafficking in Women and Children for Commercial Sexual Exploitation in the 21st Century,* 10th Specialization Course in International Criminal Law – Human Trafficking for Commercial Sexual Exploitation, ISISC (2010), p.4

These issues are directly linked to the way in which the current understanding of trafficking has evolved out of a history of international legal mechanisms of addressing four key types of harm: chattel slavery and later other forms of slavery and servitude; prostitution (in particular "white slavery"); labor violations; and organized crime. Each of these types of human suffering have conceptualized and addressed through public campaigns and using legal instruments and mechanisms designed to prevent their occurrence and punish those responsible for committing these acts.[5]

Although there are many efforts put towards using only one term which will define trafficking in human beings in every country, today, there are formulations that explain trafficking in human beings as buying and selling of people, or try to explain a phenomenon which is closer to smuggling, that is connected to crossing borders. For example, the English term "trafficking" can inadequately cover exploitation. The Arabian term for trafficking in human beings "al-ittijaar b'il-bashar", the word "al-ittijaar" means "marketing" or "trade". In the Russian word "торговля людьми", the first word also means trade. The French "le traite des personnes", Italian "trata di persone" and Spanish "trata de personas" can also be used for negotiations or trade agreements. French people sometimes even don't use the part "le traite", because it can be connected to "le traite des noirs" from the time of the Transatlantic slave trade from Africa to Europe. Also, in many countries where Spanish is the official language, the term "la trata" is connected to the term "la trata de blancas", which is a term from the period of trafficking in "white slaves". After all, this phrase is better to be used, because "trafico de personas" is used for smuggling in migrants, and in Latin American countries "el trafico" is often used in explaining trafficking in drugs and weapons.

Using such limited terms is most cases are reason for confusion in terms of making effective legal system, successful court processes or victims' protection. It is especially problem in cases when trafficking in human beings is happening transnationally and several countries are included in the process of transport.

The paper analyses the different definitions of trafficking in human beings characteristic for different timelines. Every each one of them is connected to different terms used to point out trafficking in human beings, and each term covers different group of victims, narrowing or widening it. The full chronological period can be divided into three parts, classified by the term used to mark the phenomenon of trafficking in human beings.

Short overview of the defining process of trafficking in human beings before the Palermo Protocol

The process of international discussion regarding trafficking in human beings has started in 1904 with the term trafficking in "white slaves", then continued in 1921 with the term trafficking in women and children, and in 1949 it continued with the newest and widest term, trafficking in human beings.

The period of 90s of the XIX and the beginning of the XX century were marked with the suppression campaigns against trafficking in "white slaves" that was very different in comparison to the slave trade in the Transatlantic period. It was a period of transport of women and children in brothels where they were sexually exploited.

[5] Ibid, p.8

There is an understanding by which the term trafficking in "white slaves" is used as a term to explain a process during which women and girls were transported to other countries under false promises of success, prosperity and wealth, where they were exploited as prostitutes. [6] Thereto, main problem were kidnapping cases of European women used for prostitution by nonwestern men or other "inferiors", in the countries of South America, Africa or in the Orient. [7]

The international community answered these situations with few international documents whose main goal was trafficking's suppression.

Before the first document was brought, two conferences were held in Paris in 1899 and 1902. Two years later, the world got the International Agreement for the Suppression of the White Slave Traffic.[8] This International Agreement does not defines trafficking in "white slaves", but accents the need of help for victims and the process of their repatriation, especially evaluating the migrant side of trafficking.

Six years later, once again in Paris, the International Convention for the Suppression of the White Slave Traffic[9] was opened for member countries and signatures. It was a document which was directed towards criminalization of the phenomenon. Article 1 of the Convention says that *whoever, in order to gratify the passions of another person, has procured, enticed, or led away, even with her consent, a woman or girl under age, for immoral purposes, shall be punished, notwithstanding that the various acts constituting the offence may have been committed in different countries.* Whereas, article 2 says that *whoever, in order to gratify the passions of another person, has, by fraud, or by means of violence, threats, abuse of authority, or any other method of compulsion, procured, enticed, or led away a woman or girl over age, for immoral purposes, shall also be punished, notwithstanding that the various acts constituting the offence may have been committed in different countries.* [10] What is also important to be mentioned is that in 1948 the both documents were upgraded with a Protocol authorized by the United Nations. With the Protocol the migration aspect and criminalization were merged into only one document. From articles 1 and 2 where the criminalization aspect is elaborated we may conclude that during those times, trafficking in "white slaves" or white slave traffic was defined as procuring, enticing and leading away a woman or girl over age, by using fraud, means of violence, threats, abuse of authority, for immoral purposes or gratifying the passions of another person.

The next step is made in 1921, when the second chronological period starts. In Geneva, during the International Conference held by the League of Nations, the International Convention for the Suppression of the Traffic of Women and Children[11] was opened for signatories. With this Convention, international community accepts the

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[6] Љупчо Арнаудовски. "Криминалитетот "Трговија со луѓе" – проблеми во дефинирањето" *Родова перспектива на трговијата со луѓе* (2004): 57

[7] Џо Доезема. "Распуштени жени или изгубени жени? Повторно појавување на митот за белото робје во современиот дискурс за трговијата со жени" *Родова перспектива на трговијата со со луѓе (2004)*: 214

[8] Opened for signatures on the 18th of May 1904 and entered into force on the 18th of July 1905, available at http://www1.umn.edu/humanrts/instree/whiteslavetraffic1904.html [10.11.2016]

[9] Opened for signatures on the 4th of May 1910 and entered into force on the 5th of July 1920, available at http://www1.umn.edu/humanrts/instree/whiteslavetraffic1910.html [10.11.2016]

[10] Article 1 and 2 from the International Convention for the Suppression of the White Slave Traffic, available at http://www1.umn.edu/humanrts/instree/whiteslavetraffic1910.html [10.11.2016]

[11] Opened for signatures on the 30th of September 1921 and entered into force on the 15th of June 1922, available at http://www.vilp.de/Enpdf/e158.pdf [10.11.2016]

fact that victims of trafficking in human beings can be people from other races, and children from male gender. At that moment only adult males still were not recognized as possible targets for traffickers.

Similar to the last one, the International Slavery Convention[12] was the first international documents dedicated to slavery, which accepted the existence of modern forms of slavery, including trafficking in human beings for sexual exploitation. In its provisions, slavery is defined *as the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.* [13]

The last of these Conventions that uses the term trafficking in women and children, is the International Convention for the Suppression of Traffic in Women of Full Age[14]. This Convention widens the term trafficker under which by its provisions we understand everyone included in the trafficking process, even people who tried to commit such a process outside a country.

The third and last period starts in 1949 with the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.[15] This document is a creation of the United Nations and is the first document whose provisions are obligatory for its member states. It was ratified by 66 countries, mostly because of the obligation to criminalize prostitution if the document is ratified. Also, it has the adjective as the first document in which trafficking in human beings was defined. It is the first document in which the term trafficking in human beings is used for the first time. In this way the international community accepted the fact that everyone, no matter od gender, race or age, can become a victim of trafficking.

In the Article 1 of the Convention, the Parties *agree to punish any person who, to gratify the passions of another: (1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person; (2) Exploits the prostitution of another person, even with the consent of that person.* [16]

Since this Convention, the legal space of the international community had a vacuum of 51 year, during which there were no new obligatory documents, but it was a period of many activities in direction of defining, suppression and prevention of trafficking in human beings. But, events starting from 1993 were the important ones, because they ended with a new document in 2000.

Before 1993, as a very important document we must mention the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) [17] , in whose article 6 the protection of women from trafficking in human beings and exploitation for prostitution is mentioned.

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[12] Opened for signatures on the 25th of October 1926 and entered into force on the 9th of March 1927, available at http://www2.ohchr.org/english/law/pdf/slavery.pdf [10.11.2016]

[13] Article 1 from the International Slavery Convention, available at http://www2.ohchr.org/english/law/pdf/slavery.pdf [10.11.2016]

[14] Opened for signatures on the 11th of October 1933 and entered into force on the 24th of October 1934, available at http://www1.umn.edu/humanrts/instree/women-traffic.html [10.11.2016]

[15] Opened for signatures on the 2nd of December 1949 and entered into force on the 25th of July 1951, available at http://www2.ohchr.org/english/law/pdf/trafficpersons.pdf [10.11.2016]

[16] Article 1 from Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, available at http://www2.ohchr.org/english/law/pdf/trafficpersons.pdf [10.11.2016]

[17] Opened for signatures on the 18th of December 1979 and entered into force on the 3rd of September 1981, available at http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm [10.11.2016]

In 1993, Vienna was hosting the World Conference on human rights during which analyzing few cases of trafficking of women processed in some European countries, was detected the fact that human rights are not respected. That's why one of the conclusions of the Conference was the fact that trafficking in human beings is a phenomenon during which human rights are not respected.

Two years later, in 1995, Beijing hosted the World Conference for women, when cases of trafficking for sexual exploitation whose victims from the Balkans and Columbia were presented. The result is including trafficking in human beings into the provisions of the Beijing Declaration (two articles).

These and many more documents clearly accent the necessity defining trafficking in human beings inside the human rights issue, because trafficking is a modern type of the old slavery. It is negation of the fundamental human rights, especially the freedom of movement and physical integrity. [18] This phenomenon is complex criminal behavior that is directly threatens human rights and freedoms and it has serious implications on stability, democracy and rule of law inside national and regional frameworks. [19]

Defining trafficking in human beings in the Protocol of Palermo

A starting point in the examination of human trafficking should be slavery and the slave trade in ancient times as the origin of trafficking can be traced back to those practices. The key elements of slavery and the slave trade were the ownership of human beings for subsequent exploitation with the use of violence and threat, and deprivation of their liberties and freedoms. [20] Slave trading can be defined as the process of acquiring, recruiting, harboring, receiving, or transporting an individual, through any means and for any distance, into a condition of slavery or slave - like exploitation. [21] Slavery can be defined as the process of coercing labor or other services from a captive individual, through any means, including exploitation of bodies or body parts. [22] Slavery is a relation between two sides. It is a social and economic relation. Its core should be searched inside control over people, not into property. [23] It is a social and economic relation during which people are controlled by using violence or threats for using violence, without any material benefit and with economic exploitation. [24] Slavery and slave trade existed long before human trafficking, resulting today as a modern form of the old, good, business labyrinth.

Years later, legal systems, because of harmonization with European legislature were adjusted to international documents, newer methods were accepted, border controls, action against corruption, police actions and investigations, changes in legal and criminal incriminations. And such policies gave results. They decreased the level of

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[18] Александар Штулхофер. " За поимот и за некои аспекти на трговијата со жени и деца заради сексуална експлоатација " *Родова перспектива на трговијата со луѓе (2004):* 156

[19] Трпе Стојановски, " Елементи за превенција и сузбивање на трговијата со луѓе" *Родова перспектива на трговијата со луѓе* (2004): 112

[20] Tom Obokata. *Trafficking of Human Beings from Human Rights Perspective.*(Leiden – Boston: Martinus Nijhoff Publishers, 2006), p.9

[21] Siddharth Kara, *Sex trafficking: Inside the business of modern slavery* (New York: Columbia University Press, 2009), p.5

[22] Ibid

[23] Kevin Bales, *New Slavery.* (Santa Barbara: ABC-CLIO, 2004), p.3

[24] Ibid, p.4

crimes, but caused changes of phenomenon's phenomenology. The human trafficking we knew mutated and overnight changed key points in the process.[25]

United Nations made an analysis during 1996 of the situation with human trafficking cases in the world. All the data was gathered by using information from government institutions and nongovernmental organizations. During 1997 - 2000, the draft texts of the UN Convention against Transnational Organized Crime[26] and the three Protocols were prepared. [27] In 1998, the Commission that was formed by UN General Assembly in 1997 formed an ad hoc Committee to elaborate the Convention and its three additional Protocols.

The Convention and two of the Protocols were opened for signatures from 12th to 15th of December 2000 in the Palazzi di Giustizia, Palermo, Sicily, Italy, and afterwards in the UN Headquarters in New York, USA.

The importance of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children[28] should be analyzed from the aspect that it contains a wider and wide-ranging definition of human trafficking, but also in its obligations towards parties for suppression and prevention of the phenomenon, victims' protection, promoting of the importance of international cooperation.

Article 3, paragraph (a) of the Protocol of Palermo defines human trafficking (trafficking in persons) as "*the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs."*[29]

This definition accepts, but does not elaborate the fact that this criminal activity is multidimensional; it is a process of several phases, during which each phase has or is realized through several different criminal activities. Thus, the phenomenon is not manifested, realized as single criminal act, but as many different criminal activities which are either independent or are in addition to one another. All of those activities, together, form the human trafficking process. [30]

The Protocol's definition encourages a broad understanding of trafficking as involving three key elements: first, a series of distinct activities involved in the movement of people; second, a description of mechanisms that involve coercion and/or the abuse of power; and third, the use of the first and second factors for the purpose of

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[25] Angelina Stanojoska. "Inside or outside: Human Trafficking Flows and changing Dimensions". Journal of Eastern European Criminal Law Vol.3 (1): 86

[26] Opened for signatures in 2000, entered into force in 2003, available at http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/covention_%20traff_eng.pdf [13.11.2016]

[27] The three Protocols drafted were covering the areas of suppressing human trafficking; smuggling of migrants and weapons trade.

[28] Available at http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/covention_%20traff_eng.pdf [13.11.2016]

[29] Article 3, Protocol of Palermo, available at http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/covention_%20traff_eng.pdf [14.11.2016]

[30] Љупчо Арнаудовски. "Криминалитетот "Трговија со луѓе" – проблеми во дефинирањето" *Родова перспектива на трговијата со луѓе* (2004): 61

"exploitation." The activities are varied ("recruitment, transportation, transfer, harboring or receipt of persons") to allow distinct actors within a complex system to be understood as part of the problem and thereby addressed through both punitive and preventative policies. The mechanisms of coercion and/or the abuse of power ("threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person") are similarly general to include an array of means by which individuals are deprived of free choice and free will. The issue of exploitation is similarly broad with the understanding that it should include at least certain actions of great international concern ("the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs."). [31]

The definition from the Protocol of Palermo contains a list of possible methods of exploitation; but it is important not to forget that the list is not emptied and that there is always a possibility for new exploitative methods. [32] It has a number of elements to suppress new forms of exploitation. [33] Also, all forms of exploitation are not defined in the Protocol of Palermo, but their definitions are part of other international documents.

Neither the term prostitution neither other forms of sexual exploitation are defined. The reasons for not defining the term prostitution are the different positions between radical feminism and the feminism of sexual work. [34]

Radical feminism defines prostitution as violence against women, it is a phenomenon which victimizes all women, accepts selling sexual services and objectifying women as sexual objects. On the other hand, the second opinion concludes that there two different types of prostitution - forced prostitution and voluntary prostitution. Forced prostitution and human trafficking are manifestations of the violence against women. [35] But, consent is either marginal either relative element, it gives seemingly free choice. Theoretically, used force can be present either during recruitment of the victims either during "the ending" of the process of trafficking, but also during the two processes. [36]

Paragraph (c) of the article 3 from the Protocol of Palermo is defining the process of trafficking in children. *The recruitment, transportation, transfer, harboring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this*

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[31] Cherif Bassiouni. *Addressing International Human Trafficking in Women and Children for Commercial Sexual Exploitation in the 21st Century,* 10th Specialization Course in International Criminal Law – Human Trafficking for Commercial Sexual Exploitation, ISISC (2010), p.5

[32] Silvia Scarpa. *Trafficking in human beings: Modern slavery* (New York: Oxford University Press, 2008), p.5

[33] UNODC. *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime and The Protocols thereto* (New York: United Nations, 2004), p.269 [p.33] – Legislative Guide, available at http://www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html [14.11.2016]

[34] Silvia Scarpa. *Trafficking in human beings: Modern slavery* (New York: Oxford University Press, 2008), p.6

[35] Џо Доезема. "Распуштени жени или изгубени жени? Повторно појавување на митот за белото робје во современиот дискурс за трговијата со жени" *Родова перспектива на трговијата со луѓе (2004)*: 229

[36] Александар Штулхофер, " За поимот и за некои аспекти на трговијата со жени и деца заради сексуална експлоатација " *Родова перспектива на трговијата со луѓе (2004):* 159

does not involve any of the means set forth in subparagraph (a) of this article. [37] Paragraph (d) defines the term child as every person under the age of 18 years.

The modern, contemporary, definition from the Protocol of Palermo has few positive aspects elaborating the reality of modern slavery. It accepts all possible forms of exploitation and does not bound them only to sexual exploitation. Thereinafter, it is not focusing itself only to women and children as potential victims, but to everyone as potential victim of this crime. Third, there is no obligation for cross border transport of the victims for the existence of the crime, explaining that human trafficking can be internal, such as movement of the victims from one region to another. The definition contains elements of distortion of the victims' free will, for an example, use of force, fraud or an abuse of power, not forgetting the fact that adult people can decide over their life, the choice of working place and migration. [38]

Conclusion

The process of creating a definition for a phenomenon or criminal activity is a serious process, it includes a long time of debating and a wide framework of different opinions that need to be narrowed and approximated to one another. The Protocol of Palermo's definition is a result of a decade of analysis, which was anticipated by a number of other international documents where the phenomenon's understandings change from the very narrow ones to widest ones.

It must be mentioned that the international community hasn't stopped developing international documents elaborating the phenomenon of human trafficking, its characteristics, etiology, prevention and protection of its victims. We should not forget the Convention on Action against Trafficking in Human Beings (2005) of the Council of Europe, where victims of trafficking are protected. This document defines victim of human trafficking for the first time, as every person who has become a subject of human trafficking.

There also the documents of the European Union, especially the Council Framework Decisions and the Protection Acts of the US Departments. Those are the Victims of Trafficking and Violence Protection Act and the Trafficking Victims Protection Reauthorization Act. All of them define human trafficking as the most serious phenomenon of modern times.

But at the end of the day it should be concluded that defining of human trafficking is only the first step that should be undertaken. After a phenomenon is defined, actions should be undertaken. All obligations for member states should be directed towards suppression and prevention of this criminal activity, everything should be undertaken so modern slavery would be put out of business.

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[37] Член 3, Протоколот за превенција, спречување и казнување на трговијата со луѓе посебно со жени и деца, достапен на http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/covention_%20traff_eng.pdf

[38] Организација за безбедност и соработка во Европа, *Прирачник за ревизија на законските регулативи против трговијата со луѓе (со посебен осврт на Југоисточна Европа),* (Скопје: ОБСЕ, 2001), стр.50-51

Bibliography

1. Арнаудовски, Љупчо. "Криминалитетот "Трговија со луѓе" – проблеми во дефинирањето" Родова перспектива на трговијата со луѓе (2004): 45 – 70;

2. Аристотел. Политика. Скопје: Слово, 2006;

3. Аристотел. Реторика. Скопје: Ѓурѓа, 2010;

4. Bales, Kevin. New Slavery. Santa Barbara: ABC-CLIO, 2004;

5. Bassiouni, Cherif., " Addressing International Human Trafficking in Women and Children for Commercial Sexual Exploitation in the 21st Century " 10th Specialization Course in International Criminal Law – Human Trafficking for Commercial Sexual Exploitation, ISISC (2010);

6. Бачановиќ, Оливер. " Правата, заштитата и помошта на жртвите во Конвенцијата на Советот на Европа за акција против трговијата со луѓе " Годишник на Полициската Академија (2007): 68 – 80;

7. Бикс, Карен, и Дилајла Амир. Глобалната секс – индустрија и препродажбата на луѓе. Lanham: Lexington books, 2009;

8. Доезема, Џо. " Распуштени жени или изгубени жени? Повторно појавување на митот за белото робје во современиот дискурс за трговијата со жени " Родова перспектива на трговијата со луѓе (2004): 213 – 256;

9. Kara, Siddharth. Sex Trafficking: Inside the Business of Modern Slavery. New York – Chichester: Columbia University Press, 2009;

10. Ниче, Фридрих. Волја за моќ. Скопје: Ѓурѓа, 2008;

11. Obokata, Tom. Trafficking of Human Beings from Human Rights Perspective. Leiden – Boston: Martinus Nijhoff Publishers, 2006;

12. Организација за безбедност и соработка во Европа. Прирачник за ревизија на законските регулативи против трговијата со луѓе. Скопје: OSCE/ODIHR, 2001;

13. Roth, Mitchel P. Global Organized Crime. Santa Barbara: ABC-CLIO, 2010;

14. Scarpa, Silvia. Trafficking in human beings: Modern slavery. New York: Oxford University Press, 2008;

15. Stanojoska, Angelina. ""Inside or outside: Human Trafficking Flows and changing Dimensions". Journal of Eastern European Criminal Law Vol.3 (1):86 - 96;

16. Стојановски, Трпе. " Елементи за превенција и сузбивање на трговијата со луѓе" Родова перспектива на трговијата со луѓе (2004): 111 – 126;

17. United Nations Office on Drugs and Crime. Legislative Guides for Implementation of the United Nations Convention against Transnational Organized Crime and the Protocol thereto. New York: United Nations, 2004, available at http://www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html [04.05.2010];

18. Штулхофер, Александар. " За поимот и за некои аспекти на трговијата со жени и деца заради сексуална експлоатација " Родова перспектива на трговијата со луѓе (2004): 155 – 166.

International Documents

1. Council of Europe. Convention on Action against Trafficking in Human Beings, available at http://www.coe.int/trafficking;

2. European Union. Council Framework Decision of 19 July 2002 on combating trafficking in human beings, available at http://english.bnrm.nl/Images/EU%20Council%20Framework%20Decision%20of%2019%20July%202002%20on%20combating%20trafficking%20in%20human%20beings_tcm64-83547.pdf;

3. International Agreement for the Suppression of the White Slave Traffic, available at http://www1.umn.edu/humanrts/instree/whiteslavetraffic1904.html;

4. International Convention for the Suppression of the White Slave Traffic, available at http://www1.umn.edu/humanrts/instree/whiteslavetraffic1910.html;

5. International Convention for the Suppression of the Traffic of Women and Children, available at http://www.vilp.de/Enpdf/e158.pdf;

6. International Convention for the Suppression of Traffic in Women of Full Age, available at http://www1.umn.edu/humanrts/instree/women-traffic.html;

7. International Labour Organization. Convention concerning Forced or Compulsory Labour, available at http://www1.umn.edu/humanrts/instree/ n0ilo29.htm;

8. League of Nations. International Slavery Convention, available at http://www2. ohchr.org/english/law/pdf/slavery.pdf;

9. Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, available at http://www2.ohchr. org/english/law/pdf/slaverytrade.pdf;

10. United Nations. Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, available at http://www2.ohchr.org/ english/law/pdf/trafficpersons.pdf;

11. United Nations. Convention on the Elimination of All Forms of Discrimination against Women, available at http://www.un.org/womenwatch/daw/cedaw/text/ econvention.htm;

12. United Nations. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, available at http://www.un.org/women watch/daw/cedaw/protocol/text.htm;

13. United Nations. Convention against Transnational Organized Crime. 2000, available at http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC% 20Convention/TOCebook-e.pdf;

14. United Nations. Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000, available at http://www.unodc.org/ documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf;

15. United Nations. World Conference on Human Rights (Vienna, 14 – 25 June, 1993). Vienna Declaration, available at http://www.unhchr.ch/huridocda/huridoca. nsf/%28symbol%29/a.conf.157.23.en;

16. United Nations. World Conference on Women (Beijing, 4 – 15 September, 1995). Beijing Declaration, available at http://www.un.org/womenwatch/daw/beijing/ platform/declar.htm;

17. U.S.Congress. Victims of Trafficking and Violence Protection Act of 2000. Public Law 106 – 386 – Oct. 28, 2000, available at http://www.isisc.org/public/Trafficking% 20Victims%20Protection%20Act%20of%202000%20-%20Banks.pdf .

Guidelines Laid Down by the European Union Law for Regulation of the Fight against Counterfeiting by Means of National Criminal Law

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Abstract

The immense amounts of counterfeiting are faced in the modern world, this causes direct damage for the holders of intellectual property rights, users and the European Union market, also it is the area for development of the organized crime. Uncertainty of criminalized infringements is a powerful incentive for it.

The differences of national criminal mechanisms of the Member States of the European Union not only undermine the operation of the internal market of the European Union, they also make it difficult to combat counterfeiting and piracy. In addition to the economic and social consequences, counterfeiting and piracy also pose problems for consumer protection, particularly when health and safety are at stake. Increasing use of the Internet enables pirated products to be distributed instantly. Finally, this phenomenon appears to be increasingly linked to organised crime.

Combating this phenomenon is therefore of vital importance for the European Union. Counterfeiting has become the lucrative activity in the same way as other large-scale criminal activities such as drug trafficking. There are high potential profits to be made without risk of serious legal penalties.[3]

One aspect of this problem is analyzed in this article, this aspect is applicability of the European Union legislature and the legislation, which is applied by the institutions of the European Union in their activities, in the national law of the Member States for the effective legal fight against counterfeit.

Keywords*: Trademarks, counterfeiting, criminal enforcement, intellectual property, organized crime.*

1. The counterfeit problem in the European Union and its Member States

The counterfeiting of the products not only violates the intellectual property of the holders of the trademarks, it also violates consumer rights and harms the economy, the

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[3] Amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights [2005] Brussels, 26.4.2006COM(2006) 168 final], p. 2

reliability and profitability of the European Union's market, counterfeiting of some products can induce harmful effects on human health and life. In some cases, it is the niche for laundering of the money derived from crime. With the spread of international trade through such trading platforms in cyberspace as “eBay Inc”, “Amazon.com, Inc.” and “Alibaba.com”, etc. the identification and security of reliability of goods becomes even more complicated, also the problem is faced, when traders resell goods that are intended for another market without the trademark owner's consent or when there is the owner's prohibition in order to achieve the cheaper cost (for example, sale of Apple products intended for the market of the United States of America (hereinafter - USA) in the European Union (hereinafter - EU) when the difference of retail prices reaches 30-40 per cent).

Currently there is no purposefully adopted legislation of the European Union regarding regulation of criminal liability for criminal offenses against intellectual property inter alia trademarks or the legislation, establishing the criteria for criminalization of theses offences, it is only fragmentarily specified in the legislation that such criminal liability must exist.

Criminal liability for industrial property rights violations inter alia counterfeiting is not widely analyzed in the scientific doctrine. The criminological policy regarding this issue and some issues of substantive law in the area of intellectual property protection criminalization were analyzed in the collective monograph “Criminal Liability for Intellectual Property (Rights) Violations” issued in 2012[4]. The individual aspects of criminal liability for criminal offenses against intellectual property ("commercial scale") were analyzed by A. Adam - *"What is "Commercial Scale"? Critical Analysis of the Decision of World Trade Organisation” No WT/DS362/R in the article of*[5] P. Sugden *“How Long is a Piece of String? “The Meaning of “Commercial Scale” in Copyright Piracy”* [6], but just reviewing the current situation in the copyright context without proposing any possible solutions.

The purpose of this article is to analyse the European Union legal acts, their projects and the legal acts related to application of criminal liability for counterfeiting, which are applied by the European Union, using the systematic, logical method, the method of document analysis and the comparative research method. Also, in the light of the results of the investigation, to present criteria or at least some guidance for application in the national law of the Member States while criminalizing the counterfeiting and offences related to the counterfeiting.

2. Intellectual property protection theories and their influence to legal acts of the European Union and their applicability in the Member States in the area of criminalization of counterfeiting

It is necessary to discuss theories reasoning the protection of intellectual property in order to set properly the content of the legal acts of the European Union from a

[4] Geiger, Ch. *Criminal Enforcement of Intellectual Property: A Handbook of Contemporary Research (Research Handbooks in Intellectual Property).* United Kingdom: MPG Books group, 2012.

[5] Adam, A. What is "Commercial Scale"? A Critical Analysis of the WTO Panel Decision in WT/DS362/R. Sweet & Maxwell and its Contributors. 2011, 33(6): 342-348

[6] Sugden P., *How Long is a Piece of String? The Meaning of “Commercial Scale” in Copyright Piracy*. European Intellectual Property Review. 2009, 31(4): 202-212

teleological point of view. Among theories the utilitarianism (economic[7]) theory and the labour (natural rights[8]) theory are significant and exclusive to the criminal law of the European Union because the underlying provisions of these theories will help to determine to what extent the infringements of intellectual property should be criminalized, to what problems the protection of intellectual property from counterfeiting at criminal level is directed at.

With regard to the utilitarianism (or economic) theories, it should be noted that *„[...] the approach to intellectual property rights, as the legal instrument by which the legislator aims to ensure the greatest social benefit, unites these theories*."[9] According to the utilitarianism theory postulates[10], the intellectual property should be regarded as the result of positive law instead of natural law. It is the cause of the discretion of the legislator to establish new, restrict or eliminate existing intellectual property rights, because the purpose of the intellectual property legal regulation is the general benefit instead of interests of separate groups.

It should be noted that the utilitarianism theory arguments are used nowadays[11], for example, it is specified in Article 7 of Agreement on Trade-Related Aspects of Intellectual Property Rights, which is Annex (1C) of the Agreement (Convention)[12], establishing the World Trade Organisation of 1994 (hereinafter, and - the TRIPS Agreement) to which the European Union joined, that the protection and ensuring of Intellectual Property Rights should contribute to the promotion of technological innovation and technology transfer and distribution, provide mutual benefits for developers and consumers of technological knowledge in such a way, which would encourage social and economic well-being and balance the rights and obligations*; in part 2 of* Article 8 it is specified that in order to prevent misuse of the rights of intellectual property by the right holders or the practice, which unduly restricts trade or has a negative impact on international technology transfer, the appropriate measures may be required provided that they would comply with the provisions of this EU Treaty. The obvious priority to the public interest - social wellbeing can be seen from these provisions of the TRIPS Agreement. Currently the most highlighted arguments of the utilitarianism theory showed in the form of economic analysis of intellectual property[13]. Trademark protection is justified regarding the aim to reduce costs for consumers while choosing the product and the encouragement of investments in the quality of the goods.[14]

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[7] Kiškis, M. Doctrines of intellectual property rights, Teisė. 2009; 73: 24 – 37

[8] *Ibid*

[9] Birštonas, R., *et al. Intellectual property rights.* Vilnius Center of Registers, 2010, Chapter 1

[10] The utilitarianism theory postulates were revealed in "Antigon" by Sophocles, in the situation of Creon, in the Venetian statute of 1474, the Statute of Anne of 1710 with the title "*An Act for the Encouragement of Learning <...>",* Section 8 of Article 1 of the US constitution of 1790 which obligated the Congress "*promote the Progress of Science and useful Arts*".

[11] Birštonas, R., *op cit.,* Chapter 1

[12] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, UNTS. 299, 33 ILM 1197 (1994) [TRIPS Agreement].

[13] For more information on the economic analysis of intellectual property and the detailed bibliography of this theme, see: Menell P. S. *Intellectual Property: General Theories //Ed. B. Bouckaert, G. De Geest, Encyclopedia of Law and Economics, Cheltenham*, 2000. Vol. II

[14] Birštonas, R., *op cit.,* Chapter 1

So, it can be seen, that the basic international act, which the European Union follows relating to the matter - the TRIPS Agreement, which notionally governs protection of objects of intellectual property rights at criminal level (analysis below) and influences the national law of the Member States, based on the provisions of the utilitarianism theory. In effect intellectual property rights related to commerce are positive, and the purpose of the protection is the universal social benefit, the public interest. However, it should be stressed that different theories can interact with each other. The opinion of the authors should be accepted, who point out that the protection of intellectual property must exist, however, it cannot be regulated too strictly because it may have negative consequences for creation of new objects protected according to the intellectual property right and for improvement of the existing objects[15]. Therefore it is necessary to strive that the harmonious system of intellectual property protection, which would be able to protect all participants of the market of intellectual property, would be created without discrimination.

The labour or natural rights theory is the opposite of the utilitarianism theory, the essence of this theory is that the person who has created a specific result using his intellectual work, has the natural right to it, and individual or group interests instead of the public interest are in the centre of attention. The "pure" theory is not compatible with the variety of intellectual property objects, specific features of their operation, and differences in the concept of ownership.

The intellectual property influences the society excessively so absolute rights should not be given to the individuals. The latter influence depends on the nature and purpose of the object, in one case, these objects are related to art and culture, in the other case, these objects are related to health, safety and progress of the society. I. Newton pointed out in the letter to R. Hooke on 5th February 1675 that the development of progress (including Newton's law of gravity) is created *"standing on the shoulders of* giants", i.e. on the basis of the intellectual products, created by other people.[16] So, regarding the intellectual property, it may not always be appropriate to provide strict regulation because it may have a negative impact on creation of the intellectual property objects, i.e. stop their development.

It is worth noting that the World Trade Organisation distinguishes two reasons of intellectual property regulation[17]. The first reason is the necessity for the legal formalisation of the dependence of property rights and moral rights of objects to the authors (the right to their own creative intellectual property result). The second reason is to ensure the spread of results of creation, intellectual activities, their use, promotion of fair trade in order to achieve social - economic progress. So, the World Trade Organisation bases the intellectual property protection on work and utilitarianism theories and it follows from the above that TRIPS and other law acts related to the mechanisms of intellectual property protection should be applied in such way that the

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[15] The Agreement on Trade-Related Aspects of Intellectual Property Rights(the "TRIPS Agreement") is Annex (1C) of the Agreement establishing the World Trade Organisation, so, according to the opinion of the authors, it should be interpreted in accordance with the policy of the World Intellectual Property Organization.

[16] Vaver, D. *Intellectual Property Rights – Critical Concepts in Law. reik. 5 dalis.* United Kingdom: MPG Books group, 2006, p. 356

[17] World Intellectual property organization Understanding Industrial property. WIPO Publication [interaktyvus] No. 895(E), Switzerland [žiūrėta 2015-04-27] http://www.wipo.int/edocs/pubdocs/en/intproperty/895/wipo_pub_895.pdf, p. 4

balance would be maintained between the owner of intellectual property rights, users (and possibly others) and the offender, selecting the type of liability (civil, administrative, criminal liability) for the offender.

3. The European Union legal acts related to the fight against counterfeiting at criminal law level

Protection of industrial property rights *inter alia* protection from counterfeiting is provided in international and regional legal acts, which are used in activities of the European Union law.

The Paris Convention[18] of 20th March 1883 can be named the beginning of modern industrial property per se protection of trademarks. The important document of the intellectual property protection is the Charter of Fundamental Rights of the European Union[19], which became obligatory while applying the European Union legal acts[20] from entry into force of the Lisbon treaty. It is imperatively stated in Part 2 of Article 17 of the Charter of Fundamental Rights of the European Union that intellectual property must be protected.

Criminal liability for intellectual property violations in Europe raises a lot of discussion and disagreements[21], it is probable that for this reason the specialized international act for definition of such liability does not exist. Nevertheless, as mentioned above, minimum standards regarding the necessity to apply criminal liability for the piracy and commercial counterfeiting are specified in Article 61 of the TRIPS Agreement.

The concept of commercial scale is problematic. In Item 19 of the Preamble of the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights: *"Acts carried out on a commercial scale are those carried out for direct or indirect economic or commercial advantage; this would normally exclude acts carried out by end-consumers acting in good faith*". It should be noted that it is not possible to invoke this interpretation because in Items "b" and "c" of Part 3 of Article 2 of Chapter 1 of the Directive 2004/48/EC it is pointed out that the area of application of this directive does not include: the provisions of the TRIPS Agreement including the commitments related to criminal procedures and penalties (Article 61 of TRIPS); the national provisions of the Member States related to criminal procedures and penalties for intellectual property rights violations.[22]

In accordance with the opinion of the authors, it is possible to state that the basis of criminalization of intellectual property rights violations exists in Article 61 of the

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[18] Paris Convention for the protection of industrial property of March 20, 1883, as revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, at Lisbon on October 31, 1958, and at Stockholm on July 14 1967. UNTS 828

[19] Official Journal of the European Communities Charter of fundamental rights of the European Union, [2000] OL C 364/01

[20] Official Journal of the European Union Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, [2007] OL C 306

[21] Geiger, Ch., et al. Criminal Enforcement of Intellectual Property: A Handbook of Contemporary Research (Research Handbooks in Intellectual Property). United Kingdom: MPG Books group, 2012, p.1.

[22] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004)

TRIPS[23] s Agreement, so, unambiguously, it is impossible to agree with the opinion of the authors, who affirm that there are no international and regional legal acts that oblige to criminalize criminal offences related to counterfeiting.[24] The agreement is Annex of the Agreement establishing the World Trade Organisation (1C). It should be indicated that the establishment of criminal liability firstly must protect the trade relations *per se* the European Union market. It is thus no surprise that the commercial scale of activity is establishment of criminal liability on principal basis and separating from civil and administrative liability. It is specified in Article 61 "Criminal proceedings" of the TRIPS[25] Agreement that the Member States provide that in the cases of wilful trademark counterfeiting or copyright piracy on a commercial scale, criminal procedures and penalties should be applied. Remedies available include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence (in production of goods). The Member States may provide how criminal procedures and penalties are to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale.[26]

The demand for criminal liability for intellectual property rights violations is mentioned directly or indirectly in Regulation (EU) No 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No 1383/2003 and Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA)[27].

The European Union in order to unify the intellectual property right, tried to implement it in two stages at civil, administrative and criminal level. For this purpose the Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights has been successfully adopted[28]. It is specified in Item 28 of the Preamble of this Directive that in addition to the civil and administrative measures, procedures and remedies provided for under this Directive, criminal sanctions also constitute, in appropriate cases, the means of ensuring the enforcement of intellectual property rights.

After the Member States successfully implemented most of the provisions of this Directive in the national law, the drafting of the legal act providing criminal liability for violations of the property right was started. *"[...] The second stage of Community*

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[23] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, UNTS. 299, 33 ILM 1197 (1994) [TRIPS Agreement].

[24] Justyna Levon (2016) Criminal Liability for Foreign Trade or Service Mark Use, Criminal Justice and Business, 253-273

[25] *Ibid.*

[26] TRIPS

[27] „ *The following offences, if they are punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least three years and as they are defined by the law of the issuing Member State, shall, under the terms of this Framework Decision and without verification of the double criminality of the act, give rise to surrender pursuant to a European arrest warrant: […]counterfeiting and piracy of products"*

[28] Directive 2004/48/EC of the European parliament ant the counsil of 29 April 2004 on the enforcement of intellectual property rights, OL L 157, 2004 4 30, p. 45—86

members procedural law unification is proposed, its objectives are expressed in the European Parliament and the Council Directive project COM/2006/0168 on criminal measures aimed at ensuring the enforcement of intellectual property rights [...]. The aim of this draft directive is to provide a uniform basis for criminal liability for intellectual property rights violations in the EU."[29] After specification and defining (as compared with Article 61 of the TRIPS Agreement) of the requirements for the application of criminal liability for intellectual property violations (the amount of fines, prison terms, qualifying factors)[30], the common position was not coordinated, therefore, the directive has not entered into force.

The next attempt of the fight with the counterfeiting using penal measures at the international level was the Anti-Counterfeiting Trade Agreement between the European Union and its Member States, Australia, Japan, United States of America, the United Mexican States, Canada, the Republic of Korea, the Kingdom of Morocco, New Zealand, the Republic of Singapore and the Swiss Confederation (hereinafter - ACTA). The legal norms, which essentially itemize the provisions of Article 61 of the TRIPS Agreement, are specified in Article 23 "Criminal offenses" of the Agreement.[31] The Agreement had

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[29] 21. Kiškis, M., Krikščionaitis, M., *Measuring Intellectual Property Infringements: Methodological aspects*, Teisė. 2008; 68: 37-50

[30] Amended proposal for a Directive of the European Parliament and of the Council on criminal measures aimed at ensuring the enforcement of intellectual property rights [2005] Brussels, 26.4.2006COM(2006) 168 final, Article 5: *, This article concerns the level of criminal penalties: offences must incur a maximum term of at least four years' imprisonment when they are committed under the aegis of a criminal organisation. The same applies where the offences carry a health or safety risk. The threshold of four years' imprisonment was chosen because it broadly corresponds to the criterion used to identify a serious offence. It is the threshold selected in Joint Action 98/733/JHA and in the proposal for a Council Framework Decision on the fight against organised crime (COM(2005) 6 final) and in the United Nations Convention against Organised Transnational Crime. For natural persons or legal entities who commit the offences listed in Article 3, the penalties include criminal and non-criminal fines to a maximum of at least EUR 100 000 for cases other than the most serious cases and to a maximum of at least EUR 300 000 for offences carried out under the aegis of a criminal organisation or which carry a health or safety risk. It must be possible for this factor to be taken into account where the risk is deemed to be present, even where the dangerous product has not yet caused any damage. A risk to personal health or safety exists where the counterfeit product placed on the market directly exposes people to a risk of illness or accident."*

[31] *„ 1. Each Party shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright or related rights piracy on a commercial scale.9 For the purposes of this Section, acts carried out on a commercial scale include at least those carried out as commercial activities for direct or indirect economic or commercial advantage.*

2. Each Party shall provide for criminal procedures and penalties to be applied in cases of wilful importation 10 and domestic use, in the course of trade and on a commercial scale, of labels or packaging:

(a) to which a mark has been applied without authorization which is identical to, or cannot be distinguished from, a trademark registered in its territory; and

(b) which are intended to be used in the course of trade on goods or in relation to services which are identical to goods or services for which such trademark is registered.

3. A Party may provide criminal procedures and penalties in appropriate cases for the unauthorized copying of cinematographic works from a performance in a motion picture exhibition facility generally open to the public.

4. With respect to the offences specified in this Article for which a Party provides criminal procedures and penalties, that Party shall ensure that criminal liability for aiding and abetting is available under its law.

5. Each Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability, which may be criminal, of legal persons for the offences specified in this Article for which the Party provides criminal procedures and penalties. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the criminal offences."

not entered into force because of provisions governing the criminal liability for violations of the copyright, potential incompatibilities with the right of individuals to privacy and uncertainty of legal norms, negative resonance reaction of the society in a large part of the European Union.

Specialized legal acts, such as the mentioned directive on the enforcement of intellectual property rights, regulates the protection only at civil or administrative level. Draft legislative acts, which were intended for establishment of the common standards for criminal liability for criminal offenses for intellectual property, did not enter into force due to the lack of consensus between the contracting parties. It should be noted that the TRIPS agreement and its first Articles, as mentioned, emphasize universal benefits, including stability of the market, the fragility of intellectual property and intellectual property rights holders' interests.

It follows that international legal acts distinguish public interest *inter alia* economy and business order of the European Union market as a fundamental value to be protected in case of counterfeiting of products or services. This is reflected in the necessity to follow the ordinary course of trade provided by the state, which ensures the honest behaviour of market participants, consumer interests and the collection of taxes.

In order to identify the additional values that should be protected by criminal laws of the Member States clearly, according to the authors' opinion, it is appropriate to distinguish relatively the most dangerous product groups, from which it is possible to determine to what objects damage can be done or the danger of such damage may arise.

Various factors determine harmfulness of the offence but the most important factors which determine hazard of the person's action and its criminal legal assessment, are values, to which this action is harmful or dangerous. According to the authors, dangerousness of the counterfeiting object is not identical in each case (clothes, medicines, toys, etc.), the evaluation criteria reflecting counterfeiting dangerousness per se allowing to speak about application of the criminal liability are relevant for the subject. So, the mutual objective of the legislator of the Member States (tracing the specific norm) and the case law of the Member States (distinguishing concrete criteria and explaining them) is the search of these criteria. According to the authors it is appropriate to distinguish qualified (leading to a higher hazard) liability for counterfeiting corpus delicti (body of crime) in the national law of the Member States determining a heavier responsibility, depending on the severity of the subject, respectively the importance of additional values.

Food and non-food products can be the counterfeit products. The most dangerous groups of counterfeiting are medicines, toys, fertilizers, certified food products and other food products. However, according to the authors, medicines are the most dangerous products because the improper use even of genuine medicines may be hazardous to health, certainly when the used medicine composition *de facto* is unknown, sometimes it is toxic.

The World Health Organisation, considering the large number of cases when people die from some of counterfeit medicine or the health is irretrievably unbalanced, specifies that counterfeit medicines are not only a threat to intellectual property, they are a threat for the person's life and health. According to that organization, protection of health and intellectual property are not the conflict areas[32]. So legal norms, which

[32] Geiger, Ch., et al. Criminal Enforcement of Intellectual Property: A Handbook of Contemporary Research (Research Handbooks in Intellectual Property). United Kingdom: MPG Books group, 2012, p. 353

criminalize the counterfeiting market, should act effectively against the medicine counterfeiters. Thus, the authors conclude, that health and life can be considered the additional values as regards counterfeiting as a criminal offense[33].

Counterfeit specialized food products (eco-friendly, intended for diabetics, etc.), fertilizers (for the cultivation of green or other certifiable products) pose a threat to certain groups of people who are allergic, intolerant to certain products or people, who are not allowed to use specific materials because of the diseases. Therefore, the certified products sector should especially protect products from counterfeiting, because potential buyers of such products are also potential victims.

Dangers of toy counterfeits are hidden in cheap unsafe materials and the sensitivity of children to them. The use of paint based on lead is banned in Europe since 1978.[34] Counterfeiters, saving costs, choose unsafe prohibited materials and it can have a negative impact on children's health.

From set out above, it can be concluded that the basic values to be protected by the criminal laws of the Member States that criminalise counterfeiting as a criminal offence, are the economy and business procedures. Additional values are the rights of intellectual property subject. Also, according to the authors, health and life have to be distinguished as the additional values, which *per se* should be assessed as the qualifying feature (aggravating liability), depending on the type of the counterfeit product.

The concept - the counterfeit of the trademark is used in Article 61 of the TRIPS Agreement but its definition is not provided. It should be noted that the counterfeit of the trademark and the unauthorized use of the trademark are not identical terms. This concept can be considered to be equal (similar) to „counterfeit trademark goods", the content of which is revealed in the note 14[35] of the mentioned Agreement, where it is specified that counterfeit trademark goods mean such goods, including packaging, on which there is the unauthorized trademark that is identical to the trademark, registered and valid in respect of such goods or the trademark**,** or which cannot be discerned

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[33] *Ibid*., p. 353 - 354: *[...] the annual turnover of counterfeit drugs was estimated ar US$ 39 billion [...] These examples show a huge spectrum of events and they effects [...]: 1990: Over 100 children in Nigeria died from a cough syrup that was diluted with toxic solvent; 1995: 89 people in Haiti died after the intake of Paracetamol syrup (an analgesic) containing diethylene glycol; 1996: more than 59 children died after the intake of counterfeit fever syrup; 1999/2000: Approximately 60 people in Combodia died after the intake of counterfeit anti-malarian drugs According to a study published in the leading medical journal The Lancet in 2001, up to, 40% of anti-malarial drugs sold in Third World countires do not contain enough or do not contain any active ingredient. The drugs are practically worthless, leading to thousands of deaths annually; 2002: In Switzerland, approximately 22,000 fake Viagra tablets were confiscated; 2002: AIDS medication designated for Africa was illegally reimported to Germany anf the Netherlands on a large scale via France and Belgium. It had previously been delivered to developing countries at prefential prices; [...] 2006: At least 20 persons died in Chine after the intake of counterfeit antibiotics; During the second half of 2009, the multinational police operation 'Storm II' in several Southeast Asian countries led to the arrest of 30 suspects and the seizure of 20 million units of counterfeit or illegal drugs; 2010/12: In Germany, investigations into the dealings of several pharmaceutical wholesalers are currently underway. They had ostensibly on a large scale imported and sold to pharmacies active ingedients which kad no regulatory approval for use in cancer drugs.*

[34] Krugman and Jones [interantyvus], http://ec.elobot.co.uk/apsinuodijimas-svino

[35] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, UNTS. 299, 33 ILM 1197 (1994) [TRIPS Agreement].

Criminal Enforcement of Intellectual Property: A Handbook of Contemporary Research (Research Handbooks in Intellectual Property). United Kingdom: MPG Books group, 2012, p.175

according to its essential characteristics from the authorized trademark and which violates rights of the owner of the discussed trademark according the law of the state, to which the goods are imported.

The dual concept of the goods with counterfeit trademark can be distinguished from the definition, which is present in the TRIPS Agreement. The first concept is related to the goods with absolutely identical extraneous trademark. The second concept is related to the goods with the confusingly similar trademark, which cannot be distinguished from its essential features. In both cases, the subjects of the criminal offence want to mislead the purchaser using such actions, they want to use the purchaser's inability to compare the counterfeit trademark to the original trademark or otherwise verify the authenticity of the goods. In such way it is allowed to obtain benefits from the trademark investment to the marketing activities.

In view of the fact that namely the trademark counterfeiting is specified in Article 61 of the TRIPS Agreement*("[...] Criminal procedures and penalties should be applied at least in the cases of the intentional counterfeiting of the trademark on the commercial scale")*, the authors conclude that the TRIPS agreement obliges to criminalise offenses, the subjects of which are: the trademarks identical to protected trademarks, trademarks, confusingly similar to protected trademarks, the goods marked identically to protected trademarks, the goods marked using the trademarks, confusingly similar to protected trademarks. It should be noted that the Member States' national regulation should ensure the avoidance of situation when criminals, knowing that criminal liability is established only for use of absolutely identical trademarks of extraneous goods or services, could use very similar trademarks (i.e. these trademarks could not be distinguished in the case of absence of the original trademark of goods or services by the ordinary person (non-specialist).

It should be noted that the issue of counterfeiting should not be unduly extended, it should be clearly separated, when the trademark is considered identical or confusingly similar, which could not be discerned according to the essential characteristics and when the trademark causes only associations, i.e. it is visible that the product is not original without special knowledge.

According to the authors, during individualization of the penalty for counterfeiting, the Member States should pay due attention to the difference of prices of the counterfeit product and the original product. Especially for those cases, when the price is much lower than the price of the original product or service. In that case, the buyer understands that the product or the service is not original. In such case, the profit of the person who sells such goods is not higher, that it would be in case if this person would sell goods or services that are not marked using the extraneous trademark of goods or services. For application of the standard of *bonus pater familias* during consideration for criminal liability, according to the opinion of the authors, it is important that the user arriving in different trading venues, has different expectations to find the original high-quality goods. For example, when the medicines, for selling of which the permit is necessary, are bought in the market, and the prices of such medicines are lower than usually, it is possible to expect that the goods will not be of the adequate quality or (and) they will be marked with the counterfeit trademark. Meanwhile, buying clothes in a luxurious shop and paying higher prices, the user expects to receive the high-quality and original product. So, the authors believe that the circumstances, under which counterfeited goods are sold, for example, the difference of the price of the counterfeit product and the original product, could influence the individualization of punishment

but they cannot be the decisive criterion while assessing the issue of application of the criminal liability.

Thus, it can be suggested, that the existence of counterfeiting in the European Union market causes the following derivatives: firstly, the trademark proprietor is not paid for the goods, which are made and appear in the market marked using the proprietor's registered trademark; secondly, the price difference between the original and the counterfeit goods makes the original goods less attractive than the counterfeit goods; thirdly, *"the person buying counterfeit goods becomes a moral hostage because"* [36] indirectly contributes to the financing of crime because of inability to distinguish genuine goods from counterfeit products; fourthly, the buyer is deceived and disappointed because the quality of counterfeit goods is not the expected quality, fifthly, trademark rights bodies, especially small businesses, reduce turnover or bankrupt for this reason, they dismiss employees, because they cannot compete with the counterfeit market; sixthly, for certain groups of counterfeit *("for example, alcohol, tobacco, medicines, car parts, toys, food products"*[37]) a threat to health and life arises; seventhly, the counterfeiters attempt to violate *economic powers of the state, public welfare* because they *do not pay taxes, they do not invest to creation of legal workplaces, create confusion on confidence in the quality of products, encourage illegal work, increase the underground economy.*[38]

Conclusions

1. Intellectual property objects variety determines its influence on diverse development of mankind, business relations (other manifestations of public interest), so criminal liability is necessary as the measure to protect the public interest. The protection of intellectual property is based on the labour and the utilitarianism theories, therefore regulation at the criminal level must be such that the balance would be maintained between the necessity of the protection of the rights of the property rights owner and the public interest. It should be noted that the excessive regulation that could stop further improvement of intellectual property objects and the creation of new objects should not be set.

2. Article 61 of the TRIPS Agreement[39], which is integrated in the European Union, law obliges to criminalize criminal offenses related to the counterfeiting of goods and services. This article is very abstract and it does not provide equal regulation at the criminal law level in the Member States while criminalizing criminal offenses related to counterfeiting of goods and services. Attempts to flesh out the provisions of the TRIPS at the European Union level detailing features of counterfeiting as a criminal offense did not produce results because there was no approval of the Member States.

3. The conclusion can be made from the existing abstract regulation that the Member States are obliged to criminalize at least counterfeiting goods and services, which includes: trademarks identical to protected trademarks, trademarks that are confusingly similar to a protected trademark, goods that are marked using the

[36] Laurinavičius, A. *Trade marks as a concept for protecting the international trade*, Intellectual economics, 2008, 1(3): 29-40.

[37] *Ibid.*

[38] *Ibid.*

[39] 23.12.1994 Official Journal of the European Communities, L 336/214

trademarks, which are identical to protected trademarks, goods that are marked using the trademarks, which are confusingly similar to the protected trademark. The regulation of application of criminal liability for counterfeiting of goods and services should be directed to ensuring of the public interest maintaining the balance of the rights of users, the trademark owners and the reliable European Union market.

4. The sufficient attention to the circumstances in which the counterfeit goods were sold and bought should be paid during application of the criminal liability for the counterfeiting of goods and services and its individualisation.

5. Member States should differentiate counterfeiting as the body of crime of the criminal offence taking into account the type of the counterfeit product, possible damage. The counterfeit medicines are distinguished as extremely dangerous counterfeit products.

References

1. Adam, A. *What is "commercial scale"? A critical analysis of the WTO panel decision in WT/DS362/R.* Sweet & Maxwell and its Contributors. 2011, 33(6): 342-348

2. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, UNTS. 299, 33 ILM 1197 (1994) [TRIPS Agreement].

3. Amended proposal for a Directive of the European parliament and of the council on criminal measures aimed at ensuring the enforcement of intellectual property rights [2005] Brussels, 26.4.2006COM(2006) 168 final

4. Anti-Counterfeiting Trade Agreement;

5. Birštonas, R., *et al. Intellectual property rights,.* Vilnius Registrų centras, 2010

6. Commission Communication of 30 November 2000 *Follow-up to the Green Paper on combating counterfeiting and piracy in the single market,* [COM(2000) 789 final (COM (2000) 789)

7. Communication from the commission to the European parliament committee and the committee of the regions. Roadmap to a Resource Efficient Europe, Brussels, 2011.9.20 COM(2011) 571 final;

8. Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953). ETS 5; 213 UNTS 221 (ECHR)

9. Correa, C. *Trade related aspects of intellectual property rights: a commentary on the TRIPS agreement*. Oxford: Oxford University Press, 2007.

10. Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (OJ L 157, 30.4.2004)

11. Geiger, Ch., *et al*. *Criminal Enforcement of Intellectual Property:* A Handbook of Contemporary Research (Research Handbooks in Intellectual Property). United Kingdom: MPG Books group, 2012

12. Kiškis, M. Doctrines of intellectual property rights, Teisė. 2009; 73: 24 – 37

13. Kiškis, M., Krikščionaitis, M., *Measuring Intellectual Property Infringements:*

14. Laurinavičius, A. *Trade marks as a concept for protecting the international trade*, Intellectual economics*,* 2008, 1(3): 29-40

15. Matthies, C., *et al*. *Film Piracy, Organized Crime, and Terrorism*, RAND Corporation, 2009

Methodological aspects, Teisė. 2008; 68: 37-50

16. Nevera A., Klimkevičiūtė D. (2013) Criminal aspects of infringement of trademark rights*, Anales Universitatis Apulensis Series Jurisprudentia* No 16

17. Nevera, A. The problems of criminal responsibility for intellectual property wrongs from national and international aspects, Jurisprudence 2007, 8(98): 48-53

18. Official Journal of the European Communities *Charter of fundamental rights of the European Union*, [2000] OL C 364/01

19. Official Journal of the European Union *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*, signed at Lisbon, 13 December 2007, [2007] OL C 306

20. On 15 October 1998 the Commission presented a Green Book *Combating* counterfeiting *and piracy in the Single Market*, COM (98)569.

21. Paris Convention for the protection of industrial property of March 20, 1883, as revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, at Lisbon on October 31, 1958, and at Stockholm on July 14 1967. UNTS 828

22. Sugden P., *How Long is a Piece of String? The Meaning of "Commercial Scale" in Copyright Piracy.* European intellectual property review. 2009, 31(4): 202-212

23. The European Commission proposal of 12 July 2005 for a European Parliament and Council directive on criminal measures aimed at ensuring the enforcement of intellectual property rights and proposal for a Council framework decision to strengthen the criminal law framework to combat intellectual property offences (KOM(2005) 276)

24. Vaver, D*. Intellectual Property Rights – Critical Concepts in Law*. Part 5. United Kingdom: MPG Books group, 2006

25. World Intellectual property organization *Understanding Induatrial property*. WIPO Publication No. 895(E), Switzerland http://www.wipo.int/edocs/pubdocs/en/ intproperty/895/wipo_pub_895.pdf

26. World Trade Organization 2009 January 26 Report of the Panel No. WT/DS362/R *China – Measure Affecting the protection and of intellectual property rights*.

Does the International Criminal Court Have a Future or Is It Just an Illusion?

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Abstract

For international criminal law 2002 was a great year. The act that gave the International Criminal Court (hereinafter the Court or ICC), jurisdiction over several heinous crimes committed during and after an armed conflict, the so called Rome Statute, entered into force, establishing the International Criminal Court, the first permanent court in this field. By the adoption and ratification of the Statute, the Court is able to try those liable for crimes that fall under its jurisdiction committed during or after an armed conflict of an international or intern nature or an attack against the civilian population. The establishment of the Court was the result of much debate and many compromises, not only from the procedural point of view but as well from the material one, e.g. it took them five years to come up with a definition for the Crime of Aggression.

From the beginning, the ICC was confronted with some recognition problems, one of its fiercely defenders, the United States of America, decided not to ratify the founding treaty and even withdraw from the already in 1998, signed Statute.

Fourteen years later, countries started to leave the Statute and the Court as they felt it does not fulfil its purpose anymore and its more or less biased, by as they said its focus only on the African Countries. The following article will focus on the issues the Court is facing nowadays.

Keywords: *International Criminal Court, African countries, Rome Statute, international criminal law*

1. Introduction – facts and figures in international criminal law

The first time the idea to create a permanent international court that could have jurisdiction over some of the most heinous crimes faced by humanity was expressed by Vespasian Pella in his work *Towards an International Criminal Court*[1]. Nineteen years later two *ad-hoc* military tribunals[2] were created to investigate and prosecute those responsible for crimes that fall under their statute committed during the second World War. Further on, in the early nineties two *ad-hoc* tribunals were created by the United Nations, the International Criminal Tribunal for the Former Yugoslavia[3] and the

[1] Pella, V.V., *Towards an International Criminal Court*, in "American Journal of International Law", Vol. 44, (1950).

[2] Nuremberg Charter "Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945" and International Military Tribunal for the Far East "Special proclamation by the Supreme Commander tor the Allied Powers at Tokyo January 19, 1946; charter dated January 19, 1946; amended charter dated April 26, 1946 Tribunal established January 19, 1946"

[3] UN Resolution 827 from 25 May 1993,

International Criminal Tribunal for Rwanda[4]. These were charged to investigate and prosecute those responsible for the crimes of Genocide, Crimes Against Humanity and War Crimes[5] committed during the Yugoslavian war and the Rwandese one[6]. Unfortunately, the international society could not come to a rest and during the next years several other tribunals and courts have been established to deal with the sort of crimes that national jurisdictions, concerned with this type of crimes, did not, did not want to or could not handle. As such, in 2002 the Residual Special Court for Sierra Leone was created "as the result of a request to the United Nations in 2000 by the Government of Sierra Leone for "a special court" to address serious crimes against civilians and UN peacekeepers committed during the country's decade-long (1991-2002) civil war"[7] being the first "hybrid" international criminal tribunal. Its mandate was to try those responsible for crimes committed during the above-mentioned war having its "sit in the country where the crimes took place and the first to have an effective outreach programme on the ground".[8] Later, the Extraordinary Chambers in the Courts of Cambodia[9] were created by the initiative of the Cambodian government requesting in 1997 the United Nations "to assist in establishing a trial to prosecute the senior leaders of the Khmer Rouge" [10] that would deal with the ordeals that have occurred during 17 April 1975 and 7 January 1979 on the Cambodian territory after the Khmer Rouge regime took power. The court was created in 2003 upon an agreement reached with the United Nations, being though independent from the government and the UN. The trials are held in Cambodia, it uses Cambodian staff and judges together with foreign personnel. From the law point of view it uses national legislation as well as international. Next to these, after the 2005 attack in Lebanon where 22 persons were killed, including the former Lebanese Prime Minister, Rafik Hariri, the United Nations Security Council decided the creation of the UN International Independent Investigation Commission (UNIIIC) through Resolution 1595 from April 2005. The purpose of the commission was to gather evidence and to assist the Lebanese authorities in their investigation of the attack of 14 February 2005. The UNIIIC's mandate was later expanded to include the investigation of other assassinations that took place before and after the Hariri attack. The purpose was to bring to justice "the perpetrators, organizers and sponsors of this heinous terrorist act, and noting the Lebanese government's commitments in this regard. The Council urges all states, in accordance with its

[4] UN Resolution No. 955 from 8 November 1994,

[5] N.b. war crimes are encompassed with the Statute of the ICTY under article 2 Grave breaches of the Geneva Conventions of 1949 and in article 3 Violations of laws and customs of war and under the ICTR Statute under article 4 Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II

[6] Sometimes referred as the Rwandese Genocide having as merit to be the first Tribunal to convict for genocide.

[7] Special Court for Sierra Leone, Residual Special Court for Sierra Leone Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000, the Special Court for Sierra Leone http://www.rscsl.org/

[8] http://www.rscsl.org/index.html, to be mentioned that there was a Trial held outside of the country's borders, respectively the former Liberian President, Charles Taylor

[9] Extraordinary Chambers in the Courts of Cambodia, Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea Phnom Penh, 6 June 2003, http://legal.un.org/avl/ha/abunac/abunac.html

[10] *Idem*, https://www.eccc.gov.kh/en/about-eccc/introduction

Resolutions 1566 (2004) and 1373 (2001), to cooperate fully in the fight against terrorism."[11] Further on, in 2016, the Den Haag based Tribunal for the Kosovo's war opened its doors, the Kosovo Specialist Chambers and Specialist Prosecutor's Office[12]. As all the above Tribunals, Court and Chambers, this Chambers have a limited mandate as well, "namely over certain crimes against humanity, war crimes and other crimes under Kosovo law which allegedly occurred between 1 January 1998 and 31 December 2000"[13] but in comparison with the other above mentioned institutions, these Chambers were established based on the Council of Europe Parliamentary Assembly Report Doc 12462 of 7 January 2011 ("the Marty Report")[14]

As we could see much has been done after the 1990's in the field of international criminal law, but somehow it was not enough. All these tribunals and courts were created after the end of the war, conflict or attack, their jurisdiction being put into question on many occasions by the defence or even the international community. As such, the international society decided to create a permanent Court[15] that would have jurisdiction over any crimes falling under the Genocide, Crimes against Humanity, War Crimes and/or Crimes of Aggression concepts. The court was established through the 1998 Statute which came into force in 2002. At that time, many wars were ongoing through the world, especially on the African continent as well as the well-known *one on terror*. We believe that this latter was the reason why for example USA, one of the Court's biggest advocate before 9/11 and Statute's signature did not ratify it in the end, deciding in the end to even fully withdraw from the Statute. Until a few months ago, there were 124 countries that signed and ratified the ICC's Statute, out of which 34 were African states, 19 Asian-Pacific States 18 East European, 28 Latin-American and Caribbean States and 25 West European and other states. Now, several countries have already declared that they would like to exit the Statute: Burundi[16], South Africa, Gambia while Kenya and Namibia are planning as well. Russia, a country that has, as the USA, only signed the Statute but did not ratify it, declared in November 2016, that it would like to fully withdraw from the Statute.[17]

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[11] Special Tribunal for Lebanon, Agreement between the United Nations and the Lebanese Republic (hereinafter "the Agreement") pursuant to Security Council resolution 1664 (2006) of 29 March 2006, S/RES/1757 https://www.stl-tsl.org/en/about-the-stl/636-creation-of-the-stl

[12] Law n.05/L-053 on the Specialist Chambers and the Specialist Prosecutor's Office approved by the Kosovo Parliament in August 2015, http://www.kuvendikosoves.org/common/docs/ligjet/05-L-053%20a.pdf ,

[13] The Kosovo Specialist Chambers and the Specialist Prosecutor's Office approved by the Kosovo Parliament in August 2015, Law n.05/L-053 https://www.scp-ks.org/en

[14] Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights The International Convention for the Protection of all Persons from Enforced Disappearances1, AS/Jur (2011) 45 4 November 2011 ajdoc45 2011 http://assembly.coe.int/CommitteeDocs/2011/ajdoc45.pdf

[15] Assembly of State Parties, Statute of the International Criminal Court A/CONG.183/9 of 17 July 1997, in force since 2002

[16] Burundi's *Lower house of parliament passed a draft law to exit ICC*

[17] Russia pulls out from International Criminal Court, *Moscow's decision follows UN report on Russian rights abuses and discrimination in Crimea, 16 November 2016,* http://www.aljazeera.com/news/2016/11/russia-pulls-international-criminal-court-161116132007359.html

2. Example of cooperation issues

The International Criminal Court has the possibility to try those responsible of committing crimes that fall under its jurisdiction if, no other state is willing or able to do so. Actually, it was hoped that, the countries where the crimes were committed or who had on their territory those sought for these crimes would be willing to prosecute them there, and only in special cases, as a last resort and in conformity with the complementarity principle the Court would have to investigate and prosecute those responsible.[18] Unfortunately, this was not the case and because of the ongoing conflicts or the inability or unwillingness of the states in which the crimes were committed, the ICC had to intervene. Before we make a short presentation of the current situation and discuss the court's issues, we would like to make certain clarifications.

First, the court has jurisdiction only over crimes committed after the date the Rome Statute entered force, July 2002, secondly, as already mentioned it can try an individual only if proven that a country is unwilling or unable to prosecute him or her, thirdly the Court has jurisdiction to prosecute only the nationals of member states or the resortissants of those countries who's situation was referred to it by the United Nations upon a Resolution[19] and fourthly, but not lastly, according to the ICC Statute, the capacity under which the perpetrator acted is irrelevant[20], therefore the Court being able to try states officials and presidents.

Until now, the Court has investigated situations from Uganda, the Democratic Republic of Congo, Darfur, Sudan; Central African Republic, the Republic of Kenya, Libya, Cote d'Ivoire, Mali, Georgia and Central African Republic II and has started preliminary investigations in Afghanistan, Burundi, Columbia, Gabon, Guinea, Iraq/UK, Nigeria, Palestine, Registered Vessels of Comoros, Greece and Cambodia and Ukraine. The prosecution decided in the case of Honduras, Venezuela and the Republic of Korea not to proceed with the investigation, closing the cases.

Looking at this list, is not hard to understand why it is being asserted that the ICC is an African court, being built for the prosecution of the African people.[21] The first non-African country where the Prosecution has decided to investigate after its preliminary examination was in the case of Georgia, with special focus on in and around South Ossetia for "alleged crimes against humanity and war crimes committed in the context of an international armed conflict between 1 July and 10 October 2008".[22]

Not to be understood that the Court has jurisdiction over states we would like to shortly present how the Court works. At first the prosecutor starts a preliminary

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[18] Article 17 of the Rome Statute

[19] N.B.: An investigation concerning a situation that would fall under the Court's jurisdiction can start based on the country's referral, an UN referral or the prosecutor's *proprio motu*

[20] Article 27 "Irrelevance of official capacity" and 20 "Responsibility of commanders and other superiors" of the Rome Statute

[21] Bensouda, F., *Africa Question, Is the International Criminal Court (ICC) targeting Africa inappropriately?* In Human Rights and International Criminal Law, ICC Forum.com http://iccforum.com/africa, Nyabola, N*, Does the ICC have an African Problem?* https://www.globalpolicy.org/international-justice/the-international-criminal-court/general-documents-analysis-and-articles-on-the-icc/51456-does-the-icc-have-an-africa-problem.html , South Africa to quit International Criminal Court, Government to submit a bill to exit the ICC, amid growing concerns that Hague-based court tries mostly African leaders, http://www.aljazeera.com/news/2016/10/south-africa-formally-applies-quit-icc-media-161021044116029.html

[22] ICC, Situation in Georgia, case No. ICC-01/15, https://www.icc-cpi.int/georgia

examination on a situation referred to it by a state – party or not, the UN or on a *proprio motu bases*. It analysis if the Court has jurisdiction or on any other admissibility issues. If it considers that all, by the Statute expressed requirements are met, the Prosecution starts an investigation in the case, for him or her to decide if, the case could be send to trial, based on the existing and/or gathered evidence, or not. It is only after such a decision has been taken that the case goes before the Pre-Trial Chamber which decides if an arrest warrant against one or several persons shall be issued and examines the by the prosecution and defence presented evidence. But in front of the (Pre-Trial) Chambers it is not the State that it's being prosecuted but the individuals accused of having committed the respective crimes. It is only after the Pre-Trial's Chamber decides that the case should or shouldn't go to Trial, depending if the former considers that the Prosecution has or hasn't succeeded to make a case.

For the procedure before the Pre-Trial Chamber and the Trial Chamber to be conducted, the accused must be present, a trial *in absentia* not being possible. As such, the competent Pre-Trial Chamber issues an arrest warrant for the person to be broth before the Court. And here comes the catch. The accused must be arrested, based on the by the competent Pre-Trial Chamber issued arrest warrant, by the country where he or she is found and surrendered to the Court. But this is not such an easy task to fulfil, and mainly because of political reasons or, as we shall specify later on, concluded conventions for *ressortissants* of a certain state not to be arrested and surrendered to the Court. The Country that arrests the accused has though the possibility under the universality principle of the crimes concerned in this article, to, if willing and able, try the person herself. Not to enter in many details, on this matter we would like to give an example of a case of an arrest warrant not complied with.[23]

In 2010, the United Nations Security Council "acting under Chapter VII of the Charter of the United Nations, adopted Resolution 1593(2005)[24], whereby it referred the situation in Darfur, Sudan, since 1 July 2002 to the Prosecutor of the Court and decided, inter alia, "that the Government of Sudan [...] shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution".[25] As Sudan, Darfur is not State Party to the ICC Statute, the situation entered within its competence by UN referral. Of course, Darfur, Sudan did not cooperate with the arrest warrant issued against its (still) acting president. Darfur's President Omar al-Bashir is being sought for and charged with crimes committed in Darfur Sudan, since 2003, as an indirect (co) perpetrator[26]. His first arrest warrant was issued in March 2009[27] and the second in 2010[28]. He is, *inter alia*, accused of "as the *de jure* and *de facto*

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[23] N. b. This is a more peculiar case.

[24] USA and China for example abstained, maybe because it did not want to create a precedent, even thou the US Minister of Foreign affairs at that time "saluted" the adoption.

[25] UN SC Resolution 1593 (2005) Adopted by the Security Council at its 5158th meeting, on 31 March 2005, see as well, ICC, Situation in Darfur Sudan, in the case of *The Prosecutor v Omar Hassan Al Bashir*, case No.: ICC-02/05-01/09, *Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute*11 July 2016,

[26] ICC, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, case no. ICC-02/05-01/09

[27] ICC, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, case no. ICC-02/05-01/09, Pre-Trial Chamber, *Warrant of Arrest for Omar Hassan Ahmad Al Bashir,* 04 March 2009 *(hereinafter Bashir, Arrest Warrant)*

[28] ICC, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, case no. ICC-02/05-01/09, Pre-Trial Chamber, *Second Decision on the Prosecution's Application for a Warrant of Arrest, 10 July 2010*

President of the State of Sudan and Commander-in-Chief of the Sudanese Armed Forces at all times relevant to the Prosecution Application, played an essential role in coordinating the design and implementation of the common plan"[29] and that "Omar Al Bashir acted with specific intent to destroy in part the Fur, Masalit and Zaghawa ethnic groups."[30] Seven years after the first arrest warrant was issued, Darfur's president is still at large, attending international meetings in African countries. This case raised several issues concerning States cooperation with the Court's warrants.

Several notes need to be made on this matter. As we already said, the Darfur/Sudan case concerns a non-State Party, and it would have been obliged to comply with the arrest warrant based only on the UNSC Resolution, that specifically obliges Darfur/Sudan to fulfil it.[31] If the indicted would have been found on the territory of an ICC State parties, the latter would be, in theory, in accordance with the Statue it ratified, especially article 27[32], obliged to comply with such a warrant, but in case, the if the supposed perpetrator is national of a non-State Party and/or if he or she is found on the territory of such a country, article 98 (1) of the Rome Statute establishes certain conditions. Based on this article, if the requested Stated would be in the position to breach its obligations under (customary) international law, concerning "State and diplomatic immunities of a person or property of a third State "[33], the Court "may not proceed with a request of surrender and assistance" except an agreement is reached[34]. Accordingly, the Court needs to obtain first the cooperation of that third State, for the waiver of the above-mentioned immunity. The second paragraph impeaches the Court to act and "proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender". This provision has been introduced after long negations carried out by the United States, country that refused to ratify the Statute in the end.[35] In conclusion, the Court and the member States need to act in conformity with their international public law obligations, the Court being able only to hope for cooperation.

Turning to the Bashir case, the President found himself several times on the territory of State Party to the ICC, but accordingly with article 98 a consent form Darfur, Sudan had to be sought. Such an accord has not been reached, but the ICC still condemned the Republic of Djibouti[36] Chad, DRC and South Africa for not complying

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[29] *hereinafter Bashir, Arrest Warrant* p.6, https://www.icc-cpi.int/CourtRecords/CR2009_01514.PDF

[30] https://www.icc-cpi.int/darfur/albashir/pages/alleged-crimes.aspx

[31] Paragraph 2 of the UN resolution states as follows "Decides that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State;"

[32] Irrelevance of official capacity

[33] Article 98 (1)

[34] idem

[35] For a more detailed analysis of article 98 and the United States, see, Zapala, S., *The reaction of the US to the entry into force of the ICC Statute: Comments on the UN SC Resolution 1422 (2002) and article 98 Agreements*., Journal of International Criminal Justice, 1.1, Oxford University Press, 2003

[36] ICC decision *precit*.,

with the arrest warrant, when the accused was on their territory, but could practically do nothing about it. It is the State's party obligation to act in conformity with its obligations pursuant the Rome Statute and to arrest and surrender the person envisaged by the arrest warrant but the state is not obliged to do so if, the accused is national of a non-State Party, and would conclude with a breach. What the requested State is obliged to do is to receive the consent of the third State to surrender its national, although the latter could claim jurisdiction as well, under the universality principle. The Al-Bashir case gets even more complicated as according to the UN Resolution of referral, the State is obliged to cooperate with the ICC. Accordingly, it would be obliged to cooperate with the by the ICC requested State or would it not? The UN SC resolution obliges only Darfur to comply with it, and not other States on which's territory the accused is situated, as such, the States that did not act in accordance with the arrest warrant did not actually breach their obligations in conformity with the Rome Statute. As such, even if the case was referred to it by the UN SC, with who's Resolutions States, party or not, must at least in theory comply, States still have their own will and act in accordance. We have chosen to shortly present this case, to show some issues the ICC is confronted with, next to the interpretation of its Statute case-by-case.

As of why there are mostly African countries under investigation, these could be some reasons. The very disputed arrest and surrender of President Al-Bashir, and reason for much debate was a consequence of the UN SC resolution to investigate the situation in Darfur /Sudan supported by African countries like DRC, Benin and Tanzania, so not only Western Countries while South Africa, Gabon and Nigeria voted in favour of the UN Security Council referral of the Libya situation to the ICC, "Ivory Coast accepted the jurisdiction of the ICC and undertook to cooperate with the ICC. Kenya's President Kibaki and Prime Minister Odinga pledged support to the Prosecutor's independent decision to open an investigation into crimes in Kenya *proprio motu."*[37] On the other hand, if the events happened before 2002 or the country shows signs it would be able or willing to investigate, then the ICC would not have any jurisdiction. More, it needs to be kept in mind that the ICC has jurisdiction only over certain crimes, so it would not be able to prosecute crimes like terrorism or organized crime.

Because it is not the purpose of the paper to discuss the issue of immunities, arrest warrants or cooperation, further on we would like to shortly present what the ICC achieved and the first cases of withdrawal from the Statute.

What has the ICC achieved?

Currently, the Court has under preliminary examination ten cases and the same number of situations under investigation. There are no cases in Pre-Trial, five in Trial, one case is on appeal and three in the stadium of reparation meaning a conviction has been entered. Next to all of these, five cases have been closed, for reasons like, insufficient evidence, *the Prosecutor v. Uhuru Muigai Kenyatta, case no. ICC-01/09-02/11,* in one case charges have been vacated**,** the Chamber considering the evidence presented by the prosecution was weak *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang,* case No. ICC-01/09-01/11, in two cases the Pre-Trial Chamber did not confirm the charges, and in one case the accused was acquitted.

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[37] Clarke,K. M., *Africa Question, Is the International Criminal Court (ICC) targeting Africa inappropriately?* In Human Rights and International Criminal Law, ICC Forum http://iccforum.com/africa#Clarke

The first case before the ICC, *Prosecution v. Lubanga Dyilo*[38] case, was a long, exhausting one. The charges against him were confirmed in 2007 and the Verdict was given in 2012, and the appeal decision was rendered in 2014. During these 7 years, the Trial Chamber ordered two times a stay of the proceedings, first in June 2008 "because the Prosecutor would not disclose certain documents obtained through confidentiality agreements which potentially contained evidence favourable to Lubanga's defense"[39] and the second time in July 2010 "because the Prosecutor refused to disclose the identity of an intermediary - an outside person assisting the Prosecutor's investigation - out of a concern for the intermediary's safety. The judges found that the Prosecutor's failure to disclose compromised the possibility of a fair trial.[40] After the, as many defence lawyers would say, fair trial fiasco in the *Lubanga* case[41], the second case before the Court, where a conviction had been entered was sketchy as well. *The Prosecution v. Katanga and/or Ngudjolo Chui.* The case against Katanga started in 2007 when the arrest warrant was issued. In 2008 the Pre-Trial Chamber I joins the cases against *Germain Katanga and Mathieu Ngudjolo Chui* but then it decides in 2012 to separate the cases and sever the charges against *Ngudjolo Chui*. In the end the latter was acquitted. And, finally the last conviction before the ICC was one concerning the Mali situation, *Le Procureur c. Ahmad Al Faqi al Mahadi*[42] where, the defendant actually admitted its guilt, and signed a plea agreement in 2016[43]. Accordingly, the ICC, convicted 3 people out of 30plus indicted. Some might say, that not much has been achieved in its 14 years of existence, but what should be always kept in mind is that, many other cases and situations are under investigations, accused are still at large, making it impossible for the Court to prosecute them *in absentia*, and other issues the ICC is facing impeaching it from fulfilling its mandate.

3. Withdrawal of States

Based on article 127 of the ICC Statute any State can withdraw from the Statute by deposing a notification addressed to the UN SC, and in accordance with para (2) "Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective."[44]

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[38] ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06

[39] *idem,* http://amicc.org/icc/lubanga

[40] ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, 8 July 2010 http://www.hague justiceportal.net/Docs/Court%20Documents/ICC/lubanga-Decision%20on%20the%20Prosecution's%20Urgent%20Request%20for%20Variation%20of%20the %20Time-Limit.pdf, http://amicc.org/icc/lubanga

[41] The Trial's issues were enumerated even in the verdict, ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, 14 March 2012, para. 10

[42] ICC, *Situation in Mali, The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case No.: ICC-01/12-01/15 (*hereinafter* Al Mahdi,)

[43] *Al Mahdi,* ICC-01/12-01/15-78-Conf-Exp , Version publique expurgée du *« Dépôt de l'Accord sur l'aveu de culpabilité de M. Ahmad Al Faqi Al Mahdi », 25 février 2016, ICC-01/12-01/15-78-Conf-Exp,* 19 August 2016

[44] Article 127 para 2

South Africa decided this year to withdraw from the ICC because it found that its laws were conflicting with the Rome Statute, especially on head of state's immunity. The decision was taken after, while on the South African Territory the police failed to arrest Al Bashir even though next to the ICC's arrest warrant there was an interim order issued by the North Gauteng High Court preventing the Sudanese president to leave the country. Even so, the Sudanese president was allowed by the South African Government to leave the country, as it was considered that "President Bashir is protected by head of state immunity hence their alleged inability to arrest him for transfer to the ICC."[45]. Interestingly enough, this action considered by the South African State's High Court as unconstitutional and invalid dismissing their application for leave to appeal, upholding the decision that the President should have been arrested and that the Government acted illegally and against the Court's ruling. Unfortunately, just before a ruling by the Country's Constitutional Court on this matter, and scheduled for November 2016, the government announced on 19 October 2016, its withdrawal from the case. The same time the withdrawal from the ICC was announced.

Next to South Africa, two other African countries decided to withdraw from the Statute, Gambia and Burundi. Their reason was the ICC is supposed to target mostly African countries.

In September 2016, the United Nations Human Rights Council decided, based on Human Rights Council Twenty-fourth special session Resolution adopted by the UN General Assembly Human Rights Council on 17 December 2015 S-24/1, Preventing the deterioration of the human rights situation in Burundi[46], that it would be necessary for a commission on inquiry into the human rights abuses committed in Burundi since April 2015. This Commission's purpose would be to identify the alleged perpetrators and to recommend what further steps could be undertaken to guarantee their accountability. This investigation commission was established because of Burundi's failure to conduct an investigation on the tortures, killings, rapes and disappearances of hundreds of people since 2015.

Observing that "the Burundian justice system, deeply corrupt and manipulated by ruling party officials, almost never conducts credible investigations or brings those responsible for these crimes to justice. Hundreds of arbitrarily arrested people have been detained on trumped-up charges."[47] As such, the ICC, as the Court of last resort, announced in April 2016 that it would open an investigation into these vicious crimes committed on the Burundian territory[48]. Based on the UN's Resolution and the ICC's start of investigation, on 18th of October 2016, "President Pierre Nkurunziza signed a legislation calling for Burundi's withdrawal from the ICC. Burundi's government claimed the court is an instrument of powerful countries used to punish leaders who do not

[45]Southern Africa Litigation Centre, New Release: Supreme Court of Appeal Rules on Bashir case, http://www.southernafricalitigationcentre.org/2016/03/15/news-release-supreme-court-of-appeal-rules-on-bashir-case/

[46] U N GA Resolution adopted by the Human Rights Council on 17 December 2015, A/HRC/RES/S-24/1, 22 December 2015; http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20619&LangID=E

[47] https://www.hrw.org/news/2016/10/27/burundi-icc-withdrawal-major-loss-victims

[48] Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a Preliminary Examination into the situation in Burundi, https://www.icc-cpi.int//Pages/item.aspx?name=otp-stat-25-04-2016

comply with the West."[49] The notification, mad in conformity with article 127 of the ICC Statute was lodged in with the UN SC just after South Africa's withdrawal on 21 October 2016.[50]

In December 2014, in Gambia, there was an attempted *coup-etat* that led to arrests and further human rights violations.[51] "The authorities continued to repress dissent and display a lack of willingness to co-operate with UN and regional human rights mechanisms or comply with their recommendations"[52] like, the Gambian's rejection of the Universal Periodic Report's[53] recommendations that it rejected, "failed to cooperate with African regional judicial mechanisms. It has refused to implement three binding decisions by the ECOWAS Court of Justice[54] regarding the torture, murder and disappearance of journalists[55], and it has repeatedly failed to cooperate with the African Commission on Human and Peoples' Rights"[56] No investigation was carried out by the Gambian President and Government in the aftermath of the coup. The international community proposed a joint independent investigation but was ignored and the country disregarded the African Commission on Human and Peoples' Rights resolution from February seeking an invitation to conduct a fact-finding mission.[57][58]

Even though invoking the following argument that the ICC is more concerned with African countries, as it tries mostly African leaders, and does not focus on any other conflicts, we believe that, at least the last two mentioned would like to exit the Statute because their situation might fall under the ICC's prosecution, one, Burundi, being already under preliminary investigation, and not necessarily that they are concerned about the ICC targeting mostly African country. We believe that, their fear is actually not to end up being under investigation and later on prosecuted. Unfortunately, the African Union has issued in 2016 issued a Decision on the International Criminal Court[59] condemning the Court and its actions, stating its concerns on the African State's still cooperation with the Court and urging the African States not to comply with the Court's requests until certain amendments issued by the African Union on the Statute are being taken into consideration.[60] Before this, in "2011 Jean Ping, the Chairman of the AU, went so far as to declare that the AU would not cooperate with the ICC after the indictment of

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[49] https://www.hrw.org/news/2016/10/27/burundi-icc-withdrawal-major-loss-victims

[50] On the Burundian Story, http://www.irinnews.org/analysis/2016/04/26/road-ahead-icc-burundi

[51] See for example, https://www.amnesty.org/en/latest/news/2015/04/gambia-soldiers-sentenced-to-death-in-secret-trial-must-not-be-executed/

[52] Gambia 2015/2016, https://www.amnesty.org/en/countries/africa/gambia/report-gambia/

[53] U N GA Human Rights Council, A/HRC/28/6/Add.1, 24 March 2015, https://www.upr-info.org/sites/default/files/document/gambia/session_20_-_october_2014/a_hrc_28_6_add.1_e.pdf

[54] Economic Community of West African States(ECOWAS) Court of Justice http://www.courtecowas.org/site2012/index.php?lang=en

[55] Ebrima Manneh (2010), the torture of journalist Musa Saidykhan (2010) and the unlawful killing of Deyda Hydara (2014).

[56] Gambia 2015/2016, https://www.amnesty.org/en/countries/africa/gambia/report-gambia/

[57] 332: Resolution on Human Rights in Conflict Situations - ACHPR/Res. 332 (EXT.OS/XIX) 2016, http://www.achpr.org/sessions/19th-eo/resolutions/332/

[58] Interestingly enough, ICC's prosecutor Fatou Bensouda, is a Gambian national, former Attorney General and Minister of Justice of the Gambia

[59] Doc. EX.CL/952(XXVIII) the Assembly/AU/Dec.590(XXVI), http://www.au.int/en/sites/default/files/decisions/29514-assembly_au_dec_588_-_604_xxvi_e.pdf

[60] For further information, see the Decision of AU.

Muammar Qaddafi due to the court's "discriminatory" practices for only investigating situations in Africa, decrying its failure to intervene in Afghanistan, Iraq and other places where Western powers have been implicated. As Chairman Ping remarked cuttingly, "What have we done to justify being an example to the world? Are there no worst [*sic*] countries, like Myanmar?""[61]

The civil society has expressed its concerns on this matter by stating that, the withdrawal from the Court's Statute "would represent a setback in the fight against impunity and the efforts towards the objective of universality of the Statute"[62] as the "ICC remains the only path to justice for many victims of the gravest crimes when national courts are unable or unwilling to try these cases"[63].

Even so, there are other African countries that are still in favour of the Court, like Cote d'Ivoire or Mali. Next to this, the Court "has initiated preliminary investigations into situations in Palestine, the Ukraine, Colombia, Afghanistan, as well as the UK's involvement in the Iraq war"[64] so steps are being made towards other regions as well.

While the ICC is considering Georgia's case, by already being under investigation and Ukraine for the Crimean situation, Russia has announced it withdrawal from the not even ratified, Statute[65] considering that "The court has unfortunately failed to match the hopes one had and did not become a truly independent and respected body of international justice" as advocated by the Ministry of Foreign affairs.[66] For not being an independent or respected body is yet to be seen, as sometimes the Court cannot actually do its work because of the veto power of Russia, China or the USA. Further on, even though it took the Court 8 years to start an investigation into the Georgian situation, it still did, but in this case, nor in the Iraq/UK case did it need an UN SC Resolution to do so, as if that would have been the case most probably the situation would not have gone further than the UN *table* because of UK's (and not only) veto power.

Other powerful countries have already signed agreements with countries in order to shield their citizens, and here we are referring to the United States of America, a very big supporter of the ICC until he change of administration in 2001, when the *war against terror* began. Later on, president Bush decided that the USA will not ratify the Statute, voted against it, withdrew from the Statute and concluded agreements[67] as established in article 98 paragraph 2 of the Statute with countries to shield its citizens from any prosecution by the I.C.C..[68]

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[61] Kamari Maxine Clarke, **"**Is the ICC targeting Africa inappropriately or are there sound reasons and justifications for why all of the situations currently under investigation or prosecution happen to be in Africa?", http://iccforum.com/africa#Clarke

[62] Statement of the President of the Assembly of States Parties on the process of withdrawal from the Rome Statute by Burundi, ICC-CPI-20161014-PR1244, https://www.icc-cpi.int//Pages/item.aspx?name=pr1244

[63] Daniel Bekele, Africa director at Human Rights Watch in https://www.hrw.org/news/2016/10/27/burundi-icc-withdrawal-major-loss-victims

[64] http://qz.com/820738/the-african-leaders-leaving-the-international-criminal-court-actually-have-a-chance-to-fix-it/

[65] http://www.aljazeera.com/news/2016/11/russia-pulls-international-criminal-court-16111613 2007359.html

[66] *idem*

[67] The United States and the International Criminal Court, https://www.hrw.org/legacy/campaigns/icc/us.htm

[68] See in this sense, Roht-Arriaza, N., *Just a'Bubble'? Perspectives on the Enforcement of International Criminal Law by National Courts*, Journal of International Criminal Justice 11 (2013), Published by Oxford University Press. All; Zapala, S., *precit*.

Conclusions

Examining, investigating, prosecution and condemning those responsible for war crimes, crimes against humanity, genocide or the crime of aggression is not an easy task. States are sometimes reluctant to try those responsible for alleged crimes that fall under the Court's Statute.

Despite all the above mentioned set-backs, the International Criminal Law as well as its jurisdiction has come a long way since it was set up. The fact that countries do not want to cooperate with a permanent Court, is not of a legal matter but more of a political and diplomatic one.

The court was not established just to prosecute and convict, the court was established so that it would end impunity and bring justice to victims of some of the most heinous crimes. The situations it is dealing with are difficult to investigate and examine. Most of the time, the court encounters reluctance on the ground and refusal to cooperate. Non-compliance with the arrest warrants is another issue the Court is confronted with. As we showed above, the countries wanting to exit the Statute fear prosecution of their own, not being willing to investigate the crimes committed on its territory, even though international help was offered.

On the other hand, on the question that keeps rising, on why the ICC is, almost at all investigating other countries or situations then African ones, some pertinent answers could be given. First, the African continent is mostly affected by crimes that fall under the Court's jurisdiction, second, even though heinous crimes are committed in other countries as well they do not fall under the Court's scope, as they do not reach the requested degree of gravity or are of a different nature, like organised crime or terrorism. Thirdly, the Court has jurisdiction only if it is proven that there is unwillingness or inability to examine, investigate and prosecute those individually criminal responsible for the crimes. Fourthly, the court might not even have jurisdiction because the country/countries involved are not part of the Statute, being able to circumvent even a Security Council referral to the Court by invoking their veto powers, some of them making sure that its citizens will not be prosecuted by the permanent Court, signing agreements on this matter with different countries. On the arrest warrants issues, the Court does not have its own police as such depending on other enforcement organs, which as we saw, sometimes due to politics fail to fulfil their duties.

But somehow, at the end of the day, what needs to be understood is, that it is irrelevant which judicial corpus will try those responsible for such crimes, as long as a trial, a fair trial, fulfilling all the necessary legal requirements is being conducted and the perpetrators are being brought to justice. What was and still is hoped is that, the Court should have learned form it's *ad-hoc* predecessors which faced similar problems. Of course, the cases it handles are very complex and hard to establish but, it is certainly being expected from this specific Court to deal with its cases in a more expedite manner, while respecting the accused's rights to a fair trial. Similar to the ICC, throughout international criminal law's history it has been shown that the Courts and Tribunals dealing with these types of crimes have always faced criticism, and their legality and jurisdiction was put into question. The only difference is that, the latter is a permanent one, out of which, State Parties could opt out.

As a conclusion, we believe the International Criminal Court has come a long way since its establishment, and even though not many verdicts were handed down until now, some sort of justice has been done for the victims. Because the Court does not have

a dead-line to fulfil its mandate, like other specialised Tribunals, Chambers and Courts, we believe there is still a future for it.

Bibliography

Articles

1. Pella, V.V., *Towards an International Criminal Court*, in "American Journal of International Law", Vol. 44, (1950)

2. Zapala, S., *The reaction of the US to the entry into force of the ICC Statute: Comments on the UN SC Resolution 1422 (2002) and article 98 Agreements*., Journal of International Criminal Justice, 1.1, Oxford University Press, 2003

3. Roht-Arriaza, N., *Just a'Bubble'? Perspectives on the Enforcement of International Criminal Law by National Courts*, Journal of International Criminal Justice 11 (2013), Published by Oxford University Press. All;

Legal Documents

1. Nuremberg Charter "Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945"

2. International Military Tribunal for the Far East "Special proclamation by the Supreme Commander tor the Allied Powers at Tokyo January 19, 1946; charter dated January 19, 1946; amended charter dated April 26, 1946 Tribunal established January 19, 1946"

3. Statute for the International Tribunal for the Former Yugoslavia, UN Resolution 827 from 25 May 1993

4. Statute for the International Tribunal for Rwanda, UN Resolution No. 955 from 8 November 1994

5. Statute of the International Criminal Court A/CONG.183/9 of 17 July 1997, in force since 2002

6. Extraordinary Chambers in the Courts of Cambodia, Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea Phnom Penh, 6 June 2003General Assembly approved the draft Agreement by its resolution 57/228(B) of 13 May 2003, http://legal.un.org/avl/ha/abunac/abunac.html

7. ICC Preliminary Examinations, https://www.icc-cpi.int/Pages/Preliminary-Examinations.aspx,

8. Special Court for Sierra Leone, Residual Special Court for Sierra Leone Agreement between the United Nations and the Government of Sierra Leone pursuant to Security Council resolution 1315 (2000) of 14 August 2000, the Special Court for Sierra Leone http://www.rscsl.org/index.html,

9. Extraordinary Chambers in the Courts of Cambodia, https://www.eccc.gov.kh/en/about-eccc/introduction

10. Special Tribunal for Lebanon, Agreement between the United Nations and the Lebanese Republic (hereinafter "the Agreement") pursuant to Security Council resolution 1664 (2006) of 29 March 2006, S/RES/1757 https://www.stl-tsl.org/en/about-the-stl/636-creation-of-the-stl

11. The Kosovo Specialist Chambers and Specialist Prosecutor's Office, https://www.scp-ks.org/en

12. Specialist Chambers and the Specialist Prosecutor's Office approved by the Kosovo Parliament in August 2015, Law n.05/L-053 http://www.kuvendikosoves.org/common/docs/ligjet/05-L-053%20a.pdf

13. UN SC Resolution 1593 (2005) Adopted by the Security Council at its 5158th meeting, on 31 March 2005

14. Economic Community of West African States(ECOWAS) Court of Justice

15. U N GA Human Rights Council, A/HRC/28/6/Add.1, 24 March 2015, https://www.upr-info.org/sites/default/files/document/gambia/session_20_-_october_2014/a_hrc_28_6_add.1_e.pdf

16. Resolution adopted by the Human Rights Council on 17 December 2015 A/HRC/RES/S-24/1, 22 December 2015;

17. African Commission on Human Rights and Peoples' Rights 332: Resolution on Human Rights in Conflict Situations - ACHPR/Res. 332 (EXT.OS/XIX) 2016, http://www.achpr.org/sessions/19th-eo/resolutions/332/

18. African Union Doc. EX.CL/952(XXVIII) the Assembly/AU/Dec.590(XXVI), http://www.au.int/en/sites/default/files/decisions/29514-assembly_au_dec_588_-_604_xxvi_e.pdf

19. Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights The International Convention for the Protection of all Persons from Enforced Disappearances1, AS/Jur (2011) 45 4 November 2011 ajdoc45 2011 http://assembly.coe.int/CommitteeDocs/2011/ajdoc45.pdf

Case law

1. ICC, Situation in Georgia, case No. ICC-01/15, https://www.icc-cpi.int/georgia

2. ICC, *Situation in Mali, The Prosecutor v. Ahmad Al Faqi Al Mahdi*, case No. ICC-01/15

3. ICC, *Situation in Darfur Sudan, in the case of The Prosecutor v Omar Hassan Al Bashir*, case No.: ICC-02/05-01/09, Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute, 11 July 2016,

4. ICC, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, case no. ICC-02/05-01/09

5. ICC, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, case no. ICC-02/05-01/09, Pre-Trial Chamber, *Warrant of Arrest for Omar Hassan Ahmad Al Bashir, 04 March 2009*

6. ICC, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, case no. ICC-02/05-01/09, Pre-Trial Chamber, *Second Decision on the Prosecution's Application for a Warrant of Arrest, 10 July 2010*

7. ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06,

8. http://amicc.org/icc/lubanga

9. ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute 14 March 2012,

10. ICC, *Situation in Mali, The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Case No. ICC-01/12-01/15, Version publique expurgée du *« Dépôt de l'Accord sur l'aveu de culpabilité de M. Ahmad Al Faqi Al Mahdi », 25 février 2016, ICC-01/12-01/15-78-Conf-Exp,* 19 August 2016

Other documents

1. Special Court for Sierra Leone, Introduction, http://www.rscsl.org/index.html,

2. Russia pulls out from International Criminal Court, *Moscow's decision follows UN report on Russian rights abuses and discrimination in Crimea, 16 November 2016,* http://www.aljazeera.com/news/2016/11/russia-pulls-international-criminal-court-161116132007359.html

3. Bensouda, F., *Africa Question, Is the International Criminal Court (ICC) targeting Africa inappropriately?* In Human Rights and International Criminal Law, ICC Forum.com http://iccforum.com/africa ,

4. Nyabola, N*, Does the ICC have an African Problem?* https://www.globalpolicy.org/international-justice/the-international-criminal-court/general-documents-analysis-and-articles-on-the-icc/51456-does-the-icc-have-an-africa-problem.html

5. South Africa to quit International Criminal Court, Government to submit a bill to exit the ICC, amid growing concerns that Hague-based court tries mostly African leaders, http://www.aljazeera.com/news/2016/10/south-africa-formally-applies-quit-icc-media-161021044116029.html

6. Clarke,K. M., *Africa Question, Is the International Criminal Court (ICC) targeting Africa inappropriately?* In Human Rights and International Criminal Law, ICC Forum.com http://iccforum.com/africa#Clarke

7. Southern Africa Litigation Centre, New Release: Supreme Court of Appeal Rules on Bashir case, http://www.southernafricalitigationcentre.org/2016/03/15/news-release-supreme-court-of-appeal-rules-on-bashir-case/

8. Human Rights Council adopts four resolutions, creates commission of inquiry on Burundi - See more at: http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20619&LangID=E#sthash.jZilq1t2.dpuf
http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20619&LangID=E

9. https://www.hrw.org/news/2016/10/27/burundi-icc-withdrawal-major-loss-victims

10. Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a Preliminary Examination into the situation in Burundi, https://www.icc-cpi.int//Pages/item.aspx?name=otp-stat-25-04-2016

11. Burundi: ICC Withdrawal Major Loss to Victims, Latest Move Shows Government's Disregard for Victims 27 October 2016, https://www.hrw.org/news/2016/10/27/burundi-icc-withdrawal-major-loss-victims

12. The road ahead for the ICC in Burundi, http://www.irinnews.org/analysis/2016/04/26/road-ahead-icc-burundi

13. Gambia: Soldiers sentenced to death in secret trial must not be executed, 1 April 2015, https://www.amnesty.org/en/latest/news/2015/04/gambia-soldiers-sentenced-to-death-in-secret-trial-must-not-be-executed/

14. GAMBIA 2015/2016, https://www.amnesty.org/en/countries/africa/gambia/report-gambia/

15. Clarke, K.M. "*Is the ICC targeting Africa inappropriately or are there sound reasons and justifications for why all of the situations currently under investigation or prosecution happen to be in Africa?",* http://iccforum.com/africa#Clarke

16. Statement of the President of the Assembly of States Parties on the process of withdrawal from the Rome Statute by Burundi, ICC-CPI-20161014-PR1244, https://www.icc-cpi.int//Pages/item.aspx?name=pr1244

17. Daniel Bekele, Africa director at Human Rights Watch in https://www.hrw.org/news/2016/10/27/burundi-icc-withdrawal-major-loss-victims

18. Chutel, L., *The African leaders leaving the International Criminal Court actually have a chance to fix it,* October 28, 2016 http://qz.com/820738/the-african-leaders-leaving-the-international-criminal-court-actually-have-a-chance-to-fix-it/

19. The United States and the International Criminal Court https://www.hrw.org/legacy/campaigns/icc/us.htm

The Role of Macedonian Police in Modern Society: the Use of Force as a Legitimate and Legal Instrument

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Abstract

Police is one of the most important institutions of a country. Operational policing is formally and legally defined in the Law on Police. In performing its tasks police can or is allowed to use means of force. Legal solutions have exactly determined and noted that forceful means are available to the police, but also contain provisions which exactly determine situations during which police forces can and should use exactly those means. Often we have witnessed situations where there is a disproportionate use of force. It is legitimate to ask, whether the misconduct of police officers achieved the goal of solving a particular situation or does it cause a counter effect. Such situations force us to seriously analyze these examples in the country, but also the most common consequences arising i.e. resulting from a police officer's misconduct. Are there opportunities and ways to use certain experiences of Western countries which will be easier and simpler to be incorporated into Macedonian legislation? Those experiences will primarily refer to raising the level of responsibility and awareness among police officers about situations where they can use means of force.

Keywords: *legal solution, means of force, operating activities, police, purpose, responsibility.*

1. Introduction: historical overview of development and social place of police

Historical approach is used so we can get a certain knowledge of operations and functioning of police during past times. Such method of research will help us to understand the role that this organization had in the past and how that role over time and with the change of certain socio - political conditions evolved or how it complicated apparatus began to change under reforms and upgrades, reaching to a position that we have today in these modern and democratic societies. The beginning of police forces as

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organized entity is tied to modern times, but most sources speak for some forms of police forces and policing since Ancient times. In fact the roots of police should not be looked anywhere else, but simply and only in original Greek city - polis.[4] In the polis, police would guarantee, in particular maintain a certain internal social order.

The development of the police function parallels the development of the state. The police function existing within a kinship-based society, as a product of the whole society, is transformed into a police function that predominantly represents the interests of the dominant class in a class-dominated society while at the same time purporting and appearing to represent the entire society.[5]

The process of social evolvement, the changes in regulations systems inside communities have contributed in the process of creating states as the highest level of organized social forms of life. Establishment of states at the same time meant that there will be many rules which will accompany them. Rules and legislation are the inevitable part of state organization; they are the assets which are secured by police forces and the ones important for the existence of their organizational framework. States are the ones that have the monopoly of using force to keep citizens under its legal boot and make them accept, respect and implement their obligations and relevant politics.

A society dominated by a ruling class needs a coercive instrument to maintain this class's control over basic resources and over a labor force necessary to produce the surplus product to support and sustain its class (Haas, 1982: 173-174).[6]

If we analyze the role of police during 20th Century, we should mention and conclude that even in such an important 100 years, police forces have experienced a position of constant transformation, but always aiming towards meeting and fulfilling the needs of governments. It has never been important who the holder of power inside borders is: are those one the people or is it the sovereign (monarchy).

In the middle of the last century a textbook example of direct and rather complete use of police in direction of states' interests (the goals and interests of the ruler) if the functioning of the German police in the period of Nazi Germany. During the ruling of Adolf Hitler power was incarnated through totalitarianism. Symbols of the state were primary and above all. People were dominated by the opinion and view that everything which is located inside the country it secure and that everything which is outside cannot harm what Germany has inside its borders. Police was largely used to impose authority; its role was decisive, especially in securing the Hitler's ideas and securing fascist ideas. Institutes of justice and righteousness were relativized and marginalized; means of force were everyday assets while police was Hitler's right hand.

In the period after the end of the Second World War there were changes in the process of police control. The essence of those changes can be found in the fact that after a long time, human rights and freedoms, human dignity, prosperity and respect got their place on the pages of few important international documents.[7] Same important place in the process of protection of human rights and freedoms, as most imperative arising, has

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[4] Оливер, Бачановиќ. Полицијата и жртвите. Скопје, 1997 година, стр 34.

[5] Robinson, Cyril D., Richard Scaglion. "The Origin and Evolution of the Police Function in Society: Notes toward a Theory". *Law and Society Review Vol.21 (1):* 110

[6] Ibid. p.109

[7] Universal Declaration of Human Rights, available at: http://www.indiedownloads.com/2769630/download-universal-declaration-of-human-rights-pdf.html [04.11.2016]

the European Convention on Human Rights and Freedoms[8], which defined those human rights and freedoms, accentuated and emphasized the obligations for all member states, all obligations they should implement as signatories of the Convention.

2. Legal framework for policing in the Republic of Macedonia

The fact that police during its everyday work is exposed to direct contacts with citizens and the fact that it has complex activities in today's system of interpersonal and social relations, asks right and legally strong position of Macedonian police, a position where it won't be able to abuse its powers and will use them in accordance to legal solutions.

After 1991, Macedonia with gaining its independence gave citizens the central position into society which meant forming democratic system, focusing on human rights and freedoms, prosperous society where police will protect its citizens and will provide their and theirs state security. Such social structure means that police basically has tasks and obligations which are strictly legally obligatory for them and that they are not able to act outside those frameworks.

Police and state should be situated and set into a positive collision and should work in a synergy together. Thus, the principle of rule of law cannot be understood solely as a system of laws which are used to ensure peace and order, protect civil rights, have righteous judiciary etc. It should be understood as a wider concept which includes realization of certain values, such as democracy, legal fairness, certainty, equality. In order for our country to justify its positions as democratic, modern country, it should set state apparatus and every institution and body, especially police forces, inside legal circles and assure that each one of them will act according to rules.

It is expected the area of power held by police to be a core of disagreements and discussions in favor and against the use of certain means of force given to police forces and which is the level of their legality and legitimate use in every specific situation. Macedonian Constitution[9] as a fundamental and as the highest legal act in the country, in its provisions among all the others fundamental values of Macedonian social and political system underlines human rights and freedoms which are recognized with every international document. Its legal framework is and should be the basis from which every other institution should derive appropriate legal solutions in accordance and in manner imposed by it. Every basic right, obligation, duty, possibilities, actions, restrictions of citizens and governmental institutions arise from its provisions.

3. Macedonian legal solution for police organization and use of means of coercion and force

Police work in Macedonia is provided in the Macedonian Law on Police.[10] This Law regulates the police affairs, the Police organization, police authorizations, and the rights

[8] European Convention for human rights. Available at. http://www.echr.coe.int/Documents/Convention_ENG.pdf [04.11.2016]

[9] Article 8 paragraph 1 from the Constitution of the Republic of Macedonia

[10] Law on Police. Official Gazette of the Republic of Macedonia, N. N.114/2006, 148/2008, 6/2009, 145/2012, 41/2014, 33/2015, 31/2016, 106/2016

and obligations arising from the employment of police officers in the Ministry of Interior, which are not being regulated by the Law on Internal Affairs.[11]

The provisions of the Law accurately identify and determine the rights and obligations held by the police under the implementation of their daily activities. According to the Law[12], the police function is to protect and respect the fundamental freedoms and rights of citizens guaranteed by the Constitution, laws and ratified international treaties, protect legal order, prevention and detection of offenses, measures undertaken to prosecute the perpetrators of such offenses and maintain public order and peace in society. Basically the implementation of the above mentioned obligation of the police is used to effectively provide police actions for fulfilling the obligations from article 5 of the Law on Police, including:

1. protection of life, personal safety and property of citizens;
2. protection of human rights and freedoms of citizens guaranteed by the Constitution, laws and ratified international agreements;
3. prevention of criminal acts and offenses, detection and apprehension of their perpetrators and undertaking other legally defined measures to prosecute perpetrators of such crimes;
4. identifying and looking for direct and indirect benefit obtained by committing a crime;
5. maintaining public peace and order;
6. regulation and control of traffic;
7. control of movement and stay of foreigners;
8. border checks and border surveillance;
9. providing assistance and protection of citizens in case of emergency;
10. protection of specific persons and objects; and
11. other matters specified by this Law.

The Law on Police gives legal basis for collection, processing, use, transfer, keeping, and deleting of personal data by police, the Administration for Public Security, as body within the MOI, and the police officers when performing their police authorizations. There is also legal basis for maintaining personal data records with set deadlines for their keeping and possibility for re-examination in special cases by commission which includes one representative from the Directorate for Personal Data Protection. Generally, the Law on Police ensures legal protection of personal data by referring to application of the Law on Personal Data Protection and determines the Directorate for Personal Data Protection as competent body in accordance to this Law to supervise the undertaken activates for processing of personal data.[13]

The most sensitive situation which in most cases causes the attention of public, especially experts in the area is the abuse of means of force. These kinds of situations are result of the legal provisions which give to police officers the right to use means of force in legally defined situations. Macedonian Police Law allows precise determination of situation and conditions which must be fulfilled so force can be used, it defines which

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[11] Human Dynamics. Directorate for Personal Data Protection. *Analysis of the Police Sector Legislation in regard to Application of Personal Data Protection.* 2011. p.9

[12] Article 3. Law on Police. Official Gazette of the Republic of Macedonia, N. N.114/2006, 148/2008, 6/2009, 145/2012, 41/2014, 33/2015, 31/2016, 106/2016

[13] Human Dynamics. Directorate for Personal Data Protection. *Analysis of the Police Sector Legislation in regard to Application of Personal Data Protection.* 2011. p.21

actions constitute police force[14] and which are the possible means of force[15] that can be used by authorities.

Police authorizations stipulated in this Law are:

1. check and determination of the identity of persons and objects;
2. information collection;
3. summoning;
4. apprehension;
5. detention;
6. search of persons and objects;
7. redirecting, directing or restriction of the movement of persons and means of transportation in a particular area for necessary period of time;
8. warnings and orders;
9. temporary dispossession of objects;
10. search of certain facilities and premises of state bodies, institutions exercising public authorizations and other legal persons and insight in certain documentation;
11. stop, examination or search of persons, luggage and means of transportation;
12. securing and inspection of the crime scene;
13. reception of charges;
14. public announcement of awards;
15. recording on public places;
16. collecting, processing, analyzing, using, estimation, transmission, storage and deleting data, as well as personal data procession under the terms and manner determined by this and separate Law;
17. application of special investigative measures and undercover sources of data and protection of the persons encompassed by the regulations for witness protection.[16]

The recent changes and amendments of the Law on Police from March 2015, beside the assets available to the police for resolving some situations, especially means which can be used in situations when police intervenes against groups. [17] These changed provisions were accepted by nongovernmental organizations with reserve, since such changes and widening of the possible situations of using means of force used against groups will threaten basic human rights and freedoms guaranteed by both domestic positive legislation and international documents, and will give police so many possibilities to suppress demonstrations with totalitarian methods.

On the other hand, the Law on Internal Affairs regulates the internal affairs, the organization and responsibility of the Ministry of Interior, the categories, status and special responsibilities and authorizations of the employees in the Ministry, the control over the performance of the duties in the Ministry, the employment rights and

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[14] Use of force is legitimate, proportional physical or mechanical pressure, during which police have used means and methods that are part of this law, directed towards a person from police officer, only in case when police affairs cannot be fulfilled with another methods.

[15] Means of force are: physical force, police truncheon, and use of handcuffs, devices for forced stopping of cars, police dogs, and chemical means, and firearms, special kinds of equipment, firearm and explosives.

[16] Article 28 Law on Police. Official Gazette of the Republic of Macedonia, N. N.114/2006, 148/2008, 6/2009, 145/2012, 41/2014, 33/2015, 31/2016, 106/2016

[17] Physical force, police truncheon, electric paralyzer, chemical means, rubber bullets, police dogs, special vehicles for public order and peace, and pyrotechnical and explosive equipment.

obligations of the employees in the Ministry, the material liability, as well as the compensation for damage and disciplinary liability of the employees in the Ministry. LIA generally provides legal basis for collection, processing, use and maintenance of records and keeping personal data (including health data) in accordance to the goals set forth by law. In accordance to the principles stipulated in the Law on Personal Data Protection, the LIA contains obligation for deletion of personal data when it is determined that they are incorrect or when the reasons and conditions for which they were processed, ceased to exist. The Law stipulates that the authorized officers and the Administration for Security and Counterintelligence as a body with the MOI can collect and process personal data. The LIA generally provides legal protection of the processed personal data by referring to application of the regulations on personal data protection, including the fact that the Directorate for Personal Data Protection supervises the legality of the activities undertaken in regard to the processing of the personal data.[18]

4. Cases of abuse of police powers and means of coercion and force in the Republic of Macedonia

Police being the right hand of government in most cases knows to cross the legal framework and to abuse its legal authorizations. Whether those situations are result of police officers' incompetence, their arbitrariness, the lack of knowledge, very wrong assessment of the situation, the lack of adequate preventive policy, violation of human rights and freedoms or not, their most often consequence are injured citizens. In such situations, Macedonian citizens have the opportunity to report police illegal activities, their disproportionate use of force and coercion, abuse of authority, immoral and unethical behavior of police officers.

Disproportionate and indiscriminate use of force by the police is one of the main challenges for free exercise of FOA according to analysis and singled out by almost all of the interviewees. This finding is confirmed by human rights organizations and relevant national and international institutions. More specifically, disproportional use of force by the police was registered during the 5th of May protests, the protests in Gjorce Petrov.[19]

The Macedonian Helsinki Committee also noted excessive use of force by the police when dispersing the May 5th protest. The committee stressed that "the police officers did not limit use of force only towards aggressive protesters but kicked and trampled all protesters, some of whom were sitting calmly on the ground with their hands in the air." These actions by the police constitute a violation of international human rights standards. According to the European Court of Human Rights, "an individual does not cease to enjoy the right to peaceful assembly as a result of sporadic violence or other punishable acts committed by others in the course of the demonstration, if the individual in question remains peaceful in his or her own intentions or behavior".[20]

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[18] Human Dynamics. Directorate for Personal Data Protection. *Analysis of the Police Sector Legislation in regard to Application of Personal Data Protection.* 2011. p.9

[19] Western Balkans Assembly Monitor Project. Freedom of Assembly in Macedonia. Skopje, 2016. p. 16

[20] European Court of Human Rights, Ziliberberg v. Moldova, application No. 61821/00 (2004) as cited in Human Rights Council (2012). Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association. Maina Kiai. A/HRC/20/27. p.8

In the 2015 Report, the Ombudsperson found "increased police brutality compared to 2014, where one of the more characteristic examples is the public protest of the citizens in front of the Government in May 2015." Following the protests, a team of the Ombudsperson visited the detained in the police stations and visually noted injuries among the arrested. The arrested persons complained of police brutality during the arrests, but had no complaints regarding the treatment in the police stations.[21]

In most cases of police brutality and excessive use of means of force, beside regular, yearly reports by national institutions, in most cases, victims of this kind of actions forwards their case applications to the European Court of Human Rights in Strasbourg. Some of those cases are Dusko Ivanovski Vs Macedonia[22], then Jovche Lazarovski Vs Macedonia[23]. Both cases are result of their unlawful detention and use of inadmissible means of coercion and force in the process of their arrests. Also, we should mention the case of Pancho Velinov Vs Macedonia[24], because of police misconduct.

The most evident example of reckless behavior of police forces in direct violation of human rights, serious violation of basic constitutional values, is the case of El Masri Vs Macedonia[25]. In this case, El Masri applies to the Court because of the Macedonian police treated him, of the means of force they used and the fact they crossed the legal framework for those assets.

Conclusion

Modern theoretical concepts and explanations about the role police forces have into society elaborate Peel's reforms, concepts of community policing and police forces in democratic conditions and states. These concepts have their own characteristics and propose different means of actions by police forces. Such frameworks of police work defines police activities as mostly preventive ones, measures which will provide security by using specific preventive tactics and strategies.

The concept of community policing is based on the direct cooperation between police forces and citizens. Their joint work is directed towards solving fundamental problems inside the local communities, such as suppression of crime, reduction of fear of crime and enforcing the feeling of security inside those communities, prevention and reduction of various social disorders.

One of the most important parts of the concept of democratic societies is the police. Beside them democracy is characterized by separation of powers, free media, equality, responsiveness to citizens' needs, participation of citizens inside governments etc. Police forces should protect human rights and freedoms inside such societies, and also to guarantee the rule of law which is the core concept known to democracy.

The political conditions[26] in the Republic of Macedonia, the characteristics of our society as multicultural, multiethnic, multi - religious, should be used to act towards

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[21] Ombudsman of Republic of Macedonia, Annual Report on the level of respect, promotion and protection of human rights for 2015, Skopje, 2016, p. 22

[22] Dusko Ivanovski Vs Macedonia. Aplication no. 10718/05

[23] Jovche Lazarovski Vs Macedonia. Application no. 4922/04

[24] Pancho Velinov Vs Macedonia. Application no. 16880/08

[25] El Masri Vs Macedonia. Application no. 39630/09

[26] Раде, Рајковчевски. Градење безбедносна политика: Случајот на Република Македонија. Фондација Конрад Аденауер. Факултет за безбедност, Скопје, 2014, стр. 68

positive direction for the Macedonian authorities to create a police service which be able to meet the democratic changes and challenges coming out from above mentioned differences inside our society.

Macedonian police should direct its actions towards working in accordance with legal solutions, not going over legal frameworks; police should be the keeper of citizens' security, and not the long hand of political elements inside a country.

Bibliography

1. Case of Dusko Ivanovski Vs Macedonia. Aplication no. 10718/05;
2. Case of El Masri Vs Macedonia. Aplication no. 39630/09;
3. Case of Jovche Lazarovski Vs Macedonia. Application no. 4922/04;
4. Case of Pancho Velinov Vs Macedonia. Application no. 16880/08;
5. European Convention for human rights. Available at: http://www.coe.int/en/web/human-rights-convention;
6. Human Dynamics. Directorate for Personal Data Protection. *Analysis of the Police Sector Legislation in regard to Application of Personal Data Protection.* 2011;
7. Law on Internal Affairs. Official Gazette of the Republic of Macedonia, N.42/2014, 116/2014, 33/2015, 05/2016;
8. Law on Police. Official Gazette of the Republic of Macedonia, N.114/2006, 148/2008, 6/2009, 145/2012, 41/2014, 33/2015, 31/2016, 106/2016;
9. Ombudsman of Republic of Macedonia, Annual Report on the level of respect, promotion and protection of human rights for 2015, Skopje, 2016;
10. Promoting diversity and preventing discrimination in police forces, available at: www.northyorkshire.**police**.uk/**diversity**;
11. Robinson, Cyril D., Richard Scaglion. "The Origin and Evolution of the Police Function in Society: Notes toward a Theory". *Law and Society Review Vol.21 (1):* 109 - 154;
12. Universal Declaration of Human Rights, available at: http://www.indiedownloads.com/2769630/download-universal-declaration-of-human-rights-pdf.html;
13. Western Balkans Assembly Monitor Project. Freedom of Assembly in Macedonia. Skopje, 2016;
14. Бачановиќ, Оливер. Полицијата и жртвите, Скопје, 1997;
15. Раде, Рајковчевски. Градење безбедносна политика: Случајот на Република Македонија. Фондација Конрад Аденауер. Факултет за безбедност, Скопје, 2014;
16. Симовиќ, Дарко. Зекавица, Радомир. Полиција и људска права. Криминалистичко – полицијска академија, Београд, 2012;
17. Стојановски, Трпе. Полиција во демократско општество. Скопје, 1997;
18. Стојановски, Трпе. Полициска етика и деонтологија. Скопје, 2006.

Extended Confiscation – *Sui generis* Measure!

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Abstract

Even though it is a theoretical question, determining the juridical nature of a juridical institute is in many situations of practical importance. Even so, when this question is being asked regarding the extended confiscation measure – the answer is not easy to be given. More, it seems that all the problems concerning the juridical regulation of this measure start with the above-mentioned determination of its nature.

The answer to the question why the juridical nature of this institute is so controversial hides within the numerous specific points that characterize this measure, for how debatable this measure is can be best observed when a comparative analysis of national legislations is being made and by observing the different places this institution occupies within their legal systems. In some jurisdictions, like in the case of Romania and Germany, the seizure of propriety measure has the character of a security measure, in others, like Republic of Serbia and Switzerland it is a sui generis measure, in Denmark is regarded as a specific legal consequence of the crime, while the Austrian Criminal Code includes it under supplementary sentences.

The present paper shall make a short analysis of the way "extended confiscation" is being regulated by the Romanian and Serbian legislation.

Being guided by the idea of improving the current legislation, the theory is the one that should exercise a positive influence over the legislator, and while wishing in this way to "encourage" the Rumanian legislator to follow the Serbian one on this matter, the accent shall be put on the juridical nature of this judicial instrument, by trying in this way to justify that such a measure must, within the criminal law, be a sui generis one, for which special norms will be applicable, permitting in this sense and assuring a more severe applicability in a more "painful" mode.

Keywords: *extended confiscation, seizing of goods coming from criminal acts, juridical nature, Republic of Serbia's law concerning seizure of goods coming from criminal acts, New Romanian Criminal Procedure Code, organized crime.*

1. Introduction – short considerations concerning "extended confiscation"

„It is without a doubt that in modern life, and especially in the "world of crime" there are numerous possibilities presented daily to acquire illegal assets. This is especially noticeable in the sphere of organized crime[1], one of the most complex and the

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[1] „Organized crime represents those activities carried out by a group, organized for a long period of time out of three or more persons, that have corruptive liaisons or of any other nature with state's authorities and are predisposed to use violence and other ways of intimidation, having as final purpose to obtain profits and/or power by committing crimes for which the legislation provides punishment

most dangerous kinds of modern crime, whose basic motive of existence is exactly to acquire (illegal) property gain."[2] „Organized crime is a real scourge of our modern society, seeking to expand its area in order to obtain new sources of income."[3] As such, organized criminal groups persevere precisely due to the financial power that they have, and not due to the individuals that they consist of, as the members of these groups are, as a rule, "easily replaceable".

Therefore, the reactions of the traditional systems of criminal justice that, before all, serve to deliver prison sentences for the perpetrators of criminal acts, cannot give the desired results. Besides, conditioned by such a legal reaction, the benefits of criminal acts most often remain at the disposal to their perpetrators after serving their prison sentences, which is *a priori* a sufficient motivation for them to risk their freedom and commit certain "profitable" criminal acts.

For these reasons, „modern countries were forced to focus their legislative activity in the direction of finding and applying new legal instruments and mechanisms that would influence more efficiently the removal of the very motive to engage in organized crime. In other words, in today's condition of the state, the legislative bodies competent for the suppression of crime are more focused on the issue of property gain acquired through criminal acts, which has proven to be a much more efficient manner of combating organized crime and other forms of high financial crime."[4] The hit given to its exponent's wealth, is of course the hardest hit organized crime could receive and as such the success the fight against this social harm is hiding behind this measure of seizure of the person's fortune – the source of their power and "engine" of their criminal activities.

The former penal reaction regarding the illegal acts based on which it was generally acted relating to the material benefices, consisted in fines, seizure of goods by applying assuring measures and seizure of the the crime's object as well as damages reparation caused by the committed crime. Anyway, the sudden rise of the economical crime's number as well as the appearance of new forms of criminality constitutes a major problem for the current social community. Consequently, it become more evident that those penal solutions are not enough anymore, neither complete nor efficient for solving the problem of illegally obtained wealth. Accordingly, finding some special juridical measures on this matter has been considered necessary so that the, illegally obtained goods could be seized in a more extended and intense way.

In this sense by the end of last century and the beginning of this one, in most European countries the tendency to simplify the mechanisms for freezing and seizing the assets was made visible. "Principally the simplification aimed the proving

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with prison of minimum four years, by the group members that have précised and clearly determined assignments." – Darian Rakitovan, Raluca Colojoară, Ligia-Valentina Mirişan, „Organized Crime and Similar Terminological Concepts. A Problem in Defining the Notion of Organized Crime", in *Journal of Eastern-European Criminal Law*, no. 1/2015, Law Faculties of the West University of Timişoara and the University of Pécs, Universul Juridic Publishing House, 2015, p. 179.

[2] Darian Rakitovan, „Extended Confiscation in Romanian Criminal Law", in *International Scientific Conference „Archibald Reiss Days, Tematic Conference Proceedings of International Significance*, Vol. I, Belgrade, Academy of Criminalistics and Police Studies, 2016, p. 306.

[3] Laura Stănilă, „New Fields of Action for Organized Crime: Trafficking in Human Cells, Tissues and Embryos. New Challenges for Romania", in *Suprotstavljanje savremenim oblicima kriminaliteta – analiza stanja, evropski standardi i mere za unapređenje, zbornik radova sa Naučno-stručnog skupa sa međunarodnim učešćem*, Vol. II, Tara, Beograd, Kriminalističko-policijska akademija i Fondacija „Hans Zajdel", 2015, p. 299.

[4] Darian Rakitovan, *op.cit.*., p. 306.

mechanism, by giving up on the proof of certainty in favour of presumptions. At the same time, in this field the burden of proof has been reversed, in the sense that this one will fall back on the one sought out by the action."[5] Therefore, "in the fight against organized crime it was given up on the classic seizing instruments in favour of some more sophisticated ones, like the extended confiscation. (…)"[6]

Of the essence of "extended confiscation" is that the latter is a juridical instrument by means of which goods obtained by means of "criminogenic activities" are being seized, goods that do not fall under the category of those that could be seized through other "common" juridical means. Its field of applicability is larger than the one of the measures through which goods proven to come from crimes are being seized. In this sense, extensive confiscation is applicable on a larger scale and concerns goods thought to resort out of criminogenic activities. By taking this measure the entire financial situation of a suspected person of obtaining the goods through illegal means, is being investigated, offering the possibility that all the goods of criminogenic origin to be confiscated, even in the case where against the person no criminal charges for each criminal act could be carried on. By taking this measure such goods are being seized and returned to their rightful owners or are being handled in any other lawful way.

The use of this measure has in fact a double function: on one hand, it aims the eradication of organized criminality through the direct "attack" over the organized criminal group's financial pillar destabilizing in this way the power conglomerate found in the hands of its leaders, and on the other hand, a restorative function, because by applying the general penal principal of law – that no one can get rich through criminal activities, this measure will assure patrimonial lawfulness that is being disrupted by illegally acquiring the goods.

The most important and essential characteristic of the procedure of seizing goods achieved by criminal activities, "the power" of this measure, consists in the fact that, in comparison with the classical criminal procedure where the accused has the benefit of the doubt, and only the prosecutor has the *onus probandi,* in the case of extended confiscation this obligation could (partially) be transferred to the person against which this procedure is being conducted, and as such in order for the owner of the goods to protect its goods he/she must prove that the prosecutor's allegations are false.

This is the so-called standard of "*reverse proof obligation*". However, this term should not be understood in his literal sense because (usually) it is not about "displacing the burden of proof from the prosecution to the defence the moment a simple assertion is being issued by the prosecution. In the absence of the existence of an evidence for such an assertion, the accused is not obliged to bring prove against it." [7]

Ratio legis for introducing the "reverse" burden of proof is that "in practice is has been established that proving the criminal origin of the perpetrator's propriety is in many cases very difficult, even impossible"[8], and because of this reason in case of the most serious forms of criminality it is necessary for a "lighter" standard of proof to be

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[5] Ioana-Celina Paşca, *Criminalitatea organizată în perspectiva legislaţiilor europene*, Bucureşti, Universul Juridic, 2015, p. 158.

[6] *Ibidem.*

[7] Flaviu Ciopec, *Confiscarea extinsă: între de ce şi cât de mult?,* Editura C. H. Beck, Bucureşti, 2015, p. 51.

[8] Robert Golobinek, „Finansijske istrage i oduzimanje imovine stečene krivičnim djelima", in *Priručnik za pripadnike policije i pravosuđa*, CARPO projekat, Savet Evrope 2007, p. 37.

established, standard that would authorize the state to deprive the "big" perpetrators of their huge financial power.

However, on the other hand, it is clear that, a partial or total invert of the burden of proof (from the prosecutor to the accused), is questionable from the point of view of the protection of fundamental human rights and liberties, because these raise the problem of interference with the right to propriety and negates the general principles established by criminal law – threatens the fundamental right to defence, breaches the right to a fair trial and the presumption to innocence.

On the other hand, one of the most important international institutions that handles with the protection of human rights and liberties, the European Court of Human Rights, has established throughout its jurisprudence[9] that such a change in the burden of proof, does not in itself break the guaranteed fundamental human rights and liberties and that these are protected if the accused is being assured with a fair trial where he has the possibility to overturn the premise of criminogenic provenience sustained by the prosecution.

Several international documents are providing with the legal standards for the reverse burden (the split one), recommending its adaptation to the general procedural norms and juridical principels of national law.

Thus, Art. 12 para. (7) of the Palermo Convention against Transnational Organized Crime and the Protocols thereto states as follows, "States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings."[10]

Art. 5 para. 7 of United Nations Convention against Illicit Traffic in Narcotic, Drugs and Psychotropic Substances from 1988 states that: „ Each Party may consider ensuring that the onus of proof be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation, to the extent that such action is consistent with the principles of its domestic law and with the nature of the judicial and other proceedings."[11]

Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, Warsaw, 16 May 2005, provides in Art. 3 para. 4 that, "Each Party shall adopt such legislative or other measures as may be necessary to require that, in respect of a serious offence or offences as defined by national law, an offender demonstrates the origin of alleged proceeds or other property liable to confiscation to the extent that such a requirement is consistent with the principles of its domestic law."[12]

Art. 31 para. 8 of the United Nations Convention against Corruption, from New York adopted 31 October 2003, state that: „ States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is

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[9] CEDO cases: *Salabiaku v. France,* Decision of 7 October 1998; *Grayson & Barnham v. United Kingdom*, Decision of 23 September 2008; *Philips v. United Kingdom*, Decision of 12 December 2001.

[10] https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf.

[11] https://www.unodc.org/pdf/convention_1988_en.pdf.

[12] https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680083 71f.

consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings."[13]

At its turn, the Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, at point 5 of the Preamble suggests that: „... an examination should be made of the possible need for an instrument which, taking into account best practice in the Member States and with due respect for fundamental legal principles, introduces the possibility of mitigating, under criminal, civil or fiscal law, as appropriate, the onus of proof regarding the source of assets held by a person convicted of an offence related to organised crime".

Hence, for the "heavy" criminality to be efficiently fought as well as prevented, currently, in most of the democratic states "legal solutions are being developed through which the creation of a new adequate juridical framework is being created in order, for the perpetrators to be deprived of their illegally obtained profits, by respecting the human rights standards"[14]. All these are targeting the discovery, freezing, seizing and confiscating the products that are linked to the crime.

Nonetheless, it is more than clear that in this field there are many big differences between the national legislations. These fundamental differences and particularities are, first the product of the legislator's free choice, concerning the way the confiscation of the product resulted from the criminal act is being solved and the determination of this measure. How different the way this juridical mechanism is being legally legislated can be observed based on the example of two neighbouring countries – Republic of Serbia and Romania, that we took as a model for the current paper.

2. Short observations on the juridical legislation of "extended confiscation" in Republic of Serbia and Romania

On one hand, there is the Serbian criminal justice system.

Because of the real needs and the situation in the country, it was concluded that the classic methods of fighting against criminality were not efficient enough for the problems with which the country is dealing with to be solved, since the democratic changes of 2000. Adopting new regulations concerning the identification, seizing and confiscating goods illegally obtained has become inevitable.

In this sense, by adopting a special law – *Law on seizing goods resulting of crimes* [15], adopted by the Serbian Parliament on 23 October 2008, in force from 4 November 2008, and applicable from 1th of March 2009, a new penal measure, already existing in several other European countries, has been introduced within the Serbian juridical system – *the measure of seizing goods resulting of crimes.*

By adopting this law, the Republic of Serbia has in a reformed way solved the problem of propriety resulting of crimes. The Serbian legislator has not included the measure of "extended confiscation" in the "classical" measure within the Criminal Code, respectively did not regulate it as an "usual" measure of criminal law to which general norms of criminal law are applicable, but has included them as a *sui generis* measure to

[13] http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf.

[14] Oliver Lajić, „Uporedni pregled sistema za istraživanje i oduzimanje imovine stečene kriminalom", in *Zbornik radova Pravnog fakulteta*, vol. 46, no. 2, Novi Sad, Pravni fakultet Novi Sad, 2012, p. 208.

[15] Published in the Republic of Serbia's Official Monitor, No. 97/08.

which certain special rules are applicable. For this reason, next to this new penal measure, the Law concerning the confiscation of goods out of crimes is regulating a special procedure for the Law's implementation is substantially different from the "usual" criminal procedure and that is applied in parallel or after the criminal procedure.

Because initially for the implementation of this specific measure the necessary conditions have not been created and because the Law was introduced without a previous adequate preparation within the legal Serbian system and without such a preparation for the persons responsible for its implementation, in the beginning this juridical mechanism was not, many times, accessed by the Serbian judiciary authorities. This procedure was used in a small number of cases, and their duration was bigger than the one envisaged by law. Another major problem was represented by its ambiguity, inaccuracy and even the existing contradictions within the text of the law conducting to a non-uniform judicial practice concerning its applicability. All this lead to a small number of cases successfully solved. These factor's consequences lead for the law not to reach the desired and accepted results.

Four years after the implementation of the above-mentioned law, on 8th of April 2013 *a new law with the same name*[16] has been adopted. The intention of this law was to improve the applicability of this measure in practice, to rectify the legal deficiencies from the legal text as well as that this *lex specialis* to be harmonized with the newly adopted Criminal Procedure Code (*lex generalis* regarding the Law concerning the confiscation of goods coming out of crimes) and with the modifications of the Criminal Code. The decision to adopt a new law[17] (*hereinafter* ZOIPKD[18]), and not to modify the old one was taken because of the big number of changes brought to the old one, changes that were of a more "technical" character then an essential one.

This law is regulating the conditions, procedures and authority's competences for the discovery, seizure and managing from private or juridical person's goods resulted out of crimes.[19]

ZOIPKD contains 84 article, split in a systematic manner in 6 unities, as follows: 1) general provisions, 2) competent authorities, 3) procedure, 4) managing of the seized goods, 5) international cooperation and 6) transitional and final dispositions.

Based on this law, the propriety that results out of crimes could be seized almost without any restriction. As such, in conformity with ZOIPKD, for this to be applicable it is sufficient that a person was convicted for the execution for any grave crime precisely specified in Art. 2 of the ZOIPKD, that there are circumstances that indicate the fact that the income results from (any) crime, that the obtained material gain exceeded the

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[16] It must be underlined that we agree with the in the doctrine presented opinion that „the name of this law does not correspond in totality with what it regulates, because the confiscation does not refer to goods proven to come out of crimes (what could be done before this Law was adopted as well), but to goods that it was not proven that they were obtained in a legal way" (Đorđe Ignjatović, Milan Škulić, *op. cit.*, p. 388), because if it was sure that those were obtained from crimes, these could be seized by applying the general rules of criminal law, for example, by applying the measure of confiscating the material benefices stipulated in Chapter VII of the Serbian Criminal Code, and there would have been no need for a new legal mechanism to be introduced. As such, we believe the name of the new law to be changed in for example, "*Law on the confiscation of goods resulting out of criminogenic activities*."

[17] Published in the Republic of Serbia's Official Monitor, No. 32/2013

[18] Shortcut taken out of the serbian language, composed out of the first letters of each word composing the name of the Law. (*Zakon o oduzimanju imovine proistekle iz krivičnog dela*).

[19] Art. 1 of the ZOIPKD.

amount of one million five hundred dinars, and that there is an evident difference between the total actives and the legal incomes obtained by the accused.

So, the confiscation procedure of goods resulting out of crimes is, within the Serbian legislation, of a special criminal procedure nature, and the special rules that are applicable to it are significantly derogating from the "classical" rules of criminal procedure.

Concerning the burden of proof, the Serbian legislator has not "totally" inverted it but has decided that in the procedure of seizing goods criminally obtained the burden of proof to be "split" between the parties. In this way, for these procedures, the principle of "split" burden of proof is introduced in the Serbian judicial system, principle that does not create a direct legal presumption of the criminogenic nature of the propriety, but requires a certain activity from the side of the prosecution. We consider this option to be the most suitable one first by taking in account the existence of a real threat that this measure could have for the right to a fair trial and the accused's right to a fair trial and on the other hand the real necessity for the efficient and effective applicability of the procedure for confiscating the goods obtained by means of crimes and the achievement of its scope.

The standard for the "split" proof adopted by the ZOIPKD is characterized by the following:

In conformity with the provisions of Article 43 para. (2) of ZOIPKD, the prosecutor is obliged to present the court with proof on the propriety held by the accused or the collaborator, his legal revenues and the circumstances indicating that there is an evident disproportion between the propriety and the legally obtained revenues. Consequently, the prosecutor's role is to prove the obvious disproportion between the actives detained by the accused and its legitim revenue, these being the primary reason and one of the conditions for the confiscation procedure to be initiated. The prosecution's role in this case is an easier one, as he or she must provide and prove only the gathered evidence concerning the accused's propriety and his or her legitim revenues. Any other ulterior evidence is in favour of the accused. This one has, on the other hand, to succeed to reverse the prosecutor's accusations should offer evidence to justify its property, that he or she is not the owner of the goods the prosecution sustains the contrary and/or to prove that his/her legitim revenue is bigger than as asserted by the prosecution and that the difference between those revenues and the accused's property does not exist or is not as evident as asserted.

As such, a big part of the burden of proof is being transferred to the accused, as the evidence presented by the prosecution could be "incomplete". How big each party's role will be depends on how much evidence is being provided, based on which the instance could determine if the accused's goods resulted or not from criminal activities, respectively based on which the existence or inexistence of a significant disproportion within its propriety could be established, this being *questio facti*, evaluated on a case by case bases. In any case, it is certain that the accused's probational activity has a major influence on the evidentiary concerning the procedure on seizing goods resulted from criminal activity, taking in account that the goods that are not covered by evidence that would prove the legitimacy of their provenience will be considered as goods resulted from criminal acts and will be seized for good.

The solution given by the Romanian New Criminal Code is different[20].

[20] See: Darian Rakitovan, *op.cit.*, p. 306-317.

The *extended confiscation*, as a new institution has been introduced within the Romanian Criminal Code in 2012, after sharp political and public polemics[21], through Law No. 63/2012 for the modification and completion of the Criminal Code and Law No. 286/2009 concerning the Criminal Code[22], modifying in this way the „old" criminal code from 1969 by introducing art. 118[2]. These have implemented within the Romanian national law Art. 3 of the Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property. With some modifications, this criminal law institution is being retained by the Romanian New Criminal Code, in force since 1th of February 2014, currently being regulated under article 112[1].

In conformity with article 108 of the New Criminal Code, extended confiscation is a safety measure together with a) obligation to medical treatment; b) medical confinement; c) interdiction to occupy a public function or exercising a profession and d) special confiscation.

As such, the Romanian legislator has decided to introduce the *extended confiscation* institution within the *"classical" safety measures* of the Criminal Code. This introduction is of great importance, because in this way this juridical mechanism is introduced within the "classical" institutions of criminal law, to which general rules of criminal law are applicable. Consequently, in the Romanian system this measure, in comparison with the Serbian, could not be retroactively applicable. This means in fact that, by applying this measure, goods illegally acquired before 21 April 2012, respectively before the entrance into force of Law 286/2009, when this measure was introduced within the Romanian system, cannot be seized. More, the article of the New Criminal Code regulating the extended confiscation determines a five years' term "before and if necessary, after the commission of the crime"[23] so that the source of the goods acquired by the convicted person is being verified, limiting more in this way the field of this measure's applicability.

As it has been already shown, the Romanian Criminal Code envisages two forms of confiscation as safety measures: *special confiscation* and *extended confiscation*.

Distinctively from the safety measure of the special confiscation, that can be ordered only in case a material benefit of which provenience was established to be of criminal acts, respectively that it has an etiological connection with the act, while by applying the extended confiscation, goods are being seized from the person that has been convicted for certain crimes of a certain kind, goods for which it has not been shown that their provenience is of that crime for which the person was convicted, there was no etiological connection between the crime, the conviction and the goods, but their illegal acquire was proven.

Consequently, the *extended* confiscation of "criminogenic" goods, respectively "their illegal acquisition" is called within the Romanian law, *extended*, because this one is not only applicable to goods for which a judicial judgement was issued establishing that they result from a concrete crime, but other goods belonging to the convicted, for which there is a reasonable assumption that these result from other crimes committed by the

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[21] See: Adrian Neacşu, *Confiscarea extinsa a averilor ilicite. De ce abia acum?*, available at: http://www.juridice.ro/ 155598/confiscarea-extinsa-a-averilor-ilicite-de-ce-abia-acum.html.

[22] Published in the Official Monitor of Romania No. 258 from 19 April 2012.

[23] Art. 112[1] para. (2) lett. a) New Criminal Code.

perpetrator in his "criminal carrier", respectively good for which the convicted has not succeeded to prove their legal provenience.

"After the entering into force of the provisions concerning the extended confiscation, the legal practice was confronted with several legal matters on the transposal into practice of the new regulations in this matter."[24] Because of this, the Romanian Constitutional Court has been addressed several times to solve some exceptions of non-constitutionality of the norms that regulate the extended confiscation. Hereinafter we will present some of the decisions issued by the Constitutional Court of a primordial importance for the legal practice as well as for a better understanding of this measure in the Romanian criminal law.

As we already mentioned, the Romanian legislator has regulated the extended confiscation measure in Tittle IV of the New Criminal Code, named "Safety measures" including it in the "classical" safety measures, that in conformity with Article 2 of the New Criminal Code, together with the punishments and educative measures are in the sphere of criminal law. As such, the extended confiscation is enclosed in the "classical" institutions of criminal law (sanctions – safety measures), to which general rules of criminal law are applicable. For this reason, in the Romanian legal system, this measure is not retroactively applicable (*tempus regit actum*).

„In the decisions[25] delivered in this matter the Constitutional Court held that the norms of Criminal Code on extended confiscation are constitutional insofar they are not applied to acts committed and to assets acquired before the entry in force of Law no. 63/2012 amending and supplementing the Romanian Criminal Code and Law no. 286/2009 on the Criminal Code."[26]

As such, in conformity with article 15 of the Romanian Constitution, where retroactivity of the criminal law is prohibited, the extended confiscation measure can be imposed only to those crimes committed after its entry into force of Law 63/2012 introducing for the first time this measure within criminal law. Explicitly, this measure can be imposed only after 21 of April 2012[27]. This rule applies to the crimes for which conviction is the punishment as well as for the acts from which the goods, object of the extended confiscation, are resulting of.

While regulating the extended confiscation, sharp polemics have been conducted on the necessity of modifying the Romanian Constitution, by abolishing article 44 paras. (8) second Thesis which states that "*the licit character of obtaining the goods is presumed*"

Referring to the right to propriety, the Constitutional Court has considered that, "by definition, based on the content and the extend of its attributes, the right to propriety is limited, being configurated by the legal dispositions that establish the limits under

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[24] Mihai Adrian Hotca, *Câteva repere privind aplicarea dispozi□iilor relative la confiscarea extinsă*, available at: http://www.juridice.ro/377105/cateva-repere-privind-aplicarea-dispozitiilor-relative-la-confiscarea-extinsa.html

[25] *n.a.* Decision No. 356 from 25 June 2014, published Official Monitor of Romania No. 691 of 22 September 2014; Decision No. 11 from 15 January 2015, published Official Monitor of Romania No. 102 from 9 February 2015.

[26] Tudorel Toader, Marieta Safta, „The Constitutionality of Safeguards on Extended Confiscation", in *Journal of Eastern-European Criminal Law*, no. 1/2015, Law Faculties of the West University of Timişoara and the University of Pécs, Universul Juridic Publishing House, 2015, p. 9.

[27] Law No. 63/2012 Published in the Romanian Official Monitor, Part I, No. 258 on 19 April 2012, and in conformity with art. 78 of the Romanian Constitution, in force 3 days after it was published.

which it could be exercised and constitutes the expression of combining the owner's individual interest with the collective or general."[28]

„(…) by establishing that the presumption of the legal character is not an absolute one, as such the relative character of this presumption does not determine that the burden of proof had been overthrown, the *actori incumbit probation* continuing to be applicable, the Constitutional Court will establish the required standard of proof for overthrowing the relative standard of proof.

The Court notices that the legal presumptions, from their proving point of view can be relative (*iuris tantum)* and absolute *(iuris et de iure).* The relative presumptions do not establish categoric truths, that could elude any discussion possibility, of correction or information, being possible to be contended through contrary prove. The absolute presumptions on the other hand, by not admitting the possibility for them to be overcome, create the image of absolute truth, immutable, achieved once and for all and imposed to everyone throughout a legislative pronunciation."[29]

In this sense, by asserting on the law project for the constitutional review, the Constitutional Court has decided that by regulating the presumption of legal obtainment of the wealth does not prevent an investigation on the illicit character of its obtainment, the burden of proof being on the one invoking it.

In case it is being proven that the fortune has been obtained, in whole or in part, illegally, if the legal requirements are fulfilled, confiscation could be imposed for the illegally obtained part.[30] As such, because in the Romanian criminal law, the prosecution has the obligation to reverse the presumption of legal obtainment of goods, "which, even though constitutional, from the probational point of view it will remain a relative presumption *(juris tantum),* showing the opposite being always possible*."* [31]

„In the doctrine it is being shown that the burden of proof in the confiscation field has specific threads, concerning the proof of the specific facts or acts of the nature as those that have drawn the conviction, as such, an "ease" could be observed, and on the other hand, a "division" of the burden of proof, the subject being able to prove the legal character of the goods he or she possesses. The Court maintains though that this "ease" concerns only the proving of the facts or acts that attracted the conviction (…) establishing that the court must be convinced that the goods are a result of criminal activities, not being necessary that a conviction on those facts had been rendered, and in no case, that this "ease" would refer to proving the illicit character of the obtained goods."[32]

„(…) On the standard of proof the Constitutional Court retains that it should not be started from the premise that the presumption of legal obtainment of wealth could be overturned just by evidence, respectively by proving the fact that the goods were obtained by committing an offence. If this would be the case, the extended confiscation

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[28] Decision No. 492 of 21 November 2013, Published in the Romanian Official Monitor No. 54 of 22 January 2014.

[29] Decision No. 356 of 25 june2014, Published in the Romanian Official Monitor No. 691 of 22 September 2014.

[30] Constitutional Court, Decision No. 799/2011 of 17 June 2011, Published in the Romanian Official Monitor No. 440 of 23 June 2011.

[31] Viorel Paşca, *Curs de drept penal. Parte generală*, Ediţia a II-a, Universul Juridic, Bucureşti, 2012, p. 511.

[32] Decision No. 356 of 25 June 2014, Published in the Romanian Official Monitor, No. 691 of 22 September 2014.

would lack its rationality of existence, because, if every criminal act would be proven of which certain goods resulted then it would result to a conviction of the person for such acts, leading to the special confiscation as well, and therefore the extended confiscation would not find its utility anymore. Accordingly, a relative legal presumption, could be overthrown not only through evidence but as well through simple presumptions."[33]

In conclusion in the Romanian criminal law, the extended confiscation is just a safety measure, applicable only to those criminal acts committed and to the goods so obtained after 21 April 2012, the moment Law 63/2012 entered into force, the presumption of legal obtainment of wealth established by the Romanian Constitution to which this measure is referring is not of an absolute character, being able to be overruled through counterprove by the interested party, and the "relaxation" concerning the burden of proof consists of the fact that there is no need for a judgement of conviction for proving the facts and acts of the nature such as those that have drown the a conviction, are of the nature as the facts or acts for which the conviction was entered, being sufficient that the court was convinced that the respective goods resulted out of those criminal activities.

The difference between the "power" this measure has within the Serbian law in comparison with the possibilities offered by it in conformity with the Romanian criminal law, is more than evident.

Considering that the establishment of the measure's juridical nature is the main "at fault" for the limitations of opportunities that the "extended confiscation" could offer, further on we will try to justify that this measure must be (and why it is) a *sui generis* measure within criminal law, for which special norms are applicable, substantially different from the "classical" rules of criminal law, and as such, to "encourage" the Romanian legislator, when it comes to extended confiscation, to follow the Serbian legislator's way, to permit and assure, in practice, the applicability of this measure in a more "painful" and sever way.

3. "Extended confiscation's" juridical nature

Even though determining the juridical nature of this juridical institution seems more of a theoretical question, on many occasions it has proven to be of a great practical importance, and when, this question is being asked concerning the "extended confiscation" it seems that all the problems surround it start with determining its juridical nature.

In our opinion, this measure must be prescribed as a *sui generis* measure of criminal law, because by establishing it, specific juridical norms that fall outside the classical and ridged assumptions of criminal law, have proven to have been essential in practice for an efficient combat of severe crimes, can be applicable. We are referring here first at its possible retroactive application and secondly at the possibility to establish a special probational standard with the process of its application.

To justify this point of view, first it must be clarified that, because of its particularities and scope desired to be achieved by the measure's application, it cannot be assimilated with the criminal sanctions or with other legal measures, with which it

[33] Decision No. 356 of 25th of June 2014, Published in the Official Monitor of Romania, No. 691 of 22 September 2014.

has, of course, some similitudes. Unfortunately, in some national legislations this happens and very often this measure is being classified as a penal sanction.

The crime and generally criminality, is a behaviour that inflicts the society and to the individual a greater harm. For the joint and individual values to be protected, the society must respond, concerning this negative behaviours, through adequate measures, that will combat and prevent the commission of such criminal acts. The measures that need to be applied to perpetrators or other persons that have committed acts provided by criminal law are known in criminal law as, *penal sanctions*.

Penal sanctions are, as indicated above, penal measures imposed by the court after the criminal process was finalized, on criminals or person that have committed an act provided by the criminal law. Through these, by being imposed on persons or forcibly executed, some are deprived of or certain rights are restrained.

Penal sanctions "represent a fundamental institution of criminal law. Without them penal law would be an unfinished *chef-d-oeuvre*, a regulation that would have no sense, voided of any finality. The penal sanction is the one that distinguishes, from the formal point of view, the penal illicit from any other juridical illicit. "[34]

Their final and unique scope is – the protection against criminality. As such, the dispositions of article 4 paragraph 2 of the Serbian Criminal Code states that the general scope for the prevention and the prescribed penal sanctions is to suppress the acts that infringe or endanger the by the penal legislation protected values (this nomenclature through which dispositions are introduced that exclusively refer to the general or specific scope of the penal sanctions is not to be found in the Romanian Criminal Code).

Next to this mutual objective these have other specific objectives, depending on the type of the penal sanction.

The sanctioning system established by the Romanian penal legislation consists of: punishments (New Criminal Code Title III), safety measures (New Criminal Code Title IV) and educative measures (New Criminal Code Title V)

The Serbian sanctioning system consists out of these three juridical institutions as well. The Punishments are envisaged by Title IV of the Serbian Criminal Code and the safety measures in Title VI, while part II of the Code on underanged delinquents and the penal protection of minors[35], regulate the educative measures. In any case, the Serbian penal sanctioning system is a little bit more ample comprising next to the three juridical institutions in Title V of the Serbian Criminal Code, warning measures (in the Romanian New Criminal Code the measures that in penal law are defined as penal sanctions being envisaged in Chapter V "Individualisation of the punishment" Section 3, "Renunciation of sentence infliction").

Hereinafter, each of these sanctions and measures will be shortly presented, by emphasising on their special scope, taking in account that, their juridical nature and their place within the penal law system could be determined in function of the scope desired to be achieved through their disposal, while taking in account their other characteristics. At the same time, we are aware that the juridical nature of the penal sanctions and measures, as well as their place in the national legislative systematization varies in function of the respective country's juridical system, of its specific needs, time, circumstances and conditions of their appearance as well as out of the political will for

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[34] Viorel Paşca, *op. cit.*, p. 401.

[35] *Zakona o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica*, Published in the Republic of Serbia's Official Monitor, no. 85/2005.

their introduction, even though the scope wished to be attaint by most of the countries is very similar. That is why, taking this initial base in account we will try to prove the fact that the "extended confiscation's" classification within any penal sanctions is not adequate and that it cannot be identified with any other measure within the penal law.

"The punishments are the main category of penal sanctions with autonomous character, being able to be applied as unique sanctions, with a coercion and re-education function, being conditional upon their applicability of the perpetrator's guilt."[36]

As the fundamental and main penal sanction by adapting it to the country's state and concrete needs, the punishments are stipulated by all juridical systems.

The Serbian penal code expressly stipulates in article 42 the punishments' specific functions: "Within the general scope of the penal sanctions (article 4 paragraph (2) of the Penal Code), the punishments' scope is: 1) the prevention of the perpetrator from the commission of criminal acts and its influence over him or her to abstain from committing the offences; 2) its influence over others not to commit offences; 3) the expression of the social judgement for the commission of the crimes, moral consolidation and the consolidation of the respect for rule of law".

From the above mentioned the following, clear conclusions, concerning punishments could be drawn. These have "a repressive character as well (prevention of the perpetrator to commit crimes), as well as a preventive character, concerning the specific prevention directed towards the perpetrator for him to abstain from committing crimes (influence over the perpetrator not to commit crimes), as well as concerning the general prevention, meaning the influence it could have over other potential criminals for them to abstain from committing crimes (stating the social condemnation for criminal crimes, moral consolidation and the consolidation of the respect for rule of law)"[37]

It is certain that the main scope of punishments is the repressive one and is realized towards the person that committed the crime, by taking away or restricting some rights, creating a suffering for him or her as a repercussion of the committed offences. Taking these characteristics in account, even though similar with the ones of the punishments we cannot agree with the alignment of the extended confiscation measure with the former because of its character. The latter is not part of such a category because its scope is not to punish. The extended confiscation has first a retributing character consisting of re-establishing the disrupted equilibria of the propriety and to ensure in this way the "material lawfulness". Because of the illicit origin, the goods seized through this measure do not belong to the person (in comparison with for example, fines, through which the wealth, in legal propriety of the perpetrator is shrunken). For this, the repressive character of confiscation cannot be sustained.

On the other hand, like punishments, the extended confiscation measure has a preventive character. Nevertheless, the message sent by this measure to the potential crimes is of a different kind then the one of punishments. While the punishment sends the message that any person that commits a crime will be punished in an adequate way by being deprived of liberty or the interdiction of exercising certain rights, the extended confiscation measure transmits that, through criminality no one can nor will get rich, even in the case when they decide to scarify their liberty to have material gain, because this would be useless, because all the goods illegally obtained will be seized in the end.

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[36] Viorel Paşca, *op. cit.*, p. 402.

[37] Miroslav Đorđević, Đorđe Đorđević, *Krivično pravo sa osnovama privrednoprestupnog i prekršajnog prava*, *šesto izmenjeno i dopunjeno izdanje*, Beograd, Projuris, 2012, p. 90.

Next to the scope desired to be attaint by their establishment, between punishments and the extended confiscation there are other important differences that are linked to the conditions and the procedures through which these are taken. As such, for example, in conformity with the generally accepted penal law norms, the punishment can be applied only for the direct perpetrator for the by law established crimes, based on judgements rendered after a lawful criminal procedure. On the other hand, the measure in discussion is not exclusively bounded to the perpetrator, but it could be extended over his or her legal successors, the condemned inheritors and third parties.

Even though, establishing the perpetrator's guilt is a necessary condition for this measure to be imposed, this is not the "central problem", because in this case, the accent is put on the author's propriety and its interrogation. More, in almost all the penal justice systems, the punishment is being imposed when the criminal trial is finished, while on the other hand, concerning the extended confiscation, no international document envisages that the measure needs to be imposed exclusively in a strict criminal procedure, and a comparative analysis of the national legislations show very clearly that it could be imposed in the case of special procedures to which different rules then the classical criminal procedure are applicable. A good example for this is exactly the ZOIPKD of the Republic of Serbia.

From the above mentioned, it can be clearly concluded that the extended confiscation measure of goods cannot in no case be classified in the punishment mainframe, and because of this there is no need for a more detailed explanation concerning the differences between the two.

The advisory measures are those types of penal sanctions within Serbia's penal law, that, in the by law alleged conditions could replace the punishment. The Serbian Criminal Code envisages two advisory measures, respectively: the suspended sentence and the judicial admonition. In the case of the general scope of penal sanctions (article 4 para (2) Serbian Penal Code) the scope of suspended punishment and judicial admonition is that concerning the perpetrator of the crime of a lesser gravity the punishment will not be applied when it could expected that the threat with punishment (suspended) or just an advisory (judicial admonition) would have a sufficient effect on the perpetrator not to commit other crimes".[38]

A such, it could be said that the advisory measures are some sort of "lighter punishments", and everything that was said before for punishments can be referred to these measures as well. In other words, because of all reasons for which the extended confiscation measure cannot be considered a punishment it cannot be classified as an advisory measure either.

"The *educative measures* are as well autonomous penal measures, that, next to some sort of a coercive function have mainly and preponderantly an educative function, being applicable only to minors that can bear criminal responsibility".[39]

The law concerning minor delinquents and penal protection of minors specify within its dispositions which is the scope of the penal sanctions it regulates. A such, article 10 envisages that: within the general scope of penal sanctions (article 4 of the Criminal Code of the Republic of Serbia), the scope of the penal sanctions for minors is that, through control, protection and assistance, as well as assured professional and

[38] Art. 64 para. (2) Criminal Code of the Republic of Serbia.

[39] Miroslav Đorđević, Đorđe Đorđević, *op. cit.*, p. 90.

general preparation, the education and adequate development of the minor's personality to be influenced in order for the minors to be reintegrated within the community.

It is certain that the extended confiscation cannot be put in the "same basket" with educative measures.

In the end, we arrived to the penal sanction of *safety measure* with which the extended confiscation measure has the most in common in many legislations where it is encompassed, including in the Romanian.

Serbian Criminal Code presents in article 79 paragraph (1) the safety measures:

1) compulsory psychiatric treatment and confinement in a medical institution;
2) compulsory psychiatric treatment while at liberty;
3) compulsory drug addiction treatment;
4) compulsory alcohol addiction treatment;
5) prohibition from practising a profession, activity or duty;
6) prohibition to operate a motor vehicle;
7) confiscation of objects; 8) expulsion of a foreign nationals from the country;
9) publication of the judgement;
10) restraining orders prohibiting physical proximity and communication with aggrieved parties;
11) bans on attending specific sports events.

In conformity with the same articles paragraph (2) provisions state that "under the conditions prescribed by this Code, certain security measures may be imposed on a mentally incompetent person who committed unlawful act provided by law as a criminal offence" act envisaged by the criminal law he or she could not be aware of his acts or he or she could not control them" measures like compulsory, Obligation to psychiatric treatment and confinement in a medical institution and compulsory psychiatric treatment while at liberty, which could be taken independently and together with these, Prohibition from practising a profession, activity or duty; Prohibition to operate a motor vehicle; and Confiscation of objects[40].

In conformity with the provisions of article 108 of the Romanian New Criminal Code the safety measures are:

a) obligation to medical treatment
b) medical confinement;
c) interdiction to occupy a function or exercising a profession;
d) special confiscation;
e) extended confiscation.

"Within the general purpose of criminal sanctions (Art. 4 parag. (2) Criminal Code of the Republic of Serbia), the purpose of security measures is to eliminate circumstances or conditions that may have influence on an offender committing criminal offences in future"[41]

Different from the nomenclature used by other penal sanctions, the Romanian Criminal Code expressively envisages the scope of the safety measures:

„(1) The safety measures have as purpose to eliminate a state of danger and the prevention for the commission of other acts as envisaged by the penal law.

(2) The safety measure can be taken by a person that has committed an unjustified act envisaged by the penal law.

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[40] Art. 80 para. (2) Criminal Code of the Republic of Serbia.
[41] Art. 78 Criminal Code of the Republic of Serbia.

(3) The safety measures can be taken against a person against whom no punishment was applied"

Accordingly, these are a special kind of penal sanctions with a purely preventive character and can be imposed on criminally responsible persons as well as on those irresponsible.

"The safety measures have been conceived by the penal doctrine and foreseen by the lawmaker as a supplementary fighting mechanism against crime and are applicable next to and in complementary with the punishments and educative measures. The fact that these are applicable without the need of a punishment or educative measures to be imposed as well, does not negate their character as a supplementary measure, replacing in these cases the punishments that cannot be imposed because the act envisaged by the criminal law does not meet the constitutive elements of a crime."[42]

Their main scope is to eliminate the danger of crime commission, respectively to eliminate all the causes that brought to the commission of the crime, of the by the criminal law envisaged act. Hence, their main scope is to ensure the special prevention, the individual one.

Albeit, the accomplishment of the special prevention is one of the extended confiscation's objectives, in this case it's about a secondary one and not a primary. Therefore, the extended confiscation measure is different from the safety measures because of its primary and fundamental scope it wishes to achieve.

More, the measure of seizing goods originated out of offences "does not have one of the main characteristics of a penal sanction – the material content, so that by its application some rights and liberties of the perpetrator would be impaired; when the perpetrator's, by the committed offence obtained goods are seized, he or she is not impaired or restricted of its rights."[43].

An important difference consists in the fact that this measure "can be imposed to a person that was not engaged in the commission of the criminal offence, not possible in the case of other penal sanctions"[44].

For these reasons, we consider that the extended confiscation measure has significantly different main characteristics from the general ones of the safety measures, and that the differences between them are too big and as such, the extended confiscation must not and cannot be classified as a safety measure.

Conclusions

It is well known that each country has its own criminal justice system, adopted to the needs of the country, and accordingly the determination of the place of this institute at a universal, respectively general level is not "recommended"

Nonetheless, generally analysed, irrespective of the way the penal justice system is conceived, identifying the extended confiscation sanction with other sanctions or already existent penal measures, respectively its classification in one of the existing groups is not a good solution. We base our opinion on the several features that characterise this special measure regarding all the other penal law institutions, analysed

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[42] Miroslav Đorđević, Đorđe Đorđević, *op. cit.*, 90.

[43] Ljubiša Lazarević, *Komentar Krivičnog zakonika RS*, Beograd, Savremena administracija, 2006, p. 286.

[44] *ibidem.*

above, on the special scope aimed to be achieved, and first of all on its objective – to rebut the grievous patrimonial criminality.

„The expansion of international crime, especially organized crime, is a perpetual scourge that affects most of the world states and concerns the international public opinion."[45] The fact that the fight against the grievous forms of criminality, especially of the organised one, cannot be carried through conventional measure of criminal law used in the fight against "classical" criminality, is incontestable, and that for this to succeed, special measures must be applied for which special norms exists.

In this sense the "power" and exceptionality of the special measure lies with this divergence from the "common" criminal procedural rules and from the fundamental principles of criminal law.

Classifying the special confiscation measure in the "traditional" penal measures category hinders the possibility that by its disposal some special rules are applied, making the existence of the special measures meaningless.

When we concretely discuss about the extended confiscation measure, its "power" relies on its possibility to circumvent the evidence's strict form, applicable to a penal procedure and to circumvent the principle of nonretroactivity in criminal law. It is clear, that these avoids could not be achieved in case the measure would be classified within the "common" penal law institutions, like in Romanian law, where the extended confiscation measure is classified under the "common" safety measures.

We are of the opinion that the two possibilities offered by the "extended confiscation" measure in the Serbian legal system is of great importance for the fight against organised forms and other forms of grievous criminality. For this reasons we believe that each democratic country affected by this social harm in a way or another, should in any case find a modality to define this measure as a *sui generis* criminal law measure and in this way to include it within the national penal system. Hereby, the countries could, on this matter, profit of all the possibilities offered by the adopted and ratified international instruments.

Which legislative technic for the regulation of this measure will be used, if it would be regulated within an already existing *lex generalis*, or a new *lex specialis* will be adopted, totally dedicated to this measure, or the norms regulating it will be included both in a *lex generalis* and in a *lex specialis*, is left at the free choice of the country.

In the legislation of Republic of Serbia the seizure of goods resulting out of criminal acts is regulated by a complete and special law – ZOIPKD. Accordingly, this was not embedded in some of the already existing general rules of penal law of this country (like the Criminal Code, that regulates the penal sanction system and other penal measures or in the Procedural Criminal Code). Nonetheless this mnemotechnic has caused some nebulosity in the Serbian doctrine. Hence "a doubt appears if the legislator's intention was to define the measure of seizing the goods resulting of crimes as a procedural institute or as a material penal law institute that is inevitably accompanied by procedural dispositions."[46] Škulić underlines the fact that it is about a "legal mechanism pretty "slippery", for which it is not very clear if it belongs in a dominant way to the

[45] Magdalena Roibu, „Organized Crime in the United States and its Modern Challenges", in *Journal of Eastern-European Criminal Law*, no. 1/2015, Law Faculties of the West University of Timişoara and the University of Pécs, Universul Juridic Publishing House, 2015, p. 88.

[46] Aleksandar Trešnjev, „O radnoj verziji Nacrta Zakona o oduzimanju imovine proistekle iz krivičnog dela", in *Revija za bezbednost*, no. 7/2008, p. 21.

sphere of criminal material law or the procedural one (…). Not contesting that the classical penal measure of seizing the material gain (envisaged in Chapter VII of the Serbian Criminal Code) is not a penal sanction, neither can the confiscation of goods resulted out of criminal offences be considered as a penal sanction, therewith, it could not be contested that the dispositions of this law represents a mixture of material penal law and procedural criminal law, though which only the definitive seizure of propriety, achieved under certain conditions, could have the character of a material penal measure, irrespective of the fact that it is formally regulated by the dispositions of the Criminal Code, our main material law source."[47].

Nonetheless, even though regulating the seizure of goods resulting of crimes ("extended confiscation) within the Criminal Code would facilitate the elimination of the existing theoretical issue, would consolidate its position with the country's juridical system, we believe this would create a series of contradictions in relation with the fundamental principles of criminal law.

On the other hand, relating to the field of the norms of criminal procedure that regulate the procedure by which the measure of confiscating the goods resulting of crimes/extended confiscation, we are of the opinion that it would have been difficult to regulate them in the Criminal Procedural Code, because of numerous differences mentioned above, between the procedural of its enactment and the classical criminal procedure, for the reason that in this way a series of exceptions, applicable only to this measure would have been implemented within the Criminal Procedural Code.

For these reasons, we believe that regulating it within a special law while referring, in case of lack of special dispositions, to the Criminal Procedural Code as *lex specialis,* would be a more optimal solution

At the same time, it must be underlined the fact that we are not of the opinion that the Serbian law – ZOIPKD is a perfect one, and we do not suggest its complete take over, we are just supporting the idea on which this law is based upon. All in all, even in the case when all this law's deficiencies would be corrected, we are not sure that such a law would be totally adequate for Romania, by taking in account the general social conditions, the juridical opinions and the country's juridical tradition. Nevertheless, without any reservations we consider that the idea that the "extended confiscation" to be defined as a *sui generis* measure and as such to be regulated by a special penal law (*lex specialis*), is a very good one, because only in this way its retroactive applicability would be assured as well as the applicability of the "split/divided" burden of proof, all together offering a good base for a successful fight against organized crime.

On the other hand, irrespective of the way the national legislator has decided to implement the extended confiscation within its juridical system, it is important this not to be seen as a special distinctive and new penal measure, but it must be regarded as part of the complete mechanism against grievous crimes. "The legislation on organized crime must be a complete and well organized set of norms conceived out of different branches of law, penal material law of course, as well as of criminal procedural law rules, administrative law, norms on the instance's organisation and governmental organisms, norms on penal sanctions and fiscal law, and so on and so forth."[48]

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[47] Milan Škulić, *Organizovani kriminalitet – Pojam, pojavni oblici krivična dela i krivični postupak*, Beograd, Službeni glasnik, 2015, p. 612.

[48] Michele Papa, Introduction in: Robert Sepi, et al., *Borba protiv organizovanog kriminala u Srbiji: od postojećeg zakonodavstva do sveobuhvatnog predloga reforme*, UNICRI, Beograd, 2008., p. 26.

Finally, we would like to underling the fact that, even though, extended confiscation is an extremely "preferable instrument, through which (partial) reparation justice could be achieved"[49], care must be taken this institute not to be abused, because, it could happen that out of a "preferable mean for fighting against and controlling criminality, it would degenerate in a phenomenon that becomes scope and justification itself." [50]

Bibliography

1. Ciopec Flaviu, *Confiscarea extinsă: între de ce şi cât de mult?*, Editura C. H. Beck, Bucureşti, 2015.

2. Đorđević Miroslav, Đorđević Đorđe, *Krivično pravo sa osnovama privrednoprestupnog i prekršajnog prava, šesto izmenjeno i dopunjeno izdanje*, Beograd, Projuris, 2012.

3. Golobinek Robert, „Finansijske istrage i oduzimanje imovine stečene krivičnim djelima", in *Priručnik za pripadnike policije i pravosuđa*, CARPO projekat, Savet Evrope 2007.

4. Hotca Mihai Adrian, *Câteva repere privind aplicarea dispoziţiilor relative la confiscarea extinsă*, available at: http://www.juridice.ro/377105/cateva-repere-privind-aplicarea-dispozitiilor-relative-la-confiscarea-extinsa.html

5. Lajić Oliver, „Ima li alternativu oduzimanje imovine stečene kriminalom koje se sprovodi u krivičnom postupku?" in *Zbornik radova Pravnog fakulteta*, vol. 47, no. 2, Novi Sad, p. 331-347.

6. Lajić Oliver, „Uporedni pregled sistema za istraživanje i oduzimanje imovine stečene kriminalom", in *Zbornik radova Pravnog fakulteta*, vol. 46, no. 2, Novi Sad, Pravni fakultet Novi Sad, 2012, p. 207-222.

7. Lazarević Ljubiša, *Komentar Krivičnog zakonika RS*, Beograd, Savremena administracija, 2006.

8. Neacşu Adrian, *Confiscarea extinsa a averilor ilicite. De ce abia acum?*, available at: http://www.juridice.ro/ 155598/confiscarea-extinsa-a-averilor-ilicite-de-ce-abia-acum.html.

9. Papa Michele, Introduction in: Robert Sepi, et al., *Borba protiv organizovanog kriminala u Srbiji: od postojećeg zakonodavstva do sveobuhvatnog predloga reforme*, UNICRI, Beograd, 2008.

10. Paşca Ioana-Celina, *Criminalitatea organizată în perspectiva legislaţiilor europene*, Bucureşti, Universul Juridic, 2015.

11. Paşca Viorel, *Curs de drept penal. Parte generală, Ediţia a II-a*, Universul Juridic, Bucureşti, 2012.

12. Rakitovan Darian, „Extended Confiscation in Romanian Criminal Law", in *International Scientific Conference „Archibald Reiss Days, Tematic Conference Proceedings of International Significance*, Vol. I, Belgrade, Academy of Criminalistics and Police Studies, 2016, p. 306-317.

13. Rakitovan Darian, Colojoară Raluca, Mirişan Ligia-Valentina, „Organized Crime and Similar Terminological Concepts. A Problem in Defining the Notion of Organized Crime", in *Journal of Eastern-European Criminal Law*, no. 1/2015, Law Faculties of the

[49] Oliver Lajić, „Ima li alternativu oduzimanje imovine stečene kriminalom koje se sprovodi u krivičnom postupku?" in *Zbornik radova Pravnog fakulteta*, vol. 47, no. 2, Novi Sad, p. 345.

[50] *ibidem*, p. 346.

West University of Timişoara and the University of Pécs, Universul Juridic Publishing House, 2015, p. 177-190.

14. Roibu Magdalena, „Organized Crime in the United States and its Modern Challenges", in *Journal of Eastern-European Criminal Law*, no. 1/2015, Law Faculties of the West University of Timişoara and the University of Pécs, Universul Juridic Publishing House, 2015, p. 88-98.

15. Škulić Milan, *Organizovani kriminalitet – Pojam, pojavni oblici krivična dela i krivični postupak*, Beograd, Službeni glasnik, 2015.

16. Stănilă Laura, „New Fields of Action for Organized Crime: Trafficking in Human Cells, Tissues and Embryos. New Challenges for Romania", in *Suprotstavljanje savremenim oblicima kriminaliteta – analiza stanja, evropski standardi i mere za unapređenje, zbornik radova sa Naučno-stručnog skupa sa međunarodnim učešćem*, Vol. II, Tara, Beograd, Kriminalističko-policijska akademija i Fondacija „Hans Zajdel", 2015, p. 299-310.

17. Toader Tudorel, Safta Marieta, „The Constitutionality of Safeguards on Extended Confiscation", in *Journal of Eastern-European Criminal Law*, no. 1/2015, Law Faculties of the West University of Timişoara and the University of Pécs, Universul Juridic Publishing House, 2015, 9-21.

18. Trešnjev Aleksandar, „O radnoj verziji Nacrta Zakona o oduzimanju imovine proistekle iz krivičnog dela", in *Revija za bezbednost*, no. 7/2008.

Extended Confiscation. Repression and Beyond

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Abstract

In this study I would like to address a legal instrument used in the fight against economic crime. The stake for committing economic offences is the financial gain. An efficient penal policy against economic crime must aim at tracing, seizing and confiscating property derived from criminal activities. At the European level there is a constant concern for the elaboration and functioning of an efficient instrument, able to ensure the suppression of illegal gain. Legally speaking, there are several possibilities to achieve that goal: civil, administrative or criminal proceedings. My approach centers upon the presentation of the manner in which confiscation does actually work in criminal matters in Romania.

***Key-words**: confiscation – proceeds of crime – economic crime – Romania.*

Most European states have provided in their national criminal law the possibility to confiscate property derived from criminal activities. Romanian criminal law is no exception to that initiative, therefore in our Penal Code we have article 112 that refers to what is called *special confiscation*. The notion of special confiscation refers to the confiscation of goods acquired as a result of committing offences and it must be distinguished from the notion of *general confiscation*, which implies the total or partial confiscation of a person's patrimony, settled in our former criminal law and expressly prohibited by the 1991 Constitution. Presently, our Constitution sets out article 44 par. 8 according to which a patrimony that has been legally acquired cannot be subject to confiscation[1].

At the European level, it has been deemed necessary to develop a new concept, namely *extended confiscation*. This refers to the possibility of a court of law to rule on confiscation *beyond* the traditional limits of repression. The implementation of such a new concept represents, in my opinion, a dramatic change in the context of *repression*.

Thus, there was adopted the Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property[2], according to which each Member State shall take the necessary measures to enable confiscation at least (art. 3.2):

(a) Where a national court based on specific facts is fully convinced that the property in question has been derived *from criminal activities* of the convicted person during a period prior to conviction for the offence referred to in a list (art. 3.1) which is deemed reasonable by the court in the circumstances of the particular case, or, alternatively,

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[1] F. Ciopec (2015). *Confiscarea extinsă: între de ce și cât de mult?* [Extended Confiscation: Between Why and How Much?] București: C.H. Beck, p. 88-93.

[2] Published in the Official Journal of the European Union no. L68/49 of 15.03.2005.

(b) Where a national court based on specific facts is fully convinced that the property in question has been derived *from similar criminal activities* of the convicted person during a period prior to conviction for the offence referred to in to in a list (art. 3.1) which is deemed reasonable by the court in the circumstances of the particular case, or, alternatively,

(c) Where it is established that the value of the property is disproportionate to the lawful income of the convicted person and a national court based on specific facts is fully convinced that the property in question has been derived from the criminal activity of that convicted person.

The Framework Decision was supposed to be transposed into national law until the 15th of March 2007 but Romania fulfilled this obligation only in 2012[3] by the amendment of the Penal Code and the insertion of art. 112[1] which reads:

(1) There shall also be subject to confiscation other goods than the ones mentioned in art. 112, in case the defendant is convicted for an offense indicated in the list, if the offence may bring the defendant a valuable consideration and if the penalty provided by the law is imprisonment of 4 years or more.

(2) Extended confiscation shall be ordered if the following conditions are met:

a) The value of the goods acquired by the convicted person, during a period of 5 years prior to conviction, and, if the case, following the criminal activities, until the issuance if the indictment, obviously exceeds the gain that the person made by lawful means.

b) The court is convinced that the goods in question are derived from criminal activities similar to those indicated in the list.

In what follows I would like to refer to the conditions under which extended confiscation can be applied:

a) Commission of an offence

According to the Framework Decision, 'confiscation' means a *penalty or measure*, ordered by a court following proceedings in relation to a criminal offence or criminal offences, resulting in the final deprivation of property. Consequently, confiscation has a dual nature, the States being free to provide in their national legislation either one or the other of the two variants. Romanian criminal law has chosen for the second variant, namely confiscation as a safety measure, ordered by court in case an act provided by criminal law has been committed. As concerns extended confiscation, a higher standard is necessary, i.e. the act committed must qualify as an offence. It is this way that the reference related to conviction from art. 112[1] must be interpreted, since conviction cannot be ordered in the absence of an offence.

b) Existence of a state of danger

As any safety measure, extended confiscation aims at preventing a state of danger that consists in the commission of new acts provided by criminal law. The reason of extended confiscation resides in making the gain derived from criminal activities unavailable for offenders. In this case the state of danger is more serious, due to the fact that financial gain is used both to finance future criminal activities and to ensure impunity for the offences already committed.

[3] Act no. 63 of 17th April 2012, published in the Official Journal no. 258 of 19.04.2012.

c) Nature of the committed offence

Unlike special confiscation, extended confiscation does not enjoy general applicability, being limited to the offences that meet the requirements provided by the law. Conviction for an offence which does not meet these requirements cannot entail extended confiscation. There are three legal requirements:

1. The offence must be enumerated in the list expressly set out in art. 112^1. Most the offenses are economic by nature: money laundering, tax evasion, offences related to customs, illegal gambling, unfair competition, misappropriation of funds, offences against the patrimony, etc. Romanian law has extended the list of offences as compared to that settled by the Framework Decision which provides only for counterfeiting of currency, money laundering, trafficking in human beings, sexual exploitation, child pornography, drug trafficking and terrorism.
2. The penalty provided by the law should be imprisonment of 4 years or more.
3. The offence must be susceptible of bringing the offender some valuable consideration.

The logic of these requirements is debatable since I consider that it would have been more appropriate that the penalty limits refer to the sanction effectively applied by the court and not to the sanction provided by the law. Thus, extended confiscation could be avoided in case of convictions for offences which have been sanctioned with a minimal penalty by the courts, although the law provides higher limits of penalties.

d) Acquirement by the offender of goods whose value is obviously higher than the value of goods obtained by lawful means

Firstly, it should be stated that the law refers both to movable and immovable assets obtained during the reference period, as well as to amounts of money. The law does not state if the services which the convicted person benefitted from are taken into account. My opinion is that they should be, since these services are of economic value (tourist services, beauty services, etc.), therefore can be assimilated to the notion of goods.

Secondly, when assessing the nature of the acquired goods, there shall not be taken into account the assets acquired by criminal activities, since they are subject to special confiscation.

Thirdly, there shall be taken into account the value of the goods transferred by the convicted person to a family member or to a legal entity controlled by the convicted person. The Romanian Penal Code, in article 177, defines the notion of family member as being: a) the ascendants and descendants, brothers and sisters, children of the former, as well as the persons, who, by adoption, have become such relatives; b) the spouse; c) the persons who have established relations similar to those between spouses or between parents and children, in case they live together. It is irrelevant if the transfer has been for free or in exchange of a valuable consideration. If it has operated for free, the court shall take into account the value of the goods in question, and not the price obtained for those goods, which can be much lower than their real value. In fact, a low price is precisely an expression of the intent to dissimulate the real value of goods. The goods shall be assessed by reference to the moment when they were acquired and not by reference to a later moment (i.e. that of conviction). The current value of a luxury car, bought five years ago, shall be much lower than its sale price. It is also debatable if there should be taken into account the goods transferred to a person that does not have family or other ties with the convicted person (i.e. a friend). In order to prove that the goods in

question belonged in fact to the convicted person and only fictitiously to the interposed person (friend), any evidence can be adduced.

Fourthly, in determining the disproportion between the lawful income and the value of goods acquired by the convicted person, the court shall also take into account the expenses made by the convicted person and his family members.

In the fifth place, the disproportion between the value of the goods acquired during the reference period of 5 years and the lawful income should be *an obvious one*. In the absence of a legal definition for "an obvious one", incompatible with *lex certa*, we must conclude that it is a matter of the margin of appreciation of the judge. It is clear that a difference of USD 20.000 in the case of a person who has a lawful income at the level of the national minimum wage represents an obvious difference, while this difference is diluted in the case of a person who has a legal gain of USD 10.000. However, it is possible that goods may be traded at a value higher than their market value, precisely in order to hide a fictitious transaction. The question is if under these circumstances the court shall guide itself by the market value or by the transaction value, which is higher? My opinion is that the amount of money obtained as a result of the transaction must be confiscated, because otherwise the defendant would benefit from a profit derived from the transaction, which is prohibited by the law. The principle in this matter should be: "Follow the money!"[4] Thus, the legal text states that there shall be subject to confiscation the goods and amounts of money derived from the exploitation or use of the confiscated goods.

e) Reference period of 5 years

The law refers to a period which goes 5 years back in time and continues in the present up to the issuance of the indictment. This option is not the most fortunate one, since it actually includes the entire duration of pre-trial investigation, when it is very unlikely that the defendant obtain valuable consideration related to his criminal activities. Therefore, it would have been more appropriate if the present moment was represented by the start of criminal investigation or the initiation of public prosecution at the latest. The period of 5 years cannot be taken into account if extended confiscation was applied for an offence that was committed before the entry into force of the law (April 2012). This is due to the fact that the principle of non-retroactivity of the penal law would be thus violated, and the Romanian Constitution expressly prohibits it[5].

The Romanian legislator has expressly established a 5-year period, in order to prevent its establishment by a judge, as opposed to the Framework Decision which refers to a period "deemed reasonable by the court in the circumstances of the particular case" (art. 3 par. 2 a). The period of five years is correlated with the statute of limitations in tax-related matters.

f) The court's conviction that the goods are derived from criminal activities

This condition is extremely important, since it cannot result exclusively from the commission of an offence or from the disproportion between the value of goods and the lawful income. It means that the court must identify additional clues, able to strengthen

[4] F. Ciopec (2015). *Follow-the-Money! Criminal Confiscation in Economic Crime*. Journal of Eastern European Criminal Law 2, pp. 175-181.

[5] The Romanian Constitutional Court, Decision no. 15 of January 11th 2015, published in the Official Journal no. 102 of 09.02.2015.

its persuasion, elements that must be stated within the legal reasoning of the judgment. These clues (also presumptions) must be strong enough to instill probability that the goods are derived from criminal activities. The law provides that these activities must be similar to the offences enumerated in the list, and not close to those offences that entailed the conviction. This situation could generate difficulties in interpretation, since, once the defendant was convicted for an offence, it is difficult to understand how a court could form an opinion that the goods are derived from criminal activities that have nothing in common with the acts that led to conviction. Therefore, it is possible that extended confiscation be applied to goods which the court believes to be derived from criminal activities, distinct from those which entailed conviction, and for which no conviction was ruled.

Is this situation compatible with the presumption of innocence? Effectively, although the court does not judge these other criminal activities, based on the evidence of the case, it forms an opinion in the sense that these activities did exist in reality, were committed by the offender and were able to bring him a valuable consideration. Such elements are sufficient in order to enable the court to rule on extended confiscation, without disregarding the presumption of innocence. However, it is clear that the standard of proof is lower in such an instance.

Article 3 of the Framework Decision 2005/212/JHA, the legal text which was the base of national provisions on extended confiscation, was replaced, in the European order, by the Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014[6] on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union. All Member States had the obligation for transposition of the Directive into national law within the term of 4 October 2015, amended lately to 4 October 2016[7]. Romania does not comply yet with the transposition obligation, though some steps have been done in this direction[8].

Art. 5 of the new European Act provides that: "Member States shall adopt the necessary measures to enable the confiscation, either in whole or in part, of property belonging to a person convicted of a *criminal offence* which is liable to give rise, directly or indirectly, to economic benefit, where a court, on the basis of the circumstances of the case, including the specific facts and available evidence, *such as* that the value of the property is disproportionate to the lawful income of the convicted person, is satisfied that the property in question is derived from criminal conduct".

Transposing the Directive means that extended confiscation will operate on a larger scale, by waiving to the exhaustive list of offenses for which it may be applied. The enforcement of the new regulation on national level will allow confiscation of proceeds of economic crime excepted from this measure, such as: embezzlement (art. 295 of the Criminal Code), 12 offenses stipulated in art. 452 of Tax Code or offenses related to the manipulation of capital market (art. 279 of the Capital Market Act no. 297/2004).

As I stated above, in order to rule on extended confiscation, the court must be convinced that the assets are derived from criminal activities similar to those entailing the conviction. The court assessment is not *de lege lata* sufficient for extended

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[6] Published in the Official Journal of the European Union no. L127/39 of 29.04.2014.

[7] Corrigendum to Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014, published in the Official Journal of the European Union no. L138/114 of 13.05.2014.

[8] Draft Bill for Amending Criminal Code and Criminal Procedure Code of 12 August 2016, available at http://www.just.ro/transparenta-decizionala/acte-normative/proiecte-in-dezbatere/?lcp_page0=3#lcp_instance_0.

confiscation, since it must additionally be proved that there is a disproportionate difference between the wealth of the convicted person and his/her legal income. Calculating the difference is by far a delicate business. The new Directive no longer provides such a restriction; therefore, the court must be able to substantiate the conviction that the assets derived from criminal activity under any circumstances. The disproportionate difference mentioned above is only one of the circumstances, which could be considered by the judge.

Art. 4 of the Directive provides that: " 1. Member States shall take the necessary measures to enable the confiscation, either in whole or in part, of instrumentalities and proceeds or property the value of which corresponds to such instrumentalities or proceeds, subject to a final conviction for a criminal offence, which may also result from *proceedings in absentia*. 2. Where confiscation on the basis of paragraph 1 is not possible, at least where such impossibility is the result of *illness or absconding* of the suspected or accused person, Member States shall take the necessary measures to enable the confiscation of instrumentalities and proceeds in cases where criminal proceedings have been initiated regarding a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, and such proceedings could have led to a criminal conviction if the suspected or accused person had been able to stand trial".

The situations envisaged by the Directive, which require Member States to regulate non-conviction based confiscation[9], are only those where the conviction would not be possible *in absentia* proceedings, at least for cases where the defendant is unable to appear in court due to illness or when he evades trial. According to Romanian legislation, evading trial by the defendant legally served with summon does not prevent the ruling of a solution of conviction. In the same logic the termination, for any reason, of the criminal proceedings, does not preclude application of the security measure of confiscation.

The impossibility of the defendant to stand trial due to illness constitutes, according to the Romanian regulations, grounds for stay of criminal proceedings. In this matter, the draft bill proposes that judges take into consideration the possibility of continuing trial, by ordering the suspect or accused person to be heard at the place where he/she is located (hospital) or via video-link.

Finally, the Directive refers to the confiscation from a third party (art. 6): "Member States shall take the necessary measures to enable the confiscation of proceeds, or other property the value of which corresponds to proceeds, which, directly or indirectly, were *transferred* by a suspected or accused person *to third parties*, or which were *acquired by third parties* from a suspected or accused person, at least if those *third parties knew or ought to have known* that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer or acquisition was carried out *free of charge* or in exchange for an *amount significantly lower* than the market value"

While Member States respect the rights acquired on assets representing the proceeds of a crime by *bona fide* third parties, they foresee the application of the measure to *mala fide* third parties, i.e. the straw men to whom the defendant has formally transferred his/her criminal wealth in order to avoid confiscation while

[9] J.P. Rui (2012). *Non-conviction based confiscation in the European Union* - an assessment of Art. 5 of the proposal for a directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union. ERA Forum 13, pp. 349-360.

continuing substantially to enjoy it. It is consequently now possible to confiscate assets owned by persons other than the defendant, and using dissimilar criteria (e.g. the property is a gift from the defendant; the third party knew of its criminal origin; the assets are under the defendant's effective control)[10].

As a conclusion, we may state that the confiscation provided by article 112[1] of the Penal Code has an extended character from a triple perspective: that of the goods subject to confiscation (which can be other than those mentioned in article 112 of the Penal Code); that of the period taken into account by reference to the moment when the offence was committed, according to which there shall be examined the value of the goods acquired by the convicted person (5 years before the offence, and, if necessary, even after its commission, up to the issuance of the indictment); that of the persons by reference to whom there shall be analyzed the value of the acquired goods (the court shall also consider the value of the goods transferred by the convicted person or by a third party to a family member or to a legal entity controlled by the convicted person).

[10] B. Vettori (2006). *Tough on Criminal Wealth. Exploring the Practice from Crime Confiscation in the EU*. Dordrecht: Springer, p. 8.

About the Causes of Corruption in the Hungarian Public Procurement System

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Abstract

According to practical experience and research, the functions of the Hungarian state – mainly the system of public procurement – are greatly involved in corruption

The aim of this study is to examine the social background regarding the corruption of public procurement after a brief historical overview, through investigating the overlapping phenomena and highlighting the importance of the legislation and the compulsory citizenship behavior which could easily be a subject to the abuse of cunning perpetrators.

The first factor that could explain the situation is the fact that in case of the Hungarian society the willingness to comply with the law is very low

The last factor that I would like to examine, which could be the first in the priority order and in my opinion goes hand in hand with corruption, is the operation of the Hungarian tender system.

Key-words: *coruption, system of public procurement.*

The Swiss State Secretariat for Economic Affairs defined corruption in 2009 as „the abuse of public power or position for private gain".[1] Based on this definition and the Hungarian public procurement it can be said that the use of public funds is a section of the government operations where unfair advantage can be obtained directly, in a way that the decision-maker can transform the public funds at its disposal into private funds with very low risk. According to practical experience and research, the functions of the Hungarian state – mainly the system of public procurement – are greatly involved in corruption. This is also backed by the respective study of Transparency International Hungary and Corvinus University Budapest from 2009.[2] According to an opinion in the book: „the government sector is corrupt to the core even the major government procurements". Table number 2 of the authors justifies this opinion: „Public procurement as a hotbed of corruption was the second most frequently mentioned issue by the interviewees."[3] Similar reports came from GKI (Hungarian Economic Research Institute) issued on November 3, 2009 regarding the research on corruption of public procurements, which was based on 120 deep interviews (buyers, bidders, official procurement advisors) and a sociological model of 900 person involved (buyers and bidders). Vértes András, president of GKI, summarized the research as such: „Corruption

[1] Hogyan előzzük meg a korrupciót? Szerk. Liliana de Sá Kirchknopf; SCO-Budapesti Corvinus Egyetem, Budapest 2009. 8. oldal

[2] Pálinkó-Szántó-Tóth: Üzleti korrupció Magyarországon. Korrupciós kockázatok az üzleti szektorban; Szerk. Szántó Zoltán – Tóth István János; TI-Corvinus 2009. 37. oldal

[3] Pálinkó-Szántó-Tóth: im. 41. oldal

is a real issue in public procurements, and according to certain international organizations it is involved in 90% of the public procurement procedures, although this figure could be over-estimated. According to our research, the major part of the procedures is involved (although there is undue suspicion in certain cases) and approximately two-third or three-fourth of the domestic public procurements could be affected by corruption."[4]

Not even the Council of the Public Procurement Authority disputes the aforementioned involvement in corruption. In their parliamentary report J/9457 of 2009 on the credibility, clarity and transparency of public procurements[5] they frequently highlighted the influence of corruption on public procurements. Firstly, they proposed a research in 2007, which is yet to have any official results. Secondly, the report also highlights the fact, that observations made on corruption must be cautious: „the research obviously showed that bidders are usually far more aware and suspicious about possible corruption behind procurement procedures, than buyers"[6]. I would like to add that the attitude of buyers is not unexpected since their interest is to avert the suspicion of corruption. Várday György, procurement officer, expressed his experience in a different way, stating that regarding procurement procedures 6 out of 10 are subject to some kind of problem. As a jurist working in this field I am hardly as optimistic, as I think that we could find a problem in case of 8 or 9 out of 10 procedures. Sometimes it would be enough to analyze the public procurement invitations, in which the subjectivity and intentions are impossible to be overlooked by the peer reviewers. I would like to add, that a characteristic of the current legislation is that the peers are legally responsible for the invitations according to the civil law[7], however if the contracting authority places the invitation again without any correction then the Drafting Committee must publish the invitation that way.

The aim of this study is to examine the social background regarding the corruption of public procurement after a brief historical overview, through investigating the overlapping phenomena and highlighting the importance of the legislation and the compulsory citizenship behavior which could easily be a subject to the abuse of cunning perpetrators.

The public procurement system – similarly to taxation – already appeared in the organized societies of the classical antiquity (Greece, Rome) with legal institutions similar to current ones. In Greece, the emergence of the modern buyer-bidder positions (contracting authorities and tenderers), the determination and allocation of resources were linked especially to public constructions, acquisition of war material, and mining operations. An example was the regulation of the Athenian city-state that specified where and how the participants could purchase throughout the campaign. These issues were solved in most Greek city-states by preliminary talks and contracts that appeared

[4] GKI: ez a korrupció melegágya; www.stop.hu/articles/article.php?id=562287 (2009. november 3.)

[5] Beszámoló a Közbeszerzések Tanácsának a közbeszerzések tisztaságával és átláthatóságával kapcsolatos tapasztalatairól, valamint a 2008. január 1. - december 31. közötti időszakban végzett tevékenységéről (Budapest, 2009. július)

[6] Közbeszerzések Tanácsa J/9457-es beszámoló 28-as oldal.

[7] Erről részletesen lásd a közbeszerzési és tervpályázati hirdetmények megküldésének és közzétételének részletes szabályairól, a hirdetmények ellenőrzésének rendjéről és díjáról, valamint a Közbeszerzési Értesítőben történő közzététel rendjéről és díjáról szóló 34/2004. (III.12.) Korm. rendeletet.

to be the ancestor of the modern order-services interaction.[8] A very mature system was developed regarding public construction projects that ensured the concept of public participation. The key role in the process was the so-called *„polétés"*, who used or leased the elements of state property, the public funds, via public procedures, often at public sales.[9] Contracts concluded by the polétés are „reviewed by the Council, and should the Council determine any unlawful act related to the contracts, the polétés are subject to accusation by the public and handed over to the judge".[10] The polétés made public reports about the contracts that were published in People's Assembly and were guarded by public slaves. From a modern perspective, this publicity reflected the concept of public interest. The details of the winner entry work were carved into marble in order to make the terms and conditions of the project public.

In ancient Rome, certain entrepreneurs were specialized in public procurements, however the transaction of major public investments were the task of the „censors", who also specified serious tendering securities and guarantees regarding the proposals. The procurement orders could be acquired at public sales, and the evaluation of the tendering securities and guarantees of the winner bid was also the censors' duty. As a result of the entrepreneurs' bidding war, the tender with the lowest price won the order. Ancient authors like Cicero and Livius frequently reported on such occasions.[11] Acknowledging the work was a cornerstone of the contracts, and if the buyer was not satisfied with the quality of work performed, it could force the entrepreneur to correct and recondition the defects at its own expense. Certain elements of the current legislation are somewhat similar to the aforementioned practices, namely the collaterals. Even at that time, public constructions were subject to corruption.

In some cases the contractual parties invited to the public auctions were limited and predetermined. This happened „in the famous Castor-church case, when the buyer (Verres) – besides the limited publicity – had chosen the winner even before the auction, and later rejected the more favorable bidder."[12]

From the long history of the Hungarian public procurement, I would like to highlight, that the purveyors to the Royal Court and the supplier channels had developed quite early, and at the end of the nineteenth century several sections of the Act XX of 1897 on public accounting determined the spending of public funds.

„The conclusion of contracts, or conventions by the state or the acceptance of proposals of such, as well as the establishment of legally valid and binding transcripts are all subject to public competition" (Section 38 of Act XX of 1897). Furthermore, Sections 39 and 40 added, that „the minister can ignore public competition to renew or extend expired contracts only in specific cases when public interest demands it, only with the permission of the minister council, and only if there were equally or more favorable options available", as well as „Contracts concluded on behalf of the state regarding construction, sales, lease, equipment or acquisition, that values 5000 forints or more; it shall be reported to the directorate of the department of treasury, secretariat of legislative affairs in order to provide opinion on the terms and conditions of the contract, especially on the collaterals". Detailed regulations before the socialist era regarding the supply of public procurements had been enacted from 1907, in which

[8] Soós Adrienn: Közbeszerzés Athénban és Rómában; PhD Tanulmányok 7. PTE 2008. 336. oldal
[9] Todd, S. C., The Shape of Athenian Law. (Oxford 1993.)
[10] Arisztotelész: Athéni állam XLVI. 2.
[11] Idézi: Soós Adrienn, im. 329. oldal
[12] Soós Adrienn: im. 334-335. oldal

certain factors were taken into account such as the benefits and subsidies given to Hungarian suppliers, and participation in the First World War, disability and war cripples. Act 19 of 1987 on tendering that came into effect during the socialist era, that: „allowed international tendering only for a few, allowed the so-called restricted invitation to tender without any specific requirements, where the number of entrants was predetermined"[13]. Act XXXVIII of 1992 on the State Budget did not contain – until the new millennium – the rules of public procurement in full details, and therefore the act on tendering – still in force – was applied. Later, on November 1, 1995 the Act XL of 1995 came into effect that brought a significant advancement with its perspective, however the establishment of a well-functioning procurement system could not become a reality due to the lack of its traditions. The regulations in force complied with the requirements of the European Union only partially. It should be noted however, that this law stated from the very beginning, that in case of violation of the law „not only the offending party, but also the individual responsible for the infringement can be fined. Despite this, the Public Procurement Authority did not impose fine on natural persons."[14] Based on this study of Dessewffy Anna, it can be seen, that the number of legal remedies were low during the late 90s, while 45% of such proceedings were against local governments and their financial institutions, 28% of the legal proceedings were against central financial and budgetary institutions. „Only 22 legal proceedings were related to infringement regarding the call for bids, or the conditions of the documents".[15] The continuous criticism from both professionals and the public led to a completely new law, Act CXXIX of 2003 on public procurements that came into effect on May 1. Before I provide some thoughts on the aforementioned law, I would like to briefly analyze the sociological, legal, and political reasons behind the corruption in public procurement. 2000 billion forints were spent from the Hungarian State Budget on public procurements. Assuming, that we can eliminate the corruption premium – which is estimated at around 5-15% – then we could save up to hundreds of billions of forints for the state budget, that would make the continuous tax reforms, overtax, and the permanent state budget reforms unnecessary. This huge amount makes the certain links of corruption in public procurement worth analyzing at a social level. I would like to highlight some of these, as they could explain the strong influence of corruption on public procurement.

1. The first factor that could explain the situation is the fact that in case of the Hungarian society the willingness to comply with the law is very low. It can be observed in case of the enforcement of several legislations, that the compliance of Hungarian citizens with the legal norms is selective. Examples include the rules of the Highway Code, tax laws, the rules of civil law, and the norms of public procurement which are usually subject to the inaccurate use, misuse and misunderstanding by civilians, companies and sometimes even by state organizations.

Hungary is currently in an impaired condition that has negative consequences on public procurement as well. In this situation, managing public money should be of great importance. Those in the decision-making positions, who could access public funds or entitled to through their positions or connections, often aim at acquiring these public

[13] Dessewffy Anna: A közbeszerzés és a korrupció összefüggései; Korrupció 2000. tanulmánykötet, 72. oldal

[14] Dessewffy Anna: im. 77.

[15] Dessewffy Anna: im. 76.

funds – what the American literature call, the „easy money" – through the accomplishment of public procurement procedures. The transformation of public funds into private money has become a part of our life, and although irrelevant to parties it generally characterizes the political life. Similarly to taxation, the decision-makers in public procurement positions can directly experience the conflicts between private and public interest, self-interest and social solidarity. A politician is just a man after all, and therefore can draw the line between social solidarity and the well-being of his or her own, as well as the well-being of its family, with hardly any social control. The decisions made regarding public procurement procedures are often the results of such selfish motivations. Since public money counts as easy money for some people, the lack of continuous and consistent control overshadows the social responsibility, which eventually loses against self-interest. I see the morally empty, atomized social environment as the reason for the widely acknowledged and accepted levels of corruption, as the society lacks interest in the fair and righteous use of public funds. An equally serious and important problem is the professional career built on the foundations of self-licensing, self-interest and performance, therefore the possibilities of unfolding the human skills in the politically influenced human resource system of the modern public administration. Some of today's decision-makers cannot or do not want to understand their responsibility in this process, and therefore cannot or do not want to take into account the public interest. Some of them socialized in a way, that human morality, the basic ethical, legal orders did not shape them as much in becoming a politician, while in case of others the process of becoming a professional politician made them insensitive. Only in such system could it happen that a politician convicted of tax evasion was delegated as member of an Eastern-Hungarian board responsible for the allocation of EU funds. I would like to highlight a domestic deterrent example about a young politician from Bács-Kiskun County, who has been in detention, with no qualification or professional background, yet he could actively participate in project management and the allocation of public funds, as well as establish deep and valuable connections. Normally this could be impossible in a well-functioning society.

As a counterexample I would like to add the case of Lónyai Menyhért, minister of finance during the era of dualism, who was accused of renting real property (land) with far too favorable terms, yet he did not rely on his parliamentary immunity, nor did he turn to the media to argue about the case. Instead, he resigned from his position and said: I am coming back to you, when the Hungarian Court declares my innocence. There has been no inherited steady and legal increase in wealth or cultural and ethical background behind the Hungarian people nowadays. As Percel Tamás psychologist stated: three generations of library are missing, that would ensure a safe family, property and intellectual background for all of us, and would provide the foundations of the ethical social behavior. This country has been severely plundered and has broken several times in the past 100 years. It not only lacks 150-year-old libraries, but the fundamentals as well. Imagine the mayor, who, at the age of 50, can finally conduct a billion-forint project. He has never been a well-paid employee throughout his career, and his living standards cannot be compared to his western counterparts. Therefore, what he sees in this procurement project is not public interest, but rather the golden opportunity of making money. The attitude of these individuals and politicians, as they aim to grab such golden opportunities may be understandable humanly, but as a jurist it is unacceptable.

2. The second factor that promotes corruption is the low standard of the legal-financial traditions. It is hardly arguable that the continuous reforms of the state budget

as well as the never-ending governmental reforms had discouraged professionals as well as civilians from getting acquainted with the laws a long time ago, and shook their confidence in legislation. As the way I see a reform is a positive process. We make progress from a negative position towards a more positive one. The people and the professional in Hungary have witnessed in the past 60 years, that we are living in the era of permanent reforms with continuously tightening our belts. They have learned that laws can quickly fade away, are not mandatory for everyone, and change so rapidly that it is not worth aligning with them. This is especially true for the tax laws and the rules of the public procurement law, which are essentially technical in nature. The current Act on Public Procurement is over 400 sections and includes more than 70 proceedings. This legislative text changed drastically since April 1, 2009, while several newer changes took place throughout this year. A significant part of the law is a mere adaptation of the European Union laws hence it completely lacks coherence. Consequent logical order, social security, public interest or ethical rules can hardly be identified in these norms. A series of practical research prove, that merely 4-5 out of 100 Hungarian civilians can name a public revenue, and from the deep interview-based research, that I conducted and involved 2500 people[16], it can be seen that the majority agrees on the fact that tax evasion has no consequences in Hungary, and tax liabilities could be evaded through the right connections. It can be seen, that the Hungarian legal system is not consistent regarding either legislation or judgment. It is difficult to argue with Fricz Tamás, who states that this is „a country without consequences". If we look at a few major public procurement procedures, that caused great debates, then we can ask the question what consequences the three unsuccessful port construction projects of Gönyű had, the continuous delay and cost increases of Metro 4, the fine of 10 billion forints imposed on the Csepel waste water treatment plant, or the significant delay of the European Cultural Capital project of Pécs. In my opinion those liable for these intentional or negligent acts will not be found or impeached, because no one aims at doing so. This attitude perfectly fits with the legal framework of the Hungarian public finance, where not just the public procurement problems have no consequences at all, but the legal institutions have become obsolete as well. I would like to add further examples, unrelated to public procurement, such as the failure in the detection of bleaching, the low number of final judgments regarding tax evasion proceedings (more people are convicted of homicide than tax evasion in Hungary), the cartels regarding highway constructions, and the position and management of offshore companies in the Hungarian legislation. The biggest problem is the lack of predictability and stability of the legal system. Legal compliance is impossible when something prohibited today becomes legal tomorrow, what can be done with impunity becomes punishable tomorrow, and all this happening in the pervaded and rampant web of the growing legislation. Let's imagine how the continuous and significant changes in the family support services or rental assistance and housing programs affect the Hungarian society and the population as a whole. To mention a current example for public procurement: since April 1, 2009 agricultural producers could receive millions or even billions of government subsidies without the restrictions to use the funds on public procurement projects. According to current rules, investments above the value of 1.3 billion forints, if the amount of subsidy is less than the own resources, then there is no need for public procurement procedure, while in

[16] Ld. Bővebben: Dr. Szilovics Csaba Adózási ismeretek és adózói vélemények Magyarországon (2002-2007) 2009 Pécs

case of investments below the value of 1.3 billion forints there is no need to execute the public procurement procedure even if the subsidy amounts to 75%. This resulted in the fact, that agricultural companies waited till this term, and therefore they could use the subsidies to commission their friends to carry out the projects.

3. The third factor that I would like to analyze in this study is the role of politics. What I would like to highlight from the several problems of this system is that the Hungarian legislation does not use clear and sophisticated definitions, concepts, and morality. Nowadays politics cannot even decide whether our country is „poor or rich". If we think ourselves rich, then we should know that no rich country can be founded on a poor society. Because this is an impoverished society, where hardly more than 50% of the working-age population are employed, where employees in the public sector have not received pay rise since 2002, where overconsumption is a continuously mentioned but false myth, and where besides the extremely low personal income levels, 80% of the taxpayers are subject to the highest tax rate of the Personal Income Tax (SZJA). If the political elite could admit the fact, that we are a poor country, then the public funds would be used wisely and would be spent in a fair and modest way. Therefore the appropriation of public funds, the continuous replacement of the vehicles, cell phones and furniture of the state budget institutions, the reputation-based foreign investments from public funds, the digital boards, the foreign military missions and the waived claims against the so-called developing countries must be stopped. We should think over the critical super-sized projects that never see the light of day, like EXPO, olimpia, the government quarter, water steps, since each and every forint spent on such investments is a loss. If we are a poor country, then we shall build a modest, but effective state. In this situation, the politicians should provide an example, that civilians could follow, pay their taxes, and so that they could sense the service-consideration balance at a macro level. Ordinary people can understand the message of politics regarding public money, they understand these processes, and they are ambivalent regarding the fact that the government tries to collect every single forint from them, economizes on public services, while the wasteful spending can be seen in other areas. In my opinion, the big overlap between the political and the economic (market) players is a huge problem. Even back in 900 B.C in Théba was it prohibited for individuals to be a politician and then a business person within a short amount of time. Normally it could not happen that in a lawsuit between a private company and the state, a politically exposed person represents both the defendant, then later also represents the plaintiff. The level of government redistribution must be lowered radically. As a conclusion, I would like to mention the classic example of wasteful spending: the case of the digital blackboards, a public procurement which has cost 20-25 billion forints, while most of the schools have no central heating or even flush toilet, yet they could still have digital blackboards. Now, in November 2009, we know that the invitation to tender regarding the supply of digital school equipment has ended without results for the second time, because the only entrant that reached the second round returned an invalid tender. Further public tenders will not be issued.

4. The last factor that I would like to examine, which could be the first in the priority order and in my opinion goes hand in hand with corruption, is the operation of the Hungarian tender system. One of its main characteristics is that in most cases the winner could be predicted. The corruption often starts with the invitation to tender.

The first problem is that local governments cannot even finance the submission of the tender, the preparation of projects, and they do not even have the needed contributions. An important question is why the requesting parties insist on dealing with the same contractors that have caused damage during a previous project. The answer is the dependency that arises between the requesting party and the winning entrant, namely the project that binds them. The requesting party runs after its money, it wants to deliver the project on time however it forms a great relationship with the contractor, who in turn asks for a more flexible accounting that often includes allowance for additional work, or not enforcing the performance bond. Therefore they look for companies that have a performance related reward system and could settle the public procurement with its own contributions. One way to do this is to find a company that could be a potential winner with the required funds. That company then wants no more in return than to become the contractor for the project. This implicitly suggests the directional nature of public procurement, since the system can only be maintained if those who have to win will eventually win.

Naturally, the bidder knows this, and a wide range of experts have specialized in government projects, who work closely with one another and undertake all stages of the work, from tendering to conducting the project, in exchange for a considerable profit. Obviously, these groups could not maintain their activities without political support, and these experts are often related to political parties. Organizations aimed at acquiring public funds have emerged around each and every political party, similarly to the feudal system, mutually helping each other in realizing their goals at the disadvantage of the society. The fact that those win the procurement projects who eventually has to and may provide a return leads to the fact that demanding a quality service and enforcing claims and complaints becomes almost impossible due to the interwoven mutual interests. This results that public roads quickly deteriorate due to the low quality of constructions, trams are not equipped with air-conditioning, new buildings function inefficiently. In such cases in Hungary, instead of repairing the roads by the winning contractor at its own expense, a speed limit sign is placed at the critical distances due to the above mentioned problems. They don't redress the real problems, but instead they teach the civilians to accept the deteriorating conditions in such ways, that they not only set these speed limits at certain points but also enforce them, and the police can fine those who do not comply. Due to the current controlling mechanisms bidders can have a great advantage, because they can easily implement additional costs during the preparation of plans such as a 2-6% premium for the architectural plan and design, the architect's site supervision, and further 1-2% for the procurement, legal consultant, and quality assurance. However, the entrants can spend these amounts however they want and on whatever they want, as long as they keep it formal and legal. Since April 1, 2009 the legislature has facilitated their work, since official consulting on public procurement do not have to be reported if the respective costs are lower than 53-54 million forints. This consulting is often disguised as a legal service that involves the execution of the whole procurement procedure. In several cases, the invitation to tender specifies the implementation of a certain technology (certain ways of audio engineering or water treatment techniques for instance). Not to mention the fact, that the controlling and financing authorities often imply or implicitly suggest what architecture, supplier, and expert should be hired for the project. The threat of legal remedies and recourses, the preliminary control, and the possibility to cease funds can have a great pressure on the projects. A major flaw of the current public procurement procedures is that the

examination of the winning entrant regarding the quality of a potential procurement procedure is perfunctory. Although the State Audit Office does its best with the limited tools at its disposal, the public procurement procedures are not, or only formally and subsequently checked, and the disputes are resolved through legal remedies. The monitoring is usually subsequent and involves only the formal verification of the legal documentation. The Council of the Public Procurement Authority does not supervise the actual implementation, while the National Tax and Customs Administration is not capable of carrying this out, and the attitude of the financing authorities depend on the parties involved in the project. I would like to note, that nowadays in Hungary the delay or postponement of financing can kill any project. The respective monitoring of the European Union should not be overrated: this usually means the assignment of a law firm. The European Union reckons that the member states use these funds rationally and that everyone acts as one would expect. If the European Union finances Christmas projects, it does not take summer Santa Clauses into account that the projects would be carried out in the summer. This is unimaginable for them, and therefore they do not even deal with it. A major problem of the Hungarian public procurement system, that until the deadline expires, no delays in performance or default could be ascertained, and the party causing the delay could not be expelled. It could be mentioned as a positive change, that the amendments of April 1, 2009 ceased the preposterous situation with the so-called resource providing entities by restricting and limiting the possibility of acquiring funds.

Corruption Risks in the Organisation and Operation of Tax Administration in Hungary

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Abstract

The corruption of the tax authority from the practice of large taxation.
I described the specific tax authority corruption that is inseparable from the successful budgetary fraud patterns, on the basis of realised risks and true corruption cases. As long as based on the underlying principle of legal equality, legal aid and supportive expertise can be bought, we do not feel the effect of corruption. As in this system the social contract is secretly overruled and superiorly damaged by personal interest, even disguised as group interest, all kinds of justice – and here I mean the 'existing justice' of the tax-levying government – falls prey to individual interest. Then the objective justice becomes the justice of those who paid for their place in this protected zone, for this immunity, and compared to them, everyone else becomes deprived, or at least robbed of their justice.

Key-words: *coruption, deviancies in taxation, budgetary fraud, reproductive budgetary fraud, productive budgetary fraud.*

'For how long and how can one stay aside – for how long is it possible, that stories are about anybody but the one, who is talking?'[1]

I collected and processed my primary observations on the corruption of the tax authority from the practice of large taxation. I was compelled to do this work by someone who has had high level observations of corruption since the foundation of the organisation. In November 1999 we assumed that our observations are essential in order to improve the organisation and operation of the tax administration. Its thoroughness has been strengthened by a data collection in the second part of 2002. Former managers and tax inspectors gave contribution to my systematising work. The next noteworthy data collection has been carried out, as an observing participant, during 2006. Since 2010 I have been continuously collecting and analysing the corruption observations that occurred during my forensic and contribution expert job. I designed my longitudinal research plan in 2013 to monitor the corruption risks of tax authority and the realised risks.

'The corruption risk does not show the existence of corruption, but it calls attention to the organisational situation in which the probability of corruption is high, however, the chance of its surfacing, uncovering, provability is little, perhaps it converges to zero.' – said István Jávor about organisational corruption, analysing the

[1] Barak László: A halálnepper. Kalligram, Pozsony, 2010. – in: Balázs Imre József recenziója: Tízmondatosok a félelem helyeiről, Korunk 2011/9.

operation of the tax authority as well.[2] He also states here that 'if the risk of organisational corruption is high, then the risk of the realisation of this corruption is also quite high, which increases by time'.

I described the specific tax authority corruption that is inseparable from the successful budgetary fraud patterns, on the basis of realised risks and true corruption cases. Due to the exact knowledge of the chronological facts of the case, subjects and behaviours, my conclusions are focused and assured.

I tried to shed light on a fast spreading local sociopathy that infects without immune response and has never been described before in Hungary, so it is hard to proceed on a road that is paved by international literature. Maybe the result of this work can be that it connects me with the research of other criminologists, sociologists.

I designed a longitudinal research plan that can help in the scientific verification. Until the reliable assessment of the research on corruption risks, I rely on the results of the research on the realised corruption risks. On such results of which conclusive power, frequency, sufficient redundancy, proven coherency, as a forensic expert I have gained certainty.

When Sutherland terminologically captured white-collar crime, he described the criminological character of a well-known phenomenon – in the time and place of its definition – in a valid manner, but looked way beyond it, that is why I refer to the impactful criminological observation from 1940.[3]

When I quote Mérei, I do not want to draw, by any chance, any comparison between his pedagogical-sociological research findings, still I borrowed this great terminology: 'the hidden network of communities'. It will be discussed in the sense of criminology. Neither the non-internalized, non-corrupted criminal authority, nor the national sociology and criminology has defined profoundly the peculiar network, the relations of this network, and the harmful consequences of these relations, due to which the national tax authority has gotten into the situation where it is now in Hungary. This is a hidden network, which is entrenched by internal sympathy (many converging interests) into the observed tax authority organisation, into the more broadly defined "system", and also into the social relations that are 'made risk free' because of the hidden network of communities, and finally – though in a restricted manner – it sustains a 'feudal tax exemption'.

There are two paths ahead of us: we can either suppress the distress signals or observe why they are here, what we do not know about them – and what it is that we can learn about them. The scientific verification of my conclusions are partly based on sociometric foundations, partly on document-analysing, partly on documented half-structured interviews, moreover, as an in-depth observer I could exclude the assumptions from this hypothetical work.

The risks and traps of corruption perception – deviancies in taxation

We pay tax in a risk conscious – risk avoiding environment. It is expected from the tax-levying government by the taxpayers, and the institutional system of taxpaying-taxation returns this with its demands. In contrast to that, task risk is not only bad, but

[2] Jávor István: Korrupció az állam csapdájában. Felelőtlen szervezetek – korrupciós mechanizmusok, 2014, Akadémiai Kiadó, Budapest.

[3] *Edwin H. Sutherland: White-Collar Criminality,* 1940.

also good. Tax risk is multi-layered. The voluntarily law-abiding legal entity has to pay attention to every taxable facts of the case in their legal statement during their self-assessment, first and foremost in their tax declaration. They have to act in accordance with the procedural and material law norms. Tax risk includes the incorrect legal interpretation, other error in law and the legal consequences that fall on the legal subject, with all of its economic consequences as well. Furthermore, it also includes the legal and economic consequences that stem from purposefully illegal law bending. The component of risk taking that is associated with norm-following and the individual consideration of the compliance to tax law, is the beneficial risk part that economically can be taken into the norm-following dues, and in doing so, it is a rational cost. In a colloquial sense it means that it is worth complying, it is useful to conform to the norm.

The tax-levying government, apart from taxes, expects – even if it does not declare – this rational cost from every single taxable entity.

If the corruption of the tax authority is an atypical behaviour pattern and a rare practice, the taxpayer's tax law compliance is indeed a rational cost, because the task risk, in case of a norm violating tax practice generates extra cost for the taxpayer which does not pay off, so it is not a rational cost anymore. It is a simple rule, it is easy to understand it.

On the other hand, if the tax authority corruption becomes a noticeable behavioural pattern, if it is reproduced steadily and becomes a successful way of adaptation, then for the morally fragile subjects its cost becomes rational. If this practice can be experienced as a culture of high society, if this means the correct avoidance of vulnerability, if the subject's morality is not resilient, he will use it, when he can. And he is indeed using it. My statement cannot offend anybody, because this illegal taxing practice is not demanded by prescriptive legislation, so this possibility definitely must be sought after and chosen. The problem is that this possibility does exist.

And still, deep down there is the possibility of getting caught, which this weird and amoral elite culture wants to hide. Is it not the risk that those who pay for the remission of sins want to avoid, buying immunity against norm-violation, instead of paying the rational cost of following the norm?

As if the strongest currency would be common sin. You can be relieved. You cannot. This is the DNA of corruption. And it plays for high stakes.

Nowadays the economic aspect of the following and adaption of law should come to the front as well. It should be discovered by now that mutual and voluntarily norm-following makes us able to – besides the minimisation of the costs of abiding by the law – force our interests legally and effectively. At the same time, we have a fundamental need for the balanced and non-biased audit of norm-following by the tax authority; irrespective of the fact that we live in the adolescent years of the elite deviances, the control of the organisational criminality cannot ruin institutions, and taking these into account, it is not enticing, because every organisation is responsive, especially the tax authority which is the most exposed to economical relationships. It is not inconsequential that during its learning to what requirements does the tax authority adapts openly and secretly. It is also not inconsequential, whether the hidden organisational operation and adaptations are realised in legitimate or illegitimate zones, and finally it is not inconsequential whether the legitimate adaptation happens in controlled or self-verifying spaces.

So tax risk applies to everyone. It is large-scale. The means of risk aversion cannot be bought immunity. The additional costs of taxpaying have to be included into the cost

of abiding by the law. Besides the payment of abiding by the law, compliance to the tax law and the correct practice of the dispensation of justice have to become mainstream. The collateral branches have to be cut off. Those nodes that have different agendas than the mainstream have to be eliminated.

So tax risk is necessary in order to keep up the legitimate operation. Its level has to be limited and rational. And above everything else it has to be legitimate and controlled.

There can be no place for intimate spaces in taxation. However, spaces and cases that are sensitive and secret, but are under the control of the legitimate institutional system, can still remain. This is in the interest of the government. In this case, and in this case only it is in the interest of the citizen.

Nevertheless, the mass tax risk needs to be handled by proper measures. According to the status quo, the intimate spaces of the tax authority and the little and big nodes of immunity are on opposite sites of this. They are quite forcefully so. The ending is inestimable.

However, the Credit-World-Stadium Foundation carried out a survey in 2010 May-June[4], looking for the answer to the following question: whether it is possible to manage the tax-risks in a benevolent and correct way in an insurance framework, and if it is, in what form. The survey was online and voluntary. 302 companies completed it. The scope of the research included the discovery of the patterns of the countries having developed insurance culture and also the Hungarian taxpaying culture.

While conducting of the research, the 2009 annual account of the tax authority has also been analysed. After the analysis of the data of the survey from the 300 companies, Szalai came to the conclusion that in Hungary, in 2009-2010, the companies of 10-49 people are the ones who feel the most that tax-risk is serious. He gathered that decision makers only slightly sense the administrative risk differences between the tax categories, and it is rather governed by emotional factors (general fear).

He states that tax-paying related risks, on a great scale, occur mostly in cases of small companies, micro and small enterprises. The extent of risk is high here, as the usual operational risk is also higher, than in the case of large companies, and this is also heightened by the network of partners. Some of them can afford their own financial, accounting staff, who have at least partial financial, accounting experience; and their clients are much more sensitive to the reputation and usefulness (price, quality) of their goods and services, or perhaps to the stability of their partner network. There are only few reputation-sensitive companies, some of them are the ones for whom the brand is an active part of pricing (brand sensitivity).

The fact that a tax declaration is incorrect or misleading, apart from self-audit, could be discovered by the tax authority, that can assess the amount of tax, moreover, if the damage was caused by criminal offence, legal action can also lead to the assessment of the damage caused to the budget, until the correction of the missing tax assessment or tax damage. Though its frequency is not substantial.

According to Szalai's calculations, the controls in 2009 predicted 5% chance audit probability – once in every 20 years – for a taxpayer. The generally stated goal is to audit every enterprise at least once in every five years. This aim lacks any foundation, still, the system of goals and ways of the tax audit is mostly efficient among the enterprises of 10-49 people. Among the individual taxpayers the fear of stigmatising and deprivation is common.

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[4] *Szalai Péter: Kockázat, adó, biztosítás,* 2010. július Hitel-Világ-Stádium Alapítvány

Szalai highlights that according to the literature of risks and their management, the root of the definition of risk should be found at uncertainty. The definition of risk is mainly associated with the decisions leading to the exemption of uncertainty, so it is no coincidence that the general presumptions of risks and risk taking are related to decision-making theories. According to this, a general definition of risk is: risk is the description of the negatively evaluated consequences of a possible version of activity (not certainly happening), including the weight of the consequences and the probability of the occurrence.

In our mathematised world we use the definition of risk naturally. Since 1986, this definition has become part of the scientific discourse in a new, peculiar way[5]; since 2003 in the Hungarian literature: to confront the individual and the community with the incalculableness of the external effects lurking out there and steer them into the direction of the risks and their management.[6] According to Szalai, active risk taking is the foundation of a dynamic economy and innovative society.

Speaking of taxpaying-taxation from a risk management aspect, it is crucial that risk is not the same as danger or sheer luck. We also cannot speak about risk if the possibility of an event is 100% sure. So the definition of risk is inseparable from factors of possibility and uncertainty. The other dimension of risk is the seriousness of the consequences.

In cases of risks of great significance and with high probability, mostly prevention, and in a lesser extent, correction is the behaviour to be followed. This is expressed by the formula of quantified risk-management based on the risk potential:

$$R(x)=P(x)*M(x),$$

where R is risk, P is the probability of occurrence, M is the magnitude of the consequences.

In the field of taxpaying, risk and risk management occur in different terms of meaning, distinguishing the different risks of the significant parties.

The group of taxpayers is far from homogeneous, group formation can happen in various ways. Obviously, the tax system is dissimilar, so the task risk is different for those employees, who live on salaries, and do not or only slightly apply for reductions, whose tax declaration is done by the tax authority or their employer, and it is different for those companies – the employers - who think about the tax system as an inevitable trouble and employ professionals as 'tools' of the tax system. While the first group – the employees - is less sensitive to the complexity of the system, rather to the amount of tax; in case of the second group (the employers), besides the amount of tax, the price of the transactional cost of taxpaying and the cost of the management of the risk that stem from abiding by the law also add in to the expenses of the enterprise, creating real competitive disadvantage if it produces for export as well.

Still this range of risk, this 'soft' or 'hardcore' risk of norm-violation is part of the social coexistence. The sub sequential tax assessment, with all of its extra costs, or the budgetary fraud with its legal and economic consequences, is standard tax risks that we

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[5] *Beck, Ulrich* 1986: *Risikogesellchaft. Auf dem Weg in eine andere Moderne.* Frankfurt/Main: Suhrkamp Verlag.

[6] *Beck, Ulrich* 2003: *A kockázattársadalom. Út egy másik modernitásba.* Budapest: Andorka Rudolf Társadalomtudományi
Társaság – Századvég Kiadó.

consider normal. Compared to this, the risk exemption of the norm-violation that is different from the standard is uncontrolled, and happens in intimate spaces.

In the matter of tax-levying one must be open and honest, as taxpaying and taxation have to be about common duties and legal claims, that are given to everybody, so they are given to the whole legal community. The question of the serious violation of the public trust occurred in this context, according to which it has been the topic of the international public discourse for quite some time now that there are uncontrolled subcultural, deviant phenomena in the Hungarian taxation and they are not sporadic. Although the professional common knowledge is infused with the fact that the tax shortening behaviours violate the taxpayers' legally guaranteed right for the equal sharing of the tax burdens, still, the organised corruption of the tax authority strikes the heaviest blow at the proportional sharing of public burdens.[7]

As people and enterprises living with their own interests, their subjective approach to defence and survival can turn into the opposite and after that, it breaks the tolerance threshold of the community not as protection, but as majority, as supremacy. The criminological observational points of view of the discussed topic resemble white-collar and organized crime, because white-collar and organised crime show their most stealthy and viable mutations in situations of superiority.

In my work I am trying to come up with an answer to the question of where is the fault line in taxation between the enforcement of one's rights and legal abuse. Moreover, at what contact points can the shaken faith of the public be mended. What kind of atypical, complicated and useful - from the perspective of fraud – norm-violation should be the target of the peculiar legal claim of the government, of the criminal claim of the enforcement of taxpaying, besides the consistent pursuing of the reproductive tax avoidance and fraud formations.

The introduction of the definition of reproductive and productive budgetary fraud

We have to think about the fact that if the criminal law knows a certain budgetary fraud form, then those economical participants, who are able to enforce their interests efficiently, will avoid it. The known and prosecuted behaviours are repeated cyclically, what is more, István Jávor, Zsolt Bognár and Dávid Jancsics sociologists point out its widespread and daily practice. [8]

It can be seen how strongly individuals and groups are attached to the known forms of tax-avoiding and budgetary fraud behaviours. The 'easy preys' emerge from them, the ones who can be 'hunted'. It is also obvious that there is a long lasting revival of the love of the supremely and illegally gained economic benefits. Here are also some known winners and sometimes we hear from the losers from criminal cases.

The results of my research point to a territorial-like formation that sells taxpaying-taxation on a commercial basis. From the perspective of more than ten years, the serious connections of economic interests, reproductive cycles of the successful and

[7] *Angyal Pál: A magyar büntetőjog kézikönyve 8. Adócsalás,* Athenaeum 1930

[8] *Jávor István: Ezt hívják happy korrupciónak,* hvg.hu 2013. január 15.; *Bogár Zsolt – Jancsics Dávid: Joszip Tottól Taxis*

Gyusziig: Ilyenek a strómanok, hvg.hu 2013. szeptember 19.

undiscovered organisation have become visible characteristically and with proof. Just like that, the self-defensive mechanisms of the organisation also take shape properly.

The study of Semlyén-Szántó-Tóth was written is 2001, which slightly mentions the characteristic of the organisation that emerges despite the hiding, and they pointed out even then, that there is something illegal and immoral about their topic, but there are also the keywords: one commits tax fraud, has a mole in the NTCA, nobody pressed the issue, he got away, he got a car, auditor. I am quoting hereby an interview as a part of the study for second-analysis:

'The CEO-owner of an enterprise that offers tax consulting as well:

Corruption obviously does exist. It can be understood from a human perspective. I have met a client – I refused him eventually – who bragged about the fact that he has a mole in the NTCA. I was introduced to him back then when it was probable that our company would do the accounting of the client. He got a car for his services and interestingly no one noticed at the NTCA, no one pressed how he could afford a car like that from his salary. The (corrupt) company, while it obviously commits tax fraud, is still flourishing.

I have heard about another case in which during the tax audit, the NTCA found a huge tax arrears at a company, which was reported by the tax inspector to his superior. Then a long bargaining, law interpretation-wrangling began between the company and the NTCA, and then the NTCA directed the company to an auditor company… Then with suitable tricks, this company hid the most parts of the originally questioned tax arrears then got a payment that was larger than the half of the originally discovered arrears. And the company got away with the assessment of a little tax arrears that only caused a small penalty… It is without doubt that one can read only a little about exposed corruption cases. Still perhaps the written media is not likely to distort this sort of news.' (Semlyén-Szántó-Tóth, 2001)[9]

The subject of the interview seemed to be resigned to the fact that the auditor made something disappear with tricks, and that it was useful. What can an auditor make disappear? Nothing can be concealed. Those who read between the lines can see that it is only wishful thinking/temptation and hiding. But what does hide here? A community does. The hidden network of communities does. Those who pass on the baton to each other at the right point of the clerical work and the related social network. This goes on in those interstitial spaces where the public thinks that nothing happens. Because nothing should happen. These are the most incredible places. These are the places of active relaxation, having fun and sometimes even recovery. And there are many more unimaginable, but recognisable places, where one can ask for, give or get something. It can be anything, where two or more people can imagine the exchange, violating the rights of someone else.

And what about the auditor who makes something disappear? This can also happen, but the auditor alone is not enough. The network is also necessary. And in the network those very strong nodes are also required, without whom it is impossible, but with whose knowledge and acceptance immunity can be accomplished in a certain case or for a lifetime. Little by little generations have been socialized in this network. Taking part in this illegal operation actively or passively, gaining some primary advantage or secondary benefit of it.

[9] *Semjén A.–Szántó Z.–Tóth I. J.: Adócsalás és adóigazgatás,* 120. o., 2001.

So the auditors can handle it? There is always someone, not necessarily an auditor who knows how to get into the network. But then the most solid parts of the network do not have obvious entrances. To get into is a serious matter of trust. To be in it is a way of life. The auditor sector naturally, necessarily and in an encoded manner protects itself from fraud. The continuous regulation of auditing gives a framework for the goals of the independent auditor and for the execution of the audit that is in accordance with the international standards. The national standard on auditing that comprises 200 items is effective since April 2009, and in theory it excludes the possibility that an independent auditor could be 'mistaken' by agreeing with the decision makers who are laypersons compared to him, and the screening of fraud is regulated by the 240th standard.[10] The cited part of the interview from the study of Semlyén-Szántó-Tóth demonstrates the fear mixed with awe that was typical of the outsiders before and even after the study. Those fragile outsiders who want to belong to this sphere of immunity that is known by everyone.

No one can be a successful budgetary fraud, only an immune white-collar. To be immune is not only about behaviour. But it is only the behaviour that can be copied, if we observe the network from the outside.

On the other hand, the behavioural patterns, as they are well known, can be learnt easily, and they change only if they are related to new taxable facts of the case or now to the new criminal material legal facts of the case, but in a sense of law, criminal psychology or sociology, the same behavioural patterns are repeated and copied. I call this phenomenal reproductive budgetary fraud.

Apart from codified, moderated and canalised reproductive budgetary fraud, there are productive forms as well. Every productive form is a set of heterogeneous deviances, where the legal authority does not notice it or it cannot or do not want to respond to the detected behaviours or results, so these norm-violations remain latent, and in this way, the behaviour reaches its goal. When we talk about productive budgetary fraud, we have to examine the deviant behaviours of those who enjoy the illegal benefits that have been gained by long lasting (sometimes in terms of decades) successful corruption strategy.

Reproductive budgetary fraud

All those memorisable budgetary fraud patterns, methods and behaviours, that can be used to rob the protected budgets by those individuals and communities that remain outside of the organised corruption network of the tax authority, come with the risk of discovery and punishment.

'According to the explanation of the Act C of 2012 that is effective from 1th July 2013., the facts of the case on budgetary fraud has been created by the merger of eight different acts (ACC. 396 §). As Barna Miskolczi pointed out correctly, the crimes that offend the income part of the budget of the EC can also be listed here, so actually nine facts of the case have been merged into one facts of the case in the new act. On the income side there is tax fraud, tax fraud in connection with employment, excise violation, smuggling, value-added tax fraud, the violation of the financial interest of the European Community, and any other form of fraud that is related to the violation of the budget. On the expense side there are the illegal gain of economic advantage, the

[10] http://www.mkvk.hu/tudastar/standardok/standardok_2012

violation of the financial interest of the European Community, and any other form of fraud that is related to the violation of the budget.'. (Háger, 2004)[11]

Productive budgetary fraud

I call those crimes productive budgetary fraud, that besides or instead of the known patterns, methods and behaviours of budgetary fraud that exhaust the facts of case of budgetary fraud, use corruption strategies and mainly remain stay latent, because with the aid of the organised corruption network certain individuals and communities rob the protected budgets in a way that it does not come with the risk of discovery or punishment.

In 2001, the researchers of the Economic Research Centre of the Hungarian Scientific Academy, looking for the ultimate connections of the behaviours and phenomena that I discuss here, pointed out the possibility of the entwining of the government and the hidden economy:

'It is in the best interest of every government – irrespective of its political orientation – to fight the hidden economy for purely financial reasons: the greater the hidden economy, the greater the loss from the missing tax incomes. This loss can be so huge that it can be hardly compensated by the advantage that stems from the possibility that perhaps the members of the hidden economy will vote for the government in power. – Here we disregard the chance of corruption. Of course in case of the entwining of the government and the hidden economy, the mentioned benefits – at least for a short period of time, until the downfall of the system – can exceed the disadvantages that stem from the loss of tax incomes.' (Semlyén-Szántó-Tóth, 2001)[12]

The researchers add here, that 'It is in the best interest of the government to use those political means that can decrease the chance of the expansion of the non-taxpaying economy.' (Semlyén-Szántó-Tóth, 2001). Placing the problem into a government political context does not change the nature of the entwining which aims at government-spanning superiority and exclusion, gaining unjustified advantages illegal. It must be recognised, and if for nothing else then at least for the reason that since the publication of the study not only one government has been established, and the network of corruption has been reproduced, but it has also remained mainly unharmed.

In my opinion, it cannot be in the best interest of any government that has the control of legislation and criminal power up to their sleeve to entwine itself with the hidden economy in corruption. On the contrary, as this interlacing leads to the downfall of the system.[13] I think the truth instead is that there is a network of interest in the institutional system, "the hidden network of communities"[14] that is able to stay alive across legislative periods and finds its short and long term interests in corruption. According to this, in real life, a collaborating group that is mutually interested in defence, hiding, adaptation, imitation, growth, embedding into other systems and the reproduction of profit that is gained by corruption, has to entwine with the hidden economy and certain politicians also use this particularly vital corruption network for

[11] *Háger Tamás: A költségvetési csalás pénzügyi, anyagi jogi és bizonyítási alapjai, különös tekintettel a terhelt vallomására,* Jogelméleti Szemle 2014/1. szám

[12] *Semjén A.–Szántó Z.–Tóth I. J.: Adócsalás és adóigazgatás,* 26. o., 2001.

[13] *Semjén A.–Szántó Z.–Tóth I. J.: Adócsalás és adóigazgatás* ,26. o., 2001.

[14] *Mérei Ferenc: Közösségek rejtett hálózata.* Budapest [1971] (2006)

their hidden, unacceptable goals. My own observations and data gathering confirm this latter explanation.

Those who are involved in the practice of the productive budgetary fraud are not individual perpetrators. This is a heterogeneous group whose members are efficient in enforcing their interests; moreover they pretend efficiently that they abide by the tax and accounting law. Against them, the institutional system that protects the proportional sharing of public dues formally carries out the administrative and criminal law prevention entirely. Those productive budgetary frauds, who are seemingly norm-following, willing to take part in the proportional sharing of public burdens, still – with their illegal law-bending – stealthily, continuously and extremely, rob the protected budget.

This phenomenon can be described in a framework of financial control, administrative and criminal procedure system of legal remedy, where the embodiments of the norm-violators point to usually implicitly mentioned state capture.[15] The organized corruption of the tax authority is one of the clearly describable segments of state capture that is operated by a corruption network of efficient and heterogeneous composition, a corruption hierarchy, in which private interests prevail instead of the public interest.

This tax authority segment of the corruption hierarchy is the discrete imprint of the organisational system of the national tax authority. It is not at all about that the organisation of the tax authority is usually an accomplice in the organized corruption. Opposed to that, there are exactly as many number of public servants in as many positions, who are part of the organized corruption of the tax authority, as many number of public servants with as many levels of competencies could reach the goal, that is accomplishing the demanded or agreed law-bending or direct breaches of the law. Usually the top of the hierarchy shows the way, but at least has a theoretical knowledge and understanding of the goals and methods, for reasons that could be defined precisely.

The operation of this corruption hierarchy points way beyond taxation, beyond the known and overseen system of control mechanisms and the protection of criminal law. It is in the service of heterogeneous deviances, every one of them providing illegal advantages for the embedded members.[16] The internalised social group, which is the greatest winner of the illegal advantages gained by corruption, works with the segment of the tax authority that is involved in corruption in an undividable manner.

The locally valid criminological theory and corporation of the organized corruption of the tax authority versus the breaking of silence

Pure interest organises every corruption crime. The object of desire can be any kind of hardly obtainable advantage or riskily obtainable, valuable thing or service. The easiest way to define the incident of crime can be that the toughened accessibility or the restrictive condition or the risk of attainment can be compensated or avoided by paying the price of the illegally given financial or other advantages. For the incident of crime the

[15] http://transparency.hu/NIS_2011: Nemzeti Integritás Tanulmány, 2011.

[16] A korrupciós bűncselekmények hatályos szabályozásával kapcsolatban, lásd: *Gál István László: A korrupciós bűncselekmények* In: *Polt Péter* (szerk.) Új Btk. kommentár 5. kötet Különös rész Nemzeti Közszolgálati és Tankönyvkiadó Zrt., 2013. pp. 183–10.

followings are necessary: a perpetrator that can be passively paid off, the offender who is willing to commit the crime, the actively bribing other perpetrator who wants to gain the illegal advantage, and the realistic chance that the illegal advantage can be obtained in a criminal way. Given the fact that the kind of organized corruption of the tax authority that comes with serious social costs and reverberating effects usually happens between parties who are quite capable of enforcing their interest, it is particularly interesting that despite the legal consciousness that can be required from the offenders, they primarily believe in the absence of legal consequences. During the commitment of the socially quite dangerous corruption crimes the perception of corruption, otherwise known as the subjective perception of the crime against legal consciousness, does not occur in the proper intensity, because the environment of influence that can be bought with money or something else, the dramaturgy of influence gaining, overrides the legal consciousness of the subjects. This happens when the crime has to be committed or can be committed without predictable consequences by the group of subjects that are part of the crime, or at least they perceive it that way, and expressively or unspeakably an illegal 'contract' forms between them, aimed at the commitment of the crime.

This is exactly the kind of script that applies to the most dangerous organized corruption of the tax authority that exists, whose incidents of crime happen in the isolated spaces of the central institution of NTCA, with its board members; in the spaces of large taxation, mentioning the administrative branch of the Special Competence department of the Directorate of Special Cases as a prominent example, with all of its particular (not all of them) privileged connections, moreover, the spaces of the strategic and operative leaders of the apparat that deals with taxation related crime-control and law enforcement.

In theory, everything is given in these spaces for the success of organized crime, as even the appearance of the fact can be dispelled, that by exploiting the background of the given bureau and the public trust, certain people and groups would join forces to commit a crime whose social responsibility, societal cost, and eventually whose ecological footprint would be equal to the gravest damaging of the environment, the damaging of the public trust.

The critical part of the tax authority control and the related law enforcement corruption is how the traces of the complicated and multiplayer crimes can be covered up. Solely paying off the accomplices and offenders has its risks, because as a bank robbery could not end with a reassuring, fair distribution for everyone, neither can the corruption hierarchy work efficiently in the long run, because the sense of justice of the loser or the pursued is no less than that of the winner's or pursuer's, and the breaking of silence can happen anytime.

The corruption hierarchy that was mentioned in relation to the organized corruption of the tax authority is still infused with long-lasting, traditional, many-sided interests. Significant position can only be held on mutual basis. It is a shadow-organisation above the illusion hierarchy of the tax authority, with interests that span across legislative cycles, unwritten rules of distribution, stable human force. Their professionals know everything about the way rules can be violated with the slightest risk of legal consequences, how to avoid the control-mechanisms, and make the control that is able to oversee, interested in the maintenance of the status quo.

In Hungary, the regulation of the breaking of silence, that would have made multitudes interested in the exposure of the guilty group collaborations, did not develop in connection with the tax-procedure, still it was one step away from that the morally

and financially conditioned muckraker view could be taught to those resilient circles, groups and individuals who are sensitive to the public good. The social consensus, that can add effective civil control to organisational and procedural system of the general and proportionate sharing of taxation by the breaking of silence, needs to be made attractive. This would make possible that not only the flood of the evil-minded reports would give tasks to the tax authority, but the actually budget-protective, responsible attitude would also succeed. The competition law regulations, created for the treatment of cases of superiority, can be the basis for that. After all, however, the up-to-date and community-protective regulation idea - despite the existing guideline - has been lost for the kibitzers in a tactic and intelligent way. The misinterpretation of the market-protective economic policy, the cartel-protective competition and law enforcement policy, the limitless advancing of state capture at the head of tax administration and law enforcement specialised on budgetary fraud.

The legitimate communities need to be protected. But the reproduction of illegal communities needs to be stopped.

There is nothing new under the Sun; Sutherland's[17] white-collars were also born from the economic-policy way seeking that was created by social needs after the global economic crisis. They are not firstborns.[18] The privileged social groups and certain privileged social participants are the actual winners of history. For that reason their history scarcely receives criminological explanation. But here and now the problem is big. Maybe morally it is bigger than what is noticeable today. Nonetheless the concentration and centralization of capital do not necessarily come with the proneness to crime, as it is proven by so many prominent examples here and across the world. Our white-collars can be tough because of the same thing that gives character to every other white-collar individual around the world. And this is the legal and basically moral interpretation of interests. On the other hand, the moral gap that enforces the organised corruption of the tax authority, weakens even the existing moral bindings and degrades the legal consciousness to a complicated mimicry.

The connection of interests of the organised corruption of the tax authority and the possibility to step out of the reproductive cycle of committing crime

The tax authority is a quite large organisation. The number of its employees equals the number of inhabitants of a Hungarian town. Basically its operation is built on the following pillars: information technology, paper usage, specialist publishing activity, dispensation of justice, facility management and transport-logistics. There are two other great organisations that have particularly significant effect on the relationship of the tax authority with the economy, and also on the moral inside and around the organisation. The most important economically significant operation is the heavy influence on the enforcement and liquidation proceedings. And the moral engine can be any kind of educational activity that is related to the tax authority. The organisation of the tax authority can be vulnerable and corrupted through these channels, but especially at

[17] *Edwin H. Sutherland, White-Collar Criminality,* American Sociological Review, February, 1940

[18] *Irk Ferenc: Fehérgalléros bűnözés, elitbűnözés, menedzserdeviancia,* Jog, Állam, Politika, 2014/ 1., 49–67. o.

those points, where the cash flow and the connection with the operational economy is the most significant. I consider information technology- and paper-procurement extremely important. Facility management, which makes use of the rented properties, also opens up opportunities for interests that are oblivious to taxation, especially in case of rented properties that are connected to the operation of criminal organisations.

While the educational and specialist publishing activity do not come with huge cash-flow, still it is a really effective way of gaining influence and illegally setting up sources if influence. Certain information technology (back then the APEH SZTADI) and paper-procuring connection systems infiltrate the organisation of the tax authority so deeply that their harmfully internalised interests could accomplish the embedding of certain managers for decades on the most sensitive levels of the organisation. These connections are able to fully supervise the control activities and they can trade that skill for extra corruption income. They operate much more powerful, inbred 'financial relationships' than the former receipt factories and they decide on the basis of the general principals of organised crimes about the to-be protected interests, and about those participants whom they cannot get under their power and can be sacrificed. They are immune; they are free from the claim of the criminal power until the inbred group does not single them out. The outsider participant can be discredited by forged evidence, criminal procedure, because the boundaries of the circle are established in a way that makes it possible to serve the illegal (though disguised as legal) interests sufficiently and safely. This occurs in emergency situations, because the supervision of the formed discrete connection is multifaceted and strong, and if the connection in or outside of the network is appropriately embedded, then the chance of leaving the reproductive cycle of crime-commitment is negligible. If the cooperation turns out to be long-lasting, basically they can even supplement liquidity for the certain connection, where the true economic and tax law agreement is not necessary, by unlimited operational freedom, illegitimately, even with illegal VAT refund application. If it is necessary, they produce forged documents under the direction of the institutional connection.

The inbred group imitates legitimacy, using its influence and tools in a 'sufficient amount' if the internalised connections or the inbred network are in need of them: the forging of private and public documents, especially during the operation of the criminal branch, is a common tool of the inbred presentation of evidence, when the false evidence is inevitable due to the demands of repression. There were some cases where the leadership of the administration hysterically demanded 'evidence' from the investigation branch and it would have (predicted) negative outcome, if it did not turn out to be 'successful'. In these cases, those personal and group purposes standing above the legal operation of the tax authority succeeded, that reached their financial or personal benefits by a suppressive measure over a tax subject accomplished by the tax authority. It was able to enforce it illegally in a way that the network of the criminal power that cooperates with the tax authority did not detect it or particularly supported it, perhaps it was also involved in the 'presentation' of the evidence. The mutually beneficial interest was at least the opportunity of position.

If any of the serious secrets of the organised corruption hierarchy becomes threatened, this network of interest interferes with any economic relation, and it does not spare the individual or group that becomes dangerous, or even their family relations.

In case of another authority it had happened that they had a pressing investigation action, and though they kept it behind closed doors until the very last minute, by the time they carried it out (the search warrant), the detectives of the NATC had covered up the evidence that pointed to the 'organisation cemetery' from the spaces of the subject who was 'protected' by them.

There seems to be a strong connection between the well-known VAT fraud cases that flamed up in relation to corn trade and the elitist, biased and negligence-motivated trespassing of the criminal leadership of the NATC that are connected to its certain social, hunting and political relationships.

I wanted to point out by my sampling type list, focused on certain emphasised phenomena, that breakage regularly happens even in the inbred corruption network, related to taxation. As the mere existence of the hidden network is a dysfunction, their accomplishments that resemble a crime organisation, also cannot be kept alive forever. In every case, beyond the actual gain, the unwanted deposit of the illegal activity is preserved: the bodies that were left behind, and the breaking of silence of those who were left out in the cold or the morally ascending ones.

The organisation of the tax authority is really young, not traditional and only seemingly transparent, so its extremely sensitive operation also cannot be sufficiently transparent. As those criminological factors that vastly influence the operation of the organisation are reproduced almost unscathedly in interaction with the organisation, I think it is unavoidable to apply the philosophy of the RNR (Risk – Need – Responsivity) model to the monitoring of the organisational operation, at least in case of the particularly exposed leaders. According to Judit Szabó,[19] the first version of the RNR model was created by Andrews Bonta and Hoge, and has been found to be a theoretically firmly supported, pragmatic and efficient model to assess the risk factors that increase the probability of recidivism, the criminal needs and the receptiveness, responsiveness of the individual, if they use it to aid the rehabilitation of criminals, as the theory and model has been created for this.

In my opinion, the application of the three main principals that serve as the core of the RNR model: risk, need and responsivity could also improve the control of the criminal needs of the leaders of the tax authority.

Szabó points out that empirical evidence verifies the efficiency of the RNR model, and the principals that serve as its foundation are also well-grounded. She highlights that due to the standardised tests that are based on quantitative results, the application of the RNR model is relatively easy compared to the qualitative diagnostic procedures, and the results are comparable as well. Szabo also calls attention to the fact that the RNR model has several weak points from theoretical and practical aspects as well, criticising the legal validity and reliability of the methods of risk assessment. It is true, nonetheless, that the pros and cons of the RNR model supports the fact that it exposes the criminal needs.

Desistence and restorative practice for bridging the moral gap

Taxation is one of the most important and sensitive public duties. No matter what deficit hides in Pandora's Box, after opening it up, hope also cannot stay inside. Many

[19] A bűnelkövetők rehabilitációjának meghatározó irányzatai a nemzetközi szakirodalom tükrében, Szabó Judit, Országos Kriminológiai Intézet, Alkalmazott pszichológia 2012/2, 73–88.

dispensers of justice still remain stuck in the cycle of committing crime, in the several sticky relations of interest, in hopelessness, in the pit of individual or group crimes.

I draw a parallel between Judit Szabó's explanation and for the benefit of the reintegration of the group that I studied, I shift the stress from the treatment of the deficits of the now latent criminals to their skills and capabilities that could be used for reintegration. Here I also agree with the idea that (Ward and Maruna, 2007, cited by Szabó) 'the strengths (capabilities) should be mapped out in the same way as the risks and needs (Workman, 2009).'

As in case of the classical rehabilitation of criminals, by approaching the disturbances of the moral works of the tax authority on the basis of risk and need, a new direction of reintegration should also be developed, because due to its special maintainer public duty, it is one of the most important pillars of society. The permanently and currently existing organisational and operational deficits of the tax authority should be replaced with only those kinds of activities which are useful for society as a community of law, with sense of responsibility, with future-orientation, and with the development of prosocial identity.

Choosing resiliency

The new way of access to the law is that the market of law services has expanded, and in taxation it has been extended to the access of 'justice'. It is a terrible mistake if an unspoken and extremely distorted feudal tax-free principal crawls under the floor of declared proportional sharing of public burdens, into the public law and financial relationship of the individuals and groups with the government. Should not those pay entirely the public burdens that bribe the illegal tax collector and fail to break the silence? Can tax authority be used as a tool for suppression, for personal or group interests if this is what the privileged segment wants?

As long as based on the underlying principle of legal equality, legal aid and supportive expertise can be bought, we do not feel the effect of corruption. As in this system the social contract is secretly overruled and superiorly damaged by personal interest, even disguised as group interest, all kinds of justice – and here I mean the 'existing justice' of the tax-levying government – falls prey to individual interest. Then the objective justice becomes the justice of those who paid for their place in this protected zone, for this immunity, and compared to them, everyone else becomes deprived, or at least robbed of their justice.

Gaetano Mosca developed the definition[20] of political class in the late 1800s: 'In the government, everything that is connected to decision making, the practice of power, order and taking responsibility, is always the role of a certain class; though the members of this class can vary across countries and historical periods, whatever should be the composition of this class, it is always in infinitesimal minority compared to the masses it governs, that is submitted to its will."

Both the definition of political class, developed by Mosca and theory of governing elites by Vilfredo Pareto assumes that no society can exist without the necessary duality of those who rule and those who are ruled, but there is no social consensus, no theory

[20] *Gyáni Gábor: Az elit fogalma és történelmi változékonysága,* Korunk 2009. március

that explains the legitimacy of the benefits that are gained by corruption, so the self-preserving and reproduced 'elite' that is created in this way cannot exist permanently.

Both the community and the authority, every legal subject and dispenser of justice who is interested in the sharing of public burdens have to develop the ability of flexible resistance in order to not allow the influence of wealth to damage the proportional sharing of public burdens, no matter how strong the desire, how frequent or shocking the enticing effect is, how easily reachable the rewards seem to be at the expense of the proportional sharing of public dues.

As soon as possible, the good condition of public trust should be won back or most likely be won, because our burdens are definitely shared.

Lawyers and Money laundering

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Abstract

The European recommendations suggest that the lawyers are considered gatekeepers of money laundering, such persons who can contribute to the legalization of money acquired through illegal ways with their expertise in the area.

The Hungarian legislation concerning money laundering that can potentially affect lawyers raise serious constitutional concerns on several points.

It is increasingly common in the international legal practice, that a criminal proceeding is launched against a lawyer. These proceedings are often based on the assumption that the criminal defence lawyer has conducted money laundering by receiving his legal fee.

Keywords: *money laundering, lawyers, criminal proceeding.*

The involvement of the **lawyers** on the money-laundering[1] is always a "hot-topic" in the public opinion, legislation and the international legal literature[2] as well. A specific **tension** can be felt in a lawyer's position[3], on the one hand the client's interest has to be represented –who is an actual or alleged perpetrator- , on the other hand this representation must be achieved within the framework of legality. Briefly below we take up some – our constitutional point of view – considered question in connection with the describing of the fight against the money laundering[4] and the provisions for lawyers.

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[1] Dennis Cox, *Handbook of Anti Money Laundering*, John Wiley & Sons, Ltd, Cornwall, 2014. p.6. " The idea of money laundering is simple in principle. The person who has received some form of ill-gotten gains will seek to ensure that they can use these funds without people realising that they are the result of inappropriate behaviour. To do this they will need to disguise the proceeds such that the original source of the proceeds is hidden and therefore the funds themselves appear to be legitimate. Given that it is often cash that needs to be disguised, the criminal will often seek out legitimate cash-based businesses to enable them to disguise the source of their illegitimate cash."

[2] Ping He, *Lawyers, notaries, accountants and money laundering*, Journal of Money Laundering Control, Volume: 9 Issue 1, 2006 pp. 62-70; Marcelo Ruiz, *Lawyers and money laundering*, Journal of Money Laundering Control Volume: 7 Issue 3, 2004 pp. 272-274; Klaus Bernsmann, *Der Rechtsstaat wehrt sich gegen seine Verteidiger – Geldwäsche durch Strafverteidiger?* [The legal state defends itself against its defenders - money laundering by criminal defense lawyer] In: Festschrift für Klaus Lüderssen zum 70. Geburtstag am 2.Mai 2002, Nomos Verlaggesellschaft, Baden-Baden, 2002, pp. 683-692.; Keppeler, Frank: *Geldwäsche durch Strafverteidiger* [Money Laundering by criminal defence lawyer] Deutsche Richterzeitung 2003/3, pp. 97-104.; Eugene R. Gaetke – Sarah N. Welling, *Money Laundering and Lawyers*, Syracuse Law Review Vol. 43 1992 pp. 1165-1245.

[3] Matt Holger, *Strafverteidigerhonorar und Geldwäsche* [Criminal Defence Lawyer's fee and Money Laundering] In: Festschrift für Pter Reiss am 4.Juni 2002, hrsg. von Ernst-Walter Hanack, Hans Hilger, Volkmar Mehle, Gunter Widmaier, Walter de Gruyter, Berlin, New York, 2002, p. 739.

[4] A Lawyer's Guide to Detecting and Preventing Money Laundering - A collaborative publication of the International Bar Association, the American Bar Association and the Council of Bars and Law

1. According to the Hungarian Criminal Code [in the following: HCC], it is realized a **qualified case** of money laundering[5], when it is committed by an **attorney-at-law** [HCC Section 399 (4) section e) p.]. According to the Act XI of 1998 Section 13 (1) on Lawyers, any member of the bar association who has taken the **attorney's** oath may engage in legal practice (except the assistant attorneys). Obviously it does not based on this more serious qualification if the perpetrator **pauses** the advocatory action according to the Act XI of 1998 Section 17 (1), or if he not drills[6] it according to the Act XI of 1998 Section 18 (3) or rather will be **suspended** according to the Act XI of 1998 Section 54 (1).[7]

Because of the phrasing of the law, it includes the **assistant attorneys** according to the Act XI of 1998 Section 84 (1) because he practices law on the basis of an employment relation created with an attorney or law firm; although he is not a member

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Societies of Europe. October 2014. p. 4. " Money laundering involves three distinct stages: the placement stage, the layering stage, and the integration stage. The placement stage is the stage at which funds from illegal activity, or funds intended to support illegal activity, are first introduced into the financial system. The layering stage involves further disguising and distancing the illicit funds from their illegal source through the use of a series of parties and/or transactions designed to conceal the source of the illicit funds. The integration phase of money laundering results in the illicit funds being considered "laundered" and integrated into the financial system so that the criminal may expend "clean" funds."

[5] Act C of 2012 on the Criminal Code Money Laundering "*Section* 339 (1) Any person who, in connection with an asset obtained from any punishable criminal offense committed by others: *a)* converts or transfers the asset in question, or performs any financial transaction or receives any financial service in connection with the thing in order to: *aa)* conceal or disguise the origin of the asset, or *ab)* frustrate the criminal proceedings conducted against the perpetrator of a punishable criminal offense committed by others; *b)* conceals or disguises the origin of the asset and any right attached to the asset or any changes in this right, or conceals or suppresses the place where the asset can be found; is guilty of a felony punishable by imprisonment between one to five years. (2) The penalty under Subsection (1) shall also be imposed upon any person who, in connection with an asset obtained from a punishable criminal offense committed by others: *a)* obtains the asset for himself or for a third person; *b)* safeguards, handles, uses or consumes the asset, or obtains other financial assets by way of or in exchange for the asset, or by using the consideration received for the asset; if being aware of the true origin of the asset at the time of commission. (3) The penalty under Subsection (1) shall also be imposed upon any person who, in order to conceal the true origin of an asset that was obtained from a punishable criminal offense committed by others: *a)* uses the asset in his business activities; *b)* performs any financial transaction or receives any financial service in connection with the asset. (4) The penalty shall be imprisonment between two to eight years if the money laundering specified under Subsections (1)-(3): *a)* is committed on a commercial scale; *b)* involves a particularly considerable or greater amount of money; *c)* is committed by an officer or employee of a financial institution, investment firm, commodities broker, investment fund manager, venture capital fund manager, exchange market, clearing house, central depository, body acting as a central counterparty, insurance company, reinsurance company or independent insurance intermediary, voluntary mutual insurance fund, private pension fund or an institution for occupational retirement provision, an organization engaged in the operation of gambling activities or a regulated real estate investment company; *d)* is committed by a public official; *e)* is committed by an attorney-at-law.(5) Any person who collaborates in the commission of money laundering as specified under Subsections (1)-(4) is guilty of misdemeanor punishable by imprisonment not exceeding two years."

[6] Act XI of 1998 on Attorneys at Law "*Section* 17 (1) An attorney may suspend his practice - with the permission of the bar association. Suspension is for a minimum of three months. The bar association may refuse to permit suspension if the attorney has not properly provided for handing over or terminating his agencies and - if the person announcing the suspension employs assistant attorneys and articled clerks - he has failed to make the arrangements stipulated in the Labor Code for the employee relations of assistant attorneys and articled clerks."

[7] László István Gál, *A pénzmosás* [The Money Laundering], KJK-Kerszöv Jogi és Üzleti Kiadó Kft., Budapest, 2004, pp. 99-100.

of the bar, but he falls below similar judgment with the lawyers. According to the Section 84 (1), the assistant attorney can practice the law solely by the employer with his assignment. Consequently, if the assistant attorney commits the money laundering based on attorneys assignment, but he is not aware of the crime, in that case the lawyer who gave the assignment – agree with László István Gál – will be an **indirect perpetrator**. According to the Act XI of 1998 Section 95 (1) on Lawyers, the articled clerks don't belong to this group, because an articled clerk is not a member of the bar association according to the 96 (2) section.

It can cause a **problem**, a crime is committed by only those person, who is a bar member, or it can happen without this "operating permit"?

Mihály Tóth[8] and László István Gál[9] have an opinion that the crime can be realized without this admission, because the main point is that "to be a lawyer" is a facilitating condition for the realization of the money laundering and not the actually registered bar membership. We think that this interpretation could be suitable for the further conversation, we should examine that it would be more appropriate to handle the statutory more formal, so to narrow the fact pattern for those who have bar membership.

The HCC Section 400 (2) controls the **reasons of the terminating of criminality**, its criminal policy reason that a greater interest connects to the uncovering of the unexplored or only partially explored acts, than the perpetrator's punishment. The exploration of the money laundering may results not only the returning of the damage caused by the basic crime, but it also prevents that the legalization of the material assets, which were acquired in a guilty way, ensure the financial background of the further new crimes. Nevertheless it is a question, if the lawyer committing the crime with the mandator, how realistic is this regulation?

2. In the former[10] money laundering law (Act XXIV of 1994.) – commonly called "Brick law"- have not been set those provisions which are specialized for the lawyers. This was obviously regulated[11] in the new Act CXXXVI. of 2007 [in the following: AML], which is about the prevention and impeding of the money laundering and terrorism financing[12]. The legislature regulated in the HCC Section 401 the misdemeanour of the failure of the **notification obligation in connection with money laundering**. This action can be called "bank money laundering", although it affects now a much widely area. The background norm is the above-referred Pmt. law.

This law – despite some of the provisions which contains at the Hungarian Legislator's common standard "overfulfilment" elements and some controversial elements –

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[8] Mihály Tóth, *Gazdasági bűnözés és bűncselekmények* [Economic criminality and crimes], KJK-Kerszöv Jogi és Üzleti Kiadó Kft., Budapest,2002, p. 361.

[9] Marco Arnone – Pier Carlo Padoan, *Anti-money laundering by international institutions: a preliminary assessment*, European Journal of Law and Economics, Volume: 26, Issue:3, 2008, pp. 361-386.

[10] Judit Jacsó, *A pénzmosás elleni fellépés nemzetközi eszközei* [International], Magyar Jog 2000/6, pp. 545-549.

[11] Pál Sinku – László István Gál, *Dinamikus és statikus pénzmosás - egy új tényállás kritikai elemzése* [Dynamic and static money laundering - critical analysis of a new statement of facts], Magyar Jog 2008/3. pp. 129-133.

[12] László István Gál – Mihály Tóth, *The Fight against Money Laundering in Hungary*, Journal of Money Laundering Control 8 (2) 2004. pp. 186-189.

corresponds to the **international**[13] and **European** recommendations and prescriptions[14]. It proceeds that the large amount movements, mobility, investments of the material essential and its consistent analysing organizations, which operate with the appropriate system and able to eliminate the indicators which allude to the commitment of a crime. The announcement of these are more important than the law and the obligation related to the **secrecy**.

On a more general level, given the present conditions, the social interest against the spreading **organized crime** may be more important than the relationship between the person who perform certain financial activities and his client, or the protection of the personal data.

The content of the lawyers activities can be found in the Act XI of 1998 Section 5 (1). According to this an **attorney** represents his client, provides the defense in criminal cases, provides legal counsel, prepares contracts, petitions and other documents, holds valuables deposited.[15]The assistant attorney performs attorney's activities. According to some legal literature opinions – István László Gál[16] – the articled clerks perform attorney's activities too, however we do not share this interpretation. According to the Act XI of 1998 Section 13 (1) on Lawyers, any member of the bar association who has taken the attorney's oath may engage in legal practice (except the assistant attorneys). The articled clerk does not have bar membership and legal qualification exam, so we consider unreasonable this broad interpretation of the legislation.

According to the AML 6-7. section, those people who perform legal activities have identification and reporting obligation, if they hold any money or valuables in custody or if they provide legal services in connection with the preparation and execution of the following transactions in accordance with the Act XI. of 1998 (1) of Section 5. (For example he assists in the preparation of real estate purchase contract.)

The lawyer can't be held accountable for the **obligations** described in AML, in such cases when he became aware of the data, fact or circumstances suggesting money laundering during a **criminal proceedings**, **defence** and representation in court in progress (not including representation in court of registry), or became aware during preparation, execution, or following execution related to the abovementioned

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[13] Camelia Şerban Morăreanu, *Money Laundering – an Economic Offence*, Journal of Knowledge Management, Economics and Information Technology, Issue 7, December 2011 pp. 1.4.

[14] Peter Lewisch, *Money laundering laws as a political instrument: the social cost of arbitrary money laundering enforcement*, European Journal of Law and Economics, Volume: 26, Issue:3, 2008, p.409. "In the light of the aforementioned situation, it is no surprise that international covenants have developed (albeit under considerable pressure from their net beneficiaries) that obligate the signing parties to enact pertinent anti-money laundering legislation and to enforce it. Typically, these legal instruments have also required the signing states to provide for measures that allow seizure and confiscation of the proceeds of crime and disgorgement of gains."

[15] Act XI of 1998 on Attorneys at Law "*Section* 5 (3) Attorneys may provide the following services in addition to those specified in Subsection (1): *a)* tax consultancy, *b)* social security consultancy, *c)* financial and other business consultancy, *d)* real estate agency, *e)* patent agency, *f)* activities authorized by legal regulation (with the exception of local government bylaw), *g)* mediator activities in mediation proceedings regulated in specific other legislation, and in criminal cases, *h)* converting the instrument of constitution of a company - that he has prepared - and the additional appendices of the company's application for registration (notification of amendments) into electronic format, *i)* services of accredited consultants for public contracts; *j)* notifier protection."

[16] See: László István Gál, *A pénzmosás és a terrorizmusfinanszírozás az új magyar büntetőjogban* [Money laundering and financing terrorism in the new Hungarian criminal law], Belügyi Szemle 2013/6. pp. 26-32.

representation, defence and proceedings, including **legal consultancy** considered necessary for execution of above activities.

The European recommendations suggest that the lawyers are considered "gatekeepers" of money laundering, such persons who can contribute to the legalization of money acquired through illegal ways with their expertise in the area, which explains the overzealous approach of the legislature.

3. The Hungarian legislation concerning money laundering that can potentially affect lawyers raise serious **constitutional concerns** on several points, though the national legislature did no more than adopting the EU regulation into our national legal system. (Which is still does not mean that the EU regulations related to money laundering would stand the test of the European Court or the European Court of Human Rights)

According to Criminal Procedure Act XIX of 1998[17] Section 5 (1): "The accused is entitled to legal protection" and "… the **defence** of such person can be carried out by a defence attorney during any stage of the procedure" [CPA Section 5 (3)], and "the defence attorney is obliged to use all means and manners of legal defence in protection of the accused in a timely manner" [CPA Section 50 (1) point b.)], and "inform the accused of his rights and any **legitimate means of defence**" [CPA Section 50 (1) point c.)].

Hence the abovementioned includes that in case the accused suggests a defence tactic that is not compliant with the law, the defence attorney should inform the accused of this circumstance. (However the defence lawyer can not be held accountable for, in case the accused resolves to such tactic despite the pre-notice).

According to Bar Act XI of 1998 "Section 8 (1) "Unless otherwise prescribed by law, an attorney is bound by confidentiality with regard to every fact and datum about which he gains knowledge in the course of carrying out his professional duties. This obligation is independent of the existence of the agency relation and continues to obtain after he has ceased to function as an attorney in the given matter," also "during official investigation conducted at the lawyer, such lawyer can not reveal documents and data related to his client" and "the lawyer and his staff can not be questioned regarding such data and fact that was learned as a defence attorney".

The justification of the Bar Act correctly lays down that the obligation of confidentiality is the rule of **guarantee** for the operation of the lawyer, and as such it is unlimited:

- It covers all the facts and data, which became aware during the performance of the lawyer's profession
- Independent of the existence of a contract with the client, and the lawyer is obliged to act as such even if the contract with the client has not been realized or terminated.
- Independent from the operation of the lawyer, therefore remains in effect after the termination of the lawyer's activities in this capacity.

The defence lawyer has an autonomous status during a criminal proceeding, his operational activities are independent from that of his defendant, therefore there is no such person that can relieve him from the obligation of confidentiality regarding facts and data learned during his mandate as defence attorney. (This rule prevents the

[17] in the following: CPA

potential influence of the accused, due to which he would relieve the defence lawyer of his duties of confidentiality.) The law – in order to avoid legal uncertainty – also correctly extends this prohibition described in Bar Act Section 8.§ (3) to staff of lawyer.

The Operatonal Rules of The Hungarian Bar Association 1/1999 (III.22.) includes the followings on the ethical rules and expectations on the lawyer's profession:

- "The person under the confidential obligation shall keep such secret from any person" (point 4/3.)
- "The lawyer can not do a testimony regarding **the secrets of the defender**, and can not transfer documents containing such secrets to the authorities. Keeping the secrets of the defender is mandatory, irrespective of any statements made by such person ruling over such confidential information" (point 4/5.)
- "If the person ruling over the confidential information commences a legal proceeding against the lawyer before any authority or court, it will be deemed to consent that the person under confidential obligation can be relieved of this obligation to a certain extent that is necessary for his legal defence. However, the confidential obligation as a defence lawyer is not included in this rule" (point 4/5.)

4. The international literature puts substantial emphasis on the connection between defence fees and money laundering within the field of lawyer's money laundering. It is increasingly common in the international legal practice, that a criminal proceeding is launched against a lawyer. These proceedings are often based on the assumption that the **defence** (lawyer) has conducted money laundering by receiving his **legal fee**. It is common practice in Germany, that the Prosecutor's Office sends a "Letter of Warning"[18] to the defence lawyer before the initiation of the criminal proceeding.

The various interpretations in mainstream literature differs in a sense, whether the receipt of legal fee should be exempt from this fact, or be limited to acts of direct intent. (The actual court practice varies. According to a German higher court - Hanseatic City Court of Appeals[19] - opinion, the defence lawyer can not be held accountable for receiving legal fee despite aware of the fact it is from criminal activity, if none of the victims has needs that would be jeopardized by payment of such legal fee. By contrast, the ruling of the Second Criminal Council of the Federal Supreme Court states that if the defence lawyer accepts such legal fee that he is aware of being from a criminal activity, then the lawyer should be punished for money laundering.

In this essay concerning the relation of money laundering and lawyers, we have only highlighted some of the issues, however many other intriguing questions are yet to be answered. In our view, the Hungarian Bar Association has taken the necessary steps that are required for combating money laundering, among many actions created its Code of Conduct on prevention of money laundering in line with its legal obligation, which provides ample guarantee in order to combat this crime.

In our view, if the legislature would oblige the lawyer to report, it would reduce the defence options of the accused, which would seriously endanger the principle of "**equality of arms**". It is also problematic if the position of the defence lawyer is unstable from a legal perspective, as the Bar can and would relieve the defence lawyer from his position, due to suspicion or accusation, even if it is a severe crime. Utilizing

[18] Holger, *op. cit.*, p. 740.

[19] HansOLG Hamburg: *Keine Strafbarkeit wegen Geldwäsche bei Annhame eine Strafverteidigerhonoras* [No punishability by the acceptance of legal fee] Neue Juristische Wochenschrift 2000, p.673.

this trick, the investigators or prosecutors would easily be able to "remove" lawyers that are inconvenient for them, even if such lawyer performs his duties at a high standard. A "**friendly police dog**" can easily find illegal drug in the car of any defence lawyer. From this point onward, the defence lawyer finds himself in a difficult position from professional and ethical point of view, and the enforcement authorities instantly achieve a case that is "already won".

The attention is called to three important rules of thumb to criminal defence lawyers: "Know your business", "Know your customer" and "Know your employee".[20]

The defence attorney is the real guarantee of a constitutional state. Audiatur et altera pars. The European legislators would do better to incorporate the opinions of the defence attorneys when creating regulations concerning them but without them, simply in the name of the battle against money laundering, as it is easy to cross the Rubicon between legality and injustice.

[20] Zéman Zoltán – Lukács János – Túróczi Imre, *A pénzmosás megjelenése a gazdaságban* [Appearance of money laundering in the economy], Polgári Szemle 2015/1-3.pp.105-107.

The organised criminal phenomenon on the Internet[1]

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Abstract

The use of Internet offers wide range of available features for cybercriminals which are exploited by them such as anonymization, encryption and virtual currencies, creating constant challenges for law enforcement. Cybercrime is getting more sophisticated and increasing in scale and impact. Cybercrime has also become a big profit-driven illegal and service-based industry and created the Crime-as-a-Service business model. It lured even the traditional mafia-style criminal organizations into the cyberspace since they are able to expand and transfer their offline activities.
The present paper analyses the followings:
- *the organised criminal characteristics with general aspects*
- *criminal communication and networking*
- *DoS, DoSS – attack with extortion*
- *unlawful gambling operations*
- *child pornography as a business opportunity*
- *online money laundering.*

Keywords: *organised crime, cybercrime, DoSS attack, unlawful gambling operations, child pornography, online money laundering.*

1. The organised criminal characteristics with general aspects

The disadvantage of the technology development is that the criminals may exploit and take advantage of the modern technology for their own criminal acts.[2]

First of all, the present paper examines criminal networks in cyberspace. Cybercrime has become a big profit-driven illegal and service-based industry. It has developed the Crime-as-a-Service business model which provides a wide range of services such as rental botnets, denial-of-service attacks, malware development. It has

[1] The present paper is part of a project, namely the program for raising the quality of legal education and research, supported by the Hungarian Ministry of Justice. [Jelen tanulmány az Igazságügyi Minisztérium jogászképzés színvonalának emelését célzó programjai keretében valósult meg.]

[2] Papp, P., Hi-tech bűnözés napjainkban [High tech crime in our days]. Belügyi Szemle 52. 2001/11-12. p. 5.

also lured traditional organised crime groups into cybercrime areas since it offers high financial gain with low risk. Cybercriminal groups lack the structure and hierarchy of a traditional organised crime group.[3] "The most common view on the structure of organised criminal groups is that they represent flexible network formed by high-skillet, multi-faceted cybercriminals."[4] They plan, organize and commit numerous cybercrimes and set up online criminal networks which operate on a "stand alone" basis. Their members rarely meet or keep physical contact in person with one another, only meeting online. The organization is run by its core members.[5]

Cybercriminals started to adapt legitimate business models and imitate the operations of big companies such as eBay, Yahoo, Google and Amazon. They provide the most value for their consumers, who are not the victims, but the criminals using the tools to commit different crimes.[6]

McGuire has suggested a typology of cybercrime groups, which has six types of group structure with three main groups.[7] The first group operates fundamentally online and assessed via reputation in their online activities. It can be divided into two types firstly, there are the swarms, which are large collectives, disorganised organizations without leadership, typically consisting of ephemeral clusters of individuals, active in ideologically driven online activities such as hate crimes and political resistance (e.g. Anonymous has a swarm). Secondly, there are the so-called hubs, which are more organised with a clear, central command structure and diverse online activities from botnets to online sexual offences. The second type of group is called "hybrid" since it combines both online and offline activities. There are also two types within the hybrid one: the clustered hybrid, which operates as a small group and focuses on specific activities or methods and the extended hybrid, which is similar, but a lot less centralized. The third type of group operates mainly offline but take advantage of technology development to improve their offline activities. It can be subdivided into hierarchies, which are the traditional criminal groups, mafia crime families who continue their activities online such as pornography, online gambling, extortion and aggregates, which are loosely organised, temporary groups without a clear purpose sometimes, their operation is ad hoc.[8]

We chose the title carefully, since the paper analyses the problem more widely rather than only focusing on the Hungarian Criminal Code's concept of criminal organization.[9] We also deal with organised crime related acts which have some organised criminal characteristics.[10] Complex illicit operations, cybercrime infrastructure, the level of

[3] EUROPOL – Internet Organised Crime Threat Assesment (IOCTA) 2014. p 9.

[4] Tropina, T., The evolving structure of online criminality: how cybercrime is getting organised. eucrim 4/2012 p. 162.

[5] http://www.unicri.it/special_topics/securing_cyberspace/cyber_threats/explanations/ (accessed: 12.11.2016)

[6] Tropina, T., op. cit. p. 158.

[7] McGuire, M., Organised Crime in the Digital Age. London: John Grieve Centre for Policing and Security.

[8] Broadhurst R. – Grabosky P. - Alazab M. – Chon S., Organizations and Cyber crime: An Analysis of the Nature of Groups engaged in Cyber Crime. International Journal of Cyber Criminology. Vol 8 Issue 1 January - June 2014. p. 5-7.

[9] According to the Hungarian Act C of 2012 on the Criminal Code: 'criminal organization' shall mean when a group of three or more persons collaborate in the long term to deliberately engage in an organised fashion in criminal acts, which are punishable with five years of imprisonment or more.

[10] Korinek, L., Kriminológia II [Criminology II]. Budapest, 2009. p. 338-339.

specialization through division of labour show the characteristics of organised cybercriminal activities in order to gain financial or other material benefits.[11] The following characteristics can be recognized in the online environment:

a) Committing a single crime is not a lucrative investment:

- Legitimate and relatively bureaucratic actions are required: domain name requisition, web hosting rental, later on establishment of foundation for money laundering, application for different permits which allow them to do legal, but cover activities such as online gambling.

- It also requires financial investments: the expense of Internet access and web hosting rental, the fee for making the website, the price of the programme for website mirroring or covering their TC/IP number.

b) Division of labour[12] is also necessary as it appears typically in case of crimes committed by criminal groups. The division of labour between its members and their activity in criminal organization generally is aimed to maximize profit.[13] In case of organised cybercriminal organizations, the increasing specialization of perpetrators is typical and the tasks are divided amongst its members.[14] The knowledge of information technology is manifold so as the expertise and designated role of the cybercriminal group members, though some tasks might be outsourced:

- Coders or programmers write the malware, other software tools and design or upload a website to commit the cybercrime. As regard designing a website, there are many websites which make available templates free of charge or for money. These templates are simple and meet basic requirements, although specialized technical knowledge is needed to create more complex ones. The legitimate business associations may also design or upload websites, even provide web hosting services. If the cover-up activities are legal (foundation, online gambling, sale of used belongings etc.) then they can make and upload the websites without consequences. Although they must be aware of that if these activities or contents (pornography, pedophilia, drug distribution, illegal gambling etc.) are considered to be illicit then they may become perpetrator or accomplice by uploading the website. The criminals generally do these for themselves.

- Distributors or vendors trade and sell stolen data or illicit goods.

- Technicians maintain the infrastructure and technologies such as serves, ISPs and encryption. The server provider for the Internet access and the contracting party with the web hosting service provider who rents it are two different people generally. The Internet access: through legitimate service provider or through web hosting service. After this they might use tricks to hide the subscriber or his/her computer (server): For example, when the server crosses the Hungarian border (or overseas). It raises some jurisdiction related questions. It is possible that the server is in Hungary, but its content

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[11] Nato, J., Cybercrime, Organized Crime and Societal Responses. Emilio C. Viano (editor). p. 186.

[12] The developed division of labour can be recognized in case of other crimes. See: Réka Gyaraki, Az on-line elkövetett szerzői vagy szerzői joghoz kapcsolódó jogok megsértésének bűncselekménye. [Online infringement of copyright and certain right related to copyright]. Infokommunikáció és jog. 41. 2010/6. p. 220.

[13] Balogh, Á., The definition of criminal organization and consequences of committing crime in the framework of a criminal organization under Hungarian criminal law. Law Series of the Annals of the West University of Timisoara 2015. p. 17.

[14] Tropina, T., op. cip., p. 158.

http://www.unicri.it/special_topics/securing_cyberspace/cyber_threats/explanations/ (accessed: 12.11.2016)

is mirrored to another country's website. Mirroring is not a complex activity, though it requires some practice.[15]

Anonim or public proxy servers can be used to hide the real servers. These „pirate servers" could play a role in some activities and they are not able to provide continuous cover. In particular, there is the distorting proxy which can be tricky since it shows a fake IP address for the host server.

Proxy chaining, proxy to proxy, for examples makes possible for us to appear in one of the Caribbean Islands. Its efficiency can be deadened by the decrease of bandwidth but it can offer a continuous website availability.

- Cashers control drop accounts and provide those names and accounts to other criminals for a fee also they manage "money mules". Money mules are used to transport and launder stolen money or merchandise. Tellers assist in transferring and laundering money through digital currency services and between different national currencies.

- Executives select the potential victims and recruit members also assign members to the above tasks, they are charge of the management of the organization.[16]

c) The cybercrimes are deemed to be committed on a commercial scale since the cybercriminals are engaged in criminal activities of the same or similar character to generate profits on a regular basis. The profit might be gained by selling illegal contents or services, or using extortion with DoS or DDoS attack. Cybercrime industry intends to meet forbidden needs for.[17] As Mihály Tóth stated about the notion of criminal organization is "continuous, business-like criminal conspiracy"[18] which is also suitable for the modern cybercrime industry.

The following topics are discussed in detail: criminal communication and networking, DoS and DDoS attacks – extortion, unlawful gambling operations, child pornography and online money laundering.

2. Criminal communication and networking

The organised criminal groups might use networks for communication. The hacker legend Kevin Mitnick[19] presents a case in his book: when an unknown person persuaded a boaster young man to get the student database of the Chinese engineering university, then obtain the description of the Boeings' safety technology systems from Lockheed Martin, which means basically he made him to hack these information systems for these documents and after the assignment the principal has become unavailable. The young hacker has realized what he has done after only he heard about the Indian hijacked Boeing. The police of the United States of America found the connection between the

[15] The most popular mirroring applications are the followings: Teleport Pro, Wget, WebWhacker or Webcopier. The cybercriminals prefer the registry free ones.

[16] Broadhurst R. – Grabosky P. - Alazab A. – Chon S., op. cit. p. 7.

[17] Tóth D. – Gál I. – Kőhalmi L. – Organized crime in Hungary. Journal of Eastern-European Criminal Law. 2015. p. 43.

[18] Tóth, M., A bűnszervezet környéke. [The environs of the criminal organization] Jogtudományi Közlöny 1997,12., p. 507.

[19] Mitnick, K. (1963-) spent 5 years in prison due to different committed cybercrimes. He hacked the most well-known and protected IT networks and gained thousand of clients' data. Today he has his own IT security venture with significant references. He published two books: „The art of deception" (Perfect, 2003) and „The art of intrusion" (Perfekt, 2006).

hijacking and the hacker's activity so they caught him.[20] This method is suitable for recruitment of people with specialized expertise. Web-based chatrooms and open forums or forums within the deep web or Darknet are ideal places for the communication. The most popular English speaking criminal forum the Darkode was taken down by law enforcement in 2015 and there is no any notable replacement so far. Two type of communications can be distinguished in relation to criminal communications: criminal-to-criminal (C2C) and criminal-to-victim (C2V). For C2C communication is the key the security and anonymisation while for C2V communications is accessibility, the ability to contact more easily the potential or targeted victims for example in this case e-mail is the simplest way and beyond that applications are widely used such as Skype, Facebook Messenger, WhatsApp and Viber which can be used for sending spam, social engineering, phishing etc.[21]

3. DoS, DDos – attack with extortion

The organised crime use capable opportunities for destructive attacks.[22] Instead of viruses, malwares which might cause serious damages in databases and software or a website defacement, firstly we focus on a modern crime, the extortion on the information technology networks. It is not a new phenomenon because in the early '90s Lewis Popp already sent infected discs with virus about the medical development of curing AIDS and it activated itself after 90 days unless the unsuspecting user bought an antivirus disc for money.[23] An increasingly popular motivation for DDoS attack is extortion, by which a cybercriminal demands money in exchange for stopping or not carrying out the attack.

During troubleshooting they send some short packets (ping) to check the connection for the host computer which has to respond to it. They use this technical solution in case of so-called denial of service or distributed denial of service attacks (DoS or DDoS). The attacked system receives a larger volume of data packet and it cannot respond to them, which means generally sending packets as fast as possible without waiting for replies. The server is overloaded and waits for the client computer's confirmative respond in vain. The differences between DoS and DDoS are substantive. In a DoS attack, a perpetrator uses a single Internet connection to either exploit a software vulnerability or flood a target with fake requests. The aim of the assault typically is to exhaust server resources (e.g., RAM and CPU). On the other hand, DDoS attacks are different since it is launched from multiple connected devices that are distributed across the Internet. These connected devices are the so-called zombie computers activated by a software to send packets. Users usually don't know that their computers are infected with a malicious software and serve criminal networks. Perpetrators use software tools

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[20] Mitnick K. – Simon W., A behatolás művészete [The art of intrusion]. Perfekt kiadó. Budapest, 2006. p. 27-59.

[21] EUROPOL – Internet Organised Crime Threat Assesment (IOCTA) 2016. p. 45-46.

[22] Mezei, N., Digitalizált bűnözés – digitalizált védelem. [Digitized crime – digitized protection]. Rendészeti Szemle, 57. 2009. p. 40-45.

Sebők, J. A harmadik világháború (Mítosz vagy realitás) [The third World War (Myth or reality)]. Budapest, Népszabadság könyvek, 2007. p. 88-93

[23] Nagy, Z., Bűncselekmények számítógépes környezetben [Crimes in the IT envrionment]. Budapest, Ad-Librum, 2009. p. 257.

for automate attacks[24], which can be preinstalled or downloaded, unpacked (games, other programmes from websites, torrents etc.) by users. Unlike single-source DoS attacks, DDoS assaults tend to target the network infrastructure in an attempt to overwhelm it with huge volumes of traffic. Secondly, DDoS attacks also differ in the manner of their execution. DoS attacks are launched using homebrewed scripts or DoS tools (e.g., Low Orbit Ion Canon), while DDoS attacks are launched from botnets, large clusters of connected devices (e.g., cellphones, PCs or routers) infected with malware that allows remote control by an attacker. The botnet makes possible to launch large-scale attacks on the less protected private (with easily obtainable personal data or sensitive information) or corporate systems with high-levelled protection by sending spam or disseminating malware.[25] This botmaster controls the botnet remotely, often through intermediate devices known as the command and control (C&C;, or C2) servers. To communicate with a server, the botmaster uses various hidden channels, including IRC and HTTP websites, as well as popular social networks like Twitter, Facebook and even Reddit. Botnet servers are able to communicate and cooperate with other botnet servers, effectively creating a P2P network controlled by a single or multiple botmasters. Botnets-for-hire are widely available, they are often being auctioned and traded among attackers in the underground economy using online marketplaces which are hard to be tracked down. Botnets can be rented and used for DDoS or other attacks. These platforms, often hiding behind the ambiguous service definition of stressers, or booters, sell DDoS-as-a-service. They provide their clients with a toolkit, as well as a distribution network, so as to execute their attacks on call.[26]

The European Union has realized the fact that botnets pose a higher level of threat to the Member States in the public and private sector too. The Directive 2013/40/EU on attacks against information systems[27] has come force in 2013. It aims to introduce criminal penalties for the creation of botnets and also encourages the Member States to use more severe penalties and make available as aggravating circumstances where an attack against an information system is committed by a criminal organisation or conducted against a critical infrastructure of the Member States. It also sets up measures against identity theft and other identity-related crimes. The above mentioned elements from the Directive are missing for example from the Hungarian Criminal Code.

There are an increasing number of cases when DDoS attacks are designed to keep a business competitor from participating in a significant event (e.g., Cyber Monday), while others are used for shutting down business websites for a long time. The target is well considered and chosen. The offenders often choose websites whose operation demand continuous and undisturbed conditions (e.g. online casino websites). For example, Europol arrested of key members of the extortionist DD4BC hacking group that blackmailed multiple European companies (e.g. an online gambling company, PokerStars was confirmed as a victim) with DDoS attacks in exchange for Bitcoin payments. The group launched small DDoS attacks against companies and then asked for a ransom in Bitcoin to prevent further assaults. If the victim declined to pay, the

[24] Gercke, M., Understanding cybercrime: phenome, challenges and legal response. ITU 2012. p. 17.

[25] Tropina, T., op. cit. p. 161.

[26] https://www.incapsula.com/ddos/ddos-attacks/denial-of-service.html (accessed: 18.11.2016)

[27] According to the Directive 2013/40/EU: 'information system' means a device or group of inter-connected or related devices, one or more of which, pursuant to a programme, automatically processes computer data, as well as computer data stored, processed, retrieved or transmitted by that device or group of devices for the purposes of its or their operation, use, protection and maintenance.

group would then launch more powerful attacks in the following days. The extortion scheme has become a regular practice these days and there are many copycat groups who follow this lead.[28] The conventional crimes against property – such as extortion - can be committed with the help of modern technology solutions too.

4. Unlawful gambling operations

Unauthorized gambling activities are typically planned to run in the long term. The organised groups earn tax-free revenues. It has always attracted those who want to avoid their taxation and other obligations.[29]

The different kind of gambling games (poker, slot-games, blackjack, baccarat, craps and other games) and betting websites has become widespread and fastest-growing areas in the Internet. The poker has become popular thank to the broadcasted tournaments by sport channels, poker websites and online casinos' advertisements. The online casinos are widely available and hosted in countries with liberal laws or no regulations on online gambling. Their popularity can be explained by the higher odds and tax-free prizes (no game tax or income tax). Most of the them just as well legitimate or illegal ones offer free demo games which help the users to get acquainted with the casino. They can open accounts, transfer money and play games of chance. Although the players must be aware of that the payment might be uncertain in case of unlawful operations. Online casinos can be used in money laundering and activities financing terrorism. There are players who are supposed to be insiders and they play to lose and pay in only. Online role playing games are also used to launder money, especially massively multiplayer online role playing games (such as Second Life and World of Warcraft) provide an easy way since these games use credits that players can exchange for real money.[30]

Gambling operations are considered to be unlawful due to the fact that the organizer has no right to run the operation. Gambling activities generally belong to the state monopoly. It can be transferred to others with a concession agreement, though the authorized cannot assign to other people. According to the Hungarian Criminal Code unlawful gambling operation can be determined if it is orientated to gain profit on a regular basis id est several or indefinite number of games in advance and the elapsed time is rather short between the games. In the case of Internet gambling's key factor is the regularity owing to the refunded investments and financial enrichment. Organizing the game, maintaining the website, handling or accepting the stakes, paying out the prizes are all considered to be perpetrator's conduct. It is also unlawful operation when the authorized person is entitled to organize the legal gambling but he/she would exceed his/her authority. It is indifferent whether it gives financial benefit as a result in the end. Offering the server is determined as an accomplice's behaviour and it is irrelevant whether it is free or it is for a valuable consideration.

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[28] https://www.cardschat.com/news/pokerstars-ddos-attackers-arrested-by-europol-extortion-group-also-alleged-to-have-targeted-betfair-neteller-18629 (accessed: 21.11.2016)

http://news.softpedia.com/news/members-of-dd4bc-the-group-that-blackmailed-companies-with-ddos-attacks-arrested-by-europol-498797.shtml (accessed: 21.11.2016)

[29] Farkas I. – Jávorszky J., Az illegális pénznyerő-automaták felderítése [The investigation of illegal gambling machines]. Rendészeti Szemle, XXXI. évfolyam 1993.5. p. 58-59.

[30] Jean-Loup Richet, Laundering money online: a review of cybercriminals methods. p. 12.

5. Child pornography as a business opportunity

Organised criminal networks play a significant role in child sexual exploitation, including commercial and online sexual activity. The users thank to the anonymization and encryption are able to follow their dark sexual desires on the Internet. Pedophiles have a deviant sexual tendency and their sexual urges are not accepted by the public, thus they do their culpable activities in secret. We examine child pornography thoroughly in this paper. Child pornography is "any material that visually depicts a child engaged in real or simulated sexually explicit conduct; any depiction of the sexual organs of a child for primarily sexual purposes; any material that visually depicts any person appearing to be a child engaged in real or simulated sexually explicit conduct or any depiction of the sexual organs of any person appearing to be a child, for primarily sexual purposes; or realistic images of a child engaged in sexually explicit conduct or realistic images of the sexual organs of a child, for primarily sexual purposes".[31]

Since Internet has become widespread it has a substantial damaging drawback: it is used as a platform for child sex offenders to communicate, store and exchange child sexual exploitation material (CSEM) and made easily for them to hunt for new victims. There are two types of sexual coercion and extortion online: content driven, for sexual purposes, and financially driven, for commercial purposes. It means typically grooming[32] the child or impersonating another in order to gain their trust. The sexual predators use different platforms such as social networks, online games, forums and chats where the sexting begins which is part of the grooming process.[33] This activity can lead to the sexual extortion of children by asking self-generated photo or video of a sexual nature and involves a process whereby they are coerced into continuing to produce sexual materials or told to perform sexual acts under threat of disclose or send to others like directly to family, friends etc. There are an increasing number of more extreme, sadistic, and degrading demands by the perpetrators.[34] The self-generated images might give further challenge since in some jurisdictions it is considered that the minor who generated and distributed it is guilty of producing and disseminating CSEM.

The most common method to exchange child abuse material (CAM) is still Peer-to-Peer (P2P) platforms, but they started to use more sophisticated ones for distribution, such as the Darknet. The use of Darknet is getting more popular among perpetrators using hidden services on platforms like TOR. These platforms facilitate untraceable CSEM by allowing sharing of images anonymously through websites, private messages and email. The another growing area is the live streaming of child sexual abuse which poses a particular challenge for law enforcement. It also supports the so-called hands-on

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[31] According to Article 2 (c) of the Directive 2011/92/EU of the European Parliament and the Council on combating the sexual abuse and sexual exploitation of children and child pornography

[32] According to the Interagency Working Group on Sexual Exploitation of Children: Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse (Adopted by the Interagency Working Group in Luxembourg, 28 January 2016) p. 51. „In the context of child sexual exploitation and sexual abuse, "grooming" is the short name for the solicitation of children for sexual purposes. "Grooming/online grooming" refers to the process of establishing/building a relationship with a child either in person or through the use of the Internet or other digital technologies to facilitate either online or offline sexual contact with that person."

[33] IOCTA 2016. op. cit. p. 24.

[34] Interagency Working Group on Sexual Exploitation of Children p. 51.

offending which means after the live stream the soliciting offender travels to the place for purpose of child exploitation. The Internet and new technologies revives online and offline child sex tourism, it can be arranged easily with low risks and offers profitable services overseas. It is an attractive proposition to earn easy money with the crime of abuse via live streaming. These are paid services and the payment is generally made through international money transfer and, less frequently, via local money transfers.[35] The organised crime represents itself on the cyberspace in the followings:

- commercial sexual exploitation of children online;
- obtaining credit card information and get money with them;
- blackmailing clients with their "sex adventure" in order to gain financial benefits.

In our troubled world it is typical that individuals turn to perversions and the information systems offer a suitable platform for this. The organised crime is based on this demand. The tolerance against extreme contents drives the supply to serve the interested potential clients with more marginal contents.[36]

The most endangered injured parties are children who are under the age of 18 years and entitled to special protection, whether they are acting in the online environment or offline.[37]

In the EU the online content regulation related issues are part of the Member States' jurisdiction (e.g. Germany, the UK and Hungary adapted Internet blocking), except child pornography.[38] There are some well-meaning, binding international documents with clear contents[39] in this field, though there is a tendency for further dynamic spread of child pornography due to new technology developments. The virtual reality (VR) devices make a good example by their consumer release in 2016. It is possible that such devices could be used to simulate abuse on a virtual child or view CSEM since VR pornography industry is already established in Asia which means this development could be adopted easily for this disturbing purpose as well.[40] Cloud computing is also challenging since files are stored in a shared pool of computer resources on the Internet, it makes them accessible from any computer and the storage is maintained by the cloud server without a need for installing anything. The cloud system makes possible for the users to share their access and files with other designating users. It has been already recognized that perpetrators use cloud for possession and distribution of CSEM.[41]

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[35] IOCTA 2014. op. cit. p. 28-34.

[36] Parti, K., Gyermekpornográfia az interneten [Child ponography ont he Internet]. Bíbor Kiadó, Miskolc, 2009. p. 48.

[37] Interagency Working Group on Sexual Exploitation of Children p. 11.

[38] Dornfeld, L., A virtuális tér geopolitikája. In: Dornfeld L. – Keleti A. – Barsy M. – Kilin J. – Berki G. – Pintér I. 2016/1. szám p. 63.

[39] International conventions:

- United Nation Convention on the Rights of the Child
- Optional Protocol of the Convention on the rights of the child
- Cybercrime convention
- Lanzarote convention
- Framework Decision 2004/68/JHA
- European Directive 2011/92/EU on combating the sexual abuse and sexual exploitation of children and child pornography

[40] IOCTA 2016. op. cit. p. 27.

[41] Rogers, A., From peer-to-peer networks to cloud computing: how technology is redefining child pornography laws p. 22.

The Hungarian Criminal Code under Section 204 subjects to punishment obtaining or having in possession, producing, offering, supplying or making available, distributing, dealing with or making pornographic images of an under aged person or persons.

6. Online money laundering

Eventually the aim is to monetise the obtained, crime-related assets in the legitimate economy. Money laundering is not tied solely to organised crime, but it is an essential part, providing the organised operations, economic background and making the offenders wealthy. Laundering the illegally gained money has industrial scale nowadays.[42] It is a global phenomenon and Internet contributes to offer a wide range of different money laundering methods.

The phases of money laundering in real world can be recognized in the virtual space too. Anonimity is enough for some service requisitions which means a fake name and address is able to hide the real user. Furthermore, most of the financial transactions can be carried out anywhere and anytime. It is supported by the bank sector's interest, on the one hand, the banks help the cash flow with flexible regulations, technical background, client friendly ways, on the other hand, the banks charge the clients with different fees during the transactions which make them interested.

Money laundering involves three distinct stages which are recognizable in its cyber form too since criminals transfer and circulate funds within the digital economy.[43] The first phase is the so-called placement when cash moved from its source like in the following examples:

Onetime or frequent transactions to another individual, organization or foundation and the legal grounds of the transactions are indifferent and might be anything like based on charity, personal reasons or simple sympathy.

In case of legal or illegal gambling when the insider gamer loses all the time.

In the above mentioned cases the offenders may pay or transfer money also in a legal way, but then the money may go directly to terrorist groups or other organised criminal organizations. The legal literature calls this phenomenon as inverse money laundering.[44]

The fraudulent online auction activity is also serve as a suitable mean of money laundering. The auction is supposed to be fraudulent if:

- selling obtained goods which originate from crime commission (dealing in stolen goods), or

- after transferring the money there are no movement of the goods or service fulfilment. There is an opportunity to shorten the auction with accepting the pre-set highest automate bid.

The second stage is the layering. The primary purpose of this stage is to separate the illicit money from its source. The criminals use sophisticated layering of financial transactions that hide and make difficult to find the link between the money and the

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[42] Bardócz, Cs., Pénzmosási technikák [Money laundering techniques]. Belügyi Szemle XXX. évfolyam, 1997. p. 74.

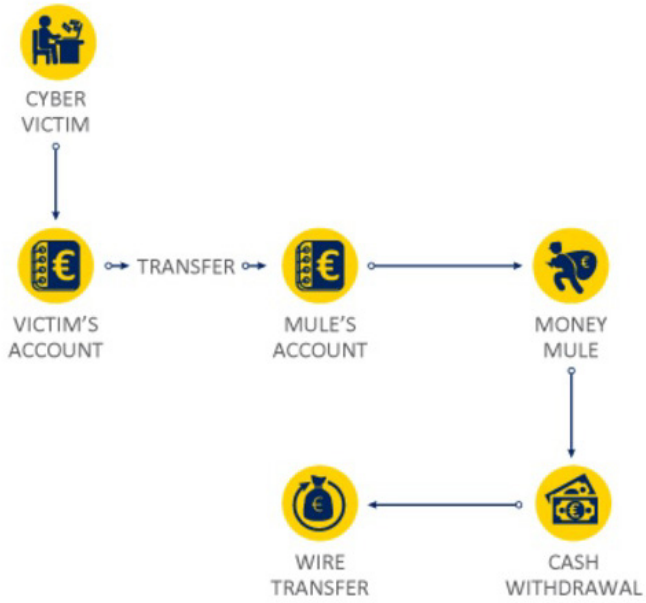
[43] IOCTA (2016), op. cit. p. 43.

[44] Gál, I. L., A pénzmosás és terrorizmus finanszírozása. [Money Laundering and financing terrorism] In: László Korinek – László Kőhalmi – Csongor Herke (editors). Emlékkönyv Irk Albert egyetemi tanár születésének 120. évfordulójára. PTE ÁJK Pécs, 2004. p. 39.

original crime. Generally, the „dirty" money land in businesses, banks or it is placed in securities and finally the multiple transactions are untraceable for the law enforcement.

In the final third integration stage the money, which is layered through a number of financial transactions therefore it seems like resulting from a legitimate source, is fully integrated into the financial system and can be used for any purpose.

Most organised crime shares a common denominator which is the financial motive. Organised crime groups boost their assets and then inject them into the legal economy through different money laundering schemes.[45] The following figure shows an online money laundering scheme:



1. Figure: Example for an online money laundering scheme (source: EUROPOL)

Law enforcement traces the assets likewise the criminal networks. The investigation of money mule networks is a top priority both the law enforcement and the financial sector and in order to track them down they cooperate with each other (e.g. European Money Mule Actions). According to IOCTA „money mules are individuals recruited, often by criminal organisations, to receive and transfer illegally obtained money between bank accounts and/or countries. The recruited individuals may be willing participants, however some may, initially at least, be unaware that they are engaging in criminal activity and believe they are performing a legitimate service."[46]

Conclusion

The use of Internet, the widespread of innovative technology, the increasing number of Internet users, the fast-paced development of high-tech hardware and

[45] https://www.europol.europa.eu/crime-areas-and-trends/crime-areas/economic-crime/money-laundering (accessed: 24.11.2016)

[46] IOCTA (2016), op. cit. p. 43.

software contribute to the expansion of cybercrime and organised crime in the cyber space and on the networks. It makes possible for criminals to meet each other in the online world without physical connection. Most of the users are not aware of the danger of the Internet, they can be deceived easily and become a victim of a cybercrime. Their computer or mobile devices might serve criminal networks without their knowledge. The cybercrime phenomenon intensifies the competition between the safety, security technology and the technical knowledge of the cybercriminals.

Bibliography

- Balogh, Á., The definition of criminal organization and consequences of committing crime in the framework of a criminal organization under Hungarian criminal law. Law Series of the Annals of the West University of Timisoara 2015.
- Bardócz, Cs., Pénzmosási technikák [Money laundering techniques]. Belügyi Szemle XXX. évfolyam, 1997.
- Broadhurst R. – Grabosky P. - Alazab M. – Chon S., Organizations and Cyber crime: An Analysis of the Nature of Groups engaged in Cyber Crime. International Journal of Cyber Criminology. Vol 8 Issue 1 January - June 2014.
- Directive 2013/40/EU on attacks against information systems
- Directive 2011/92/EU of the European Parliament and the Council on combating the sexual abuse and sexual exploitation of children and child pornography
- Dornfeld, L., A virtuális tér geopolitikája. In: Dornfeld L. – Keleti A. – Barsy M. – Kilin J. – Berki G. – Pintér I. 2016/1. szám
- EUROPOL – Internet Organised Crime Threat Assesment (IOCTA) 2014.
- EUROPOL – Internet Organised Crime Threat Assesment (IOCTA) 2016.
- Farkas I. – Jávorszky J., Az illegális pénznyerő-automaták felderítése [The investigation of illegal gambling machines]. Rendészeti Szemle, XXXI. évfolyam 1993.5.
- Gál, I. L., A pénzmosás és terrorizmus finanszírozása. [Money Laundering and financing terrorism] In: László Korinek – László Kőhalmi – Csongor Herke (editors). Emlékkönyv Irk Albert egyetemi tanár születésének 120. évfordulójára. PTE ÁJK Pécs, 2004.
- Gercke, M., Understanding cybercrime: phenome, challenges and legal response. ITU 2012.
- Jean-Loup Richet, Laundering money online: a review of cybercriminals methods.
- Korinek, L., Kriminológia II [Criminology II]. Budapest, 2009.
- McGuire, M., Organised Crime in the Digital Age. London: John Grieve Centre for Policing and Security.
- Mezei, N., Digitalizált bűnözés – digitalizált védelem. [Digitized crime – digitized protection]. Rendészeti Szemle, 57. 2009.
- Mitnick K. – Simon W., A behatolás művészete [The art of intrusion]. Perfekt kiadó. Budapest, 2006.
- Nagy, Z., Bűncselekmények számítógépes környezetben [Crimes in the IT envrionment]. Budapest, Ad-Librum, 2009. p.
- Nato, J., Cybercrime, Organized Crime and Societal Responses. Emilio C. Viano (editor).
- Papp, P., Hi-tech bűnözés napjainkban [High tech crime in our days]. Belügyi Szemle 52. 2001/11-12.

- Parti, K., Gyermekpornográfia az interneten [Child ponography ont he Internet]. Bíbor Kiadó, Miskolc, 2009.
- Rogers, A., From peer-to-peer networks to cloud computing: how technology is redefining child pornography laws
- Sebők, J. A harmadik világháború (Mítosz vagy realitás) [The third World War (Myth or reality)]. Budapest, Népszabadság könyvek, 2007.
- The Interagency Working Group on Sexual Exploitation of Children: Terminology Guidelines for the Protection of Children from Sexual Exploitation and Sexual Abuse (Adopted by the Interagency Working Group in Luxembourg, 28 January 2016)
- Tóth, M., A bűnszervezet környéke. [The environs of the criminal organization] Jogtudományi Közlöny
1997,12.
- Tóth D. – Gál I. – Kőhalmi L. – Organized crime in Hungary. Journal of Eastern-European Criminal Law. 2015.
- Tropina, T., The evolving structure of online criminality: how cybercrime is getting organised. eucrim 4/2012.

Online sources

- http://www.unicri.it/special_topics/securing_cyberspace/cyber_threats/explanations/ (accessed: 12.11.2016)
- https://www.incapsula.com/ddos/ddos-attacks/denial-of-service.html (accessed: 18.11.2016)
- https://www.cardschat.com/news/pokerstars-ddos-attackers-arrested-by-europol-extortion-group-also-alleged-to-have-targeted-betfair-neteller-18629 (accessed: 21.11.2016)
- http://news.softpedia.com/news/members-of-dd4bc-the-group-that-blackmailed-companies-with-ddos-attacks-arrested-by-europol-498797.shtml (accessed: 21.11.2016)
- https://www.europol.europa.eu/crime-areas-and-trends/crime-areas/economic-crime/money-laundering (accessed: 24.11.2016)

Statute of Limitations in the Polish Criminal Law

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Abstract

The article discusses the problems of the statute of limitation in the Polish criminal law. It is a traditional institution of the Polish criminal law which repeal the punishment or enforceability of adjudicated penalties in connection with the passage of time. This article shows, among others, essence, the legal nature and the reasons for limitation, its constitutional conditions and the current regulatory approach in the Polish law. It takes into account the case-law of the Polish Constitutional Tribunal and the Supreme Court. These bodies often spoke on the topic of limitation.

Keywords: *Statute of limitation, excluding the punishment, repealing the enforceability of adjudicated penalties, polish criminal law.*

I. The essence of limitation, the constitutional conditions and types

Limitation is a factor which repeal the penality or enforceability of adjudicated penalties in connection with the passage of time. The occurrence of limitation does not pick up the criminal nature of the act, however, it precludes the possibility of sanctions for the offense or the execution of sanctions. Limitation therefore is a factor that breaks the link between criminality and the penality[1]. Repealing of penality is absolute and occurs *ex lege.*

To properly define the essence of limitation and its position in the Polish legal system, it is necessary to look at this institution from the constitutional perspective and to answer the question of whether the limitation is the constitutional right of an offender. The current Polish Constitution of 2 April 1997[2] refers to the limitations in three regulations (Article 43, 44 and 105 Paragraph 3), which will be more widely mentioned, but none of them exposes it directly as a right enjoyed by certain categories of people. Nevertheless, the doctrine expressed the view that under the Constitution there is a subjective right of the perpetrator to the limitation[3]. However, it is a secluded

[1] See R. Koper, K. Sychta, J. Zagrodnik, 'Karnomaterialne aspekty instytucji przedawnienia – zagadnienia wybrane' in G. Artymiak, Z. Ćwiąkalski (ed.), *Współzależność prawa karnego materialnego i procesowego* (Warszawa 2009) 187–188; I. Andrejew in I. Andrejew, W. Świda, W. Wolter, *Kodeks karny z komentarzem*, (Warszawa 1973) 351.

[2] Official Journal of Laws No. 78, item 483 as amended.

[3] See M. Kulik, *Przedawnienie karalności i przedawnienie wykonania kary w polskim prawie karnym* (Warszawa 2014) 107.

point of view, not accepted by the representatives of the doctrine[4], and the jurisprudence of the Polish Constitutional Court[5] and the Supreme Court[6]. Dominant opinion is expressed most fully by the Constitutional Court that the Constitution does not give rise to reconstruct the offender's rights to the limitation and therefore he cannot expect that penality of his crime will be excluded at a given time. This expectation is constitutionally unjustified even if the laws in force at the time of the offense provide deadlines of its limitation, because the legislator has a wide discretion in their modification, including extension, depending on the current needs of the criminal policy. In the light of the Constitution an offender cannot count on the fact that commission of crime will be barred at the date specified by the regulations in force at the time of its commission. After committing the crime legislator may in fact extend the deadline for its limitation, and even - as it seems - abolish the statute of limitations (Constitutional Tribunal take a stand that even if the legislator did not foresee the legal institution of limitation, it would not be possible to argue that some constitutional rights and civil liberties have been violated in this way[7]). The Constitutional Tribunal emphasizes that the rules governing the limitation period cannot be treated as a guarantee for the perpetrators, because they are not established due to the perpetrator, but due to the desirability of punishment and implementation of the desired criminal policy by the legislator. Therefore, the statute of limitations - in the opinion of the Constitutional Tribunal - is not a constitutional right of the offender, but the element of criminal policy, which defines the "temporal extent of use of the competence of classifying the act in criminal law and the associated criminal sanction by the competent authority"[8].

The above perception of the statute of limitation by the Constitutional Tribunal does not mean, however, that the legislator has an unlimited freedom when it comes to giving it a definite shape. In particular, it should be noted that the scope of that freedom is changing significantly when a period of limitation which is valid at given time has expired. Then the legislator may not lead to a "revival" of the limitation period, or - in other words - the repeal of the effects of limitation and the restoration of the penality of expired crimes. Such a legislative procedure would remain in contradiction with the principle of citizens trust in the state and its laws (Article 2 of the Constitution) and the principle of lex retro non agit (Article 42 paragraph 1 of the Constitution). Thus

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[4] See e.g. L. Kubicki, 'Nowa kodyfikacja karna a Konstytucja RP' (1998) Państwo i Prawo No. 9-10, p. 30; T. Sroka in M. Safjan, L. Bosek (ed.), *Konstytucja RP. Komentarz*, Vol. I (Warszawa 2016) nb. 3-7; A. Zoll, 'Nowa kodyfikacja karna w świetle Konstytucji' (1997) Czasopismo Prawa Karnego i Nauk Penalnych No. 2, p. 105-106.

[5] See e.g. the judgments of the Constitutional Tribunal of: 25 May 2004, in case SK 44/03, OTK-A 2004, No. 5, item 46; 2 September 2008, in case K 35/06, OTK-A 2008, No. 7, item 120; 15 October 2008, in case P 32/06, OTK-A 2008, No. 8, item 138; 13 October 2009, in case P 4/08, OTK-A 2009, No. 9, item 133.

[6] See e.g. resolution of the Supreme Court of 6 June 2002, in case I KZP 15/02, OSNKW 2002, No. 7-8, item 49; decision of the Supreme Court of 22 April 2009, in case IV KK 14/09, OSNKW 2009, No. 7, item 54.

[7] See e.g. the judgment of the Constitutional Tribunal of 25 May 2004, in case SK 44/03, OTK-A 2004, No. 5, item 46.

[8] See the judgment of the Constitutional Tribunal of 15 October 2008, in case P 32/06, OTK-A 2008, No. 8, item 138.

prolonging the period of limitation is possible only if it takes place before its expiry, calculated in accordance with the previously applicable regulations[9].

In addition, the Constitutional Tribunal recognizes that under the Constitution, and in particular Article 42 paragraph 1 read in conjunction with Article 2 and 7, it must be reconstructed a principle that anyone who commits an act prohibited under penalty by the law in force at the time of its commission, is subject to criminal responsibility. Therefore, if the offender committed a crime it should be a principle to brought him to criminal responsibility. This principle, according to the Constitutional Court, indicates the constitutional relationship between the crime and the penal consequences of its commission (penalty). At the same time the need to safeguard this principle, and the affirmation of its content, to preserve its essence, causes that any exceptions should be treated narrowly[10]. The statute of limitation, as an institution breaking the link between the offence and the punishment, is an important exception to the principle of criminal responsibility of the offender. Moreover, as noted by the Constitutional Tribunal, the limitation weakens the sense of inevitability of liability relating to violations of the law and can weaken the sense of the law as such, a sense of justice and the principles of democratic rule of law. Therefore, the legislator, shaping the institution of limitation, and thus realizing the specific criminal policy "should therefore exercise extreme caution, especially when the legislator reduces the period of limitation"[11]. In particular he should pay attention that the shape of the institution of limitation cannot give a sense of impunity and injustice. If this happens, it is justified, both legally and socially, to introduce the regulations that will reduce the likelihood of avoiding responsibility and punishment, and that kind of regulation could be eg. the provision which will extend the limitation period[12].

Limitation is one of those institutions of the Polish criminal law, which operate in that law almost from its inception. Initially, in the former Polish criminal law the statute of limitation took the form of a limitation of the criminal complaint and was only related to the offenses prosecuted on a private accusation, ie those which were harmful only to the victim, without prejudice to the interests of the state[13]. The first modern Polish Penal Code, which was the regulation of the President dated 11 July 1932- Criminal Code[14], knew already extensive statute of limitation with wide range of application. In this Code, there were three types of limitation, namely the limitation of criminal proceedings (Article 86), the limitation of sentencing (Article 87) and the limitation of enforcement of the sentence (Article 89). The wide range of applications of the institution of limitation was also maintained by the next Polish Criminal Code, which was the Act of 19 April 1969[15], although that act reduced the types of limitation to two, namely the limitation of penality (Article 105 and 106) and the limitation of enforcement of the sentence (Article 107). Such an approach of the limitation and such a terminology has

[9] See e.g. the judgments of the Constitutional Tribunal of: 25 May 2004, in case SK 44/03, OTK-A 2004, No. 5, item 46; 15 October 2008, in case P 32/06, OTK-A 2008, No. 8, item 138.

[10] See the judgment of the Constitutional Tribunal of 25 May 2004, in case SK 44/03, OTK-A 2004, No. 5, item 46.

[11] Ibid.

[12] Ibid.

[13] More information on the historical development of the institution of limitation see M. Kulik, Above, p.1 and next.

[14] Official Journal of Laws No. 60, item 571 as amended.

[15] Official Journal of Laws No. 13, item 94 as amended.

been basically maintained in the current Law of 6 June 1999 - Criminal Code[16], which distinguishes two types of limitation, namely the limitation of penality (Article 101 and art. 102) and the limitation of enforcement of the sentence (Article 103). It should be noted that the limitation is actually related to almost all categories of crime, because only some of them are exceptionally excluded by the legislator from the application of that institution (Article 105).

II. Legal nature and justification of limitation

You can extract three different positions on the legal nature of limitation. The first one assumes that the limitation period is the institution of substantive criminal law[17]. According to the second point of view the limitation has a procedural character[18]. In turn, the third view assumes mixed (substantive and procedural) nature of the limitation[19]. Today, it must be emphasized above all the substantive nature of that institution, but there are also important arguments located in the field of the procedural law. The procedural elements of the institution of limitation are - firstly- connected with the fact that begining of the limitation period depends on some procedural actions. Secondly, an appearance of limitation cause a parallel procedural effects in the form of occurence of obstacles to the process, which results a refusal or discontinuance of criminal proceedings (Article 17 paragraph 1 item 6 of the Act of 6 June 1997 - The Code of Criminal Procedure[20])[21]. As a result, in the case of an offense, which penality was expired, it cannot be passed a sentence of conviction or acquittal, but merely a decision to discontinue the proceedings. Undoubtedly, you should strongly emphasize the substantive nature of the limitation, because all the provisions of the existing Criminal Code make the statutory periods of limitation on the nature of the offense and its legal qualification or the type and amount of the penalty, specifying at the same time the condition of limitation. Linking the limitation with the offense or sanction clearly demonstrates that this institution fulfill some functions in the field of substantive criminal law. Repeal of penality, specified in the rules of substantive law, is in this case the circumstance of original importance, which must occur as a first, so that you could even consider the possibility of refusal or discontinuance of criminal proceedings[22].

Despite the fact that the limitation is not a constitutional right of the citizen and is a part of the criminal policy of the state in which the legislator has a broad discretion, however - as emphasized by the Constitutional Tribunal - the existence of a limitation in

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[16] Official Journal of Laws of 1997, No. 88, item 553 as amended, hereinafter referred to as Criminal Code or k.k.

[17] See A. Zoll in A. Zoll (ed.), *Kodeks karny. Część ogólna. Komentarz*, Vol I (Warszawa 2004) 1307; P. Hofmański, S. Zabłocki, *Elementy metodyki pracy sędziego w sprawach karnych* (Warszawa 2006) 31.

[18] More on this topic K. Marszał, *Przedawnienie w prawie karnym* (Warszawa 1972) 79–80; J. Czabański, M. Warchoł, 'Przerwa i zawieszenie biegu przedawnienia – uwagi de lege ferenda'(2007) Prokuratura i Prawo No. 10, p. 51.

[19] See T. Grzegorczyk, J. Tylman, *Polskie postępowanie karne* (Warszawa 1999) 177.

[20] Official Journal of Laws of 1997, No. 89, item 555 as amended, hereinafter referred to as k.p.k.

[21] See L. Wilk in O. Górniok (ed.) *Kodeks karny. Komentarz* (Warszawa 2006) 373.

[22] See R. Koper, K. Sychta, J. Zagrodnik, Above 191–194; the judgments of the Supreme Court of: 10 March 2004, in case II KK 338/03, OSNwSK 2004, item 521; 22 October 2009, in case IV KK 446/08, KZS 2010, No. 2, item 16; decision of the Supreme Court of 22 April 2009, in case IV KK 14/09, OSNKW 2009, No. 7, item 54.

the legal system must have a strong and convincing justification. As already mentioned, the statute of limitations- as a institution breaking the link between crime and punishment- is an important exception to the constitutional principle of criminal responsibility of the offender, and such exceptions should be treated narrowly[23].

Over the years, the limitation was justified by the different rations, both of a substantive and a procedural. As regards the arguments concerning the substantive law, the following theories appeared in the literature: 1) a theory of retribution assuming that the torment of the offender, associated with the possibility of detection and imposing a penalty, is a sufficient penance for the offense, if such a state lasted for a longer period of time (this theory shall be regarded as obsolete, because it ignores other purposes, which are today posed in front of the penalty)[24]; 2) a theory which is based on a general deterrence and a blurred memory of a crime - the passage of time cause that a social sense of justice does not need to punish the offender, that is forgotten[25]; 3) a theory justifying the existence of the institution of limitation by repealing of social harm due to the passage of time (in relation to this theory it is rightly underlined that the evaluation criteria of social harmfulness, included *de lege lata* in Article 115 paragraph 2 of the k.k., ie. the type and nature of the infringed goods, the size of the damage or threat of injury, the manner and circumstances of the offense, the weight of the duties violated by the perpetrator, the form of intention, motivation of the perpetrator, the type of prudential rules violated the and the degree of their violation, are permanent in the sense that the passage of time does not change their perception and relativizing to the offense; thus the passage of time cannot reduce, much less remove the social harm of crime); 4) a theory of rehabilitation of the perpetrator assuming that after a certain period of time the offender could be improved, which could make his punishment inexpedient[26].

On the other hand, the following procedural theories has appeared in the literature to justify the institution of limitation: 1) a theory of evidence - implies the existence of evidentiary difficulties that may occur after a considerable lapse of time, eg. the destruction, seizure or loss of material evidence, the death of witnesses and so on. The risk of passing an incorrect judgment increase when it occurs[27]; 2) a theory of tardiness of the prosecutor - limitation is a reaction directed against the prosecutor in connection with his indolence and negligence, which did not lead to hold perpetrators criminally responsible (this theory is, however, in conflict with the principle of legality which is in force in the Polish criminal proceedings, and thus the duty of the prosecution of crimes which could not yet expires or disappears due to the tardiness of the prosecutor in a particular case)[28]; 3) a theory of resignation from the complaint - the passage of the statutory limitation period does not result in the repeal of penality, but causes the

[23] See the judgment of the Constitutional Tribunal of 25 May 2004, in case SK 44/03, OTK-A 2004, No. 5, item 46.

[24] R. Koper, K. Sychta, J. Zagrodnik, Above, 197.

[25] K. Banasik, *Przedawnienie w prawie karnym w systemie kontynentalnym i anglosaskim* (Warszawa 2013), 96 and next; I. Andrejew, *Polskie prawo karne w zarysie* (Warszawa 1983) 322.

[26] K. Marszał, Above, 56; E. Bieńkowska in G. Rejman (ed.) *Kodeks karny. Część ogólna. Komentarz* (Warszawa 1999) 1293.

[27] See J. Śliwowski, *Prawo karne* (Warszawa 1979) 307; K. Buchała, *Prawo karne materialne* (Warszawa 1980) 648.

[28] R. Koper, K. Sychta, J. Zagrodnik, Above, 195–196.

disappearance of powers of the state to punish the perpetrators. However, limitation shall causes a loss of right to complaint[29].

Currently in Polish literature the views of justifying the existence of a limitation primarily by general and individual deterrence are dominant. It is also an argument from the field of a substantive law. In this respect, it is pointed out that the justification of limitation should be sought primarily in the context of the objectives of the penalty. From the point of view of general deterrence, the passage of time cause the decreasing of the possibility of shaping the legal awareness of the society and it eliminates the need to redress the social sense of justice. A gradual blurring of the memories of the crime and the weakening of the impression caused by such an act undermine the sense of punishment[30]. In terms of the individual deterrence, it is pointed out that with the passage of time the possibility of preventive and educational impact on the offender by a penalty is excluded[31]. I. Andrejew even argued according to the provisions of the previous legal status that if the perpetrator did not break the law during the period of limitation, it indicates a superfluity of his punishment from the point of view of preventive and educational impact[32]. In addition, a justification for the limitation with help of procedural arguments is currently heavily accented. According to that, criminal proceedings after a considerable lapse of time since the offense could encounter major difficulties of evidence[33].

Similarly, so from the perspective of the objectives of the punishment (the arguments of substantive law) and the difficulties of proof (the arguments of the procedural nature), the legislator seems to perceive the limitation. In justification of the draft of the Criminal Code it is indicated that the passage of limitation periods "outdate the realization of the objectives of punishment and it also may lead to avoid the destruction of the social inclusion process of the offender. Some practical considerations which are connected with the difficulties in the process of proving the fact of committing a crime are also important"[34].

III. Limitation of penality

Limitation of penality is the negative procedural premise, since its existence, in accordance with Article 17 paragraph 1 point 6 k.p.k., results a refusal or discontinuance of criminal proceedings. If the court recognize during the proceedings that the penality of an offense has expired, it excludes the possibility of a conviction or acquittal[35].

The Criminal Code provides a diverse range of limitation periods of the criminal offenses. The main circumstance which determine the length of the limitation periods is the type and the shape of the anticipated penalty (for imprisonment) and the weight of act. It is about a threat of punishment in the law, not the punishment imposed in

[29] K. Marszał, Above, 67.

[30] R. Koper, K. Sychta, J. Zagrodnik, Above, 198–199.

[31] A. Zoll, Above, 1307.

[32] I. Andrejew, Above, 322.

[33] See A. Zoll, Above, 1307; L. Wilk, Above s. 373; A. Marek, *Prawo karne* (Warszawa 2004) 376.

[34] Nowe kodeksy karne – z 1997 r. z uzasadnieniami (Warszawa 1997) 171.

[35] See the judgments of the Supreme Court of: 8 June 1977, in case I KR 87/77, OSNPG 1977, nr 11, poz. 114; 18 July 1975, in case IV KR 132/75, Gazeta Sądowa 1975, No. 22; decision of the Supreme Court of 2 July 2002, in case IV KKN 264/99, Legalis.

concreto. The modifications of the statutory penalty clause associated with an extraordinary mitigation of punishment, its extraordinary aggravation and withdrawal from punishment are irrelevant in fact[36].

Limitation periods of the crimes prosecuted ex officio and crimes prosecuted on private accusation are defined in Article 101 k.k. For clarity it needs to be clarified that the criterion of the division of crimes into crimes prosecuted ex officio and triable on private prosecution is their mode of prosecution. The first offense is prosecuted by indictment (ex officio) by the body acting on behalf of the State. The second category of crime is prosecuted on private accusation, so the initiative of the victim is necessary. The principle is the prosecution by indictment, so the private prosecution is limited to the few crimes which mainly violate the individual interest of the victim (eg. defamation, insult), which justifies the decision to transfer the competency of prosecution to the victim.

When it comes to the limitation period of crimes prosecuted ex officio- in accordance with Article 101 paragraph 1 k.k. - the penality of such an offense ceases after: 30 years when the act is a homicide, 20 years- when the act constitutes another serious crime[37], 15 years - when the act constitutes a misdemeanor punishable by imprisonment exceeding five years, 10 years- when the act constitutes a misdemeanor punishable by imprisonment exceeding three years, 5 years- when it comes to other misdemeanors.

The period of limitation starts from the date of the offense, except for the material offence (classified as an effect-producing offence), where there is a rule that the limitation period of their penality starts from the moment when the effect came (Article101 paragraph 3 k.k.). Ratio legis of the latter regulation is associated with the prevention of the limitation of penality, where the effect appears after a considerable period of time since an act or omission which caused that effect.

When it comes to limitation of offences prosecuted on a private accusation- according to Article 101 paragraph 2 k.k. - the penality of such an offense shall cease at the end of one year from the moment when the victim learned about the offender, but no later than at the end of 3 years from the time of its commission. Article 101 paragraph 3 k.k. is respectively used with respect to the limitation of an material offence prosecuted on a private accusation.

A special regulation concerning the limitation of penality is Article 101 paragraph 4 k.k., which appearance in the Polish legal system should be associated with the implementation of some of the instruments of European Union law, in particular Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography. That decision compelled the member states in the Article 8 paragraph 6 to enable the prosecution of at least the most serious

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[36] See A. Wąsek, *Kodeks karny. Komentarz*, Vol I. (Gdańsk 1999) 309; the judgment of the Supreme Court of 4 July 2001, in case V KKN 346/99, Prokuratura i Prawo 2001, No. 12, item 1.

[37] According to the Article 7 § 1 k.k., crimes under Polish criminal law are divided into serious crimes and misdemeanors. The serious crime is an act punishable by imprisonment for not less than 3 years or a more severe penalty (Article 7 § 2 k.k.). Misdemeanor is the offense threatened with a fine of more than 30 the daily rate or above 5000 zł (the currency of Poland), the penalty of restriction of liberty exceeding one month or imprisonment in excess of one month (Article 7 § 3 k.k.). At the core of the division of crimes into serious crimes and misdemeanors is their social harmfulness *in abstracto*, determined by the legislator on the stage of criminalization and determining the penalty incurred for their committing. Serious crimes are more socially harmful than the misdemeanors *in abstracto.*

offenses set out in this provision after coming of age by the victim. By this way the European legislator moved towards the creation of possibility that the victim of a sexual offence after coming of age - and therefore fully consciously and independently of any pressure from the closest person (when the offense took place in that circle of people) - could reveal the crime and that such action could result in the possibility of conducting a criminal prosecution in this matter[38]. Article 101 paragraph 4 k.k., after introducing into the Polish legal system, has undergone many changes and now it states that in the case of: 1) crimes against life and health, committed to the detriment of a minor, punishable of a maximum of more than 5 years imprisonment, 2) the offenses referred to Chapter XXV of the Criminal Code ("Crimes against sexual freedom and decency"), committed to the detriment of a minor or when the pornographic content include the participation of a minor - the limitation of penality may not take place before reaching 30 years of age. For clarity it requires an explanation that the concept of a minor used in the Article 101 paragraph 4 k.k. shall be construed in accordance with Article 10 paragraph 1 and 2 of the Act of 23 April 1964 - Civil Code[39]. In the light of these provisions, a minor is a person under 18 years old who has not came of age by marriage.

Both in respect of the offenses prosecuted ex officio and offences prosecuted on private accusation the legislator predicted extension of the limitation periods. In Article 102 k.k. the legislator decided that, if within the period of limitation specified by Article 101 k.k. the criminal proceeding was initiated, the penality of crimes prosecuted by indictment expires over 10 years, and the penality of crimes prosecuted on a private accusation cease at the end of 5 years - counted from the end of that term. The aim of the regulation of Article 102 k.k. is to enable the criminal proceedings, despite the fact that the statutory limitation periods referred to in Article 101 k.k. has already passed. But the initiation of such proceedings before the expiry of the limitation periods is one of the main condition.

IV. Limitation of enforceability of adjudicated penalties

Limitation of enforceability of legally valid adjudicated penalties is regulated by art. 103 k.k. The legislator adopted the type and the size of imposed penalty as a criterion of the length of the limitation periods It is not important whether a penalty was imposed for an act which is a serious crime or a misdemeanor, as it is irrelevant whether it was an act prosecuted ex officio or on private accusation, The consequence of the expiring of the limitation periods, reffered in Article 103 k.k., is the lack of feasibility of executing of imposed but unexecuted penalties. In such a situation, the executive proceedings shall be called off by the court (Article 15 paragraph 1 of the Act of 6 June 1997 - Executive Penal Code[40]).

According to the Article 103 paragraph 1 k.k., it is impossible to execute the sentence if the period of time from the moment of validating the sentence is: 30 - in the case of a sentence of imprisonment exceeding five years or severe penalty; 15 - in the event of a conviction to imprisonment not exceeding 5 years; 10 - in the event of a conviction for another penalty.

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[38] See explanatory to draft law amending the Criminal Code and other laws, Sejm Paper No. 458 of 18 April 2008.

[39] Consolidated text: Official Journal of Laws of 2016, item 380 as amended.

[40] Official Journal of Laws No. 90, item 557 as amended, hereinafter referred to as k.k.w.

Limitation of execution of the sentence is not running at the time of its execution, which is reflected in Article 15 paragraph 4 k.k.w., which provides, inter alia, that the execution of a sentence of imprisonment in the same or another case suspends the running of the statute of limitation. It should also be appreciated that - in accordance with Article 15 paragraph 3 k.k.w. – the suspension of the enforcement procedure, which occurs in the case of long-term obstacle preventing the enforcement proceedings (Article 15 paragraph 2 k.k.w.) does not suspend the limitation period, unless the convicted person evades execution of the sentence. In the latter case, the period of suspension of the running of the statute of limitation may not exceed 10 years.

In accordance with Article 103 paragraph 2 k.k., the regulation of Article 103 paragraph 1 point 3 k.k., providing a 10-years limitation period for enforcement of the punishment, shall be applied to punitive measures, compensatory measures and confiscation. It means that the legislator has established a 10-year limitation period for execution of the mentioned measures.

V. Suspension of limitation period

Suspension of limitation period is regulated in Article 104 k.k. That suspension is associated with legal obstacles to criminal proceeding or continuing already initiated proceeding and lies in the fact that the limitation period is suspended for the duration of such obstacles. The period of suspension of the limitation period is not included in the limitation period. This period begins to run after the repealing of the reasons for the suspension[41]. Suspension of limitation period is applicable to the limitation of penality and the limitation of execution of adjudicated penalties.

The reason for suspension of limitation period are the situations where the provision of the Act expressly does not allows for an initiation or continuation of criminal proceedings (eg. in the case of using the immunity by the perpetrator). It is not about any actual inability to initiate or continue the proceedings, caused eg. illness of the accused, but about a legal obstacle. It should be noted, however, that if the legal barrier to the initiation or continuation of the proceedings is the lack of request for prosecution or the lack of private prosecution, the limitation period is not suspended (Article 104 paragraph 1 k.k.). It is about preventing the situation that the victim by not filing a complaint or a request could not allow to occur limitation and thereby maintain the offender in uncertainty[42].

The specific case of the suspension of limitation period is described in the Article 44 of the Constitution, which provides that the limitation period in relation to the crimes not prosecuted for political reasons, committed by public officials or on their order, shall be suspended to the moment of removal of these causes. The specificity of such suspension of the limitation period is based primarily on the fact that its due is not a obstruction of a legal nature, but specific factual circumstance. This circumstance is the failure to prosecute for a political reasons[43].

The reason for introducing an Article 44 to the Constitution were historical experiences, which shows that in the past, and especially in the years 1944-1989, there

[41] See W. Świda, *Prawo karne* (Warszawa 1978) 379.
[42] W. Świda, Above, 379.
[43] See T. Sroka, Above, nb. 27.

were accidents in Poland, when the crimes committed by public officials or on their order have not been prosecuted for political reasons[44]. The legislator, by introducing an Article 44 of the Constitution to the legal system, took the view that the impunity of public officials and persons acting on their order, whose offenses were not prosecuted for political reasons, cannot be reconciled with the social sense of justice (the principle of social justice) and the rule of law[45]. Therefore, with a view to preventing such impunity, the legislator decided in Article 44 of the Constitution, as in the provision of a higher order than the statutory provision, for the suspension of the limitation period of crimes not prosecuted for political reasons until the expiry of those reasons. This regulation is effective both in relation to the events of the past, as long as they have not yet been barred, as well as events that might occur in the future[46].

Article 44 of the Constitution - in accordance with Article 8 paragraph 2 of the Constitution - should be directly used by law enforcement authorities, and the legislator can not adopt the provisions that allow for the free statute of limitation with respect to the crimes not prosecuted for political reasons, committed by public officials or on their order. Such provisions would be contrary to the overriding regulation, which is the Article 44 of the Constitution[47].

Another case of suspension of the limitation period can be found in Article 105 paragraph 3 of the Constitution. It applies to parliamentary immunity. This provision stipulates that the criminal proceedings initiated against a person before the day of his election as a deputy, shall be suspended - at the request of the Sejm - until the expiry of the parliamentary mandate. At the same time, this provision provides that in such a situation the limitation period shall be suspended for that time. The latter solution - as emphasized in the doctrine - is to ensure that "using immunity will not change in total impunity"[48]. It should be noticed at the same time that Article 105 paragraph 3 of the Constitution shall also be applied accordingly to the senators (Article 108 of the Constitution).

VI. The exclusion of the statute of limitation

Article 105 paragraph 1 and 2 k.k. excludes the possibility of limitation of penality and the limitation of execution of the sentence in relation to the categories of crimes listed therein. This regulation is an exception to the rule that prosecution of the offense and the possibility of execution of the sentence cease with the passage of time. On the basis of Article 105 paragraph 1 k.k. a derogation from this rule is justified mainly by the particular nature and weight of the categories of crimes listed therein, and in relation to art. 105 paragraph 2 k.k. there is moreover an argument associated with inactivity of procedural bodies, not interested in prosecution of certain offenses committed by public officials, which could lead to their limitation. The provision of Article 105 paragraph 1

[44] See P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.* (Warszawa 2000) 64.

[45] T. Sroka, Above, nb. 11 and the literature cited there.

[46] Ibid., nb. 9-10 i 34-36 and the literature cited there.

[47] In accordance with article 8 paragraph 1 of the Constitution, the Constitution is the supreme law of the Republic of Polish, which means, inter alia, that the provisions of laws must be consistent with it.

[48] J. Repel in J. Boć (ed.), *Konstytucje Rzeczypospolitej oraz komentarz do Konstytucji RP z 1997 roku* (Wrocław 1998) 185.

k.k. should be seen as a sign of fulfillment of constitutional and international obligations, resulting primarily from the provisions ratified by Poland of the Convention of 26 November 1968 on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity [49].

Article 105 paragraph 1 k.k. states that the penality of crimes against peace, crimes against humanity and war crimes cannot expire. Such a definition of crimes covered by that provision should be associated with the acts set out in Chapter XVI k.k., entitled "Crimes against peace, humanity and war crimes". In turn, Article 105 paragraph 2 k.k. regulates that the penality of intentional offense of homicide, grievous bodily harm or deprivation of liberty connected with particular torment, committed by a public official in the performance of official duties, cannot expire. In the constitutional context it is necessary to notice a close relationship between Article 105 paragraph 1 k.k. which excludes the limitation of penality of crimes against peace and humanity and war crimes, and Article 43 of the Constitution, which states expressis verbis that war crimes and crimes against humanity are not subject to statute of limitations. The last provision obliges the legislator to maintain such a state of law, where there is no possibility of limitation of penality of two categories of offenses, namely war crimes and crimes against humanity. In addition, Article 43 of the Constitution includes a warrant, addressed to the Polish authorities, of prosecution and hold responsible of each perpetrator of war crimes or crimes against humanity[50].

The justification for the above duties of the legislator and the authorities, underlined in Article 43 of the Constitution, is an exceptional weight of war crimes and crimes against humanity which hit the base of being of nations and the elementary sense of justice. Therefore, even a significant passage of time since the commission of such a crime does not outdate a need of its punishment and satisfying in this way the social sense of justice[51].

Recognizing the close relationship between Article 105 paragraph 1 k.k. and Article 43 of the Constitution, it cannot be assumed at the same time that in this latter provision the concept of war crimes and crimes against humanity should be explained through the prism of the Criminal Code, and in particular Chapter XVI ("Crimes against peace, humanity and war crimes"). Article 43 of the Constitution is in fact a reference to the norms of international law and, in particular, cited Convention of 26 November 1968 about not applying the limitation to the war crimes and crimes against humanity. Therefore the concepts of war crimes and crimes against humanity included in this provision should be explained as it is done in the international law, regardless of the classification used in the Polish Criminal Code[52].

VII. Summary

The current shape of the statute of limitation in the Polish criminal law is the result of many years of evolution of this institution, which in the modern and extensive form

[49] Official Journal of Laws of 1970, No. 26, item 208 as amended.

[50] See B. Banaszak, M. Jabłoński, J. Boć in J. Boć (ed.) *Konstytucje Rzeczypospolitej oraz komentarz do Konstytucji RP z 1997 roku* (Wrocław 1998) 88.

[51] See Z. Siwik in J. Boć (ed.) Ibid., 88.

[52] See L. Kubicki, Above, 30-31 i 32; B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz* (Warszawa 2012) nb. 1; T. Sroka, Above, nb. 35.

appeared for the first time in the Penal Code of 1932. It should be emphasized that the Polish doctrine has never widely questioned and does not actually question the meaning and the need of functioning of the limitation in the criminal law. Of course, the doctrine indicated and currently indicates the number of specific reservations as to the shape of the institution, but these reservations never led to formulate demands the elimination of the limitation from the Criminal Code. These demands do not appear despite the fact that in the light of the Constitution - as has already been mentioned - there are no obstacles to eliminate the institution of limitation from the Polish criminal law, and in particular, it would not violate the constitutional rights and civil liberties. Approvals for the institution of limitation in Poland seems to correspond with the trends occurring in other European countries, where, except for the countries of the common law, the institution of limitation exists in a relatively wide range. It seems that today a far-reaching critique of the institution of limitation, affecting its basics and aiming to eliminate or at least to significantly reduce the limitation, was rejected[53]. There is also no indication that in the foreseeable future this situation can fundamentally change.

[53] Such criticism has performed particularly in the second half of the eighteenth century and in the nineteenth century. The critics were, inter alia, Beccaria and Feuerbach. It was pointed out, inter alia, that the limitation period is an alien institution for the criminal law moved from civil law, incompatible with typical criminal law justice objectives. The legitimacy of the existence of limitation in criminal law was also questioned by representatives of the school of anthropological, who claimed that the institution favors clever criminals who managed to hide the offence (see M. Kulik, Above, 9).

Preparatory Hearing in Criminal Proceedings according to the Criminal Procedure Code of the Republic of Serbia from 2011

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Abstract:

During the recent years the criminal procedure law in Serbia is reformed with key aim of creating the normative basis for more efficient criminal proceedings, which would act as a foundation for the entitled right to trial within a reasonable time. With that purpose, in 2011. new Criminal Procedure Code is adopted, which, among many novelties, introduced the preparatory hearing in criminal proceedings. Goal of this stadium of poceedings is preparation of the main hearing, making it more organized, systematic and efficient, relieved from examination of unnecessary and unimportant evidences for subject-matter. However, it's questionable is it or would it fulfill the aims for which it was introduced in the first place and if its existence in criminal proceedings is necessary.

Key words: *Preparatory hearing, reform, efficiency.*

1. Introduction

Criminal Procedure Law in Serbia is undergoing reforms and the key aim is creating a normative basis for more efficient criminal proceedings, which would act as a foundation for the entitled right to trial within a reasonable time. Given goals are necessary to achieve, but they should not and must not act against the national legislation and relevant international instruments which guarantee freedoms and human rights generally.[1] Also, the key aim of these reforms is to harmonize legislation in Serbia with existing solutions in modern comparative criminal procedure law and

[1] Bejatović, S., (2015). Glavni pretres i njegov doprinos obezbeđenju suđenja u razumnom roku [The main hearing and its contribution to securing a trial within a reasonable time], In: S. Bejatović and I. Jovanović (editors), Glavni pretres i suđenje u razumnom roku, regionalna krivičnoprocesna zakonodavstva i iskustva u primeni, Beograd, Misija OEBS u Srbiji, pp. 10

present tendencies in modern legal science.[2] With this purpose, new Criminal Procedure Code from 2001. with its amendments has introduced significant changes in the criminal procedure legislation in Serbia. Finally, in 2011. Serbia has adopted new Criminal Procedure Code,[3] which introduced significant novelties in criminal procedure legislation.

One of the many new features in criminal proceedings is the introduction of the preparatory hearing. This step in criminal trial comes after the confirmation of indictments and its purpose is the preparation for the main hearing in order to increase efficiency of criminal proceedings and reduce the caseload the courts are dealing with. Main hearing is important stadium of the trial, where the criminal case is being discussed respectively about indictment of the prosecutor, defense of the accused, evidences and all the important factual and legal questions.[4] All these elements are the basis for judge's just and law-full decision, which is the main purpose of the criminal proceedings. Knowing the impact of the main hearing we can also see what is the importance of the preliminary hearing as the stadium which leads to it and whose purpose is to prepare it. Goal of this stadium is to bring systematic and oreder to the trial, by relieving from unnecessary and unimportant questions, to which, otherwise, the evidences wolud be presented. However, it's questionable if the installment of the preparatory hearing is achieving the targeted key aims of introducing it in the first place. Also, will this stadium of the proceedings increase efficiency of the trial, reduce the courts caseloads and entitle the right to trial within a reasonable time, is in question.

2. About the preparatory hearing

After receiving confirmed indictment and case documentation, president of the panel starts with preparation for the trial, which includes holding of the preparatory hearing, scheduling of the trial and making other decisions, related to the management of the proceeding.[5]

The reason for the introduction preparatory hearing in criminal proceeding is bringing the new concept of the trial, which is taking characteristics of adversarial trials, which is not so common for Serbian traditional criminal procedure.[6]

The point of the preparatory hearing is that the parties state their positions in relation to the subject-matter of the charges and also about their proposition of evidence by explaining the need for them to be examined at the trial. This is meant so that the judge can plan time, duration and course of the trial, and all that in order to his

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[2] Bejatović, S., (2014). ZKP Srbije iz 2011 – Kraj reforme ili samo jedan neuspešan korak procesa reforme? [CPC Serbian the 2011: End to reforms or just one unsuccessful step process of reform?], *Strani pravni život*, iss. 1, pp. 48

[3] The Criminal procedure Code, *Official Gazette od RS*, no 72/2011, 101/2012, 121/2012, 32/2013, 45/2013 and 55/2014, further in text: The Code

[4] Pavlović, Z., (2015). Krivično procesno pravo II, drugo dopunjeno izdanje [Criminal procedural law, second edition], Novi Sad, Univerzitet Privredna akademija u Novom Sadu, pp. 80

[5] Škulić, M., Ilić, G., (2012). Novi Zakonik o krivičnom postupku Srbije, Kako je propala reforma - Šta da se radi? [New Serbian Criminal procedure Code – How is failed reform and what to do?], Beograd, Udruženje javnih tužilaca i zamenika javnih tužilaca Srbije, pp. 67

[6] Škulić, M., (2013). Dominantne karakteristike osnovnih velikih krivičnoprocesnih sistema i njihov uticaj na reformu srpskog krivičnog postupka [The dominant characteristics of the major criminal procedure systems and their impact on the reform of the Serbian criminal procedure], *Crimen*, vol. IV, iss. 2, pp. 223

efficiency.[7] Purpose of this preliminary stadium is to limit parties freedom of proposing the new evicences in this phase of proceedings, so that they could notifie in advance and to uncover evidence for main hearing witch attempt to be examined at the trial and also to prevent manipulation with evidences.[8] Here, key aim is to prevent obstruction of proceeding. „By, this, it is possible for both parties to „show their hand" with evidences that they are planing to bring out on the main trial."[9]

Beside parties declaration about criminal case and evidence proposition, in this stadium the factual and legal question which will be the topic of trials discussion, are being determined as well as on other questions the court finds relevant for holding the trial. The president of the panel can make decision about discontinuing, joinder or severance of criminal proceedings, if there are conditions prescribed by law. He can also make a decision on a plea agreement which has been concluded before. If the defendant is in detention, ruling can be made to abolish or replace it with other milder measure.

The preparatory hearing is held before the president of the panel and the parties and the defense council, the injured party, legal representative and proxy of the prosecutor and injured party, and if needed a translator and an interpreter,[10] and they will be summoned to the preparatory hearing. It's held without presence of the public and in the summons for the preparatory hearing the parties will be notified that the main hearing may be held at this state of the proceeding. Provisions on the trial are applied accordingly to the preparatory hearing, unless specified otherwise by Code.[11]

2.1. Scheduling and holding a preparatory hearing

Prescribing the schedule of a preparatory hearing, legislator had in mind a need for an urgency when people who are in detention are in question. Thus, after reception of the confirmed indictment by the court, the president of the panel will schedule a preparatory hearing not later than 30 days, or 60 days counting from the date of reception of the confirmed indictment by the court, depending on if the defendant is in detention or is at liberty. If he doesn't schedule a preparatory hearing within the time limit, he needs to notify the president of the court, who will undertake measures for the preparatory hearing to be scheduled immediately. Therefore, this time limit is counting from the date of reception of the confirmed indictment by the court. The indictment is confirming after court has received it, delivered it to the parties and examined by the panel, so it would make more sense counting time limits form the date of reception of the confirmed indictment by the president of the panel,[12] whose duty is to schedule the preliminary hearing and not from the moment of the receiving it by the court.

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[7] Bejatović, S. Glavni pretres i njegov doprinos obezbeđenju suđenja u razumnom roku [The main hearing and its contribution to securing a trial within a reasonable time], pp. 20

[8] Škulić, M., Ilić, G., Novi Zakonik o krivičnom postupku Srbije, Kako je propala reforma - Šta da se radi? [New Serbian Criminal procedure Code – How is failed reform and what to do?], pp. 67

[9] Bejatović, S. Glavni pretres i njegov doprinos obezbeđenju suđenja u razumnom roku [The main hearing and its contribution to securing a trial within a reasonable time], pp. 20

[10] Grubač, M., (2011). Nove ustanove i nova rešenja ZKP Srbije od 26.septembra 2011. godine [Serbain CPC from 26. september 2011. - The new institutions and solutions], *Pravni zapisi*, God. II, iss.2, pp. 498

[11] The Code, article 345.

[12] Škulić, M., Ilić, G., Novi Zakonik o krivičnom postupku Srbije, Kako je propala reforma - Šta da se radi? [New Serbian Criminal procedure Code – How is failed reform and what to do?], pp. 145

Scheduling and holding preparatory hearing is a rule. However, legislator has predicted an exception to the rule according to the severity of the offence or scope of the penalty. Thus, scheduling a preparatory hearing is not necessary when an indictment has been filed in connection with a criminal offence punishable by a term of imprisonment up to twelve years and the president of the panel holds that holding a preparatory hearing is not necessary for as much collected evidence, the controversial factual and legal questions or the complexity of the case. In this case, he will issue an order scheduling a main trial.

The president of the panel will schedule a preparatory hearing in case if the public prosecutor, the defendant and his defense counsel have concluded a plea agreement in respect to certain counts of the indictment, for the part of the indictment non encompassed by the agreement.

In this stadium of proceedings, president of the panel determines that the files containing transcripts or information that may not be used in criminal proceedings, or that a court decision may not be based on it, will issue a ruling on their exclusion from the files. A special appeal is allowed against this ruling and after the ruling becomes final president of the panel needs to put them in the place under a separate sealed cover and to deliver them to the judge for the preliminary proceedings who will keep the excluded transcripts separate from other documents, and they may not be examined or used in the proceedings.

Preparatory hearing is not public. However, in the summons the parties will be advised that the main hearing may be held at the preparatory hearing. By the rules, the main hearing is public, which is not the case with preliminary hearing. The question is what would happen if preliminary hearing becomes main hearing, which is discretional right of the president of the panel and he may decide that. In that case, it would mean that the main hearing is going to be held without public or with „simulation" of public, even in those cases when public are not formally excluded from the main hearing,[13] which should be acceptable.

On a motion of the parties, president of the panel may order the files, objects or instruments held by the court or other state authority, if it's necessary to obtain for the preparatory hearing.

2.2.Process of the preliminary hearing

Preliminary hearing begins with examination of the conditions fulfilled for it's scheduling. In that manner, the president of the panel first checks whether all the persons summoned are present, and in event of the absence of any them, are there the conditions prescribed by the Code for holding this stadium of proceedings in their absence is fulfilled. Exceptionally, if the defendant is absent and he has been duly summoned and he doesn't justify his absence, president of the panel may decide that the preparatory hearing be held, if the defense council is present. This legislative solution fulfills the goal of the proceedings not stalling, but the question is if that is in the interest of the defendant, who needs to declare on the criminal case and to propose evidence for his claims, on which the main hearing course is much in depend on, thereby the result of it. Although there is predicted condition for holding a preparatory hearing in the absence of the defendant by the presence of the defense council, which is good solution,

[13] Ibid. pp. 70

it would still be meaningful that the defendant to be present on this hearing. Intent for introduction this phase in proceedings is preparation for main hearing, by declaration of the parties of criminal case in this stadium and that's all for determined all the facts that are going to be proven on the main trial.[14] This aim may be completely accomplished only if the both parties are present on the preparatory hearing.

After checking if all the persons summoned are present and if the conditions prescribed by Code for holding the preparatory hearing are fulfilled, the president of the panel will check personal data of the defendant, is he being on liberty or in detention, and if he is in detention and how long is in detention, and in case he was released before the filing of the indictment, information on the duration of detention.

After checking personal data of the defendant, if the injured party hasn't submitted a restitution claim, president of the panel will advise him about the right to submit this claim and the duties of proposing the evidence for it and about the right to propose a temporary measures to ensure the restitutional claim.[15] Afterwords, president of the panel decides about plea agreement concluded between the public prosecutor and the defendant, if it's concluded.

2.2.1. Deciding on plea agreement on preparatory hearing

According to the Code, it's possible for the public prosecutor and the defendant to conclude the plea agreement. The president of the panel is deciding on it at the preparatory hearing and the public prosecutor and the defendant will notify him if they had concluded the agreement after confirmation of the indictment. In this way, it's created the possibility for the completion of the proceedings by consensus of the parties in this early stadium of the proceedings[16] and that's in the interest of the defendant, the public prosecutor and the court as well. Thus, the defendant is avoiding partaking in long and arduous process, which is uncertain for him, and also could end with serious consequences in respect to those which could be in the agreement. In this manner, if the president of the panel accept the agreement, the judiciary is relieving caseload.

The president of the panel may accept, dismiss or reject the plea agreement. If the agreement doesn't contain the data specified by the Code[17] or of a duly summoned defendant has not appeared and failed to justify his absence, the president of the panel will dismiss a plea agreement by a ruling. In other case, he will accept it if he establish that the defendant has knowingly and voluntarily confessed to the criminal offence or criminal offences which are the subject-matter of the charges, or if the defendant is aware of all the consequences of the concluded agreement, and it's a especially highlighted the consequences of the renouncing of right to trial and restriction of his right to file an appeal against the decision of the court based on the plea agreement, or if

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[14] Kos, D., (2009). Pripremno ročište kao model utvrđivanja spornog i oblikovanja dokaznih prijedloga stranaka u vezi s kontradiktornim ispitivanjem [Preparatory hearing as a model for determining disputed and designing parties evidence proposition related to contradictory examination], In: Novine u kaznenom zakonodavstvu – 2009, Inženjerski biro, (2016, November 11) Retrived from: http://crm4.demo.snt.hr/CustomPages/Static/HRV/Files/DKos_Pripremno-rociste_2009.pdf

[15] Škulić, M., (2015). Krivično procesno pravo, osmo izmenjeno i dopunjeno izdanje [Criminal procedural law, eighth edition], Beograd, Pravni fakultet Univerziteta u Beogradu, pp. 363

[16] Škulić, M., Ilić, G., Novi Zakonik o krivičnom postupku Srbije, Kako je propala reforma - Šta da se radi? [New Serbian Criminal procedure Code – How is failed reform and what to do?], pp. 8

[17] The Code, article 314.

the other existing evidence are not run contrary to the defendant's confession on having committed the criminal offence and that the penalty of other criminal sanction or measure in respect of which the parties has reached agreement was proposed in line with criminal or other law. If the president of the panel accept the agreement, he will declare the defendant guilty by a judgment and he will also write in it the reasons which led him to accept the plea agreement. If he determines that the offence which is subject-matter of the charges is not a criminal offence and that the conditions for applying a security measure doesn't exist or that the statue if limitation for criminal prosecution has expired, or that the offence is covered by amnesty or pardon, or that the other circumstances exist which permanently preclude criminal prosecution, or there is insufficient evidence for a justified suspicion that the defendant committed the offence which is the subject-matter of the charges, he will reject a plea agreement by a ruling. In this case, when the ruling becomes final, president of the panel will destroy plea agreement and all documents related to it, in the presence of the judge who issued the ruling, and transcript of it it will be made. Next, the proceeding will be returned to the stage which preceded the conclusion of the plea agreement. The judge who issued the ruling may not participate in the further course of the proceedings. President of the panel will also reject a plea agreement by a ruling, in case of one or more of the conditions for accepting the agreement haven't been fulfilled. The decision of the court on the plea agreement is delivered to the public prosecutor, the defendant and his defense counsel and it's excluded the right to appeal on a ruling dismissing or rejecting the plea agreement. It is allowed to appeal against the ruling accepting the plea agreement for the existence the reasons for rejecting an agreement or if the judgment doesn't relate to the subject-matter of the agreement.

If the plea agreement relates to only some counts of the indictment, the proceedings for those offences will be separated in accordance with the laws and for the other counts of the indictment president of the panel will hold the preparatory hearing or will schedule the main hearing if the preparatory hearing is not scheduling.

With new legislation solutions is provided greater use of this institute, because concluding the plea agreement is now enabled for more criminal offences. Concluding this agreement is now allowed by the law, without limitation toward the seriousness of the criminal offence, while the previous legal solutions were limiting the conclusion of the plea agreement in this matter. Limiting factor was that this kind of the agreement was possible only for the criminal offences punishable by a term of imprisonment of up to twelve years. Although, there are many reasons in favor of this agreement, still it may be bad legal solution, because it allowed concluding the agreement on the serious criminal offences and for whom there is no justification for the offenders not to be judged or possibly that they could receive milder punishment or misuse this institute.

There is much criticism by the public experts if the field of legislature aboute this agreement, because the process of concluding it is not specified by the Code in detail. This act defines the contents of the agreement, but not the manner on how the agreement between the parties will be concluded and the rules of course of the process which preceded the conclusion of it, in terms of negotiating about signing the agreement. The Code only prescribe with the rules that when interrogating defendants, question that will be asked may not contain deception or be based on an assumption that he has admitted to something which he has not admitted, and they may not be leading. It is necessary for the confession of the defendant to be voluntarily and that he is need to be aware of all consequences of the concluded agreement. However, it's

questionable if the defendants confession is voluntarily and without deception and pressure. By presenting the consequences of the proceeding, the extent and scope of the criminal penalty will be suggested, in that case are questioning the voluntarily of the confession of the defendant and it's absence of deception and pressure and his free will.

Further, the problem is that the process of concluding the agreement is private, so there is no control of public which is contrary of the basic principles of the procedural law and fundamental human rights. Public is excluded from the preparatory hearing, on which is deciding about the plea agreement, and so the question is will the defendant have the ability to conscientiously, voluntarily and completely free confess the offence. Further, would the judge check this assumptions with sufficient attention and how is he going to check if the other evidences are in the opposite with confession of the defendant.

The public prosecutor and the defendant are making an agreement on the type, extent or scope of the penalty or other criminal sanction, beside confessions of the defendant. Problem of that kind of legal solution is is possibility of agreement the parties, who are only formaly equal, on the concluding the plea agreement by which the defendant is confessing committing the criminal offence and by which is making a decision on his criminal responsibility and the type, extent or scope of the penalty or other criminal sanction for that criminal offence. For that matter, the judge does not decide for criminal responsibility of the defendant in true sense. That is the result of a consensus of the parties and the judge is reduced to authorized person who is checking if all the conditions for concluding the agreement are fulfilled.[18] If the plea agreement contains scope of the penalty, judge is only to measure and give the criminal sanction within the scope. In this case, the question is how the judge is going to measure the sanction if he is not presented with the evidence about circumstances from which depends the decision on a penalty.[19]

It is the the judge's duty to check is the defendant confessed committing criminal offence knowingly and voluntarily and is he aware of all consequences of the agreement. He also checks are the other evidence in accordance with the confession of the defendant. Problem that may occur in practice is possible doubt if the judge is going to consider all the issues and details, how is he going to do that and with how much attention. The is a lot criticism of this legal solutions in the matter of the plea agreement, such as renouncing the right to appeal or insufficient protection of interest of the injured etc.[20] Numerous critics of the experts related this institute are not questioning it's importance and validity, they are meant to improve legal solutions, so they could be suitable for exercising and preventing possible abuse of this institute.[21]

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[18] Škulić, M., Ilić, G., Novi Zakonik o krivičnom postupku Srbije, Kako je propala reforma - Šta da se radi? [New Serbian Criminal procedure Code – How is failed reform and what to do?], pp. 8 and 9

[19] Bejatović, S., (2015). Efikasnost krivičnog postupka kao međunarodni pravni standard i reforma krivičnog procesnog zakonodavstva Srbije (norma i praksa) [Efficiency of criminal procedure as international legal standard and reform of criminal procedure legislation of Serbia: Standard and practice], *NBP Žurnal za kriminalistiku i pravo*, Kriminalističko-policijska akademija, Beograd, vol. 20, iss. 2, pp. 40

[20] Ibid.

[21] Bejatović, S. (2013). Pojednostavljene forme postupanja kao bitno obeležje reformi krivičnog procesnog zakonodavstva zemalja regiona [Forms of Simplified Procedure – a Key Characteristic of Criminal Procedure Reforms in the Region], In: I. Jovanović and M. Stanisavljević (editors), Pojednostavljene forme postupanja u krivičnim stvarima, regionalna krivičnoprocesna zakonodavstva i iskustva u primeni, Beograd, Misija OEBS u Srbiji, pp. 17

2.3. Declaration of the parties on the charges and evidences and proposing new evidence

After the president of the panel decides on plea agreement, the parties will declare on the charges. By statements of the parties, public prosecutor and the defendant, starts the preparatory hearing in terms of contents.[22]

The public prosecutor quotes from the indictment the description of the act which meets the legal elements of a criminal offence and the legal qualification of the criminal offence and he presents the evidence for his claim. He may also propose the ruling a certain type and extent of criminal sanction. If the charges is filed by a subsidiary or private prosecutor, the president of the panel may summarize their contents. On this stadium of proceedings the public prosecutor have no need much to engage in analysis and explaining contents of the evidences, because he will do that on the main hearing. Also, the defendant should not focus on the proposed evidence by the prosecutor.[23] These action could start main defense of the defendant on the preliminary hearing, not on main hearing. If the injured party is present, he may submit a restitution claim and if isn't and he has submitted the claim, the president of the panel will read it out.

The defendant also has right to declare on the charges, after the president of the panel have advised him about his rights and duties. At this stadium of proceedings, declaration of the defendant is very important. He has the opportunity to declare on the indictment and to challenge the claims made in the charges. It's very important that the defendant understands what he's charged of and also that he understands all the parts of the indictment, because it's substantially what parts is he going to make indisputable at this stadium of the proceedings. It's important which part of the indictment he is challenging and for what reasons. Consequences of his declaration on the charges on the preparatory hearing may be substantial, because at the trial it is going to be examined only on evidences connected to the part of indictment which has been challenged. The president of the panel has duty to caution the defendant about that. Problem with this legal solution is that it can occur that the defendant may mistakenly or because of carelessness, ignorance or incomprehension do not challenge the indictment or parts of it and that may affect the process of the main hearing and decision making as well. This may causes disastrous consequences for the defendant. He may be without defense counsel, semi-literate, unaware of knowing what challenging the claims made in the charges mean. Further, he may be unaware of consequences of challenging the charges at this stadium of proceedings and inability to do that later at the main hearing. The same case is with the awareness of consequences of inability proposing the evidence at main hearing, which he knew about on preparatory hearing.[24] It may not expect form layman, who is defending without defense counsel, to specify which part of the indictment he is challenging and for what reasons. This also extends to explaining the proposed evidence that he intends to examine at the trial. This is because he has no

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[22] Škulić, M., Krivično procesno pravo, Osmo izmenjeno i dopunjeno izdanje [Criminal procedural law, eighth edition], pp. 363

[23] Krstić, Z. (2015). Pripremno ročište i efikasnost glavnog pretresa [Preparatory hearing and the efficiency of the main hearing], In: S. Bejatović and I. Jovanović (editors), Glavni pretres i suđenje u razumnom roku, regionalna krivičnoprocesna zakonodavstva i iskustva u primeni, Beograd, Misija OEBS u Srbiji, pp. 161

[24] Škulić, M., Ilić, G. Novi Zakonik o krivičnom postupku Srbije, Kako je propala reforma - Šta da se radi? [New Serbian Criminal procedure Code – How is failed reform and what to do?], pp. 68

knowledge of criminal and criminal procedural law which is needed, like public prosecutor or defense counsel, and that puts him in unequal position in regard to the prosecutor.[25] Further, the result from such legal concept is presumption of accuracy of the indictment, because at the trial will be examined only evidence connected to the part of the indictment which has been challenged. Beside numerous reasons for which the defendant may not be challenging the indictment, the question is what will happen if the defendant remains silent. So, his right to defends himself with silence and the right to change his defense tactics during the proceedings are questioned.[26] "If they are not challenging anything, that means that the public prosecutor do no need to prove anything and the main hearing becomes practically unnecessary and the conviction "guaranteed"."[27] This legal solution disputes the presumption of innocence.[28] Finally, it is prescribed by the Code that the burden of proving is on the prosecutor.[29]

If co-defendant has confessed to a certain counts of the indictment which are related to the other co-defendant who has challenged them, the main hearing will be held for both of them and then will be issued as a rule a single judgment.

Proposing the evidence comes after declaration of the parties. Both of them have right to propose the evidence for their claims, which they are intend to present at the trial, and they have to explain the proposal. Also, the injured party have this right for his claims. Each party will state its position on the proposals of the opposing party and the injured party. It's important for each party to prepare for this stadium of proceedings, as the evidence known to them, but not proposed at that time without justified reasons, will not be examined later at the trial. They will be advided about this matter in the summons to the preparatory hearing. Therefor, this is the last moment for them to propose the evidence which they consider important for their claims and which are known to them at that time and which they have the ability to present. It can be concluded that the defendant and his counsel are going to propose the evidence at the preliminary hearing, without the intent to propose at that time, because of the limited ability for doing that later in the trial.[30] "Imposed extortion evidence by the Code can not in any way determine that is in the harmony with defendants right not to prove his innocence or with standard that the burden on proof is on the prosecutor."[31] The question remains: which are the justified reasons on witch the court will assess in each specific case. Meaning of this limitation, is preventing the possible abuse of the of right proposing the evidence, which would lead to obstruction of proceedings.[32] Exception has been provided in the case of new evidence, whose examination can be proposed

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[25] Tripalo, D., Đurđević, Z., (2011). Predlaganje dokaza [Presenting the evidence], *Hrvatski ljetopis za kazneno pravo i praksu* (Zagreb), vol. 18, iss. 2/2011, pp. 482

[26] Krstić, Z. op. cit. pp. 162

[27] Škulić, M., Ilić, G., (2012). Novi Zakonik o krivičnom postupku Srbije – Reforma u stilu „jedan korak napred – dva koraka nazad" [New Serbian Criminal procedure Code – reform in style „one step forward – two steps back"], Beograd, Udruženje javnih tužilaca i zamenika javnih tužilaca Srbije, pp. 123

[28] Škulić, M., Ilić, G., Novi Zakonik o krivičnom postupku Srbije, Kako je propala reforma - Šta da se radi? [New Serbian Criminal procedure Code – How is failed reform and what to do?], pp. 68

[29] The Code, article 15.

[30] Đurđić, V., (2015). Perspektiva novog modela krivičnog postupka Srbije [A perspective of new form of criminal proceeding], *NBP Žurnal za kriminalistiku i pravo*, Kriminalističko-policijska akademija, Beograd, vol. 20, br. 2, pp. 84

[31] Ibid.

[32] Pavlović, Z., op. cit. pp. 83

until the end of the main hearing. Even though, the key aim of the reform is efficiency of the proceedings, with the aim of exercise of the right to trial within a reasonable time, still the express trial doesn't always mean efficient trial. The proceeding that ends quickly may be unfair and that's not and shouldn't be the aim which democratic state tends to.[33]

Thus, courts decision will depend of parties proving initiative. The court must be sure of the certainty of each of the decisive facts. If some of them doesn't have substantial evidence to make sure of its existence, court may not investigate and collect evidence of its existence. In that manner, court's degree of certainty only depends on parties evidences. This also imposes an obligation to the court to investigate sureness of every fact determine with certainty, but that doesn't mean an obligation for court to fully and truthfully determines finding facts. Courts assurance in certainty of the facts share destiny of the intentions of the parties and their ability to prove the truth.[34] Exceptionally, the court, ex officio, may order to examine the additional evidence, but not in the aim of determining the truth, but to eliminate contradictions and ambiguities presented in the evidence.[35] "Hence, instead of having parties prove facts on which the punishment in favor of public interest is based, it's civilizational that that the state to relies on independent, impartial and competent state authority, such is the court. Changing the new process Code and bringing back principle of truth into the criminal proceedings, but also to establish a balance between principal duty of prosecutor to carry the burden of proving and proving initiative of the court, should be approached with this in mind. Obviously, the legislators has been motivated by the idea of increasing the efficiency of proceedings, without keeping the guarantee of human rights in criminal proceedings in sight."[36]

If the defendant confesses to having committed the criminal offence at a preparatory hearing, state authority is obliged to collect the evidences on the defendant and criminal offence, if there is a doubt in the truth of the confession, if it's contradictory, unclear and or it's in opposite with other evidence. In this respect, proposing the evidence for the trial will be limited and also it would be limited to the evidence on which depends the decision on the type and extent of the criminal sanction.[37]

President of the panel is deciding on the parties evidence proposal. He does not have to accept every evidence proposal of the parties. He can reject ones that he consider illegal, but he has an obligation to justify his ruling. If he considere that the proposal is aimed at proving the facts that are not the subject-matter or that they are refers to the fact that are not proving or which examination is obviously aimed at delaying the proceedings, he can do the same.

2.4. Deciding on other questions

At the the preparatory hearing, the president of the panel may decide on defendants detention. With consent of the parties, he can abolish or replace it with more

[33] Škulić, M., Ilić, G. Novi Zakonik o krivičnom postupku Srbije, Kako je propala reforma - Šta da se radi? [New Serbian Criminal procedure Code – How is failed reform and what to do?], pp. 13

[34] Đurđić, V., op. cit. pp. 79

[35] Ibid., pp. 80

[36] Ibid., pp. 81

[37] The Code, article 88. and 350. paragraph 3.

lenient measure by a ruling, and appeal it's not allowed. Therefore, at the preparatory hearing this measure can be replaced only in the interest of the defendant.[38]

At this stadium of the proceedings, the president of the panel also may decide discontinuing criminal proceedings. Thus, he will discontinue proceedings by a ruling if he determines that the prosecutor has desisted from the charges or the injured party from the motion to prosecute or that the defendant has already been convicted for the same criminal offence or acquitted of the charges with a final decision, or that the charges against him have been rejected with a final decision, or the proceedings against him have been discontinued with final decision. The same will be in the case that he determines that the defendant has been relieved from prosecution by an act of amnesty or pardon, or if criminal prosecution can not be undertaken due to expiry of the statute of limitations or other circumstances permanently excluding it. The prosecutor may appeal against this ruling and in that case the panel will decides on it.

If the president of the panel finds that the main hearing can take place, according to proposed evidences and legal question that will be subject-matter at the trial, he will issue an order on holding the trial. Before the conclusion of the preparatory hearing, president of the panel will issue an order designating the date, hour and place of holding the trial.

Conclusion

Key aim of introducing the preparatory hearing in criminal proceeding is to allow the court to prepare for main hearing, by concentrating of the proposed evidences and restricting parties freedom to propose new evidence at the main hearing and having them declare on the indictment and proposed evidences at this early stadium of proceedings, with relieving the main hearing of presenting unnecessary and unimporatant evidences for the subject-matter.

It seems that the preparatory hearing, when it's optional, in the practice is holding rare, and that the way of it's implementation, in many cases, are not in accordance with intentions of the legislator.[39] It happend, in many cases, that the court summones the parties to the main hearing, and then he delays it, so the witnesses and experts could be examined, but they could be questioned on the same day as the defendant. The same is in the case if parties or defense councel do not appear on the hearng, although there are legal solutions for violating process dicipline. [40] Thus, instead of more efficient proceedings, in practice, this is possible and it happens that the preparatory hearing is producing the opposite effects, such as prolongation of the proceedings and creating unnecessary and higher costs. It can be seen that the Serbian criminal procedure legslation currently is not in the function of the key aims of the reform as a whole, or the creating the normative basis for efficiant criminal proceedings, as the presupposition of realizeing the right to trial within the responsable time, with respect of human rights guaranteed with national and international legislation.

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[38] Škulić, M., (2013). Osnovne novine u krivičnom procesnom pravu Srbije, Novi Zakonik o kivičnom postupku iz 2011. godine [Basic novelty in Serbian criminal procedural law, New Criminal procedure Code from 2011.], Beograd, Pravni fakultet Univerziteta u Beogradu, pp. 129

[39] Krstić, Z. op. cit. pp. 154

[40] Ibid., pp. 163

In Serbian professional public, taking into account all the peculiarities of preparatory hearing, it is present point that this stadium is usless for its complication, and becouse of this, it is not in the function of efficincy of criminal proceedings, which is the key aim of its introductioning.[41] Fast proccedings is not always efficiant one, and swiftness must not be detrimental to making right and legal decision. The preparatory hearing, instead of making the trial more efficient, it's making the opposite, so in practice leads to unnecessary delay in proceedings. This is why the part of the professional public stand for its suspension and finding the other way for make criminal proceedings more efficinat and for entitle to trial within in a reposnsible time, which would not be at the expense of making right and lawful decision and which would be put into practice.

It's necessary to continue working on the process of the reforming criminal procedure legislation, in terms of solving current problems, including the question of exsistence and maintenance of preparatory hearing in criminal proceedings.[42]

Literature

- Bejatović, S., (2015). Glavni pretres i njegov doprinos obezbeđenju suđenja u razumnom roku [The main hearing and its contribution to securing a trial within a reasonable time], In: S. Bejatović and I. Jovanović (editors). Glavni pretres i suđenje u razumnom roku, regionalna krivičnoprocesna zakonodavstva i iskustva u primeni, Beograd, Misija OEBS u Srbiji, pp. 9-33

- Bejatović, S. (2013). Pojednostavljene forme postupanja kao bitno obeležje reformi krivičnog procesnog zakonodavstva zemalja regiona [Forms of Simplified Procedure – a Key Characteristic of Criminal Procedure Reforms in the Region], In: I. Jovanović and M. Stanisavljević (editors), Pojednostavljene forme postupanja u krivičnim stvarima, regionalna krivičnoprocesna zakonodavstva i iskustva u primeni, Beograd, Misija OEBS u Srbiji, pp. 11-31

- Bejatović, S. (2015), Glavni pretres i ZKP RS iz 2011. godine, Ispunjenost očekivanja procesa reforme, ili ne? [The main hearing and CPC RS from 2011, The fulfillment of the expectations of the process of reform or not?], In: M. Škulić, G. Ilić, M. Matić Bošković (editors), Unapređenje Zakonika o krivičnom postupku, de lege ferenda predlozi, Beograd, Misija OEBS u Srbiji, pp. 101-126

- Bejatović, S., (2014). ZKP Srbije iz 2011 – Kraj reforme ili samo jedan neuspešan korak procesa reforme? [CPC Serbian the 2011: End to reforms or just one unsuccessful step process of reform?], *Strani pravni život*, iss. 1, pp. 45-67

- Bejatović, S., (2015). Efikasnost krivičnog postupka kao međunarodni pravni standard i reforma krivičnog procesnog zakonodavstva Srbije (norma i praksa) [Efficiency of criminal procedure as international legal standard and reform of criminal procedure legislation of Serbia: Standard and practice], *NBP Žurnal za kriminalistiku i pravo*, Kriminalističko-policijska akademija, Beograd, vol. 20, iss. 2, pp. 27-53

[41] Bejatović, S., Glavni pretres i njegov doprinos obezbeđenju suđenja u razumnom roku [The main hearing and its contribution to securing a trial within a reasonable time], pp. 21

[42] Bejatović, S. (2015), Glavni pretres i ZKP RS iz 2011. godine, Ispunjenost očekivanja procesa reforme, ili ne? [The main hearing and CPC RS from 2011, The fulfillment of the expectations of the process of reform or not?], In: M. Škulić, G. Ilić, M. Matić Bošković (editor), Unapređenje Zakonika o krivičnom postupku, de lege ferenda predlozi, Beograd, Misija OEBS u Srbiji, pp. 126

- Đurđić, V., (2015). Perspektiva novog modela krivičnog postupka Srbije [A perspective of new form of criminal proceeding], *NBP Žurnal za kriminalistiku i pravo*, Kriminalističko-policijska akademija, Beograd, vol. 20, iss. 2, pp. 71-95

- Grubač, M., (2011). Nove ustanove i nova rešenja ZKP Srbije od 26.septembra 2011. godine [Serbain CPC from 26. september 2011. - The new institutions and solutions], *Pravni zapisi*, God. II, iss.2, pp. 467-514

- Kos, D. , (2009). Pripremno ročište kao model utvrđivanja spornog i oblikovanja dokaznih prijedloga stranaka u vezi s kontradiktornim ispitivanjem [Preparatory hearing as a model for determining disputed and designing parties evidence proposition related to contradictory examination], In: Novine u kaznenom zakonodavstvu – 2009, Inženjerski biro, (2016, November 11) Retrived from: http://crm4.demo.snt.hr/CustomPages/Static/HRV/Files/DKos_Pripremno-rociste_2009.pdf

- Krstić, Z., (2015). Pripremno ročište i efikasnost glavnog pretresa [Preparatory hearing and the efficiency of the main hearing], In: S. Bejatović and I. Jovanović (editors), Glavni pretres i suđenje u razumnom roku, regionalna krivičnoprocesna zakonodavstva i iskustva u primeni, Beograd, Misija OEBS u Srbiji, pp. 154-170

- Pavlović, Z., (2015). Krivično procesno pravo II (drugo dopunjeno izdanje) [Criminal procedural law, second edition] , Novi Sad, Univerzitet Privredna akademija u Novom Sadu

- Škulić, M., (2013), Osnovne novine u krivičnom procesnom pravu Srbije, Novi Zakonik o kivičnom postupku iz 2011. godine [Basic novelty in Serbian criminal procedural law, New Criminal procedure Code from 2011.], Beograd, Pravni fakultet Univerziteta u Beogradu

- Škulić, M., (2015). Krivično procesno pravo (osmo izmenjeno i dopunjeno izdanje) [Criminal procedural law, eighth edition], Beograd, Pravni fakultet Univerziteta u Beogradu

- Škulić, M., (2013). Dominantne karakteristike osnovnih velikih krivičnoprocesnih sistema i njihov uticaj na reformu srpskog krivičnog postupka [The dominant characteristics of the major criminal procedure systems and their impact on the reform of the Serbian criminal procedure], *Crimen*, vol. IV, iss 2, pp. 176-234

- Škulić, M., Ilić, G., (2012), Novi Zakonik o krivičnom postupku Srbije – Reforma u stilu „jedan korak napred – dva koraka nazad" [New Serbian Criminal procedure Code – reform in style „one step forward – two steps back"], Beograd, Udruženje javnih tužilaca i zamenika javnih tužilaca Srbije

- Škulić, M., Ilić, G., (2012). Novi Zakonik o krivičnom postupku Srbije, Kako je propala reforma - Šta da se radi? [New Serbian Criminal procedure Code – How is failed reform and what to do?], Beograd, Udruženje javnih tužilaca i zamenika javnih tužilaca Srbije

- The criminal procedure Code, *Official Gazette of RS*, no 72/2011 and 101/2012, (2016, November 11) Retrived from:
http://www.mpravde.gov.rs/files/Criminal%20Procedure%20Code%20-%202012.pdf

- Tripalo, D., Đurđević, Z., (2011), Predlaganje dokaza [Presenting the evidence], *Hrvatski ljetopis za kazneno pravo i praksu,* vol. 18, iss 2/2011, pp. 471-487

- Zakonik o krivičnom postupku, Službeni glasnik RS, no. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014

Conditioning by a Covert Investigator

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Abstract

Human intelligence measures, such as informants, undercover persons, or other private individuals cooperating with the police in disguise play an important role in combating organised crime. Nonetheless, due to their professional skills, and with regards to their legal authorizations and responsibilities, covert investigators provide more substantial guarantees to the legality and effectiveness of the procedure than informants of criminal backgrounds.[1] This study aims to enhance the significance of covert investigators, but with a view on the weak points of the institution, specifically the limits of influencing and conditioning, that can lead to misinterpretation of data.

Key words*: organized crime, covert investigator, influencing, covert intelligence gathering, evidence.*

Introduction

In the course of undercover operations the covert investigator infiltrates into the criminal organization in target and to be eliminated, and may even commit criminal offences if necessary. Official documents (ID, drivers licence) and covert documents shall certify the alias of the covert investigator. The applicable statutory provisions of law allow such covert documents to be part of the administrative registries.[2]

Decision of the Federal Supreme Court of Germany (Bundesgerichtshof, henceforth referred to as BGH) of 1983 sets the principles and guidelines on combating organized crime and the necessity of covert investigative operations. BGH draws the attention to the fact that the evolution of crime can not only be characterised by the increasing numbers of criminal acts committed in the past few years, but a change of quality must be recognised in the enhanced appearance of criminal organisations, considerably

[1] Géza, Finszter, Special methods and measures of detecting evidential proof, Criminalistics 1-2, p 734, BM Publishing, 2004, Budapest

[2] Bence, Mészáros, Actual questions of regulating and using covert investigators, Journal of Internal Affairs, Volume 53, 2005/2, p 74-75, Budapest

encumbering criminal investigations. This principle shall specifically apply to drug trafficking, to criminal offences related to night-life, to stealing premium quality vehicles, to other acts of burglary – committed to the request of background receivers or fences -, furthermore, to producing or circulating counterfeit money and to illicit arms trafficking. The strategy of the offenders is to protect and veil the identity of the chiefs of the criminal organisations in front of outsiders.

According to the decision, using traditional measures, in most cases the police can only capture the offenders who stand at a lower or subordinated level in the given criminal organisation. These offenders can be replaced or substituted at will, any time on the given level of the organisation, without interrupting the activities of the group, especially because they do not possess any insights of the structure or constitution of the entire organisation. The persons inevitably given insight into the operation of the system are detained from disclosing information through threat, intimidation or by being paid of for keeping quiet.

If an offender is being arrested or imprisoned, in most cases, the organisation supplies financial support to the family members and relatives, and often overtakes defence costs in order to establish even firmer dependence in order to prevent disclosure of information to the authorities. In conclusion, the result of combating crime depends on how firmly the criminal conduct can be attested to the main offenders, to those who organise activities from the background and to other persons involved in financing and controlling organised crime. In order to get closer to their targets, law enforcement entities employ covert police officers and other undercover persons. Cooperating individuals are persons of confidence hidden from the public, who assist police operations by gathering and transmitting intelligence in order to prevent, hinder, deter or detect criminal acts. Covert persons include informants (for example taxi drivers, bartenders etc.) or other individuals infiltrating into the organisation (for example, covert agents) who gather intelligence for the police, and whose identity is not disclosed by the law enforcement bodies.[3]

The institution of covert investigator contributes to the disorganization of a criminal group, and the intelligence gathered by the investigator may establish the order of covert intelligence gathering or the application of other procedural measures subject to a later judicial permit. Nevertheless, intelligence delivered by a covert investigator is not necessarily used in criminal procedure by all means, it's more to likely to assist covert intelligence gathering operations (i.e. employing a covert investigator shall remain veiled), while transmitted information is classified, establishing the introduction of added means and measures provided that police may gather further information of relevance.

1. Conditions of using a covert investigator

The instrument of the covert investigator is an operational opportunity to gather evidence directly from the offenders or members of the criminal organisation. Information gathered and transmitted by the covert investigator can be useful in many aspects:

[3] *BGH, 17. 10. 1983-GSSt 1/83: Zur gerichtlichen Vernehmung von Vertrauenspersonen der Polizei und zur Zulässigkeit verdeckter Ermittlungen http://www.verkehrslexikon.de/Texte/Rspr3817.php 2016.03.03.*

- all intelligence gathered can directly help the investigative operations of the police;
- the report can be used as evidence during the criminal procedure;
- the covert investigator may be interrogated in the criminal procedure if things he'd seen or heard may be important;
- law enforcement bodies may collect direct evidence through the covert investigator's operation.[4]

The intelligence gathered by the covert investigator gives the opportunity to law enforcement entities to map criminal organisations, furthermore, they may use the gathered information in later investigations and in collecting evidence. Moreover, intelligence gathered by the covert investigator can be used to compare and supervise the information supplied by other covert persons who cooperate with the police.

Covert investigators can be used in covert intelligence gathering (hereinafter referred to as TIGY), a procedure not subject to judicial permit, or in the frame of other data gathering activities (hereinafter referred to as EASZ). In case of TIGY, covert investigator is used prior to the criminal procedure, while in case of EASZ, such measure is used as an actual part of the procedure. In case of EASZ, the investigating authority may use a covert investigator upon the prosecutor's permission, while during TIGY the investigating authority may use a covert investigator for intelligence gathering, data control or mystery shopping without the preliminary permission of the prosecutor or the court. Exceptionally, the prosecutor's permission is needed during covert intelligence gathering, if the investigating authority uses a covert investigator to pursue pseudo-, or test purchasing, to infiltrate into a criminal organisation, or if the investigator is involved in controlled shipping.

The investigating authority is not entitled to use a covert investigator during covert data gathering (henceforth referred to as TASZ). In case the investigating authority manages to obtain a court order necessary to use a special technical device subject to judicial permission, the covert investigator may record the events in a private home (for example, intercommunication of the person(s) under surveillance) with a special technical device during the course of the criminal procedure. According to Section 206/A (1) b) of Be. (Act XIX of 1998 on Criminal proceedings), should such record be taken prior to the criminal procedure, it may only be used as evidence, if the body requesting for the permission for covert intelligence gathering has ordered initiation of the investigation immediately after obtaining the information intended to be used in the criminal procedure or the law enforcement body has immediately fulfilled its obligation to report the criminal act.

Upon the authorization of Section 64 (1) d) of the Rtv. (Act XXXIV of 1994 on police forces, hereinafter referred to as Rtv.) the covert investigator may – besides his surveillance competences related to private homes - *'keep under surveillance the person suspected of having committed a crime, or any individuals, facilities, buildings or other implementations, pieces of fields or roads, vehicles or events that can relate to proceeds of crime, and may and record the result of the surveillance with a technical device (henceforth: technical device)'*. Without a judicial permit, the covert investigator may only be entitled to record any correspondence at places that shall not be deemed a

4 Bence, Mészáros, Actual questions of regulating and using covert investigators, Journal of Internal Affairs, p 77, Volume 53, 2005/2, Budapest

private home according to the applicable provisions of law, consequently, at public areas or at places, areas or facilities otherwise opened for the public.[5]

Principally, the victims of organised crime have no information on the identity of the offender, and commonly, they do not facilitate much trust to turn to the authorities. Also, if the injured party happens to be a criminal, he is more unlikely or will never file a complaint or a report on any injury he'd suffered.[6] In such cases, authorities may only gather information on criminal acts by using the channels of human intelligence.

Besides the essential incorporation of statutory provisions on the covert investigator's operations, clarification of the rules and terms of tactical steps of intelligence, uninfluenced intelligence gathering and maneuvering information should be taken into consideration.

In accordance with the provisions of Section 67/A (1) of Rtv. the complaint may be rejected and / or the the criminal procedure pending against the covert detective may be terminated

- if the covert detective infiltrating the criminal organisation has committed the criminal act in the line of duty in the interest of law enforcement ;
- and the later interest takes precedence over the interest to enforce the claim of the state under criminal law.

Although it is not necessary, that a covert investigators has to breach legal norms in the course of his operation, however, we can not exclude the possibility that he shall become a perpetrator or a co-actor of crime due to conspirational reasons, or just because he's got too close to the offender(s).[7]

2. Influencing (conditioning)

However, this also begs questions whether the covert investigator has gathered and transmitted uninfluenced and unprejudicated information, or whether the data provider has transferred undistorted data or not? The investigating authority shall supervise and check the intelligence, nevertheless, it's highly probable that they shall never reveal whether the covert investigator has asked the proper questions during intelligence gathering, or if he'd influenced the data provider or eventually misinterpreted the information. By all means, it's advisory to conduct the query in accordance with the principles stipulated in the previous chapter to ease the tasks of the officers pursuing the investigation and processing the gained information. In the majority of the cases the authority processing the information has does not have the necessary means and measures to check the information, except for the audio or visual recordings made by the covert investigator.

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[5] Should the covert investigator proceed otherwise, the evidence obtained shall be deemed unlawful. According to Section 78 (4) of Be. facts derived from means of evidence obtained by the court, the prosecutor or the investigating authority by the way of committing a criminal action, or by other illicit methods may not be admitted as evidence. In this case, covert investigator shall be charged by committing the offence of unauthorized information or data gathering.

[6] Bence, Mészáros, Covert investigator and 'criminal acts committed in duty' - de lege ferenda, Hungarian Law Enforcement, Volume VII, issue 2007/3-4, p 120, Budapest

[7] Géza, Finszter, Special methods and measures of detecting evidential proof, Criminalistics 1-2, p 733, BM Publishing, 2004, Budapest

In its order No 8. B. 904/2006/86 the council of the Metropolitan Court has expressed that the motion of the covert investigator to buy narcotics had some sort of motivating impact on the execution of the criminal act, furthermore, in the given case it is presumable, that the given action would not have been completed without the conduct of the covert investigator.

As the appeal court, the Metropolitan Court of Appeal has changed the decision of the Metropolitan Court No 8. B. 904/2006/86 and terminated the procedure against the defendants. The Metropolitan Court has stated that none of the defendants was 'tending' to commit the criminal action, but they have conducted it to the request and incitement of the covert investigator. The covert investigator was not a passive observer, but an active indicator of the crime. Consequently, the actions of the covert investigator breached the demands of the European Court of Human Rights on the essentially passive actions of covert secret agents, and the covert investigator has provoked the criminal action, that the defendants would have not committed without his intervention.

The defendants have been deprived from their right to righteous procedure, thus the procedure has breached Section 1 of Article 6 of the European Convention of Human Rights signed on 4 November, 1950 in Rome.

According to the applicable state of facts, acting as an abettor, the covert investigator had intentionally persuaded the defendants to commit the crime. The covert investigator has provoked the conduct of the criminal action, therefore, the criminal act subject to the accusation is an act of the covert investigator committed against the permission of the prosecutor, thus the investigator did not meet the requirements stipulated in the police act and the act on criminal proceeding, and they can not be considered as righteous actions.

Undoubtedly, it is rather difficult to evaluate, whether the officer's conduct involves any measures of illicit persuasion or not, therefore, such debates must be trusted to the judgement of the court, upon and in possession of any and all proof of evidence.[8]

The European Court of Human Rights (henceforth referred to as ECHR) has defined the frames of the abettor's actions if committed by an undercover officer in the case of Ramanauskas v. Lithuania, and the ECHR further referred to the subject in its decision in the case of Bannikova v. Russia[9]:

Police incitement is conducted if police officers are participants (co-actors) of the action, - whether they are security officers or other individuals following orders – if they do not stay essentially passive during the investigation, and if they attempt to influence, persuade and incite another person to commit a crime that she would not have committed otherwise, in order to secure the judgement of the criminal action, or to provide evidence of proof or in order to initiate accusation.[10]

Furthermore, ECHR demonstrated, that in case the defendant complained, that she has been persuaded and incited to commit a criminal act, the court had to go on examining any and all details and records included in the accounts, hence the trial has to

[8] Bence, Mészáros, Decision of the Metropolitan Court of Appeal on state incitement to drug abuse: inappropriate investigating measures and legitimate accusation, JeMa – case Commentaries, p 30, 2011/2, Budapest

[9] Bannikova v. Russia, no. 18757/06, 4 November 2010, http://www.hrr-strafrecht.de/hrr/egmr/06/18757-06.php

[10] Ramanauskas v. Lithuania ([GC], no. 74420/01, ECHR 2008, http://en.tm.lt/dok/Ramanauskas_v__Lithuania_JUDG.pdf

be fair and righteous in accordance with Section 1 of Article 6 of the Convention and any and all evidence that's a proceeds state incitement must be excluded.[11]

Covert investigators and informants may manipulate the recorded correspondence, and may intentionally use certain communication techniques with the target person. The American linguist Professor Shuy concluded his experiences in his study, stating that he'd listened to hundreds of conversations related to criminal actions, in which covert investigators or other undercover persons have knowingly and deliberately applied certain communication strategies during the correspondence. The recorded correspondences has created an illusion, according to which the suspect had taken part in certain the criminal act, an act that has never actually been conducted. This also begs the question whether the covert investigators and other undercover agents had the intention to raise this suspicion or not? Linguistic analysis of the recorded conversations has confirmed the statements of the linguist, and the conclusions remained undebated. The communication strategies of the police officers illustrated in the study have had a serious impact on the target persons. Not being in possession of the necessary skills, the target persons could not realise that they have been manipulated, so they've been easily mislead. Listening to the audio recordings the target persons seem to be guilty, nonetheless, the criminal acts subject to the records have never actually happened. The covert investigator has deliberately led and moderated the conversation in a certain way, implying that the target person had committed a criminal act.[12]

The above cited study points out to the dangers of conditioned correspondence, and to the requirement, that the covert investigator must avoid such measures and tools.

Final remarks

During his activity the covert investigator conceals his identity, 'misleading' the target person in order to gather the desired intelligence. However, the covert investigator must keep his conduct essentially passive, he may not influence or condition the target person, he may not incite or persuade another person to commit a crime, otherwise he shall become an abettor.

Nevertheless, according to Sándor Nyíri, exemption from punishability shall not apply in this case when shaping of the intent is the consequence of the covert investigator's conduct, since the illicit action is the result of incitement. In these cases the covert investigator shall be punishable as an abettor.[13]

Continuous education and constant training of the covert investigators is required, moreover, there's a definite need for field practices, and paying special attention to the effects and possible consequences of undesired conditioning.

Notes

Géza, Finszter, Special methods and measures of detecting evidential proof, Criminalistics 1-2. BM Publishing, 2004, Budapest

[11] Ramanauskas v. Lithuania § 60.

[12] Roger W. SHUY: Creating Language Crimes: how Law Enforcement Uses (and Misuses) Language, Oxford University Press, p 13-15, 2005, New York

[13] Sándor, Nyíri, The covert investigator, Journal of Internal Affairs, 1999/12, p 185, Budapest

Bence, Mészáros, Actual questions of regulating and using covert investigators, Journal of Internal Affairs, Volume 53, 2005/2, Budapest

Bence, Mészáros, Covert investigator and 'criminal acts committed in duty' - de lege ferenda, Hungarian Law enforcement, Volume VII, issue 2007/3-4, Budapest

Bence, Mészáros, Decision of the Metropolitan Court of Appeal on state incitement to drug abuse: inappropriate investigating measures and legitimate accusation, JeMa – case Commentaries, 2011/2, Budapest

Roger W. SHUY: Creating Language Crimes: how Law Enforcement Uses (and Misuses) Language, Oxford University Press, 2005., New York

Sándor, Nyíri, The covert investigator, Journal of Internal Affairs, 1999/12, p 185, Budapest

BGH, 17. 10. 1983-GSSt 1/83: Zur gerichtlichen Vernehmung von Vertrauenspersonen der Polizei und zur Zulässigkeit verdeckter Ermittlungen http://www.verkehrslexikon.de/Texte/Rspr3817.php 2016.03.03.

Bannikova v. Russia, no. 18757/06, 4 November 2010, http://www.hrr-strafrecht.de/hrr/egmr/06/18757-06.php

Ramanauskas v. Lithuania ([GC], no. 74420/01, ECHR 2008, http://en.tm.lt/dok/Ramanauskas_v__Lithuania_JUDG.pdf

The System of Criminal Sanctions for Juvenile Offenders in the New Criminal Law of the Republic of Serbia from 2005

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Abstract

At the beginning of 2006, new system of juvenile criminal law (substantial, procedural and executive) entered into force in the Republic of Serbia. In that way, by completing the reform of its criminal laAt the beginning of 2006, new system of juvenile criminal law (substantial, procedural and executive) entered into force in the Republic of Serbia. In that way, by completing the reform of its criminal law, the Republic of Serbia followed the tendencies of contemporary criminal policies of other developed European countries (such as France, Germany, Swiss, Finland, Croatia, Montenegro, Bosnia&Herzegovina, Macedonia and etc.) and determined the status of juveniles in criminal law in a specific manner. This specific manner includes several aspects: 1) the adoption of lex specialis – special Law on juvenile perpetrators of criminal offences and criminal – legal protection of juveniles, which completely separated the status of juvenile offenders from the status of adult perpetrators of criminal offences, 2) the establishment of special jurisdiction of higher courts for the cases of juvenile offenders, 3) obligatory specialization of persons employed in judiciary bodies who participate in criminal proceedings against juvenile perpetrators of criminal offences (including previous training and obtaining appropriate licenses i.e. certificates) and 4) the option, provided by the law, to impose specific sui generis measures on juvenile perpetrators, known as educational orders (instructions or recommendations), as means of restorative justice by which the initiation or the conduct of criminal procedure can be avoided. New juvenile criminal law of the Republic of Serbia is familiar with two types of criminal sanctions: 1) educational measures and 2) juvenile prison sentence. These criminal sanctions are defined as measures of social reaction prescribed by the law, which are imposed on juvenile perpetrators of criminal offences by the court in charge, in order to improve their education, re – education and appropriate (proper) development. New status of juvenile perpetrators of criminal offences and the application of juvenile sanctions are discussed in this paper, from theoretical, practical and comparative – legal aspect.

Keywords: *juvenile criminal law, special jurisdiction, specialization of persons, educational measures, juvenile prison sentence.*

1. Basic properties of the juvenile criminal law

In earlier versions of the criminal law of the Republic of Serbia (in former Yugoslavia)[1], since 1959., legal provisions of juveniles punishments were singled out at separately chapter, and in the Code about criminal proceedings[2] there were proposed

[1] D. Jovašević, Komentar Krivičnog zakona SR Jugoslavije, Beograd, 2002., pp. 213-224
[2] D. Jovašević, Zakonik o krivičnom postupku, Beograd, 2004., pp. 147-169

partial provisions about arbitral proceeding toward juveniles - article 464-504. All material (corporeal), processing and executive provisions related to criminal law about juveniles are, in the new Law about juvenile comitters and criminal law protection of juveniles (LAJCCA)[3], conjoint in one place.

That is how the juvenile criminal law has been created. It is characterized as follows[4]:

1) Principally, inquest of the juvenile injurers guilt is excluded,

2) Among criminal sanctions towards juvenile injurers the priority belongs to the educable provisions comparing to the punishment that presents the exception expressed in juvenile jail implementation. By the way of exception with the juvenile jail can be punished only the older juvenile if he committed a crime for which the proposed punishment is over five years, if he is sufficiently mentally mature that he can understand importance of that crime and he control his acts and if the consequences of the committed crime are that grand, and the extent of guilt that high when the application of educative provisions wouldn't be justified,

3) In the criminal proceeding towards juveniles, prosecution and juridical apparatus have wide authority in terms of starting, processing and terminating the proceeding[5]. Those authorities consist of discrete rights to withdraw prosecution no matter what is the committed crime, if it is considered that it would be useful in terms of education and reeducation of the juvenile delinquent. The principle of utility has the priority than the principle of objectiveness. The court mandates consist of not only a wide scale of optional means and provisions, but of possibility to replace already delivered verdict with some other more convenient provision, if it is required by the specific situation[6],

4) In juridical system of the Republic of Serbia there are special jurisdictional bodies for struggle against juvenile criminality: special departments for juvenile delinquency in internal affairs agencies, a prosecuting attorney for juveniles and special juvenile council i.e. the juvenile court that supervises the whole criminal proceeding against any juvenile delinquent. The juvenile court is represented with lay judges that have competences and personal qualities whereby can influence the juvenile delinquent. In the process the special role belongs to the authorities of social welfare[7].

The juveniles, in terms of the article 3 of this new Juvenile criminal law, are those persons from accomplished fourteen to accomplished eighteen year of age. Those persons who haven't accomplished fourteen years, in terms of criminal law, are not treated as juveniles but as children. Children are not active subjects in the criminal law so, in the case of commitment of some crime, there can not be applied any criminal sanction towards them, butt the provisions of social character that are provided by the centers for social issues. The juveniles are divided into two groups, according to their age – younger and older juveniles. Younger juveniles are persons from the age of fourteen to the age of sixteen years. Older juveniles are those persons who accomplished sixteen, but still haven't accomplished eighteen years[8].

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[3] Službeni glasnik Republike Srbije broj 85/2005.

[4] M. Singer, Lj. Miškaj Todorović, Delikvencija mladih, Zagreb, 1989., pp. 45-76; F. Hirjan, M. Singer, Maloljetnici u krivičnom pravu, Zagreb, 2001, pp. 87-95

[5] D.Jovašević, Krivično parvo, Opšti deo, Beograd, 2016., pp.291-298.

[6] M. Singer, Kaznenopravna odgovornost mladeži, Zagreb, 1998. , pp. 114-132

[7] A. Carić, Problem maloletničkog sudstva, Split, 1971. , pp. 76-84

[8] D.Jovašević, Maloletničko krivično parvo, Niš, 2012., pp. .23-31

2. The idea and types of the criminal sanctions

In the new juvenile criminal law of Republic of Serbia,[9] the juvenile is the person who, at the moment of the criminal action execution, accomplished fourteen and did not accomplish eighteen years (the article 3. of the Law for the juvenile crime committers and the criminal-legal protection of the juveniles – LAJCCA). Persons of the age up to fourteen years are called children and towards them there cannot be applied the criminal sanctions nor any other criminal-legal measures. It means that they cannot be the active subjects of the criminal action.

The juveniles are divided according to their age, in two categories: the younger and the older juveniles. The younger juveniles are the persons, age from fourteen to sixteen years, while the older juveniles are the persons who accomplished sixteen but did not accomplish the age of eighteen years[10]. Beside them in the particular cases the juvenile criminal law is applied towards the younger mature persons – the persons who at the moment of the criminal action execution accomplished eighteen years, and at the moment of trial did not accomplish the age of twenty-one year.

The new juvenile criminal law[11] anticipates two basic types of the juvenile criminal sanctions. These are: 1) the educational measures and 2) the juvenile prison. They are legally anticipated measures of the social reaction towards the juvenile committers of the crime activities that are sentenced the legally determined organs (the district court – the judge for the juveniles and the tribunal for the juveniles) in aim to protect the society from the criminality trough the education, reeducation and proper development of the juvenile. The educational measures are the basic kind of the juvenile criminal sanctions. They are sentenced regularly to all juvenile crime committers (to the younger juveniles as well as to the older juveniles)[12].

Subsidiary, and only exclusively when the legally anticipated preconditions are fulfilled and when the court fortifies that the purpose of the juvenile criminal sanctions can not be realized applying the educational measures, the court can sentence the special kind of the punishment – the sentence of the juvenile prison. Yet, this punishment can be sentenced only to the older juvenile as to the committer of the criminal action. So the sentence of the juvenile prison is never sentenced compulsorily, cannot be sentenced to every immature person and cannot be sentenced for every committed criminal action (but only for the harder)[13].

Within the general purpose of all (so the juvenile too) criminal sanctions, in the article 10. LAJCCA there is specifically determined that the purpose of the criminal sanctions towards the juveniles is to affect: to their development and the strengthening of their personal responsibility, to the education and the proper development of their

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[9] D. Jovašević, Zakon o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica sa komentarom, Beograd, 2006., pp. str.22-48

[10] The similar solution are prescribing some of the modern criminal codes : articles 31-32. of the Criminal code of the Republic of Bulgaria, article 17. of the Chinese criminal code, article121. of the Greek criminal code, article 122-7. of the French criminal code

[11] D. Jovašević, Krivično pravo, Opšti deo, Beograd, 2010., pp. 298-305

[12] More : O. Perić, Krivičnopravni položaj maloletnika, Beograd, 1975. godine; O. Perić, Komentar krivičnopravnih propisa o maloletnicima, Beograd, 1995.

[13] M.Simović et al., Maloljetničko krivično parvo, Istočno Sarajevo, 2015., pp.78-87

personalities in order to provide the repeated inclusion of the juveniles into the social community. This purpose can be accomplished in two ways[14]:

1) wit the custody,
2) affording the protection and the help and
3) providing the general and professional qualifying.

Beside that, the purpose of the juvenile prison is performing the stronger impact to the juvenile committer not to commit criminal actions in the future as well as to the other juveniles not to commit criminal actions.

The basic types of the criminal sanctions, for the juvenile committers of the criminal actions, anticipated by our legislature are nine educational measures systematized in three groups:

1) the measures of warning and guiding,
2) the measures of intensive custody and
3) the institutional measures.

Exceptionally, towards the older juvenile there can be sentenced the sentence of the juvenile prison. Yet, towards the juveniles in accordance with the legally anticipated conditions there can be sentenced also the safety measures except the prohibition of making the phone calls, activities and duties (the article 39. LAJCCA). Exceptionally the measure of the compulsory psychiatric remedial treatment and the retention in the medical institution can be sentenced to the juvenile independently if the legal conditions are fulfilled (the article 81. of the Criminal code of the Republic of Serbia from 2005. year - CC RS[15]). Thereat the law restricted the application of the safety measure of the compulsory remedial treatment of alcohol addicts and the safety measure of the compulsory remedial treatment of drug addicts, so they cannot be sentenced along with the warning measure or the guiding measure.

Beside and instead of sanctions, the new criminal legislature recognizes also the special type of measures – the educational dictates (orders) as the alternative measures that have the aim the deflecting of the criminal proceeding towards the juveniles (*la diversion*) to the other measures application.

3. The educational dictates

The educational dictates[16] (orders, respects or instructions) are special measures *sui generis,* which do not have the character of the criminal sanction. Towards the immature crime committer, for the crime for which there is prescribed the penal sum or the sentence of prison of up to five years, can be sentenced one or more educational dictates. The purpose of these dictates[17] is not to initiate the criminal proceeding towards the juvenile or to suspend already initiated criminal proceeding respectively applying of such educational dictate to affect the juvenile to develop properly and to strengthen his personal responsibility in order not to continue with the crime committing, specially when it is about the low or the medial criminality[18].

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[14] Ž. Horvatić, Kazneno pravo, Opći dio, Zagreb, 2003., p. 247

[15] More: D. Jovašević, Krivični zakonik Republike Srbije sa uvodnim komentarom, Beograd, 2007. godine

[16] B.Petrović, D. Jovašević, A.Ferhatović, Krivično pravo 2, Sarajevo, 2016.,pp. 109-115

[17] B. Petrović, D. Jovašević, Krivično (kazneno) pravo Bosne i Hercegovine, Opći dio, Sarajevo, 2005,. pp.

[18] O. Perić, Alternativne mere i sankcije u novom krivičnom zakonodavstvu o maloletnicima, Bilten Okružnog suda u Beogradu, Beograd, No. 69/2005., pp. 14-15

The educational dictates are sentenced by the public prosecutor for the juveniles or the judge for the juveniles if the two following cumulative preconditions are fulfilled[19]:

1) the objective condition – that it is about the criminal activity for which there is prescribed the penal sum or the sentence of prison of up to five years and

2) the subjective condition – which occurs in two forms:

a) when the juvenile admitted the criminal activity execution and

b) when there is already the specific relation of the juvenile towards the criminal activity or the impaired person. The educational dictates can be sentenced only to the immature crime committers, which means that their application is excluded towards older mature persons.

When chooses the educational dictate[20] the competent organ specially takes in consideration the total interest of the juvenile and the impaired person, taking care that applying one or more educational dictates does not disturb the process of the regular education of the juvenile employing. This way determined dictate can last at most for six months whereby the choice, the replacement and the application respectively the custody in the educational dictate application by the competent organ, is done in cooperation with the parents, the adapters or the assignees of the juvenile and with the authorized organ of custody. There are several types of the educational dictates (the article 7. LAJCCA)[21].

Those are:

1) the alignment with the impaired person in order to by recovering the damage, the apologizing, by work or in some other way there would be removed in total or partially the destructive consequences of the executed criminal activity,

2) the ordinary attending of school or ordinary going to work

3) participation, without the remuneration, in the humanitarian organization activities or jobs of social, local or ecological content,

4) the incurring to the appropriate research and the weaning of the addiction caused with the consumption of alcoholic drinks or the intoxicant drugs and

5) participating in the individual or the group treatment in the responsible medical institution or the consultancy.

The public prosecuting attorney for juveniles also have the possibility to put under limits his decision not to initiate the criminal proceeding, with the assent of the juvenile and his parents, the adopters or the assignees as well as the juvenile capability to fulfill one or more established dictates within the left period, according to the principle of the pursuit opportunity (the article 58. LAJCCA.). Actually, all until the request for the preparatory proceeding startup is not submitted, the public prosecutor for the juveniles has wide discretional possibilities about the deciding whether he will initiate the criminal proceeding towards the juvenile because of the committed criminal activity.

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[19] B. Petrović, D. Jovašević, Krivično (kazneno) pravo Bosne i Hercegovine Bosne i Hercegovine, Sarajevo, 2005., pp. 358-359

[20] These measures are prescribing many modern criminal codes : in criminal law in Bosnia and Herzegovina (articles 76-78. of Criminal code of the Bosnia and Herzegovina, articles 80-82. of the Criminal code of the Federation of Bosnia and Herzegovina, articles 80-82. of the Criminal code of the Brčko District of Bosnia and Herzegovina, (articles 65-67. of the Criminal code of the Republic of Srpska), in criminal law in French Republic (articles 1. of the Code of juvenile as criminal offences), in criminal law in Republic of Slovenia (article 77.of Criminal code)

[21] D. Jovašević, Maloletničko krivično pravo, Beograd, 2008., pp. 89-96

4. Sanctions for the younger mature persons

All contemporary criminal legislatures in the special way determine the criminal-legal status of the younger mature persons[22]. Those are persons who at the moment of the crime execution accomplished eighteen years, and at the moment of the trial did not accomplish twenty-one year (the article 3. position 4. LAJCCA)[23]. The specific position of the younger mature persons in the criminal law occurs in two cases:

1) in application the educational measures towards the mature persons for the criminal activity executed by them while they were immature and

2) in application of the educational measures for the criminal activity towards the younger mature crime committers.

Towards the mature person there can be sentenced the educational measure under the terms that the criminal activity executed as the older juvenile (at the age from 16 to 18 years, if at the moment of trial still did not accomplish 21 year). In this case to the younger mature person can be sentenced the next educational measures[24]:

1) the special commitments,

2) the measure of the intensive custody by the side of the organ of custody or

3) the measure of sending to the educational reformatory respectively on special occasions also the sentence of the juvenile prison (the article 40. pos.2. and 3. LAJCCA).

Therefore, this is the facultative possibility of the court to estimate in every particular case whether and which of the criminal sanctions will sentence to the crime committer. Estimating this, the court will specially take in consideration all the circumstances of the case, and specially the weight of the committed crime, the time that passed since it was executed, the features of the person, the committer's behavior as well as the purpose that should be achieved applying some of these sanctions.

Exceptionally, to the mature person who at the moment of trial accomplished 21 year, the court can instead of the juvenile prison sentence the suspended sentence or the sentence of prison. So, in this case the court does not have possibilities to sentence to such person any educational measure. This way sentenced the sentence of prison in the meaning of the rehabilitation, the obsolescence, the conditional release and the legal consequences of the sentence, has the same legal effect as the sentence of the juvenile prison. In this case of solution, in the theory there is propounded as the arguable question whether when the court, when sentences the punishment of prison, is fasten with the confinements related to the minimum or the maximum of this punishment that are prescribed with the ranges of the sentence of the juvenile prison and the sentence of prison. Beside the juvenile criminal sanctions, to the mature person in both cases the court can sentence also the appropriate safety measure, if the legally anticipated preconditions for that are fulfilled.

In the second case (the article 41. LAJCCA) to the person who executed the criminal activity as the mature person, but at the moment of trial still did not accomplish 21 year, the court can, instead of the criminal sanction prescribed for the mature persons,

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[22] More : Lj. Lazarević, Položaj mlađih punoletnih lica, Beograd, 1963.

[23] As siminalr way is prescribing criminal legal status of the younger mature persons in criminal codes in Republic of Slovenia, Republic of Italy, Republic of Croatia, Republic of Montenegro, Republic of Macedonia and Federal Republic of Germany

[24] D. Jovašević, Zakon o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica sa komentarom, Beograd, 2006., pp. 21-22

sentence some of the following educational measures in order to avoid negative, harmful effects of the punishment application:

1) the special commitments,

2) the measure of the intensive custody by the side of the organ of custody or

3) the measure of sending to the educational reformatory if due to the features of his personality and the circumstances under which the crime was committed, there can be expected that with the educational measure will be achieved the same purpose, which would be achieved with the punishment sentencing.

Of course also in this case, along with the educational measure, to the younger mature person the court can sentence any safety measure under the legally prescribed preconditions.

5. Educative provisions (measures)

Educative provisions[25] are provisions defined by the law, whereby is provided the society protection of criminality by education and reeducation of juveniles. They ere sentenced by the court towards the juvenile injurer because of the committed crime and consist of limitation of their freedom and rights. These provisions present a special kind of criminal sanctions that can be applied only towards a juvenile person who committed a crime. But their implementation doesn't depend on the existence of the criminal liability (guiltiness) of the juvenile. It makes them similar to safety provisions. So far, safety provisions are applied towards morally responsible and morally irresponsible crime executors no matter to their age, until educative provisions are sentenced only towards juvenile crime executors[26].

The law proposes nine types of educative provisions[27]:

1) warning provisions and guiding: juridical admonition and specific obligations;

2) provisions of intensive custody: by the side of parents, adopters or curators, in another family, by the side of the tutorship authorities and with daily temporary abode in the adequate institution for upbringing and education of juveniles and

3) institutional provisions: cross reference to the educational institution, to the educative reformatory and to the specific institution for therapy and qualifying.

The court is authorized by the legislator to sentence the provision that is considered as the most convenient and the best for juvenile education, in the particular case. Which provision will be sentenced depend on personality of the juvenile who committed crime and on estimation of the court whereby provision can be best accomplished education, reeducation and proper development of the juvenile.

By the court estimation which provision will be applied, the court is obliged to take in account more circumstances like: 1) age and maturity of the juvenile, 2) other

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[25] Educative measures are prescribing many modern crimianl codes : articles 74-81. of the Criminal code of the Republic of Slovenia, articles 90-91. of the Criminal code of the Russian Federation, article 112. of the Criminal code of the Republic of Ukrain, articles 74-83. of the Criminal code of the Republic of Macedonia, article 82. of the Criminal code of the Bosnia and Herzegovina, article 87. of the Criminal code of the Federation of Bosnia and Herzegovina, article 87. of the Criminal code of the Brčko District of Bosnia and Herzegovina and article 71. of the Criminal code of the Republic of Srpska

[26] D. Jovašević, Krivično pravo, Opšti deo, Beograd, 2016., pp. 368-382

[27] D. Jovašević, Krivične sankcije za maloletnike u novom krivičnom pravu Republike Srbije, Bezbednost, Beograd, No. 5/2006., pp. 689-711

characteristics of his personality and the extent of disorder in social behavior, 3) weightiness of the crime and motives that induced him to commit the crime, 4) surroundings and circumstances that he lived in, 5) behavior after the committed crime and especially whether he prevented or tried to prevent ingoing of the harmful consequence, as well as whether he recompensed or tried to recompensed the damage, 6) whether towards the juvenile there was sentenced any criminal or forbidden sanction in the past, as well as 7) all other occasions that can be of importance to the pronouncement of that provision that will provide the best accomplishment of the educative provision point[28].

6. Warning and guiding provisions

Warning and guiding provisions[29] are sentenced to the juveniles when there is required and sufficient by such provisions to influence the juvenile personality and his behavior, so in cases when towards them is not necessary to implement more continuous educative provisions and who committed crimes as a result of frivolity and thoughtlessness, and not because their educational neglect. The law in the articles 13. and 14. recognize two kinds of these provisions:

a) juridical admonition and

b) specific obligations.

1) Juridical admonition is the mildest educative provision that consists of rebuke that the court refers to the juvenile person who committed the crime, in the name of society, because of the crime execution. The court will sentence this provision if it is possible, from the relation of the juvenile toward the committed crime and his expressed willingness not to commit crimes in the future, to conclude that it is sufficient that the juvenile is only rebuked for the committed crime and admonished about possible consequences. At this provision sentencing, the court is obliged to indicate to the juvenile about harmfulness and unacceptability of his dealing and to prefigure him that, in the case of repeated crime committing, there will be applied harder criminal sanction.

2) The court can sentence one or more specific obligation lasting up to one year to that juvenile person who committed crime in terms of it is estimated that it is necessary to influence the juvenile and his behavior by proper requirements and prohibitions. In the article 14. the law conjectures a few specific juvenile obligations:

1) to apology to the injured person,

2) under his own possibilities to recover the damage caused by the crime he committed,

3) to attend school regularly or not to intermit from his working place,

4) to qualify for the profession that fits into his capabilities and proclivities,

5) logging in the humanitarian organization or jobs of social, local or ecological content, without financial recovery,

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[28] These similar rules of circumstances for proportioning are prescribing Criminal code of the Swiss Federation (article 85.) – More : N.F. Kuznjecova, A.V.Serebrenikova, Ugolovnij kodeks Švejcarii, Moskva, 2000.

[29] N. Milošević, Disciplinske vaspitne mere, Bilten Vrhovnog suda Srbije, Beograd, No. 2/1998., pp. 19-27

6) to participate to some sport activities,

7) to submit himself to the certain observation and weaning of addiction caused by consumption of alcoholic drinks or narcotics,

8) to take part in individual or group sessions in corresponding public-health facilities or clinics,

9) to attends courses for professional qualifying or to prepare and pass the exams whereby the certain knowledge is tested,

10) not to be allowed to leave the place of abode or residence without the court compliance and special endorsement of the tutorship authorities.

7. Provisions of intensive custody

The court sentences provisions of intensive custody[30] to the juvenile when for his education and develop there is necessary to undertake more continuous provisions altogether with adequate professional supervision and help. While all these, it is not necessary to entirely exclude the juvenile from the previous surrounding. These provisions are:

a) intensive custody by the side of parents, adopters or curators,

b) intensive custody in another family,

c) intensive custody by the side of the tutorship authorities and

d) intensive custody with daily temporary abode in the adequate institution for upbringing and education of juveniles[31].

1) Intensive custody by the side of parents, adopters or curators[32] is sentenced by the court if the parents, adopter or curator neglected to provide custody over the juvenile, and they are capable to do such custody and it can reasonably be expected of them. At sentencing of this provision to the parents, adopters or curators are given all necessary instructions and they are ordered with some duties related to undertaking of individual educational provisions, respecting for removal of harmful impacts addressed to him. Beside that, the court can enjoin to the custody authority to control the implementation of this provision and to provide support (help) to the parents, or curators. This provision can last from six months up to two years.

2) Intensive custody in another family[33] is sentenced if the parents, adopters or curators of the juvenile are not capable of doing the custody over him or if that can not be expected by them, reasonably, so the juvenile is consigned to another family that is willing to accept him and that is capable of doing intensive custody over him. For accomplishing of this provision it is necessary that there is a family willing to accept the juvenile and to take care of his education and that is able to influence his behavior. If the juvenile is consigned to another family, the court enjoins to the custody authority to do the custody over its execution, to provide necessary help to the family and to submit reports about that to the court. This provision can last from six months up to two years, but can be suspended even before the lapse if the parents, adopter or curator acquire

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[30] Lj. Hadžović, V. Babić, Zaštita maloljetnih delikvenata – priručnik za primenu vaspitnih mera pojačanog nadzora organa starateljstva, Beograd, 1994., pp. 45-52

[31] Đ. Križ, Kriteriji za odabir odgojnih mjera maloljetnicima u svjetlu primjene Zakona o sudovima za mladež, Hrvatski ljetopis za kazneno pravo i praksu, Zagreb, No. 2/1999., pp. 369-375

[32] M.Simović, D.Jovašević, M.Simović, Izvršno krivično parvo, Banja Luka, 2014., pp.311-321

[33] More : S. Uzelac, Priručnik za voditelje odgojne mjere – pojačana briga i nadzor, Zagreb, 1988.

the capability to do the custody over the juvenile or if the necessity for the intensive custody discontinues.

3) Intensive custody of the tutorship authorities[34] is sentenced when it is not possible to apply any of the two previous mentioned provisions. In the case of this provision, the juvenile stays to live with his parents, adopters or curators. The tutorship authority is responsible to take care about juvenile's education, his employment and secession from the previous surrounding that influences him badly, then about necessary remedial treatment and arranging the conditions under which he lives. These provisions are executed by a certain official that stays in contact with the juvenile and his family. About this provision suspension the court decides afterwards, but its lasting can be from six months up to two years.

4) Intensive custody with daily temporary abode in adequate institution for upbringing and education of juveniles is new established type of educative provision in the article 18 of this law. The court sentences this provision to the juvenile when beside some of the previously mentioned provisions of intensive custody it is necessary to engage professionals in a specific institution which deals with issues related to upbringing and education of juveniles. Also this provision can last from six months up to two years; during this period the juvenile stays with his family or other persons who take care of him, and during the day he spends defined period of time in the institution for upbringing and education only if this way doesn't disturb his education or employment (working).

In the aim of as successful implementation of the sentenced provision of the intensive custody, as it is possible, at time of its sentencing the court can define (determine) one ore more specific orders proposed in the article number 14. from new juvenile criminal law[35].

8. Institutional provisions

Institutional provisions[36] are implemented when the court ascertains that towards the juvenile should be applied more continuous educative provisions, more continuous remedial treatment or qualifying, all these with entire separation him from the previous surrounding (environment) for the sake of doing intensive custody over the juvenile. Institutional provisions are:

a) cross reference to the educational institution,

b) cross-reference to the educative reformatory and

c) cross-reference to the specific institution for remedial therapy and accomplishing qualifications.

1) Cross-reference to the educational institution[37] (sending to the educational institution - the article 20. LAJCCA) is sentenced when it is necessary to separate the juvenile from the previous environment and provide him help and permanent custody

[34] More : M. Miković, Maloljetnička delikvencija i socijalni rad, Sarajevo, 2004.

[35] D. Jovašević, Osnovne karakteristike novog maloletničkog krivičnog prava Republike Srbije, Zbornik Pravnog fakulteta u Rijeci, Rijeka, No. 27/2006., pp. 1075-1077

[36] M. Radojević, Centri za socijalni rad i vaspitne ustanove u izvršavanju vaspitnih mera, Beograd, 1979., pp.112-131

[37] V. Vrulj, Odgojne mjere prema maloljetnicima i njihovo izvršenje u Bosni i Hercegovini, Godišnjak Pravnog fakulteta u Sarajevu, Sarajevo, 2004., pp. 394-426

by the professionals. This provision is executed in the educative institution for juvenile of the general type. This provision can last from six months up to two years. Determining the duration of this provision is not done in advance but the duration is decided later, every six months during the execution (implementation).

2) Cross-reference to the educative reformatory[38] (sending to the educational reformatory - the article 21. LAJCCA) is sentenced to the juvenile towards whom, beside the separation from the previous environment, also should be applied the provisions of the intensive custody and particular professional educational program. Educative reformatories are special institutions with established regime in purpose of improving more educative uncared-for juvenile delinquents. In these institutions the juvenile is provided to accomplish general and professional vocation. At sentencing of this provision, the court specially takes in account: previous way of juvenile's life, the extent of disorder in his behavior, and the weight and the nature of the committed crime and circumstances whether towards the same juvenile there was sentenced any criminal or forbidden sanction in the past. This provision is sentenced for the period from six months up to four years. But, at sentencing the court does not define the duration of this provision, but about its duration it is discussed afterward every six months.

The juvenile who spent at least six months in educative institution or educative reformatory, could be given, by the court, the parole if it is possible, according to the successes achieved during the educational process, reasonably can be expected that the juvenile will not commit crimes ever in the future and that he will well behaves in his living environment. During the duration of the parole the court can decide the juvenile to be put under some provision of intensive custody. The parole can last up to juridical expiry of this provision duration, if before the expiry the court hasn't suspended this provision or replaced it with some other. So far as the juvenile, during the parole, doesn't comply the established obligations, or behaves in the way that his staying out of the educative institution or the educative reformatory is not justifiable, the court can withdraw the parole. The time spent as parole is not counted as a part of the duration of the sentenced educative provision[39].

3) Cross-reference to the special institution[40] for the remedial therapy and accomplishing qualifications (sending to the special institution for the remedial treatment and the qualifying -the article 23. LAJCCA) is sentenced towards the juvenile who is retarded in his psycho – physical development (deaf, blind, deaf mute, morons and the like) or with mental disorders. This provision has twofold character: as an educative provision and as a safety provision of cross – reference to the institution for retention combined with remedial therapy. That's why this provision can be sentenced instead the safety provision of compulsory psychiatric treatment and retention in the public-health facility if by this it is possible to achieve the point of this provision and provide retention and therapy.

Here are used specific methods in processes of upbringing and education that require also specific competency. The duration of the provision is legally defined to not longer than three years, except if it was sentenced instead of the safety provision of medical character when it wasn't defined its duration because it is not possible to

[38] O. Perić, Komentar krivičnopravnih propisa o maloletnicima, Beograd, 2003., pp. 122-127

[39] B. Petrović, D. Jovašević, A. Ferhatović, Izvršenje vaspitnih mjera, Pravna riječ, Banja Luka, No. 7/2006., pp. 371-394

[40] B. Petrović, D. Jovašević, Izvršno krivično pravo, Sarajevo, 2006., pp. 231-239.

determine how long it would be necessary for qualifying of the retarded person for independent life and useful work. In such institution the juvenile stays until it is necessary for the sake of his remedial treatment and qualifying, but when he becomes mature there will again be tested the necessity of his further retention in that institution.

9. The juvenile (pupillary) jail

The juvenile jail (prison)[41] is the only kind of punishment in the system of the juvenile criminal sanctions (the articles 28. -38. LAJCCA). It is the special kind of punishment that consists of subtracting of the freedom of movements to the older immature committer of the harder criminal activity for the determined time. This punishment can be sentenced if the legally prescribed cumulative conditions[42] are fulfilled (the article 28. LAJCCA):

1) that the committer of the criminal activity is the older juvenile i.e. the person who at the moment of the crime execution accomplished sixteen years, and did not accomplish eighteen years,

2) that the juvenile committed the criminal activity for which there in the law is prescribed the sentence of punishment in duration longer than five years,

3) that the juvenile committed the criminal activity with the high extent of guilt. It is the extent of guilt over the usual, normal, average extent of the conscious and willing orientation of the committer towards the committed crime. Whether in the particular case there is the high extent of guilt, represents the factual question that the tribunal has to solve in every particular case and

4) that the court came to the approvals that because of the nature and the weight of the committed criminal activity and because of the high extent of guilt, it is not sustainable to sentence the educational measure.

The juvenile jail (prison) is a special kind of punishment, as arresting, that is similar to the sentence of confinement as to a type of a criminal sanction for adult persons who committed crimes. It is sentenced to a juvenile who committed a harder criminal act. But, according to the objectives that should achieve, this punishment is very closed to educative provisions. A punishment of the juvenile jail is characterized as follows[43]:

1) it is a criminal sanction whereby are achieved aims of specific and general prevention. A special prevention is of a primary importance because it provides education, reeducation and proper development of a juvenile. A general prevention glasses itself in indicating and emphasizing to the juveniles that, in the case of committing hard crimes, towards them will be implemented sanction of arresting for longer period of time,

2) the preconditions for sentencing the juvenile jail are committed crime and the guilty of the criminal. But, before deciding whether this sanction will be sentenced, the court considers circumstances that are in relation with the personality of e person who

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[41] This juvenile penalty are prescribing all modern crimianl codes as : article 88. of the Criminal code of the Russian Federation, article 63. of the Criminal code of the Republic of Bulgaria, article 89. of the Criminal code of the Republic of Slovenia

[42] More : O. Perić, Maloletnički zatvor – primena i izvršenje, Beograd, 1979. ; Đ. Karamitrov, Izvršuvanje na vaspitnite merki i kazneta maloletnički zatvor vo SR Makedonija, Skoplje, 1981.

[43] M.Simović et al., Maloljetničko krivično pravo, Istočno Sarajevo, 2015., pp. 289-298

committed crime (his mental development, propensities, necessity for education and reeducation, habits, motives),

3) the juvenile jail is scaled on a base of e special rules among which the priority have subjective circumstances related to the personality of a person who committed crime,

4) this punishment is not sentenced for short duration. According to the fact that the juvenile jail has not been prescriptive neither for any crime, the court estimates whether and when will sentence this punishment and then it is sentenced in the range between the general minimum and maximum of the punishment. The juvenile jail can not be sentenced in duration shorter than six months. It is sentenced for a year and half of a year.

It can not be sentenced in days and months,

5) for those crimes in conjuncture the juvenile jail is sentenced under specific conditions. Considering overhead estimation of crimes, the court sentences one unique punishment of the juvenile jail,

6) this punishment is not followed with legal consequences of the conviction[44].

The juvenile jail is a hybrid criminal sanction, which is, according to its form a criminal provision with marked elements of repression, but essentially it is an educative provision with objectives to educate and reeducate of the juvenile person who committed the crime.

This punishment can be sentenced if there the following conditions are satisfied (article 28. LAJCCA) :

1) the juvenile person who committed the crime is an older juvenile i.e. a person who accomplished 16 years at the moment when the crime was committed;

2) the juvenile committed a crime for which there is prescribed a punishment harder than five years of jail,

3) because of the high extent of guilty, nature and weight of the committed crime, it wouldn't be sustainable to sentence any educative provision,

4) according to the juvenile personal situation, there a satisfied other conditions for the guilty (responsibility and undertaking of the criminal act with premeditation or negligent, then existence of consciousness anent responsibility and capability of consciousness about illegality).

Before sentencing the juvenile jail there is necessary to provide the court estimation that in the particular case wouldn't be sustainable to sentence an educative provision. So, the juvenile jail is a punishment which implementation always has optional character. At estimation whether there will be sentenced some educative provision or juvenile jail, the court is obliged to take in consideration specially the extent of the juvenile's maturity as well as the time that is required for his education and professional qualifying.

The juvenile jail in the Republic of Serbia can be sentenced in duration from six months up to five years , except in the case when for the committed crime in the Law there is proscribed a punishment as a jail in duration of twenty years or any stricter punishment, or in the case of acquisition of at least two crimes for which there is prescribed a punishment as a jail in duration longer than ten years, then the juvenile jail can be sentenced in duration of ten years[45].

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[44] B. Petrović, D. Jovašević, A.Ferhatović, Krivično pravo 1, Sarajevo, 2015. , pp. 267-269

[45] I. Kovčo, Izvršenje maloljetničkih sankcija, Hrvatski ljetopis za kazneno pravo i praksu, Zagreb, No. 2/1999., pp. 685-712

At sentencing of this punishment the court is obliged to determine its duration by implementing the rules of punishment scaling from the Criminal statute book of the Republic of Serbia considering the general point of this kind of punishment. At punishment scaling in the case of an older juvenile for certain crime, the court however can not sentence this punishment in duration longer than there is prescribed the punishment of jail for the same crime, but also it doesn't have to be the shortest lasting punishment of the prescribed punishment.

If an older juvenile commits more crimes in coincidence, and the court finds as a proper to sentence a punishment of the juvenile jail, it will be scaled according to its own estimation within its overall maximum. On the other hand if the court finds, for some older juvenile who committed crime done in coincidence, should be sentenced only the juvenile jail, and for the others some educative provision, for all committed crimes in coincidence, the court will sentence only one punishment as a juvenile jail. In the same way the court will proceed in case if, after the sentenced punishment of a juvenile jail there is fortified that the juvenile committed some crime, before or after it was sentenced.

The convicted juvenile conditionally can be released if he accomplished one third of the punishment, but not before he spent six months in the penitentiary. The court can assign the provision of intensive custody by the custody authority over conditionally released juvenile during the period of conditionally release. The counterman of the conditional release is executed under overall rules

Conclusion

From January 1 st, 2006. in the Republic of Serbia a new material and penitentiary crimimal law has entered into force. A new juvenile criminal law provides in special ''juvenile'' code (LACCAJ) which contains all material, procedural and penitentiary (executive) prescriptions on minors as actor of criminal offences. In this paper, the author analyses the basic characteristics of new juvenile criminal law in the Republic of Serbia with comparative aspects in other modern criminal codes.

BASIC LITERATURE

Carić Ante, Problemi maloletničkog sudstva, Split, 1971.

Hirjan Franjo, Singer Mladen, Maloljetnici u krivičnom pravu, Zagreb, 2001.

Horvatić Franjo, Kazneno pravo, Opći dio, Zagreb, 2003.

Jovašević Dragan, Komentar Krivičnog zakona SR Jugoslavije, Beograd, 2002.

Jovašević Dragan, Komentar Krivičnog zakona Republike Srbije, Beograd, 2003.

Jovašević Dragan, Zakonik o krivičnom postupku, Beograd, 2004.

Jovašević Dragan, Zakon o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica, Beogad, 2006.

Jovašević Dragan, Krivični zakonik Republike Srbije sa uvodnim komentarom, Beograd, 2007.

Jovašević Dragan, Maloletničko krivično pravo, Beograd, 2008.

Jovašević Dragan, Maloletničko krivično pravo, Niš, 2011.

Jovašević Dragan, Krivično pravo, Opšti deo, Beograd, 2016.

Lazarević Ljubiša, Vučković Branko, Vučković Vesna, Komentar Krivičnog zakonika Republike Crne Gore,Cetinje, 2004.

Novoselec Petar, Opći dio kaznenog prava, Zagreb, 2004.

Perić Obrad, Komentar Zakona o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica, Beograd, 2005.

Petrović Borislav, Jovašević Dragan, Krivično (kazneno) pravo Bosne i Hercegovine, Opći dio, Sarajevo, 2005.

Petrović Borislav, Jovašević Dragan, Izvršno krivično (kazneno) pravo, Sarajevo, 2006.

Petrović Borislav, Jovašević Dragan Ferhatović Amila, Krivično pravo 1, Sarajevo, 2015.

Petrović Borislav, Jovašević Dragan Ferhatović Amila, Krivično pravo 2, Sarajevo, 2016.

Simović Miorag, Jovašević Dragan, Simović Marina, Izvršno krivično pravo, Banja Luka, 2014.

Simović Miodrag et al., Maloljetničko krivično pravo, Istočno Sarajevo, 2015.

Certain Changes in the Criminal Procedure Law (KPP), Criminal Procedure (KP) after 1990 - These in Bosnia and Herzegovina

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Abstract

The authors analyze the scientific ideas, material changes and trends in the BiH society in terms of changes in the criminal procedure law or procedure with regard to the process of accusation, after the 1990s. In this context, it turns out that in the Republic of Bosnia and Herzegovina nineties nineteenth century building the new criminal legislation where criminal procedural law – a process occupies an important place in which the prosecutor dominates – dominus litis, in contrast to earlier treatment, where the investigating judge had the main word, all in terms of the practical application of the law in court and legal system, which Bosnia and Herzegovina is constantly evolving and promotes through various forms of theoretical and practical training.

The process of accession new form of treatment is an excellent example of the ability and willingness of legislators and members of the judiciary in Bosnia and Herzegovina presented by experts and consultants involved in the project – to the legislative bodies shall cooperate, share their knowledge, experiences and opinions in science and the legal profession, order exceeded the existing obstacles in the formation of harmonized judiciary in the country.

Members of the criminal justice system are invited to constantly work on improving the new mode, in relation to the work to the nineties of the twentieth century, through constructive critical feedback as it is intended that the present educational material continuously update and enhance the scientific and practical terms.

Keywords: *investigation, preparation of the indictment, the indictment, the contents of the indictment, the decision on the indictment.*

Introduction

As part of this educational work dealt with topics of criminal procedural law, with emphasis on the changes in the criminal procedure law, after the 90s of the twentieth century in Bosnia and Herzegovina. This theme was chosen and treated for the training of judges, prosecutors, defense lawyers, students of law and other faculties of which it is the main activity in the treatment and study as the most important process of legal activity, given the present implementation problems that arise in legal reforms nineteenth or twentieth Ages.

This scientific work and other practical educational tools will help in the ongoing training of judges, prosecutors and other interested personnel.

1. Investigation in criminal proceedings

The investigation stage of pre-trial proceedings conducted by the prosecutor against a person, due to grounded suspicion that he committed an offense. What is "adversarial seal" whole new criminal justice system is setting the criminal proceedings as a comprehensive "criminal proceedings", with strongly pronounced akuzatornošću each stage of the criminal proceedings in which the prosecutor one of the parties to the proceedings, with powers to prosecute offenders, where a legislator leaves and establishes responsibility for the entire process of discovering and clarifying the crimes and their perpetrators, focusing on the authorization or the rights and duties of the prosecutor, limited judicial intervention in the investigation only to cases in which an investigation or specific actions to be implemented in an investigation, or may not produce such effects which can be undermined or limited, but defined human rights and freedoms.

The process of accusation lies in the XX-th head of the Criminal Procedure Code of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina, Serbian Republic and the Brcko District of Bosnia and Herzegovina, while the main trail built in the head XXI of the Criminal Procedure Code of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina , Serbian Republic and the Brcko District of Bosnia and Herzegovina. The paper will be presented legal solutions relating to the accusations. On this occasion will be given a practical explanation of the relevant legal provisions.

Also, will point out the specific legal issues and their already established solutions. This contributed to the theoretical and practical advancement of knowledge and skills of judges and prosecutors in handling at this stage of the criminal proceedings.

Only normative and legal solution consists of two parts. The first part deals with the process of accusation, which is the final stage of the previous procedure, and the second part deals with the main trial as well as the central and most important stage of the criminal proceedings.

The new Criminal Procedure Code in the accusation and the case introduced fundamentally changes compared to the previous legal provisions pertaining to this phase of the criminal proceedings. The importance of this phase of the criminal proceedings, and the extent and nature of the changes, imposed the need to take the process of accusation and trial devote significant attention in the process of training of judges, prosecutors and students in law schools.

To this end, and in the context of this work, deals with the process of accusation, whose main task indictment, making a preliminary hearing on the charges, plea, plea bargaining and preliminary objections. With regard to the objectives of education, the total area given: a review of the legal provisions relating to the stage of criminal proceedings, a practical explanation of the relevant legal provisions, review of different attitudes and practices with regard to certain legal solutions.

2. Procedure accusations

2.1. Indictment

Relevant regulations[1]: Art. 16 of the Criminal Procedure Code of Bosnia and Herzegovina (hereinafter: the CPC BiH): "Criminal proceedings may be initiated and conducted upon the request of the Prosecutor." Art. 17 of the Criminal Procedure Code of the Federation of Bosnia and Herzegovina (hereinafter: FBiH CPC): "Criminal proceedings may be initiated and conducted upon the request of the competent prosecutor." Art. 16 of the Criminal Procedure Code of the Republic of Serbian (hereinafter: RS CPC) and Article 16, paragraph 1 of the Criminal Procedure Code of the Brcko District of Bosnia and Herzegovina (hereinafter: CPC BD): "Criminal proceedings may be initiated and implemented only at the request of the prosecutor.

" The aforementioned legal provisions expressed principle accusatory or adversarial principle which is the basis for the initiation and conduct of criminal proceedings which was the essential requirement prosecutor. Accepting this principle implies that the court can never be prosecuted on its own initiative, which requires:

✓ separation basic process function so that the function of prosecution was entrusted to the competent prosecutor, defense functions entrusted to the suspect or the accused and his defense attorney, a function of the trial - the court;

✓ criminal proceedings has the character of a dispute the two parties (the prosecutor and the suspect or the accused) in court;

✓ criminal proceedings can be initiated only against those individuals and for what offense that the prosecutor determined in its request.

In accordance with the principle of accusatory, after the conclusion of criminal proceedings may be initiated only after the indictment the prosecutor in charge and only against a person identified in the indictment and only for work that is the subject of the charges. "The prosecutor is obliged to initiate a prosecution if there is evidence that a criminal offense, unless the law provides otherwise." The provision contains the principle of legality of criminal prosecution according to which the competent prosecutor, except in the cases expressly provided for in the laws on criminal procedure, required to initiate a prosecution if there is evidence that a criminal act.

However, in cases where there is evidence that a criminal offense was committed, competent prosecutor not to initiate a prosecution if the statute of limitation of criminal prosecution, if the offense is covered by amnesty or if other circumstances exist which preclude criminal prosecution, for example, in the event that a suspect enjoys procedural immunity or that the mentally ill after the commission of the offense.

If there is evidence that a criminal act, the prosecutor, therefore, as a rule, is not authorized to appreciate the expediency (expediency) of criminal prosecution from the

[1] In this section, reference is made to the relevant provisions of the Criminal Procedure Code of Bosnia and Herzegovina (hereinafter: the CPC BiH). When you call upon the relevant provisions of the CPC, shall be indicated and the relevant provisions of the Code of Criminal Procedure of the Federation of Bosnia and Herzegovina (hereinafter: FBiH CPC), the Criminal Procedure Code of the Republic of Serbian (hereinafter: CPC RS) and Criminal procedure of Brcko District of Bosnia and Herzegovina (hereinafter: CPC BD). In the event that the legislative approaches in relation to certain issues differ, it will be particularly noted. Where the legislative solutions are identical, in the present section will be indicated only provisions of any of these laws which regulate or question.

standpoint of national interests (principle of opportunity of criminal prosecution), but in any case obliged to initiate a prosecution.

"Exceptions to the principle of legality of criminal prosecution are prescribed for:

- offenses which are prosecuted upon approval (Art. 209)
- crimes for which are provided special conditions for prosecution (art. 210)
- crimes whose prosecution can be transferred to a foreign country (Art. 412)
- offenses in which the prosecutor will give immunity to the witness (Art. 84)
- minor offenses whose perpetrators are minors (in. Art. 352 and 353) and
- crimes discussed in the proceedings against legal persons (Art. 376).[2]

In accordance with the principle of legality of criminal prosecution, after the conclusion of the prosecutor is required, unless the law of criminal procedure is not otherwise provided, press charges if there is evidence that the suspect committed a criminal offense.

The prosecutor is also required to support the indictment until the legal conditions for the criminal prosecution of the suspect or the accused. The basic right and the basic duty of the prosecutor is the detection and prosecution of perpetrators of crimes falling within the jurisdiction of the court. The prosecutor has the right and duty to raise and represent the indictment before the court.

2.2. Preparation indictment

Relevant regulations: Art. 226 of the CPC BiH, Art. 241 FBiH CPC, Art. 233 RS CPC and art. 226 of CPC BD: "(1) When in the course of the investigation, the Prosecutor finds that there is sufficient evidence from which a reasonable suspicion that the suspect committed a criminal offense, shall prepare and refer the indictment to the preliminary hearing. (2) After the indictment, the suspect or the accused and the defense attorney have the right to inspect all files and evidence. (3) After the indictment, the parties and defense attorney may propose to the preliminary hearing judge to take actions in accordance with Article 223 of this law. " The investigation is the first phase of the preliminary procedure can be completed in two ways: the order of the competent prosecutor that the investigation is suspended (Art. 224 of the CPC BiH, Art. 239 FBiH CPC, Art. 224 RS CPC and Art. 224 of CPC BD) that is, when the investigation is suspended because there is insufficient evidence that the suspect committed a criminal offense, only conditionally, because the prosecutor reopen the investigation if additional information are obtained provide sufficient reasons to believe that the suspect committed a criminal offense, or indictment (art. 225, para. 1 of the CPC BiH, Art. 240 para. 1 of the CPC FBiH, Art. 225 para. 1 of the CPC RS and Art. 225 para. 1 of the CPC BD).

The prosecutor filed indictments when during the investigation finds that there is sufficient evidence from which a reasonable suspicion that the suspect committed a criminal offense. The legal requirement for an indictment is, therefore, reasonable suspicion that the suspect committed a criminal offense. "Reasonable doubt is a higher degree of suspicion based on collected evidence leading to the conclusion that a criminal

[2] Sijerčić-Čolić H., Hadžiomeragić M., M. Jurcevic, Kaurinović D. Simovic M. "Comments on Criminal Law / Criminal Procedure Code of Bosnia and Herzegovina", joint project of the Council of Europe and the European Commission, Sarajevo, 2005, p .78. The provisions to which the author calls refer to the CPC BiH (note the authors of the module).

act." Grounded suspicion that a person has committed a crime is a complex concept. In a logical sense, it indicates a certain degree of certainty of knowledge about the existence of these facts. In legal terms it is a standard that guarantees citizens that psychological assessment which is to this realization comes, be based on objective and verifiable criteria. Generally speaking, the degree of certainty must be such that in krivičnompostupku conviction of the person who is considered to be the perpetrator of the crime appear more realistic than acquittal, but these prospects arising from the existing evidence on which the suspicion "based".

In doing so, estimating the Attorney General has to go in two directions:

(A) forecasting that will include all the facts that could lead to up to sentencing and acquittal for various reasons in the Penal Code and Criminal Procedure Code (while state attorney is not legally bound by the legal assessment that the courts have given these facts but really is since it exclusively about their legal assessment depends on the final outcome of the criminal proceedings);

(B) diagnostic, which will include all the evidence to support these facts actually the whole image of the perpetrator's guilt and innocence. Only such a complex assumption Attorney General can lead to the correct conclusion that the likelihood of the offender's conviction above its liberation. "[3]

The assessment of whether the evidence collected during the investigation, a reasonable suspicion that the suspect committed a criminal offense and whether he met the legal requirement for an indictment under the exclusive jurisdiction of the prosecutor. It is based on a comprehensive analysis of collected evidence. In assessing the existence or non-existence of a fact the prosecutor is not bound or limited by special formal evidentiary rules.

There are no legal rules which are pre-determined value of certain evidence, nor that certain facts be proved only certain evidence. However, since the latter are, however, some exceptions. "Exceptionally, the law requires that certain circumstances prove only certain means of evidence (eg., To reopen the proceedings in favor of a convicted fact that the final judgment is based on the false testimony of witnesses proved by a final judgment that the witness was found guilty of giving false testimony - Art. 327, para. 2 and art. 328, para. 2). According to some views, the exception to the free evaluation of evidence is the rule that certain facts can not be taken as proven if it is not in favor of going some evidence (eg . certain types of expertise of Art. 103 par. 1, Art. 107 para. 1 and Art. 110 para. 1). Then, there are special rules of evidence in cases of sexual offenses (Art. 264th). also, this principle should be linked with the principle of legal evidence (that identifies where the evidence can not be based court decision - Art. 8), considering that illegal evidence can not be subject to free evaluation. the free evaluation of evidence limited concrete evidence prohibitions, as well as rules on the legality of evidence (ref., for example. Art. 10, 78, para. 6, Art. 86, para. 5, art. 109, para. 4 and 5, Art. 121). "[4]

For this reason, in assessing whether there is enough evidence for a reasonable suspicion that the suspect committed a crime, the prosecutor is obliged to take account

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[3] Krapac, D. "Criminal Procedural Law, the first book: the institutions", Informant, Zagreb, 2000, p. 51st

[4] Sijerčić-Colic H., Hadžiomeragić M., M. Jurcevic, Kaurinović D. Simovic M. "Comments on Criminal Law / Criminal Procedure Code of Bosnia and Herzegovina", joint project of the Council of Europe and the European Commission, Sarajevo, 2005, p .77. The provisions to which the author calls refer to the CPC BiH (note-author).

of those rules, which are exceptions to the principle of free evaluation of the evidence and to assess whether, in respect of certain fact, has the kind of evidence whose existence their finding required by law.

Current legislation on criminal procedure do not specify a deadline by which the plaintiff, upon completion of the investigation, shall prepare and refer the indictment to the preliminary hearing. However, legislation that would, if the investigation is not completed within six months after the order to conduct an investigation, the necessary measures in order to complete the investigation take college prosecution (art. 225, para. 3 of the CPC BiH, Art. 240 para. 3 of the CPC FBiH, Art. 225, para. 3 RS CPC and art. 225, para. 3 of the CPC BD), and that the termination of the investigation noted in the file (Art. 225 par. 1 . BiH CPC, art. 240 para. 1 of the CPC FBiH, Art. 225 para. 1 of the CPC RS and Art. 225 para. 1 of the CPC BD), with the right of the suspect or the accused in the shortest reasonable time be brought before the court and to be tried without delay (Art. 13 of the CPC, Art. 14 of the CPC FBiH, Art. 13 CPC RS and Art. 13 CPC BD, and Art. 6 par. first European Convention for the protection of human rights and fundamental freedoms - hereinafter ECHR), oblige prosecutors to prepare the indictment and refer to the preliminary hearing without undue delay.

It is necessary, in fact, bear in mind that the European Court of Human Rights (hereinafter: ECHR) to start calculating a reasonable period shall be the day when the person given official notification of the competent authority that there is a claim that she committed an offense.[5]

As the investigation could not be completed before the prosecutor heard the suspect (art. 225, para. 2 of the BiH CPC, art. 240, para. 2 of CPC FBiH, Art. 225 para. 2 of CPC RS and Art. 225 para. 2 of the CPC BD), it is obvious that that the reasonable time for the right of the suspect to be brought before the court and to be tried without delay begin to run even in the investigation and that the plaintiff and in preparing and submitting the indictment must take care this right suspects.

In addition to the activities of preparation of the indictment, the legal concept of an indictment (Art. 226 para. 1 of the CPC BiH, Art. 241 para. 1 of the CPC FBiH, art. 233, para. 1 of the CPC RS and Art. 226 par. 1 . CPC BD) includes the referral of the indictment to the preliminary hearing of the competent court.

The indictment is submitted to the judge for a preliminary hearing in as many copies as there are suspects and defense lawyers and a copy of the court (Art. 149 para. 1 of the CPC BiH, Art. 163 para. 1 of the CPC FBiH, Art. 60 par. 1 . RS CPC and Art. 149 para. 1 of the CPC BD).

If you suspect there are more defenders, it is enough to deliver a copy of the indictment for one of them (art. 171, para. 5 of the BiH CPC, art. 185, para. 5 of the CPC FBiH, Art. 82, para. 5 RS CPC and art. 171, para. 5 ZKPBD BiH).

If the indictment is not addressed to the preliminary hearing judge in sufficient number of copies, the judge shall invite the plaintiff to a certain period of time before a sufficient number of copies. If the plaintiff fails to comply with the summons, the preliminary hearing judge shall make the necessary number of copies at the expense of the plaintiff (Art. 149 para. 2 of the BiH CPC, art. 163 para. 2 of CPC FBiH, Art. 60 c. 2nd RS CPC and Art. 149 para. 2 of the CPC BD).

The preliminary hearing judge not, therefore, entitled to the indictment in this case rejected (Art. 148 para. 3 of the CPC BiH, Art. 162 para. 3 of the CPC FBiH, Art. 59, para. 3

[5] See the decision of the ECHR in the Fotti and Others v Italy, from 10.12. 1982

RS CPC and Article . 148 para. 3 of the CPC BD) because it is not about incomprehensible that the submission that does not contain everything you need to act upon it. After the indictment:

- suspect or accused have the right to inspect all files and evidence (Art. 226 para. 2 of the BiH CPC, art. 241 para. 2 of the CPC FBiH, Art. 233, para. 2 of CPC RS and Art. 226 . no. 2 of the CPC BD). Indictment cease restrictions on the right to inspect the files and all the evidence provided art. 47 of the CPC BiH, and Article. 61 FBiH CPC, Art. 55. RS CPC and art. 47. CPC BD. The right to inspect all files and evidence includes the right photocopies of all papers and documents. Authorization for access to documents and evidence after an indictment issued by the judge for a preliminary hearing;

- parties and defense attorney may propose the preliminary hearing judge to take actions that are used for the provision of forensic evidence (art. 226, para. 3 of the BiH CPC, art. 241, para. 3 FBiH CPC, art. 233, para. 3 RS CPC and Art. 226 para. 3 of the CPC BD). Evidence by the Court at this stage is carried out in the same manner as in the investigation phase, ie, in accordance with Art. 223 of the CPC BiH, and Article. 238 FBiH CPC, Art. 223 RS CPC and art. 223 of CPC BD, with what is now to act on this proposal functionally competent judge for a preliminary hearing.

2.3. Contents of the indictment

Relevant regulations: Art. 227 of the CPC BiH, Art. 242 FBiH CPC, Art. 234 RS CPC and art. 227 of the CPC BD: "(1) The indictment contains:

a) the name of the court,

b) the name of the suspect, with personal data,

c) a description of the act pointing out the legal elements of the crime, the time and place the criminal offense, the object on which and the means by which the offense, and other circumstances necessary for the criminal offense as precisely as possible,

d) the legal name of the crime, the relevant provisions of the Criminal Code,

e) proposal of evidence to be presented, including the names of witnesses and experts, documents to be read and objects serving as evidence;

f) the result of the investigation,

g) material supporting the indictment.

(2) An indictment may cover several criminal offenses or several suspects.

(3) If the suspect is at large, the indictment may suggest that he be detained, and if he is in custody can be proposed to extend the detention or that he be released.

The indictment was strictly formal procedural document prosecutor whose mandatory content is determined by Article 227 para. 1 of the CPC BiH, and Article. 242 no. 1 of the CPC FBiH, Art. 234 no. 1 of the CPC RS and Art. 227 para. 1 of the CPC BD BiH.Optužnica must contain the name of the court whose judge for a preliminary hearing indictment indicates. This compulsory element of the indictment the prosecutor expressed its position on what the court has subject matter and territorial jurisdiction to deal with the specific indictment and thus the obligation of the court to which the indictment refers to assess whether the matter and territorial jurisdiction to act in a particular criminal case.

Another mandatory element of the indictment is the name and surname of the suspect, with personal data. The statutory provision on the content of the indictment contains no closer indication of what personal information the suspect indictment must contain. Since the indictment specifies the person who is accused of having made a

specific criminal offense and that the verdict shall refer only to the accused person (Art. 280 para. 1 of the CPC BiH, Art. 295 para. 1 of the CPC FBiH Art. 286 para. 1 of the CPC RS and Art. 280 para. 1 of the CPC BD), the indictment contains personal data necessary for the individualization of the suspect. These are data that are taken from the suspect during his first questioning in the investigation (Art. 78 para. 1 of the CPC BiH, Art. 92 para. 1 of the CPC FBiH, Art. 142 para. 1 of the CPC RS and Article . 78. no. 1 of the CPC BD).

The third mandatory element of the indictment is a description of acts from which the legal elements of the crime, the time and place the criminal offense, the object on which and the means by which the offense, and other circumstances necessary for the criminal offense as precisely as possible. It is a part of the indictment that represents its factual basis for ordering the charge, trial and conviction (Art. 280 para. 1 of the CPC BiH, Art. 295 para. 1 of the CPC FBiH, Art. 286 st. 1st RS CPC and Art. 280 para. 1 of the CPC BD).

Description of the works must contain facts and circumstances which, in the opinion of the plaintiff, arising from the evidence collected during the investigation and that the legal characteristics of a criminal offense (the act of perpetration, consequence, if it is an element of the legal description of the act, the causal link between the act of perpetrating the immanent consequences , with the criminal offenses of omission basis from which the obligation to reflect upon the suspect to commit, the mental attitude of the perpetrator towards the actions of perpetration and nastupjeloj consequence, other subjective elements of the offense, for example, a specific intent, a description of the behavior of the suspect, which shows that it is contrary to a specific blanket regulation in case of crimes with blanket disposition, the unlawfulness of conduct when the unlawfulness of a particular element of the relevant criminal offense).

Factual allegations in the indictment must contain a description of the offense, that is, the facts and circumstances pointing to the legal elements of the crime, not the elements of the crime as they are given in marriage. For example, in the factual basis of the indictment for criminal offense of aggravated bodily harm should be stated not only that the suspect damaged caused serious and life-threatening bodily harm, but also the facts and circumstances which the violation and specifies which indicate that it is just of such physical harm. Or, for example, the factual basis of the indictment for the criminal offense of causing death by negligence is not sufficient to indicate that the suspect caused the death of another carelessly wielding a gun, but it is necessary to state the facts and circumstances of the particular case consisted failing to act and possible attention when handling a rifle.

The subject on which there is a means by which the offense are mandatory element of the factual basis of the indictment, and when they are not elements of the legal entities of the underlying crime. It is obvious that the legislator considers them in any case an essential element for the individualization of crimes for which a suspect is charged. Factual allegations in the indictment must contain the time and place the criminal offense regardless of whether they are legal elements of the crime. It is the circumstances that are used for individualization of offense for which the suspect is charged. In addition, it is the circumstances that are important for the determination of the applicable criminal law and certain provisions of the criminal law (for example, the statute of limitations) or for determination of territorial jurisdiction of the court. The law requires that the factual allegations in the indictment contains, and other circumstances necessary for the criminal offense as precisely as possible.

This and previous requirements relating to the factual allegations in the indictment, as well as those relating to the legal basis of the indictment, unless they need to provide the preliminary hearing judge of the Indictment, should also at this stage of the proceedings to enable the realization of the rights of suspected fully and in a language which he understands to be informed about the nature and grounds of the charge against him (Art. 6 (3) (a) of the ECHR) which is one of the preconditions for the realization of the rights of the suspect to have adequate time and facilities to prepare his defense (Art. 6 (3) (b) of the ECHR) . The fourth element of the mandatory content of the indictment is the legal name of the crime, the relevant provisions of the Criminal Code. This is a point which the indictment the prosecutor determines the legal qualification of the offense for which accuses the suspect. In addition to the legal title deeds and quoting provisions of the law with which the act specified, the prosecutor in this part of the indictment shall state and other legislation relevant to the work of the suspect (eg. The provisions relating to the attempt to commit criminal acts, some form of complicity, continued criminal offense , etc.). If it is a crime that has multiple forms, the plaintiff in the indictment required to mark not only that members of the criminal law it is a crime, but also a certain attitude which is in the law determined by the shape of a criminal offense for which the suspect is charged. The fifth compulsory element of the indictment is the proposal of evidence to be presented, including the names of witnesses and experts, documents to be read and objects serving as evidence. Although the law says only the names of witnesses and experts and not on their addresses, there is no doubt that the proposal of evidence to be performed must contain this information. The word on data from witnesses and experts required in taking their hearing in the investigation or in their engagement as an expert, and, moreover, the plaintiff has the right to require the provision of necessary information from government bodies, enterprises, legal and natural persons (Art. 35 para. 2 items. d) of the CPC BiH, Art. 45 para. 2 items. d) FBiH CPC, Art. 43 para. 2 items. g) RS CPC and art. 35 para. 2 items. d) of the CPC BD), but there are no reasons that would prosecutor freed and the obligation to submit these data to court with a proposal of evidence to be presented. If the indictment is proposed, in accordance with the Law on protection of witnesses under threat and vulnerable witnesses[6], examination of witnesses under threat with the use of additional measures to ensure the disclosure of the identity of witnesses (art. 13 of the Law on Protection of Threatened and Endangered Witnesses[7]), name and addresses of such witnesses will not be indicated in the indictment, but they will be labeled in the indictment pseudonym.

Also, if during the proceedings, a witness heard as a protected witness (Art. 14 through 23 of the Law on Protection of Threatened and Endangered Witnesses[8]), the

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[6] The Law on Protection of Threatened and Endangered Witnesses (Official Gazette, 21/03 and 61/04), Law on Protection of Witnesses under Threat and Vulnerable Witnesses (Official Gazette of FBiH, No. 36/03), Law on Protection of Witnesses in Criminal procedure (Official Gazette of RS, No. 48/03) and the Law on protection of witnesses under threat and vulnerable witnesses (Official Gazette of BD 10/03)

[7] Art. 14. Law on Protection of Threatened and Endangered Witnesses FBiH, Art. 13. Law on Protection of Witnesses in Criminal Proceedings of the RS and Art. 13. Law on Protection of Threatened and Endangered Witnesses BD.

[8] Art. 15th-24th The Law on Protection of Threatened and Endangered Witnesses FBiH, Art. 14th-23rd Witness Protection Act in criminal proceedings of RS and Art. 14.-23 Law on Protection of Threatened and Endangered Witnesses BD.

indictment will propose a reading of the minutes of the hearing of a protected witness with labeling that witness pseudonym that him by the court. Sixth compulsory element content of the indictment is the result of the investigation. He concludes the prosecutor of the facts arising from the evidence presented during the investigation and whose trial presentation he suggests. In this part of the indictment, the prosecutor should order and summarized their views on the legal significance of the fact that he is considered to arise from the evidence presented and all of which, in the view of the plaintiff, indicating the existence of reasonable suspicion that the suspect committed the crimes for which he is charged in the Indictment . In this part of the indictment the prosecutor should not amount to substantial results, the evidence collected during the investigation. The preliminary hearing judge, who evaluated the existence of reasonable suspicion that the suspect committed the crimes for which he is charged, the indictment is submitted materials to support the allegations and from which he can know the contents of the evidence relied on by the plaintiff in this part of the indictment, and therefore no need to be in this part of the indictment amounts and substantial results of the evidence. On the other hand, considering that the main trial shall commence by reading the indictment (Art. 260 para. 1 of the CPC BiH, Art. 275 para. 1 of the CPC FBiH, Art. 267 para. 1 of the CPC RS and Art. 260th no. 1 of the CPC BD), presenting the results of substantive evidence presented during the investigation in this part of the indictment would lead to the introduction of the main trial substantive results of that evidence by the rules to allow a departure from the principle of direct presentation of evidence at trial.

The seventh compulsory element of the contents of the indictment the material supporting the indictment. These are, as a rule, the minutes of the hearing of witnesses, the questioning of the suspect, expert evidence, records of investigation, the minutes of the reconstruction, the minutes of a dwelling or person, the minutes of seizure of items, seized items, documents, photographs and other technical records , etc. If the suspect is at large, the indictment may suggest that he be detained, and if he is in custody can be proposed to extend the detention or that he be released (Art. 227 para. 3 of the CPC BiH Art. 242 para. 3 of the CPC FBiH, Art. 234 para. 3 RS CPC and Art. 227 para. 3 of the CPC BD). On this proposal decision may be taken only after the confirmation of the indictment because of criminal procedure do not contain provisions that would refer to the custody between picking and confirmation of the indictment, but only provisions relating to detention in the investigation (Art. 135 of the CPC BiH, Art. 149 FBiH CPC, Art. 192 RS CPC.

3. The current situation in terms of criminal procedure reforms in Bosnia and Herzegovina

It is necessary to look at the steps that were taken 2003 years in the field of legislative reform in Bosnia and Herzegovina. So these days the High Representative for Bosnia and Herzegovina, in accordance with its authority, declared a set of laws that have tackled the most to fight corruption and organized crime. Among these laws, the most important was the Criminal Law, the Law on Criminal Procedure and the Law on the protection of vulnerable witnesses and witnesses under threat. The legislator is in the context of comprehensive reform of the criminal law in the legal system of BiH introduced a lot of new legislation and legal institutions that represent the elaboration of international and comparative standards relating to the need for effective prevention

of crime and the fight against complex and contemporary works, as well as the idea of universal protection recognized rights and freedoms. The question of the basic principles underlying the criminal proceedings in BiH, as well as the rules under which they take place are the issues that are often discussed. Although there are a number of additional aspects to be taken into account, however, and from a superficial review of positive procedural law may conclude that it should ensure that no innocent person be convicted and that the perpetrator of a crime imposes a criminal sanction under the terms provided for in substantive criminal law . Finally, the concept of a valid BiH CPC in itself includes the idea of civil law mixed type and common law, and Anglo-American law adversarial, and what is inferred from a comparative study and analysis of certain key institutes in criminal proceedings in BiH. Therefore, the current criminal procedural law in BiH we can repeat that result Reconciliation two legal cultures of continental or European and Anglo-Saxon and Anglo-American.

Overview of contemporary developments in the field of reforming the national criminal proceedings shows a similar picture, with a note that with more or less success boundaries of criminal proceedings which belong to different cultures.

The decisive question that arose after the adoption of the current CPC BiH referred to the need for a period of radical reforms in the criminal justice system and criminal legislation in BiH is continuously monitored and assessed.

Thus, efforts to reform criminal legislation, especially criminal procedure law and criminal procedure continued, as evidenced by the establishment in the Ministry of Justice, the team for monitoring and evaluating the application of criminal law in BiH.

These stimulus has led to concrete proposals which should affect the specific provisions of BiH. Naima in October 2004, a discussion about the first proposal, which included 61 positive procedural provision. The Ministry of Justice is already in December 2004, submitted all segments of Criminal Jurisdiction in BiH, as well as other relevant national and international organizations, so that within two months the Team submitted opinions on the proposed changed or amended. [9]After the expiry of that period Team was assigned to a large number of opinions and views on the proposed amendments, as well as new attitudes towards those processing solutions that were not included in the proposed amendments.

The National Team has set up a working group to prepare proposals WALL CPC with the task of analyzing the signaling aspects of the application of criminal procedural legislation and to recommend measures for their improvement and enhancement.

Conclusion

The conclusion of the prosecutor of the existence of reasonable suspicion that the suspect committed a criminal offense must include the assessment of the facts arising from the collected evidence the legal characteristics of a criminal offense.

Previously described actions of the plaintiff, together with a compilation of the written indictment, make the contents of the legal concept of preparing indictments.

Current legislation on criminal procedure do not specify a deadline by which the plaintiff, upon completion of the investigation, shall prepare and refer the indictment to the preliminary hearing.

[9] Journal for legal theory and practice, 2007th Law and Justice, Sarajevo, br.1.str.7

However, legislation that would, if the investigation is not completed within six months after the order to conduct an investigation, the necessary measures in order to complete the investigation take college prosecution, (art. 225, para. 3 of the CPC BiH, Articles . 240 para. 3 of the CPC FBiH, Art. 225, para. 3 RS CPC and Art. 225 para. 3 of the CPC BD), and that the termination of the investigation noted in the file (Art. 225 st . 1 of the CPC BiH, Art. 240 para. 1 of the CPC FBiH, Art. 225 para. 1 of the CPC RS and Art. 225 para. 1 of the CPC BD), with the right of the suspect or the accused that as soon reasonable time be brought before the court and to be tried without delay (Art. 13 of the CPC, Art. 14 of the CPC FBiH, Art. 13 CPC RS and Art. 13 CPC BD, and art. 6th century . 1 of the European Convention for the protection of human rights and fundamental freedoms -EKLJP), oblige prosecutors to prepare the indictment and refer to the preliminary hearing without undue delay.

Sources and references

- Jasarevic, N. Osman, Criminal Procedure Law I and II, Second amended edition, Meadow, 2012, str.277-287.
- Jašarević, N. Osman , Kazić Ena, MA, Jašarević S. Merisa, MA, Exercises of criminal procedural law (general and special part), Meadow, 2015, p. 145-163.
- Krapac, D. "Criminal Procedural Law, the first book: the institutions", Informator, Zagreb, 2000, p. 51st
- Review of legal theory and practice, 2007th Law and Justice, Sarajevo, br.1.str.7
- Sijerčić-Colic H., Hadžiomeragić M., M. Jurcevic, Kaurinović D. Simovic M. "Comments on Criminal Law / Criminal Procedure Code of Bosnia and Herzegovina", joint project of the Council of Europe and the European Commission, Sarajevo, 2005 p.78. The provisions to which the author calls refer to the CPC BiH, (note the author's work).
- Criminal Procedure Code of Bosnia and Herzegovina (BiH valid CPC) (Official Gazette of Bosnia and Herzegovina, Nos. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05 , 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13) 1
- Criminal Procedure Code of the Federation of Bosnia and Herzegovina (FBiH Applicable CPC), Official Gazette 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11, 59/14 and 76/14
- Criminal Procedure Code of the Republic of Serbian (Applicable RS CPC) ("Off. Gazette of RS", no. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014)
- Criminal Procedure Code of the Brcko District of Bosnia and Herzegovina (valid CPC BD).
- Law on Protection of Witnesses under Threat and Vulnerable Witnesses (Official Gazette, 21/03 and 61/04)
- Law on Protection of Witnesses under Threat and Vulnerable Witnesses (Official Gazette of FBiH, No. 36/03)
- Law on Protection of Witnesses in criminal procedure code (Official Gazette of RS, No. 48/03)
- Law on protection of witnesses under threat and vulnerable witnesses (Official Gazette of BD 10/03).

The Preventive Patronage and the Criminal Procedure against Juveniles in Hungary

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Abstract

The main rules of the procedure against juvenile offenders (subjects, evidence, circle of coercive measures, some particular rules of the procedure, special sanctions to be imposed against a juvenile). The proceeding of the preventive patronage. The placement of preventive patronage within the system of child protection

Key words: *criminal procedures, preventive patronage, child protection.*

1. The procedure against juvenile offenders in Hungary

As previously mentioned, there are 10 different types of the separate procedures (procedure against juvenile offenders, military criminal procedure, procedures based on private prosecution, arraignment, procedure against an absent defendant, waiver of trial, omission of trial, procedure against persons enjoying immunity, procedural rules concerning prominent cases and the asset recovery process).

The conditions of a procedure against juveniles and its borderline cases are as follows[2]:

Condition: the defendant had already turned 14 (in some cases 12), but has not reached 18 at the time of the commission of the crime		
Case mixed in time: if the accused turns 18 during the procedure, but was juvenile when he committed the crime: The rules of procedure against the juvenile shall be applied	Accumulation of crimes: if against the same accused crimes committed as a juvenile and crimes committed as an adult are judged at the same time: The rules of ordinary procedure shall be applied	Criminal accessory among the abettors there are both juveniles and adults: partial procedure against juvenile

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[2] HAUTZINGER Zoltán, HERKE Csongor, MÉSZÁROS Bence, NAGY Mariann, *Einführung in das ungarische Strafverfahrensrecht,* Schenk Verlag, Passau, 2008. p. 176

From the cases above the partial procedure against the juvenile means that the special rules shall be applicable only against the juvenile, but not concerning the adults, however, some rules of the procedure (e.g. juvenile court, prosecutor for juvenile offenders) against the juvenile effect the adult criminal also. Other rules (e.g. statutory defence, obligatory means of evidence) are applicable only regarding the juvenile[3].

The rules of a procedure against the juvenile have five main fields:

a) subjects,

b) evidence,

c) circle of coercive measures, and

d) some particular rules of the procedure,

e) special sanctions to be imposed against a juvenile.

ad a) In a procedure against the juvenile the presence of the defence counsel is always statutory. In the first instance, the presiding judge (single judge), while in the second instance and third instance – except the Supreme Court -, a member of the panel shall be the judge designated by the National Judiciary Council (Act XIX of 1998 about code of criminal procedure (CCP) § 448). The legal representative, as supplementary defence counsel has several rights (§ 451 of CCP), and in some cases an ad hoc guardian is to be appointed (§ 452 of CCP).

ad b) The age of the juvenile offender shall be proven by way of a public deed. A study of living conditions of the juvenile shall be obtained which includes the data recorded and managed by the institution entitled by the Act on Public Education, or the information given by his workplace. The study of living conditions shall be prepared by the probation officer[4]. The testimony of the juvenile offender defendant may not be tested by a polygraph. So, in this procedure the principle of free evidence is infringed partially[5], since some types of evidence is forbidden, but some is obligatory.

ad c) Some special measures concerning to preliminary arrest are to be mentioned[6]:

- may only be applied if this is necessary due to special gravity of the criminal offence,
- the session ordering the preliminary arrest cannot be held without the defence counsel,
- at the session the legal representative (guardian) may speak also,
- the decision concerning the preliminary arrest shall be disclosed to the legal representative and guardian,
- preliminary arrest can be executed also in a youth custody centre,
- juvenile offenders shall be separated from offenders of legal age.
- the term of preliminary arrest ordered against the juvenile is maximum 2 years.

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[3] DEÁK Péter, *Aspects of the juvenile criminal procedure*, Vargha László-emlékkönyv, PTE ÁJK Pécs, 2003. pp. 29-40.

[4] SZIROTA Szilvia, Juvenile probation supervision, Doktoranduszok fóruma, Budapest, 2008. pp. 217-220.

[5] HERKE Csongor, *Los acuerdos celebrados en el proceso penal en el espejo de los principios fundamentales,* Miomir MARULOVIC – Eduard KUNSTEK (eds), *Kazneno pravo, kazneno postupno pravo i kriminalistika, Zbornik radova provodom 70 godina. zivota Berislava Pavisica*, Pravni Fakultet Sveucilista u Rijeci, Rijeka, 2014. pp. 57-72.

[6] HERKE Csongor, *The preliminary arrest and its substituting institutes,* 3rd International Meeting "Justice and Law 2006". Havanna, 2006. p. 13 http://www.tsp.cu/Archivos/Ponencias/THE PRELIMINARY ARREST AND ITS SUBSTITUTING INSTITUTES.rtf

ad d) Other rules indicating the special characteristics of the procedure can also be found in the CPC, like concerning the indictment (it can be postponed also in case the criminal offence is punishable by a maximum of 5 years' imprisonment, the prosecutor shall obtain the opinion of the probation officer[7] before filing the indictment etc) and the trial (public shall be excluded from the trial, may order that the part of the trial which could have a harmful effect on the proper development of the juvenile offender be held in the absence of the juvenile etc.)[8].

However, the procedure against an absent defendant, waiving the right to trial and private accusation cannot take place regarding juvenile offenders

ad e) The CPC has provisions concerning the youth custody centre (§§ 465, 467 and 468 of CCP) and material sanctions (§ 466 of CCP) in the procedure against juvenile offenders[9].

2. The placement of preventive patronage within the system of child protection

Preventive patronage as in the framework of administrative proceeding is conducted by the Custodian Office, alongside an already existing placement into protection proceeding or simultaneously conducted with a placement into protection proceeding adaptable as a child protection authority measure since 1st January 2015.[10]

The Custodian Office initiates a placement into protection proceeding because of crime or misdemeanour, which may be punished even with occlusion or in the case of an already existing placement into protection proceeding, furthermore it informs the investigating authority about the crime or the misdemeanour authority about the misdemeanour. Following the feedback towards the Custodian Office they visit the Patronage Probation Service to get an environmental study and a risk assessment of threat of the child regarding crime prevention. (further: risk assessment)[11]

With the introduction of the legal institution the intention of the legislator was that both the system of child protection and criminal justice would preserve their own structure so that they would provide an opportunity for effective cooperation.

Preventive patronage as an authority measure is triple-poled. The Custodian Office participates in the procedure together with the probation officer and the child welfare service. The Custodian Office (district office) makes the decision of enacting the measure and it takes responsibility primarily for its implementation as well.

The probation officer takes part in preparing the necessity of the enactment of the decision (risk assessment, environmental study) and in defining the rules of conduct their implementation.

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[7] CSEMÁNÉ VÁRADI Erika, *The situation and role of probation officer in the Hungarian juvenile justice system*, Bűnözés új tendenciái, Budapest, 2004. pp. 404-410.

[8] SÁRIK Eszter, *The questions of juvenile crime and restorative justice in Hungary,* Ügyészek Lapja, 2010/3-4. pp. 87-91.

[9] CZENCZER Orsolya, *Comments on the current legislation and practice regarding the education of juvenile prisoners,* Studia iuridica Caroliensia, Budapest, 2008. pp. 23-26.

[10] § 15 (4) i) of the XXXI Act of 1997 on Child Protection and Guardianship Administration (hereinafter Gyvt.)

[11] § 68/D. (1) of Gyvt.

The child welfare service is the one who is in contact with the child (juvenile) even previously, in the framework of providing primary care or placement into protection procedure even if the child did not have a criminal past. The task of the child welfare service is to prepare the environmental study and send a pedagogical opinion towards the patronage probation service. During the preparation of the environmental study the probation officer and the child welfare service can cooperate for the sake of effectiveness.

In practice the procedure takes place as follows. The investigating authority or the misdemeanour authority informs the competent Custodian Office if the child (juvenile) has committed a crime or misdemeanour which can be punished even with occlusion. The investigating authority (misdemeanour authority) does not propose to order the measure of preventing patronage. After informing the investigating authority (misdemeanour authority) the Custodian Office decides if from among the measures available they will exclusively order the placement into protection procedure or together with it, simultaneously (or besides the already existing placement into protection procedure) orders the measure of preventing patronage as well. The Custodian Office visits the patronage probation service in case the placement into protection of the child (juvenile) has already happened before committing crime or misdemeanour, which can be punished even with occlusion. If the person who is subject to proceeding and also placed into protection, the Custodian Office sends its order about the placement into protection to the patronage probation service and at the same time sends its suggestion of ordering preventive patronage to the child welfare service. The patronage probation service prepares an environmental study as well as it carries out a risk assessment on the proneness to a criminal lifestyle. The criteria of this procedure is found in Activity of Patronage Probation Service, act of Ministry of Public Administration and Justice (hereinafter PAJM) 8/2013 (29. IV.).

(As a little detour I would indicate that it seemed important to the legislator to amend the Code of Criminal Procedure (Act XIX. of 1998) in this context with the purpose of the unification of the tasks on the side of patronage joining to the criminal and administrative procedure. So in § 114/A (4a) they introduced the definition of overall probation officer opinion, which contains alongside the opinion of the officer, the summary statements of the results of preventive patronage ordered by the Custodian Office. The summary opinion is obtained by the prosecutor after the submission of indictment by the court. § 453 (5) in case preventive patronage was ordered for the juvenile under placement into protection)

As an interesting fact based on § 5 of the PAJM the Patronage Probation Service has 30 days to prepare the environmental study from the arrival to the government office while the Custodian Office has 21 days to prepare their decision based on the § 33 (1) CXL of 2004 of General Rules of Administrative Proceedings and Services (hereinafter KET). For the time of preparing the environmental study the procedure will be suspended based on § 32 (1) KET, this period does not count into the administrative period based on § 33 (3) e).

In case if the degree of the crime prevention risk assessment prepared by the probation service is too high, the Custodian Office imposes preventive patronage and placement into protection procedure compulsorily if it did not happen before. Given the fact that in the frame of administrative procedure they intend to establish obligation, the Custodian Office holds a hearing based on § 62 (1) KET and § 91/L Government Decision 149/1997. (IX. 10) of Custodian Offices as well as child protection and guardianship

procedures (hereinafter Gyer.) At the hearing the Custodian Office listens to the child, parents and child care officer and in case of high degree of risk assessment, participation of the patronage officer is compulsory (The Custodian Office notifies the patronage officer in case of the initiation of every procedure, even if the decree of risk assessment is not high). In the decision the Custodian Office considers the rules of conduct established by the patronage service The child care officer working with the child welfare service can also establish rules of conduct.

The Custodian Office – in case the degree of preventive criminal risk assessment is medium – after examing every circumstance, can ignore the imposition of preventive patronage. In this case, reviewing this decision is compulsory after six months. Reviewing is intended to examine the child's changed circumstances and if it is needed the involvement of the probation service should be initiated. If the risk assessment is on a low level, the Custodian Office ignores the imposition of preventive patronage.

Based on the above the initiation of a procedure based on the degree of risk assessment prepared by patronage probation service has a key importance. Based on the § 68/D (4) b) of the Gyvt. Custodian Office may consider ordering preventive patronage in the case of medium level risk assessment. So in this case preventive patronage can be ordered. In terms of crime prevention in the case of low level risk assessment the act clearly rejects the possibility of imposing preventive patronage.

The Custodian Office reviews the ordered institution of preventive patronage together with the procedure of placement into protection every year ex officio. The review can happen after six months if the probation officer or the child welfare service suggests so. The cases of initiating the procedure ex officio or based on application and the list of eligible applicants are found in § 91/O (2) of the Gyer. The measure taken by the authority can be terminated in the following cases.

Half a year after the decision had become final, as a result of the review it can be concluded that the objective of the measure has been achieved or the minor's behaviour changed in a positive direction. In this case, the Custodian Office may decide to terminate both placement into protection and preventive patronage but may also decide that they terminate preventive patronage but reserve placement into protection.

The next reason for the termination of preventive patronage is that if the Custodian Office imposes some other official child protection measures, if the risk of threat of the child cannot be terminated in a current family environment. In this case, a preventive patronage measure may be maintained, the child protection officer and the place of the childcare are cooperating with the probation officer. The reasons outlined above are potential termination reasons.

Reasons for the mandatory termination of preventive patronage are the followings:

- Probation measures have been applied against the young offender
- The young offender was sentenced to reformatory education
- The young offender was sentenced to imprisonment
- S/he has reached the age of majority--- against whom preventive patronage was ordered

The importance of the institution of preventive patronage ensues from the preventive nature of it. In cases where the juvenile commits a crime, – besides a criminal procedure – at the same time an administrative procedure takes part which will be completed by ordering the measure of preventive patronage. So these two processes run parallelly. The prosecution is less concentrated on the personality of the accused juvenile, while the aim of the measure of preventive patronage is specifically aimed at

the reintegration training of the juvenile accused to the society with the integration of child welfare services and preventive patronage officers having expertise on child protection.

Another argument in addition to the preventive nature is that the child welfare services are very often in contact with the juvenile accused within the frames of basic care before committing a crime. As a result of this, when preparing the risk assessment there is already enough available information regarding the circumstances of the child's personality.

Considering the scope of the relevant age specific features I find it fortunate that measures taken within the framework of the administrative procedure prescribe such rules of conduct for the minor, with which compliance is mandatory and their implementation is enforceable even before the closure of criminal prosecution. These rules of conduct can be partly of a preventive nature, on the other hand, they may serve to prevent repeat offending as well. However, when the juvenile is prosecuted under probation or reformatory education or imprisonment is imposed that would compulsorily conclude with the elimination of the preventive patronage measure.

This study is aimed to introduce the institution of patronage primarily within the aspect of family law and child protection. As I have already mentioned several times before, we are talking about a very young legal institution, so its practical application and required preventive and socializing and re-socializing effects cannot yet draw far-reaching conclusions.

According to the perspective of guardianship, an opinion can be formulated about the mechanism of the action of the measure when the reviewing procedures have started about ordering or ignoring the measures because that will be the time when the Custodial Office comes into contact again with the persons concerned in the measure. The exercise in Pécs is that there was no application launched for review and the mandatory review is expected in the first half of the year 2016. The reviewing procedures could provide a basis for returning to the subject.

In the imposition of measures or in the ignoration of them the degree of risk in the environmental study prepared by the probation officer have a crucial role. I consider it important therefore to reflect on the exercise of risk assessment based on practice in Baranya county. On the side of Probation they consider it a bad idea to introduce the institution towards the child protection system, they do not agree with the current "mixed" form, *i.e.,* combinating administrative, criminal and family law elements of control. The probation officers take the view that the controversy is based on the fact that they do not have the basic teaching skills, working at the child welfare services they do not know the criminal side of the family. So the expertise of the two sides is not put together but both use their own tools separately.

The prosecutor currently takes part in the three- poled system as a warning system but I see Pálvölgyi's viewpoint interesting to display.

In the prosecution's perspective, the measure lives up to the expectations attached to the application, if it is based on a high degree of risk assessment with the administrative procedure, as in the "minor" cases, criminal proceedings, may already be closed at the prosecutor's phase. These cases are not lengthy court proceedings, because typically the prosecutor's reprimand phase makes it to an end with postponements of accusation or mediation procedures. Stepping in judicial phase, the trial negligence proceeding can be arranged within 30 days. So in these cases the criminal proceedings

are completed sooner than the final administrative decision is made. So this time the preventive nature of the measure fades by the prosecution's rate.

The compulsory purchase of overall patronage opinion can also cause further stalling in those cases where the prosecution could be closed at the prosecutor's period.

The measure may have a positive effect regarding prosecutor's or judicial approach, if the decision on ordering preventive patronage says that appearance before competent authorities is obligatory having regard to the fact that the juvenile accused is willing to appear at the authority at a lesser extent.

From a judicial perspective greater emphasis may be placed on the order of preventive patronage in such cases when recurring proceedings are initiated towards the same juvenile accused. In such cases having regard to the unification of judicial cases the judicial phase may even take several years.

It is also important to provide rules for mandatory appearance at the authorities within the rules of conduct (§ 461 (1) of the CCP). In case of the accused juvenile's absence the trial cannot be held and according to § 463 of CCP the cancellation of the trial in case of the juvenile cannot be applied. The above mentioned rules may result in further delays in the judicial phase.

According to the prosecutor's consideration the positioning of the measure within the child protection system is questionable. At certain procedural actions it is necessary and considered to be positive to impose the measure, but the prosecutor's participation would be more important because he supervises the investigation. It could be a special prosecutor with professional experience or with a deployed decision involved to speed up such cases.

As the guardianship, probation and prosecution opinions are all put together we can see that the measure is needed to fill the gap, but the interdisciplinary nature of its branches of law placement is still questionable, after the experiences of the review procedures are drawn it could be decided whether the current system leads to efficiency or not.

Development of Criminal Sanctions in Serbia after the Breakup of the F.R of Yugoslavia

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Abstract

The importance of criminal sanctions in the criminal sense, but also their importance for every society or country needs no special explanation. The period after nineties of the twentieth century in Europe was followed by many social and political changes that resulted from the breakup of the USSR. These changes have resulted in the breakup of previously unified countries and the same consequences happened within the criminal law. The changes that have emerged due to the formation of new countries, which can be seen in the case of Yugoslavia, led to a clear difference between previous coherent criminal laws, but true to its form, because it is a European-continental system. The primary objective of this study is to examine and consider the development of criminal sanctions in the aftermath of the breakup of Yugoslavia, from the 90' until today in Serbia. Then, the next goal of this paper is to show the factors that influenced the mentioned development, starting with the necessary protection of society and the influence of European values and standards. In the last part of the paper, conclusions that have been reached in this study are going to be presented.

Keywords: *criminal sanctions, the development of criminal sanctions, period that followed after the 90s of twentieth century.*

1. Opening remarks

During the period of the nineties of the twentieth century in Europe, especially in those areas, ie states that have previously been subject to greater or lesser influence of the USSR, primarily in political terms, was followed by many social and political changes, which have resulted in the formation of several smaller countries that were formed by breaup of perviously unified countries, as can be seen in the case of the Socialist Federal Republic of Yugoslavia (SFRY), or followed „only " byinternal changes, as can be seen in the case of Hungary and other countries of the former so-called. eastern bloc.

Yugoslavia broke during this period to number of new countries, to the Federal Republic of Yugoslavia, the Republic of Croatia, the Republic of Slovenia, the Republic of Macedonia and Bosnia and Herzegovina. Legally speaking, the legal continuity was assumed by the Federal Republic of Yugoslavia, which consisted from two countries, the Republic of Serbia and the Republic of Montenegro. In legal terms, immediately after the collapse of the former unified state, unified (criminal) legal system all the countries of

the former Yugoslavia have retained their former Republic criminal codes, which will be more explained later in this paper, but it that legals system was kept only until the adoption of new laws by each country individually.

The new criminal laws that emerged in the new countries of the former Yugoslavia had clear differences, but true to the form not only because it is still a European continental system but also because of many legal - legislative habits acquired during the fifty years of the existence of a single criminal justice system.

The central issue of this paper will be based on the development of criminal sanctions in the Republic of Serbia after the twentieth century - after the collapse of SFR. Yugoslavia. Due consideration of the problem, it is necessary to make a short review of the criminal law in the period immediately before the nineties in SFR. Yugoslavia, and therefore in the former Republic of Serbia.

2. Short review of the Serbian criminal legislation during SFR. Yugoslavia

The criminal legislation of Yugoslavia extends through the period of the last year of World War II until the breakup of the country in nineties of the twentieth century. It was created as a discontinuity of criminal legislation (and other) after the capitulation of the Kingdom of Yugoslavia during the aforementioned period.

During the war, in early 1942, construction began on a new legal system, especially the criminal system by the Supreme Headquarters of the People's Liberation Army and Yugoslav partisans when they adopted the first regulations on the organization and operation of the National Liberation Committee known as Focanski regulations. [1] With this regulations arose the first codification of the discontinuity in the liberated territories.[2] The first changes are already followed in mid 1944 and then the existing decisions implemented the following penalties: a) reprimand, b) pecuniary penalty (monetary, in kind, in part), c) expulsion from the residence, g) deprived of the rank ie titles d) removal from office f) forced labor for a period of three months to two years, e) heavy forced labor for a period of three months to two years or more, and f) the death penalty. It can be seen that it did not envisaged a prison sentence, which is justified due to the impossibility of organizing the punishment due to frequent relocation and war circumstances.

From of above mentioned it can be seen that the beginnings of the formation and criminal legislation of Yugoslavia in the period from 1976 consisted of Federal Criminal Code, six criminal laws of central government and two provincial criminal codes.[3]

In the period from 1976 until 1990, ten amendments were made to the Federal Criminal Code. When it comes to criminal sanctions, the Federal Criminal Code foresaw four criminal sanctions and they are: a) punishment, b) suspended sentence and a court reprimand, v) security measures and g) educational measures. Due to the expediency of research, it is necessary to indicate that the said federal law stipulated four penalties and they are: a) the death penalty, b) constipation, v) a fine and g) property confiscation.

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[1] Čulinović, F: *Razvotak ZAVNOH-a*, Historijski zbornik, god 2, бр.1-4, 1949, pp. 14-15.

[2] Petranović, B: *Istorija Jugoslavije 1918-1988, druga knjiga - Narodnooslobodilački rat i revolucija 1941-1945*, Nolit, Beograd, 1988, pp. 210.

[3] The Republic of Serbia is composed of two provinces and the Autonomous Province of Vojvodina and the Autonomous Province of Kosovo and Metohija

It was mentioned that it was necessary to indicate, because during this period, the Criminal Code of the Socialist Republic of Serbia does not specifically regulate the issue of penalties because of their predictability in federal law or the Constitution of 1974, many predicted that criminal issues are contained in the Federal Criminal Code, and that certain general and specific issues that do not fall within the jurisdiction of the federal criminal Code are decorated national and provincial criminal laws.

3. Serbian criminal legislation during the FR. Yugoslavia

The criminal legislation of the Federal Republic of Yugoslavia – FRY (and the Republic of Serbia) from the 1992 and from the breakup of Yugoslavia until 2002, and to the creation of the State Union of Serbia and Montenegro.

The development of the criminal legislation of the Republic of Serbia and its impact on the question of criminal sanctions during this period, is characterized by relatively frequent changes and additions, as well as many social and state changes.

After the breakup of SFR. Yugoslavia, the Criminal Code of former SFRY is fully retained by the FRY. By the same principle the Criminal Code of the Socialist Republic of Serbia is also retained, who was a part of the criminal law system. Although not of particular importance to the issue of sanctions, it should be noted that the Law on amendments to the Criminal Code of the Socialist Republic of Serbia in 1992 changed the name from the existing to the Criminal Code of the Republic of Serbia.[4] It is clear that this is just one of the consequences of socio-political changes in the country.

Significant changes in terms of criminal sanctions, in the said Criminal Code was followed by the adoption of the Law on Amendments to the Criminal Code of the Republic of Serbia from 1994, which article 2a was added. called the death penalty which determines the precise prescription of the death penalty.[5] This penalty until then predicted only by federal criminal law, but there was a change due to the strengthening of the Republican criminal legislation in relation to "new" Federal criminal law. In the Federal Criminal Code (referring to the FRY), it is necessary to point out that all criminal sanctions that were prescribed in the Criminal Code of the SFRY the detained.

The first significant change retained Criminal Code of Yugoslavia from 1976 were followed by the Law on Amendments to the Criminal Code of the FRY in 2001.[6] Article 34 lays down only two sentences, and they are: a) prison and b) a fine, unlike Criminal Code of Yugoslavia from 1976 which provided four penalties. The penalties that can no longer prescribe are a) the death penalty, and b) confiscation of property. The death penalty in this period was prescribed only for a Republic Criminal Law.

Law on Amendments to the Criminal Code of the FRY in 2001, stipulates seven security measures as opposed to the SFRY Criminal Code from 1976 which provided eight. Federal criminal law of Yugoslavia in Article 61 stipulating the following precautions: a) mandatory psychiatric treatment and confinement in a medical institution, b) mandatory psychiatric treatment at liberty, v) compulsory treatment of alcoholics and drug addicts, g) prohibition of professional activity, or duties, d)

[4] Zakon o izmenama Krivičnog zakona Socijalističke Republike Srbije iz 1992. godine, Službeni glasnik RS, br. 49/92.

[5] Zakon o izmenama i dopunama Krivičnog zakona Republike Srbije iz 1994. godine, Službeni glasnik RS, br. 47/94.

[6] Zakon o izmenama i dopunama Krivičnog zakona SRJ iz 2001. godine, Službeni list SRJ, br. 61/01.

prohibition of public appearance, f) ban on driving a motor vehicle,e) forfeiture and f) expulsion of foreigners from the country. It can be seen that the security measures on banning the public appearances was left out.

When it comes to educational measures they were not changeed in relation to the Criminal Code of Yugoslavia from 1976, but the following meassure were predicted in Article 75: a) disciplinary measures, b) increased supervision, and v) institutional measures, but specific educational measures were not prescribed.

Especially significant changes to the penal legislation referred to the amended Criminal Code of the Republic of Serbia, which was followed in 2002 when the Law on Amendments and Additions[7] foreseen the deletion of Article 2a. Criminal Code of the Republic of Serbia on the death penalty. Even though the professional public then expected, the prison sentence is still not prescribed by the Republican criminal law, is still regulated bt the Criminal Code of the FRY.

It should be noted that the reasons for the abolition of the death penalty in the criminal law of the Republic of Serbia are complex, and partly related to the non application of this penalty for a number of years, while on the other side of the FRY had that obligation because of accepting the Council of Europe.[8]

It should be noted that the abolition of the death penalty due to the reasons mentioned for the first time in the history of criminal legislation in Serbia, starting from Dushan's Code of 1349, and can be viewed from Zakonopravila (law) St. Sava from 1219 due to the prediction of feuding as a form of private reaction, no longer prescribes these criminal sanctions.

4. Serbian criminal legislation during the State Union of Serbia and Montenegro

The State Union of Serbia and Montenegro existed only a few years. More precisely since the beginning of 2003, although the agreement between representatives of the FRY, Serbia and Montenegro, in the presence of the High Representative of the European Union was signed in early 2002, until mid 2006. The highest legal act of the state was the Constitutional Charter of Serbia and Montenegro.

As with the previous government changes, here is also retained the existing criminal legislation which was applied in the FRY, with the proviso that followed certain changes.

FRY Criminal Code as a result of changes and amendments from 2003 already in the first article provides for changing the name of the law in the Basic Criminal Code.[9] Changing the name is completely clear due to the newly created social change.

Then came a change one that relates to criminal sanctions and their flow and provides the following penalties: a) a prison sentence, b) fine and v) the confiscation of property. As can be seen, this provides for the penalty of confiscation of property, and it

[7] Zakon o izmenama i dopunama Krivičnog zakona Republike Srbije iz 2002. godine, Službeni glasnik RS, br. 10/2002 i 11/2002.

[8] There was a need ratification of the Convention and the Protocol that went with it. Protocol No. 6 of 1983 requires states to abolish the death penalty. European court of human rights (2010), Konvencija o ljudskim pravima, Council of Europe, pp. 38. and 51.

[9] Zakon o izmenama i dopunama Krivičnog zakona SRJ iz 2003.godine, Službeni list SRJ, br. 39/03.

is predicted to changes and amendments Act from 2001. When it comes to other criminal sanctions. no changes followed in relation to the previous law.

In several changes and amendments to the Criminal Code of the Republic of Serbia, during this period there were no changes that related to criminal sanctions, and it needs to be emphasized that a prison sentence is still not prescribed by the Republican criminal law.

5. Criminal law of Serbia

By cessation of the State Union of Serbia and Montenegro in 2006, Serbia established a new criminal legislation. The adoption of the Criminal Code of the Republic of Serbia in 2005[10] The adoption of the Criminal Code of the Republic of Serbia in 2005 once again the codification of the criminal law was achieved, and with the adoption of the Code on January 1, 2006 Basic Criminal Code of the former Criminal Code of the Republic of Serbia ceased to be implemented. Compared to all previous criminal laws of the Republic of Serbia, due to the separation and independence, the Criminal Code finally becomes a comprehensiv, as already mentioned.

Before we begin the analysis and comparative review of the previous laws, it is important to point out that the new Penal Code is systematized on a general and special part. In general, we can findis the determination and the definition of general concepts, while in a special part offenses and prescribes penalties are regulated. Although there are two sections in the Criminal Code, they can not be viewed separately.

The general purpose of criminal sanctions remains unchanged, ie. the legislator has foreseen that the prescribing and imposing criminal sanctions suppress acts that violate or threaten the values protected by criminal legislation. By specifying the purpose of criminal sanctions in this way, does not differ from the fundamental objective of criminal law, ie. that through general and specific deterrence achieved already mentioned combating crime.[11] If this issue is considered from a theoretical point of view, it is clear that the Code is based on the relative theory, that the purpose of punishment is based on the special and general prevention.

The mentioned general purpose of punishment, does not prescibes retribution as a punishment. Some authors believe that contrary to the ruling of attitudes deriving from legislation, retributive purpose of punishment can hardly be denied. It would be acceptable if it is determined through the principles of fairness and proportionality, in which the same authors add that retributive purpose of punishment should never be the dominant purpose because the sentence should not be imposed only to returned harm for what harm he caused while committing the criminal offense.[12]

In terms of sanctions, the Criminal Code provides for four, namely: a) fines, b) precautions in) security measures and g) educational measures.

Article 43 defines four penalties: a) a prison sentence, b) fine, c) work in the public interest and g) confiscation of driver's license. In relation to the Basic Criminal Law (former Criminal Code of the FRY with all amendments and supplements), we can see

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[10] Krivični zakonik Republike Srbije iz 2005. godine, Službeni glasnik RS, br. 85/2005.

[11] Čejović, B. i Kulić, M: *Krivično pravo, Pravni fakultet za privredu i pravosuđe u Novom Sadu*, 2014, pp.287.

[12] Stojanović, Z: *Komentar Krivičnog zakonika – četvrto izmenjeno i dopunjeno izdanje*, Službeni glasnik, 2012, pp. 204-205.

that once again there is on punishment of confiscation of property, but there are two new penalties that have not been prescribed in previous criminal codes.

It is only necessary to indicate that the Law on Amendments to the Criminal Code (72/09) from 2009, which has more importance for the security measures, whuch we sill talk about more later further specifies the existing legislative determination of a prison sentence, while the changes and amended in 2012 followed significant changes when it comes to prison sentences, ie further elaborated by the question of house arrest, which is one of the novelties of criminal legislation, ie. is to some extent harmonization with European standards.

The Criminal Code of 2005 initially predicted nine security measures, namely: a) mandatory psychiatric treatment and confinement in a medical institution, b) mandatory psychiatric treatment at liberty, v) compulsory treatment of drug addicts, g) compulsory treatment of alcoholics, d) Prohibition against call, activities and duties, f) ban on driving a motor vehicle, e) forfeiture, f) expulsion of a foreigner from the country and from) the public announcement of the verdict. It can be seen that unlike the Basic Criminal Code, which stipulated seven security measures, the new Criminal Code provides for two more, with the former security measure of compulsory treatment of alcoholics and drug addicts represent a security measure, while in the new code to two separate security measures. The difference between the two laws is visible in the new security measure prescribed public announcement of the verdict.

Subsequent changes of criminal sanctions, specifically, security measures, were followed by the Law on Amendments to the Criminal Code (72/09) from 2009[13], which prescribes another security measures and that is restraining from approaching and communicating with victim, while the Law on Amendments to the Criminal Code (111/09) from 2009[14] prescribes security measures ban from attending some sporting events.

From what was mentioned it can be concluded that the Criminal Code of the Republic of Serbia with two amendments to the 2009 with the total number of eleven means of security measures, unlike the Basic Criminal Code, which prescribe seven security measures.

When it comes to educational measures, the Criminal Code of the Republic of Serbia on the basis of Article 4, paragraph 3, does not directly prescribe what measures can be imposed on a juvenile, but refers to a special law and the Law on Juvenile Offenders and Criminal Protection of Juveniles where governing educational orders and penalties that may be imposed to minors are written.[15]

Although there was no significance to this area of research, it is still worth noting that three more amendments ollowed the Criminal Code of the Republic of Serbia in 2012, 2013 and 2014, and that during the writing of this paper before the National Assembly of the Republic of Serbia there is proposal for the new Law on amendments to the criminal Code, where, on the basis of available draft, does not provides for the amendment of existing legislative solutions, which are related to the question of criminal sanctions.

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[13] Zakon o izmenama i dopunama Krivičnog zakonika Republike Srbije iz 2009. godine, Službeni glasnik RS, br. 72/2009.

[14] Zakon o izmenama i dopunama Krivičnog zakonika Republike Srbije iz 2009. godine, Službeni glasnik RS, br. 111/2009.

[15] Zakon o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica iz 2005. godine, Službeni glasnik RS, br. 85/2005

6. Statistical highlights of criminal sanctions imposed with the short discussion

The data that will be presented later in this paper refer to the latest available data of the Statistical Office of the Republic of Serbia[16], which refer to the number of convicted adults who were given some sort of criminal sanctions.

The present period will refer to the last five years, or a statistically period from 2011 to 2015.[17]

The total number of criminal sanctions imposed in 2011 was 30,807, in 2012 it was 31,322, in 2013 it was 32,241, in 2014 was 35,376, while in 2015 was 33189. It can be seen that the number of criminal sanctions imposed was on the rise until 2015 when it recorded a certain decline.

In percentage terms, in the context of criminal sanctions, the most penalties imposed was in 2011 38.4%, in 2012 40.6%, in 2013 44.5%, in 2014 44.6% a while in 2015, 34.8%.

The number of imposed corrective measures was least. Based on the data we can see that in percentage terms were represented in 2011 from 0.3% in 2012 from 0.3% in 2013 from 0.3% in 2014 to 0.3 %, while during 2015 with 0.2%.

With the statistical data presented, the goal was to draw attention to achieving the purpose of punishment, ie to what extent it achieved general and special prevention with existing criminal sanctions.

We also believe that with the introduction of alternative criminal sanctions[18] under the criminal law of the Republic of Serbia to a certain extent we can achieve the purpose of punishment, and that the legislator in recent years was based more on their development and implementation, while to a certain extent the monitoring of the effectiveness of the existing criminal sanctions was left by the side. We believe that the existing criminal sanctions is quite comprehensive and it is not necessary to do any major changes, but we also believe it is necessary to work on stricter penal policy for certain offenses.

However should be reminded that the individualization of criminal sanctions constitute a sanction to the offender by one sentence that is by consideration of the Court, is best to achieve the purpose of punishment.[19] Precisely defined, individualization of punishment is adapting the sentence in particular to the crime committed and its perpetrator by taking into account all the circumstances of the case, in particular the gravity of the offense and the degree of culpability of the accused, ie convicted.[20]

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[16] Republički zavod za statistiku Republika Srbija, Statistika pravosuđa, br. 189, god. LXVI, od 15.07.2016.

[17] The original idea of the author was to point out the data for 1990 and 2000 but there are no precise data on aggregated for these periods.

[18] Bingulac, N. i Komnenić M: *Implementacija alternativnih sankcija u krivični sistem Republike Srbije sa osvrtom na zemlje u okruženju*, Kultura polisa, broj 28/2015, godina XII, Izdavači: Kultura – Polis Novi Sad i Institut za evropske studije Beograd, pp.187.

[19] Srzentić, N., Stajić, A. i Lazarević, Lj: *Krivično pravo Jugoslavije (opšti deo)*, Savremena administracija, Beograd, 1995, pp. 308.

[20] Janković, S: *Pretpostavke za individualizaciju kazne*, Bilten Apelacionog suda u Beogradu, 2012., str.1., preuzeto sa: http://www.bg.ap.sud.rs/images/pretpostavke%20za%20individualizaciju%20kazne19.10.2012.pdf, 20.03.2015.

7. Conclusions

Modern criminal legislation its fight against various forms of criminal behavior regulates at approximately similar ways, especially when it comes to the European Union and the growing need for harmonization of interstate criminal legislation.[21] The reasons mentioned for not only to meet forma for the uniformity of criminal legislation on the territory of Europe, but also because in recent years international organized crime grows stronger, and therefore the necessary legislative fight should be organized differently.

Topic of this work was related to the development of criminal sanctions from the dissolution of the SFRY period, ie the period of the twentieth century until today, with the aim to highlight the emergence and disappearance of criminal sanctions, not only due to social and inter-state conditions, but also due to the need the protection of society. Some of the sanctions that have ceased to exist, were again been placed in this legal system in order to promote the purpose of criminal sanctions.

While we already pointed out in this paper, we will point out that we believe that the existing criminal sanctions provided for in criminal legislation of the Republic of Serbia, are quite comprehensive and it is not necessary to do any major changes, but we also believe it is necessary to work on stricter penalties policies for certain offenses, which conclude solely on the basis of indicators of the frequency with the execution of these works, which indicates the inability purpose of criminal sanctions due to inadequate penal policy.

Some of criminal sanctions are less represented in imposing although not significantly changed over this period of development. Therefore, some authors suggest that safety measures are now in „ own existence crisis " although they persist in domestic but also in foreign European criminal codes. The same authors state that the present level of crime can become more frequent them again in terms of its delivery and will receive a new form, but on the other hand, according to these authors, is likely to disappear from the criminal scene because they did not " withstand the test of time ".[22]

When it comes to other criminal sanctions from this paper can be seen that there were no major differences in their forecasting especially in those conventional such as a fine and a prison sentence.

If it can be considered that a criminal sanction are to a certain extent a mirror of a society in terms of values to be protected and to what extent they are protected, then in this short considering the development of criminal sanctions in the Republic of Serbia from the period of the disintegration of Yugoslavia until its independence can be seen the evolution of social awareness and the development of society, but also changes in external influences and modern European criminal flows, which can especially be seen in the abolition of the death penalty.

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[21] Bjelajac, Ž i Bingulac, N. *Impact of corruption on the process of Eurointegration of Serbia*, Journal of Eastern Criminal Law, vol 3, no. 1/2016, Faculty of law, University of Timisoara, pp. 209.

[22] Drakić, D: *O nastanku mera bezbednosti kao krivičnih sankcija*, Anali Pravnog fakulteta u Beogradu, godina LXIII, 1/2015, pp.113-114.

8. Literature

1. Bjelajac, Ž i Bingulac, N: *Impact of corruption on the process of Eurointegration of Serbia*, Journal of Eastern Criminal Law, vol 3, no. 1/2016, Faculty of law, University of Timisoara, pp. 208-223.

2. Čulinović, F: *Razvotak ZAVNOH-a*, Historijski zbornik, god 2, br.1-4, 1949. 3. European court of human rights (2010), Konvencija o ljudskim pravima, Council of Europe

3. Bingulac, N. i Komnenić M: *Implementacija alternativnih sankcija u krivični sistem Republike Srbije sa osvrtom na zemlje u okruženju*, Kultura polisa, broj 28/2015, godina XII, Izdavači: Kultura – Polis Novi Sad i Institut za evropske studije Beograd, pp.185-197.

4. Drakić, D: *O nastanku mera bezbednosti kao krivičnih sankcija*, Anali Pravnog fakulteta u Beogradu, godina LXIII, 1/2015, pp. 97-115.

5. 6. Zakon o izmenama i dopunama Krivičnog zakona Republike Srbije iz 1994. godine, Službeni glasnik RS, br. 47/94.

6. 7. Zakon o izmenama i dopunama Krivičnog zakona SRJ iz 2001. godine, Službeni list SRJ, br. 61/01.

7. 8. Zakon o izmenama i dopunama Krivičnog zakona SRJ iz 2003.godine, Službeni list SRJ, br. 39/03.

8. 9. Zakon o izmenama i dopunama Krivičnog zakonika Republike Srbije iz 2009. godine, Službeni glasnik RS, br. 72/2009.

9. 10. Zakon o izmenama Krivičnog zakona Socijalističke Republike Srbije iz 1992. godine, Službeni glasnik RS, br. 49/92.

10. 11. Zakon o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica iz 2005. godine, Službeni glasnik RS, br. 85/2005.

11. 12. Janković, S: *Pretpostavke za individualizaciju kazne*, Bilten Apelacionog suda u Beogradu, 2012., preuzeto sa: http://www.bg.ap.sud.rs/images/pretpostavke%20za%20individualizaciju%20kazne19.10.2012.pdf, 20.03.2015.

12. 13. Krivični zakonik Republike Srbije iz 2005. godine, Službeni glasnik RS, br. 85/2005.

13. 14. Petranović, B: I*storija Jugoslavije 1918-1988, druga knjiga - Narodnooslobodilački rat i revolucija 1941-1945*, Nolit, Beograd, 1988.

14. 15. Republički zavod za statistiku Republika Srbija, Statistika pravosuđa, br. 189, god. LXVI, od 15.07.2016.

15. 16. Srzentić, N., Stajić, A. i Lazarević, Lj: *Krivično pravo Jugoslavije (opšti deo)*, Savremena administracija, Beograd, 1995.

16. Čejović, B. i Kulić, M: *Krivično pravo*, Pravni fakultet za privredu i pravosuđe u Novom Sadu, 2014.

Gender Differences in Post-Offence Behavior in a Hungarian Sample of Homicide Offenders

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1. Introduction

„Men are from Mars, women are from Venus" – is it true in a rather special area of human experience like homicide? Gender differences in violent crime and specially in homicide is an important and interesting area of research. Yet, in the literature of the subject most often almost conventional findings are found. In our study we attempt to take a step further and investigate gender differences in a rather underexplored subject.

In perpetration of homicide males are overrepresented, solely a small amount (10%) of these crimes are committed by females according to Finnish and USA data (Fox & Allen, 2013; Malmquist, 2006; Rózsa, 2013; Häkkänen-Nyholm et al., 2009). This concurs with the data of the Hungarian prison service: in April 2015 1262 convicts where in custody for homicide, 116 (9,2%) of which were female and 1146 (90,8%) were male[1]. The higher proportion of male offenders is often explained with the higher level of aggression in males in general (Fox & Allen, 2013). Besides that the male proprietariness theory argues that males' sense of entitlement, power, and control drives their aggression towards heteroagressive directions (Fox & Allen, 2013).

Gender role models suggest that each group kills in ways that are reflective of socially approved gender role behavior (Jurik & Winn, 1990). It is due to diverse patterns of socialization influences, e.g., attitude towards aggression, different position in the family and in the social context (Putkonen, Weizmann-Henelius, Lindberg, Rovamo, & Hakkanen-Nyholm, 2011; Rózsa, 2013; Jurik & Winn, 1990). For example, traditional feminine role is related to a tendency to internalization, overcontrolled personality and a socially conform attitude, where aggressive episodes may occur periodically and in extreme form. According to Ogle Maier-Katkin and Bernard (1995) this pattern is exactly what is found when studying female homicide. On the other hand heteroagression or being violent is culturally more approved in males, in some cases it is even necessary for building a masculine image (Ogle, Maier-Katkin & Bernard, 1995).

From these differences a different pattern of stress factors and tolerance, and coping techniques can be examined as well, how males and females typically tend to deal with negative affect (Ogle et al., 1995). Several studies demonstrated that females are more sensitive and more reactive to stress in general and are more sensitive to

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[1] Informed by Hungarian Prison Service Headquarters, April 2nd 2015.

problems in their relationships, while males are more vulnerable to problems in the work area (Ogle et al., 1995). In contrast to traditional gender role theories Szabó Szántó, Balog and Kopp (2010) found on Hungarian samples no substantative, only subtle gender differences in coping preferences. No differences were found in preferences of problem focused or emotion focused coping. Females tend to use social support and passive and avoidant coping strategies, e.g., taking sedatives or praying more often than males, while males tend to use pressure reduction and cognitive restructuring more often (Szabó, Szántó, Balog & Kopp, 2010).

In contrast to the gender role model (Szabó et al., 2010) the liberation models suggests that violent and homicidal behavior of males and females tend to be increasingly similar. However, findings are vague regarding this issue, little evidence (Jurik & Winn, 1990) and experience (Smith & Brewer, 1992) shows that female homicidal behavior – similarly to male homicidal behavior - is increasingly related to personality characteristics, substance abuse and prior criminal activity of the offenders (Häkkänen-Nyholm et al., 2009).

Regarding gender differences in particular offence characteristics previous studies have investigated mostly situational precursors of the crime and relationship between the offender and the victim. Females more frequently kill intimates and kill in situations in which their victim initiated the physical aggression (Jurik & Winn, 1990). Killing of own child and killing an abusive spouse are almost female specialty. In a Hungarian sample 60% of females killed their own child, 35% killed their husband, and the rest of them were accomplice to a man in a homicide (Rózsa, 2013). In terms of weapon choice in intimate homicides firearm is the most frequent choice, but if not using a gun males tend to use physical force while females tend to use knifes or other kitchen instruments (Fox & Allen, 2013).

Even less evidence was found about the gender differences in post-offence reactions. Results of Hakkanen-Nyholm et al. (2009) demonstrated that hiding the body, or bagging the body was equally rare between the two genders. Females stayed on the scene, notified someone, denied the crime, and regretted the deed more frequently. Putkonen et al. (2011) studied males and females perpetrated filicide and included post-offence reactions. They found that mothers cleaned up and tried to hide the body more often than fathers. There were no significant gender differences in post-offence variables, e.g., doing nothing, going to bed, putting victim into bed, lying about how the victim died, trying to hurt himself/herself, committing suicide. Other studies (Swatt & He, 2006; Rózsa, 2013) found that in general males commit posthomicide suicide more frequently than females.

2. Aim of the study

Based on the previous studies that state males and females kill in a manner reflective of their gender roles, gender differences are expected to appear in post-offence reactions and coping as well. On the other hand, we can assume that these perpetrators do not meet traditional gender roles, or the post-offence phase is so specific situation psychologically that it might alter traditional gender differences.

Detailed information about the post-offence experiences of perpetrators could be used as an aid in offender profiling, and building investigative strategies based on the offenders posthmicidal behavior. Useful information for treatment purposes could

result in identifying post-offence related factors associated with gender of the offender (Häkkänen-Nyholm et al., 2009)

The present study aims to extend the current knowledge of homicidal behavior, and to examine gender differences of the posthomicidal reactions by the offender. Our aim is to explore the post-offence reactions in male and female offenders and investigate the gender differences and similarities in this area.

3. Method

3.1. Participants

The sample consisted of 129 subjects, 18 female and 111 male perpetrators, all convicted and incarcarated for homicide. Participation in the study was voluntary, all participants gave informed consent. Individuals with acute psychosis or illiteration were excluded from the sample.

Three Hungarian high-security correctional institutions were involved into the present investigation as in Hungary these three institutions executes the majority of sentences for homicide. Descriptive data of the sample (Table 1) showed that 8 (9,8%) of male and 4 (22,2%) of female perpetrator had less than primary school education, 40 (48,8%) of male and 8 (44,4%) of female perpetrators had primary school education, 22 (26,8%) of male and 3 (16,7%) of female perpetrators had profession without high-school education, 11 (13,4%) of male and 3 (16,7%) of female perpetrators had secondary school education, and 1 (1,2%) of male and 0 of female perpetrators had university or college education. Gender differences of education were not significant (X^2 (N=100) =2,910; p>0,5) (Table 1).

Descriptive data of the sample (Table 1) also showed that 40 (46,5%) of male and 2 (11,1%) of female perpetrators were single, 39 (45,3%) of male and 12 (66,7%) of female perpetrators were married or lived in common-law marriage, 3 (3,5%) of male, and 1 (5,6%) of female perpetrators were in non-marital relationship, and 4 (4,7%) of male and 3 (16,7%) of female perpetrators were divorced at the time of pertpetration. These data show a significantly (X^2 (N=104) =9,356; p<0,05) different pattern of relationship-status of male and female offenders with females more often being in some kind of relationship. These data supports the previous findings about female tendency to commit their violent crimes in a domestic context.

Data of the sample (Table 1) showed that 16 (18,6%) of male and 4 (22,2%) of female offenders lived in the capital, 17 (19,8%) of male and 7 (38,9%) of female perpetrators lived in county centre, 25 (29,1%) of male and 2 (11,1%) of female offenders lived in a town, 28 (32,6%) of male and 5 (27,8%) of female offenders lived in a village at the time of the perpetration. Gender differences of residence were not significant (X^2 (N=104) =4,416; p>0,05).

Table 3 shows that average age at the perpetration was 28.67 years and 30.83 years for female offenders. Independent sample t-test showed no significant difference in this regard (p>0,05).

3.2 Measurement

For the assessment of general proneness to anxiety and state anxiety after the perpetration of the crime the *State-Trait Anxiety Inventory (STAI)* was used (Sipos, Sipos

& Spielberger, 1988). STAI scales consist of 20 items, respectively. Items are measured on four-point Likert scale. We applied the State scale with modified instructions changing the aimed time-frame from *previous week* to *time period after the perpetration of the crime*[2]. Though STAI is a widely used and accepted as a reliable instrument (Sipos et al., 1988) in this sample reliability measures of the Trait test was weak (Cronbachα=-0,327) and of the post-offence State scale was excellent (Cronbachα=0,929) (Table 3).

To measure preferences in coping strategies the *Coping Preferences Questionnaire (CPQ)* was used (Oláh, 1986). The test consists of 80 items measuring coping preferences in anxiety-provoking situations. Items are measured on a four-point Likert scale and fit to 8 scales. This tool was applied with and altered instruction: once general time-frame to the time after the perpetration of the crime, and twice investigating coping in relation of the perpetration of the crime. Realiability of the scales showed acceptable values in the present sample, for example Cronbach's alpha (Table 3).

The first scale of the CPQ is *Problem-centric reaction* (Cronbachα=0,824), where the goal of the individual is to change the situation and prevent the threat. The scale of *Social support seeking* (Cronbachα=0,820) refers to a coping strategy where the individual tries to change the situation and prevent the threat as well but requires cooperation in the process. The next scale is *Pressure control* (Cronbachα=0,800) which refers to efforts the individual makes to stabilize his personality while not giving up the possibility of changing the situation. During this process the focus is shifted from the external threat to the self. The fourth scale is *Distraction* (Cronbachα=0,744) as a protective strategy the individual steps out of the situation and procrastinates the intervention. *Emotion focus* (Cronbachα=0,524) is the strategy where the efforts of the individual are solely aimed at shaking off the negative emotions caused by the stressful situation. The *Emotion discharge* scale (Cronbachα=0,678) shows a coping strategy where the individual discharges the pressure caused by the threatening situation through uncontrolled and aimless reactions and acting-out, anger out behaviours. *Self-punishment* (Cronbachα=0,747) shows a tendency of the individual to interpret the negative situations as justified responses to his or her mistakes and undesirable behaviour. The *Deference* (Cronbachα=0,585) shows a tendency where the individual uses external locus of control and tries to accept the negative situation without making efforts to change it (Oláh, 1986). Due to that the scales consists of different number of items to compare the real preference of coping strategies value of the scale is divided with the number of items.

To measure post-crime feeling we used a list of 14 emotions: sadness, shame, guilt, satisfaction, fear, happiness, camlness and reflectiveness, feeling in secure, tiredness, numbness, self confidence, feeling like nothing happened, paranoia, loneliness. Participants evaluated emotions after and in relation to the homicide on a three-point Likert scale[3].

Furthermore, homicide behaviors were investigated, particulary post-offence variables[4] were identified in the casefiles. These variables were dichotomous and were recorded as being present (1) or absent (0) for each case. Canter and Heritage (1990)

[2]Due to the great variance in experiences we defined this time frame this broadly.

[3] For variables of offensc related and post-offence emotions coding was the following: 0 = not at all; 1 = yes; 2 = very much

[4] Post-crime behavior is the last phase of murder, which occurs when the crime has been committed and the body has been disposed. It includes immediate responses after the crime and subsequent responses after the initial phase. (Ressler, Burgess & Douglas, 1992)

demonstrated this method to be useful and that content analysis any more specific than presence and absence dichotomy was likely to be unreliable when information was retrieved from police or jury records. These variables were the followings: returning to the scene; following the news in the media; getting rid of the evidence; planning or executing another homicide; being on the run; spending extraordinary; going to pubs, consuming alcohol or drugs; attempting to give up himself/herself; moving away; telling somebody about the crime; calling an ambulance; going to shopping; incriminating someone else; telling a false story as confession; going to see an attorney; killing again in a short time (6 months); traveling abroad; mixing socially with others; washing up or changing cloths; roaming by car or foot; orientating about state of investigation; increasing alcohol consummation.

4. Proposed analysis

SPSS 17.0 software was used for the statistical analysis.

After analyzing the sample's descriptive statistics we conducted independent sample t-tests to compare the post-offence emotions, behaviors and coping mechanisms of males and females for STAI Post-offensive State and CPQ scales, crime related emotions, post-offence behaviors based on casefiles.

5. Results

5.1. STAI Trait, Post offensive state anxiety and Coping

Average level of trait-anxiety of the present sample (M=44.4; SD=3.2) fits the average range of trait-anxiety for the Hungarian population (Mmale=40.96; SDmale=7.8; Mfemale=45.37; SDfemale=7.8). This mean value even fits the average for the subsample of subjects with antisocial personality disorder in a previous Hungarian study (M=41.4; SD=6.3) (Sipos et al., 1988).

Mean post-offensive state-anxiety (M=64.30; SD=12.0) in the present sample scored much higher than the average range for the general Hungarian population (Mmale=38.47; SDmale=10.66; Mfemale=42.64; SDfemale=10.79). These results suggest that though homicide perpetrators are not significantly more prone to anxiety than normal or average antisocial subjects. The anxiety experienced after the homicidal act might be more variant but rather high among these individuals.

Coping preferences were examined post-offence phase. For comparison scale values were used. Self-punishment (M=2,90; SD=0,7), Problem centric reaction (M=2,52; SD=0,6), Deference (M=2,41; SD=0,8) coping mechanisms achieved high scores, therefore were the most commonly used by perpetrators. While Social support seeking (M=1,84; SD=0,7), Emotion discharge (M=1,86; SD=0,5), Emotion focus (M=2,16; SD=0,6) were the least preferred coping mechanisms in the post-offence phase. Pressure control (M=2,36; SD=0,5) and Distraction (M=2,24; SD=0,5) were in the middle.

5.2. Post-offence emotions by gender

Independent sample t-tests were conducted to compare the post-offence emotions. The following crime-related feeling variables were tested: sadness, shame, guilt,

satisfaction, fear, happiness, camlness and reflectiveness, feeling in secure, tiredness, numbness, self confidence, feeling like nothing happened, paranoia, loneliness (Table 3). There were no significant gender differences in reported levels of shame, guilt, fear and anxiety, calmness, tiredness, numbness, paranoia and loneliness.

Gender differences showed that females reported sadness significantly more often (Mmale=1,12; Mfemale=1,31; p<0,05; t=-0.93), and males felt significantly more satisfied (Mmale=0,12; Mfemale=0,00; p≤0.01; t=1,21), happy (Mmale=0,11; Mfemale=0,00; p≤0.01; t=1,15), secure (Mmale=0,25; Mfemale=0,06; p<0.01; p=1.57), confident (Mmale=0,34; Mfemale=0,07; p<0.01; t=1.86), and like nothing happened (Mmale=0,28; Mfemale=0,13; p<0.05; t=10.3). These findings indicate a more intense and more often positive posthomicidal emotional experience among males. While females experience sadness more often, that is, negative feeling is more characteristic for females.

5.3. Post-offence anxiety and coping preferences by gender

We employed independent sample t-tests to compare the post-offence anxiety and coping for STAI Post-offensive State scale and CPQ scales (Table 3). No significant gender differences were found in the coping scales, however, post-offence anxiety showed significant differences. Post offence anxiety achieved significantly higher level among females than males (Mmale=63,31; Mfemale=70,47; p<0.05; t= -2.32). Therefore we may emphasize posthomicidal state as more negative and stressful for females.

5.4. Post-offence behaviors by gender

Post-offence behaviors were compared by using independent sample t-tests based on casefile information for the following variables[5]: returning to the scene; following the news in the media; getting rid of the evidence; planning or executing another homicide; being on the run; spending extraordinary; going to pubs, consuming alcohol or drugs; attempting to give up himself/herself; moving away; telling somebody about the crime; calling an ambulance; going to shopping; incriminating someone else; telling a false story as confession; going to see an attorney; killing again in a short time (6 months); traveling abroad; mixing socially with others; washing up or changing cloths; roaming by car or foot; orientating about state of investigation; increasing alcohol consummation (Table 3).

No significant gender differences were found in being on the run, thinking about giving himself/herself up, seeing an attorney, traveling abroad, moving away, mixing socially with others, namely, these behaviors occured similarly for both males and females.

These results reflected that females were more deceptive in their post-offence tactics on one hand, and their immediate regret on the other hand. Females called an ambulance significantly more often (Mmale=0,04; Mfemale=0,36; p<0.01; t=-4.38), incriminated someone else with the crime (Mmale=0,08; Mfemale=0,29; p<0.01; t=-2.23), told a false story as a confession (Mmale=0,17; Mfemale=0,43; p<0.01; t=-2.26) and washed herself or changed her clothing (Mmale=0,24; Mfemale=0,43; p<0.05; t=-1.47). Males tend to show more heterogenous immediate post-offence reactions,

[5] For variables of post-offence behaviors coding was the following: 0 = not present; 1 = present

which are reflective of taming their intensive emotional state with alcohol, drugs (went to a pub and consumed alcohol or drug (Mmale=0,19; Mfemale=0,00; p<0.01; t=1.81)), roaming (roamed by car or foot (Mmale=0,10; Mfemale=0,00; p<0.01; t=1.21), spending the prayed money (spent unusually much money (Mmale=0,08; Mfemale=0,00; p<0.05; t=1.12), went shopping (Mmale=0,07; Mfemale=0,00; p<0.05; t=1.03) or of avoiding arrest by getting rid of the evidence (got rid of the evidence (Mmale=0,55; Mfemale=0,29; p<0.01; t=1.83)). In their subsequent reactions following the media (followed the news in the media (Mmale=0,21; Mfemale=0,00; p<0.01; t=1.88)) and committing another homicide (planned or executed another homicide (Mmale=0,12; Mfemale=0,00; p<0.01; t=1.37)) are characteristic which is reflective of and concurs with the more positive homicide-related feelings. These positive feelings may be a motivation to repeat the experience of homicide (killed again in 6 months (Mmale=0,07; Mfemale=0,00; p<0.05; t=1.03)) and relive it by returning to the crime scene which males did significantly more often as well (returned to the crime scene (Mmale=0,27; Mfemale=0,07; p<0.01; t=1.6)).

6. Discussion

The results suggest that though homicide perpetrators are not significantly more prone to anxiety than normal population or than average antisocial subjects, the anxiety experienced after the homicidal act is very high in general, but females report significantly higher level of post-offence stress. It is in line with previous findings of females being more sensitive to stress (Szabó et al., 2010). Furthermore, differences in post-offence emotions demonstrates that males tend to report positive emotions more often e.g., being satisfied, happy, secure and confident after and in relation to the homicide. Sadness, on the other hand is a feeling more characteristic of females' experience.

In terms of coping with this high level of stress and intense feelings after the homicidal act self-punishment, problem centric reaction and deference are the coping mechanisms most commonly used by perpetrators. Social support seeking, emotion focus and emotion discharge are the least applied coping mechanisms in the post-offence phase. This pattern suggests that the offender while passively accepting the negative situation and interpreting it as a result of his or her mistakes and undesirable behaviour, at the same time cannot accept and give up control over and problem solving attempts of the situation. Meanwhile, offenders isolate themselves from social support, avoid discharging the pressure caused by the threatening situation through uncontrolled reactions and cannot effectively shake off the negative emotions caused by the stressful situation. This is reflective of a very tense internal state where tendencies of self-blaming and passively accepting the situation and the lack of capability to give up solving it are present simultaneously, without the possibility of seeking external support and discharging pressure, effectively taming the negative feelings. Beyond this general pattern no significant differences were found in coping preferences between males and females. It is however a possibility that females experience higher level of post-crime stress not only because of their higher proneness to anxiety, but because due to self-preservative reasons they are withdrawn from their primary coping mechanism: social support (Szabó et al., 2010).

Beyond subjectively experienced and reported coping efforts, post-offence behaviors based on the casefiles demonstrated more gender differences. Males tend to

show more heterogenous immediate post-offence reactions, which are reflective of taming their intensive emotional state with alcohol, drugs, roaming, spending the prayed money or of avoiding arrest by getting rid of the evidence. It is in line with the findings of Szabó et al. (2010) of males' preference of pressure reduction strategies, though avoidant coping strategies, e.g., taking sedatives generally are more characteristic of females. In males' subsequent reactions following the media and committing another homicide are characteristic which is reflective of and concurs with the more positive homicide-related feelings. Their more positive feelings may be a motivation to repeat the experience of homicide.

On the other hand, females more often called and ambulance, washed themselves or changed their clothing as immediate reactions, which were possibly driven by shame, regret or tendency of undoing. These results concur with those of Hakkanen et al. (2009). In the subsequent phase they incriminated someone else with the crime and told a false story as a confession more often as well. These results are reflective of females - if not apprehended immediately - are more deceptive in their post-offence tactics.

7. Conclusions

Post-homicidal behavioral, emotional reactions and coping in general is an underexplored area of research. We know even less about gender differences of post-offence reactions. The present study aimed to contribute to the current knowledge in the field of gender differences in post-homicidal behavior, and emotional reactions and coping mechanisms of perpetrators. Our results indicated that homicide and the post-homicidal phase is very stressful for perpetrators, specially for females while males more often react with positive feelings to the committed crime. In this period there is a very tense internal state where tendencies of self-blaming and passively accepting the situation and the lack of capability to give up solving it are present simultaneously, without the possibility of seeking external support and discharging pressure, effectively taming the negative feelings. However, no significant gender differences were found in the post-offence coping patterns, beyond subjectively experienced and reported coping we did found significant gender differences in the post-offence behaviors drawn from the casefiles. Females tend to show regret and shame in their immediate reactions and deceptive post-offence tactics in the subsequent reactions. Males tend to show more heterogenous immediate post-offence reactions. On one hand they try to tame their intensive emotional state with alcohol, drugs, roaming or spending the prayed money. On the other hand they attempt to avoid being caught by getting rid of the evidence. In their subsequent reactions following the media and committing or planning another homicide occur more often which is in line with the more positive crime-related feelings of males, which may be a motivation to repeat the experience of homicide.

These results suggest that in the case of female offenders, increased and more rigid hiding and deceptive efforts should be expected, therefore projective investigative and interrogation techniques may be counterproductive. Slow building of trust and acceptance may be an important element which can be used both in interrogative persuasion and in a therapeutic relationship as well. In case of male offenders, investigative tactics and media communication may be based on distinct changes in behavior, aimed to decrease pressure as these attempts may be perceptible to the social

environment of the offender. Furthermore, positive crime-related emotions should be taken into account and explored when working with male offenders specially in therapeutic context.

8. Limitations

Certainly considerable limitations can be listed in our study. Firstly, a relevant proportion of our data was collected from the verdict documents. The documents are rich in details of the homicides and include much information on crime-scene actions on a varying level. Furthermore these documents were not made for research purposes. While these documents are valuable resource of information, we have to keep in mind that because of the lack of homogenous data collection the data may be distorted.

Secondly, all limitations concerning the use of questionnaires versus interviews certainly apply to our study as well. However, homicide is a highly sensitive field and it may be difficult to discuss it even in good therapeutic relationship. The direct exposure in a face-to-face interview may be an impediment in the disclosure, while the anonimosity and facelessness provided by questionnaires may enable giving more detailed information.

Thirdly, a significant event like homicide may be subject to a number of (retrospective) bias. All memories fade and, due to the constructive nature of memory, change with time and the intense emotions related to the crime may very well interfere with the encoding as well as the retrieval of information. The retrospective design of our study itself brings the element of recall bias in perpetrators: they are asked to remember feelings and behaviours connected to an event from their past. However, considering the fact that we intended to explore the emotional factors of committing homicide as well as the characteristics of the post-offence period, a prospective design was not possible. Furthermore, beyond objective data on post-offence behavior we intended to investigate the offenders' subjective experience which necesserily may deviate from the factual data.

Certainly, post-offence happenings can not be prescinded from the homicide itself and from the details of the commission. Linkage of crime-scene characteristics and other details of the homicide with the post-offence phase among males and females is a promising area of further research.

References

Canter, D., Heritage, R. (1990). A multivariate model of sexual offence behaviour: Developments in 'offender profiling'. *The Journal of Forensic Psychiatry, 1*(2), 185-212. DOI: 10.1080/09585189008408469

Dewees, M. A., Parker, K. F. (2003). Women, region, and types of homicide: Are there regional differences in the structural status of women and homicide offending? *Homicide Studies, 7*(4), 368-393. DOI:10.1177/1088767903256462

Fox, K., Allen, T. (2013). Examining the instrumental–expressive continuum of homicides: Incorporating the effects of gender, victim–offender relationships, and weapon choice. *Homicide Studies*. DOI:1088767913493420

Häkkänen-Nyholm, H., Putkonen, H., Lindberg, N., Holi, M., Rovamo, T., Weizmann-Henelius, G. (2009). Gender differences in Finnish homicide offence characteristics. *Forensic Science International, 186*, 75-80. DOI:10.1016/j.forsciint.2009.02.001

Jurik, N. C., Winn, R. (1990). Gender and homicide: A comparison of men and women who kill. *Violence and victims, 5*(4), 227-242.

Malmquist, C. P. (2006). *Homicide: A psychiatric perspective.* Arlington, USA: American Psychiatric Publishing, Inc.

Münnich, I. (2013). Az emberölést elkövetett személy lélektanáról. In G. Vókó, E. Tamási (Ed.), *Kriminológiai tanulmányok 50* (pp. 135-174). Budapest: OKRI.

Ogle, R. S., Maier-Katkin, D., Bernard, T. J. (1995). A theory of homicidal behavior among women. *Criminology, 33*(2), 173-193. DOI:10.1111/j.1745-9125.1995.tb01175.x

Oláh, A. (1986). *A Coping Preferenciák - A 80 itemes Coping Preferenciák Kérdőív alkalmazása és jellemzői.* Budapest: MLKT Módszertani Füzetek.

Putkonen, H., Amon, S., Eronen, M., Klier, C. M., Almiron, M. P., Cederwall, J. Y., Weizmann-Henelius, G. (2011). Gender differences in filicide offense characteristics - A comprehensive register-based study of child murder in two European countries. *Child Abuse & Neglect, 35*(5), 319–328. DOI: 10.1016/j.chiabu.2011.01.007

Putkonen, H., Weizmann-Henelius, G., Lindberg, N., Rovamo, T., & Hakkanen-Nyholm, H. (2011). Gender differences in homicide offenders' criminal career, substance abuse and mental health care. A nationwide register-based study of Finnish homicide offenders 1995–2004. *Criminal Behaviour and Mental Health, 21*(1), 51-61. DOI:10.1002/cbm.782

Ressler, R. K., Burgess, A. W., & Douglas, J. E. (1992). *Sexual homicide: Patterns and motives.* New York, USA: The Free Press.

Rózsa, J. (2013). Az emberölésekről. In G. Vókó (Ed.), *Kriminológiai Tanulmányok 50* (pp. 105-135). Budapest: OKRI.

Sipos, K., Sipos, M., Spielberger, C. D. (1988). A Stait-Trait Anxiety Inventory magyar változata. In F. Szakács (Ed.), *Pszichodiagnosztikai vademecum* (pp. 123-136). Budapest: Tankönyvkiadó.

Smith, D. M., Brewer, V. E. (1992). A sex-specific analysis of correlates of homicide victimization in United States cities. *Violence and victims, 7*(4), 279-286.

Swatt, M. L., He, N. P. (2006). Exploring the difference between male and female intimate partner homicides: revisiting the concept of situated transactions. *Homicide Studies, 10*(4), 279-292. DOI: 10.1177/1088767906290965

Szabó, G., Szántó, Z., Balog, P., Kopp, M. (2010). Az életesemények, a stressz és a megküzdés nemi különbségei. *Mentálhigiéné és Pszichoszomatika, 11*(4), 349-369. DOI:10.1556/Mental.11.2010.4.7

Tamási, E., Bolyky, O., Sárik, E. (2014). Az emberöléshez vezető út rizikófaktorai fiatalkorúak és fiatal felnőttek körében. In G. Vókó (Ed.), *Kriminológiai tanulmányok 51* (pp. 130-164). Budapest: OKRI.

Table 1 – Descriptives and crosstabs of education, marital status, and residence of the participants

			Gender		Total
			male	**female**	
Education	Less than primary school	Count	8	4	12
		% within Education	66,7%	33,3%	100,0%
		% within Gender	9,8%	22,2%	12,0%
	Primary school	Count	40	8	48
		% within Education	83,3%	16,7%	100,0%
		% within Gender	48,8%	44,4%	48,0%
	Profession without high-school qualification	Count	22	3	25
		% within Education	88,0%	12,0%	100,0%
		% within Gender	26,8%	16,7%	25,0%
	Secondary school	Count	11	3	14
		% within Education	78,6%	21,4%	100,0%
		% within Gender	13,4%	16,7%	14,0%
	University, college	Count	1	0	1
		% within Education	100,0%	0,0%	100,0%
		% within Gender	1,2%	0,0%	1,0%
Total		Count	82	18	100
		% within Education	82,0%	18,0%	100,0%
		% within Gender	100,0%	100,0%	100,0%
Marital status	Single	Count	40	2	42
		% within Marital status	95,2%	4,8%	100,0%
		% within Gender	46,5%	11,1%	40,4%

			Gender		Total
			male	**female**	
	Married, common-law marriage	Count	39	12	51
		% within Marital status	76,5%	23,5%	100,0%
		% within Gender	45,3%	66,7%	49,0%
	Non-marital relationship	Count	3	1	4
		% within Marital status	75,0%	25,0%	100,0%
		% within Gender	3,5%	5,6%	3,8%
	Divorced	Count	4	3	7
		% within Marital status	57,1%	42,9%	100,0%
		% within Gender	4,7%	16,7%	6,7%
Total		Count	86	18	104
		% within Marital status	82,7%	17,3%	100,0%
		% within Gender	100,0%	100,0%	100,0%
Residence	Capital	Count	16	4	20
		% within Residence	80,0%	20,0%	100,0%
		% within Gender	18,6%	22,2%	19,2%
	County centre	Count	17	7	24
		% within Residence	70,8%	29,2%	100,0%
		% within Gender	19,8%	38,9%	23,1%
	Town	Count	25	2	27
		% within Residence	92,6%	7,4%	100,0%

			Gender		Total
			male	**female**	
		% within Gender	29,1%	11,1%	26,0%
	Village	Count	28	5	33
		% within Residence	84,8%	15,2%	100,0%
		% within Gender	32,6%	27,8%	31,7%
Total		Count	86	18	104
		% within Residence	82,7%	17,3%	100,0%
		% within Gender	100,0%	100,0%	100,0%

	Pearson Chi-Square	***Asymp. Sig. (2-sided)***
Education	*2,910*	*0,573*
Marital status	*9,356*	*0,025*
Residence	*4,416*	*0,222*

Table 2 – Data of scales used in our study

	N	Minimum	Maximum	Mean	SD	Cronbachα
STAI TRAIT	129	35,0	57,0	44,40	3,2	-0,327
PO STAI State	123	28,0	80,0	64,30	12,0	0,929
PO CPQ Problem centric reaction	116	13,0	41,0	27,72 (2,52)	6,7 (0,6)	0,824
PO CPQ Social Support seeking	117	8,0	28,0	14,74 (1,84)	5,3 (0,7)	0,820
PO CPQ Pressure control	117	19,0	64,0	40,15 (2,36)	8,4 (0,5)	0,800
PO CPQ Distraction	117	17,0	49,0	31,43 (2,24)	6,7 (0,5)	0,744
PO CPQ Emotion focus	117	12,0	63,0	25,89 (2,16)	7,3 (0,6)	0,524
PO CPQ Emotion discharge	117	8,0	29,0	14,89 (1,86)	4,3 (0,5)	0,678
PO CPQ Self-punishment	117	5,0	20,0	14,50 (2,89)	3,7 (0,7)	0,747
PO CPQ Deference	117	5,0	33,0	12,04 (2,41)	4,2 (0,8)	0,585

Mean numbers in parentheses show scale values.

Table 3 – Independent sample t-test of variables of post-offence emotions, coping strategies and behaviors

Gender		N	Mean	SD	Sig.	t
Age at perpetration	Male	111	28,67	9,2	0,97	-0,894
	Female	18	30,83	11,3		
Returned to the scene **	Male	82	0,27	0,4	0,00	1,60
	Female	14	0,07	0,3		
Followed the news in the media **	Male	68	0,21	0,4	0,00	1,88
	Female	14	0,00	0,0		
Got rid of the evidence **	Male	84	0,55	0,5	0,00	1,83
	Female	14	0,29	0,5		
Planned or executed another homicide **	Male	83	0,12	0,3	0,00	1,37
	Female	14	0,00	0,0		
He/She was on the run	Male	84	0,10	0,3	0,30	-0,54
	Female	14	0,14	0,4		
Spent extraordinarily much money *	Male	83	0,08	0,3	0,02	1,12
	Female	14	0,00	0,0		
Went to a pub, consumed alcohol or drug **	Male	83	0,19	0,4	0,00	1,81
	Female	14	0,00	0,0		
Called and ambulance **	Male	83	0,04	0,2	0,00	-4,38
	Female	14	0,36	0,5		
Went to shopping *	Male	83	0,07	0,3	0,03	1,03
	Female	14	0,00	0,0		
Incriminated someone else with the crime **	Male	83	0,08	0,3	0,00	-2,23
	Female	14	0,29	0,5		
Told a false story as confession **	Male	83	0,17	0,4	0,00	-2,26
	Female	14	0,43	0,5		
Killed again in a short time (6 months) *	Male	83	0,07	0,3	0,03	1,03
	Female	14	0,00	0,0		
Washed himself/herself or changed clothing *	Male	83	0,24	0,4	0,04	-1,47
	Female	14	0,43	0,5		
Roaming by car or foot **	Male	83	0,10	0,3	0,01	1,21
	Female	14	0,00	0,0		
Wanted to give up himself/herself but changed his/her mind	Male	83	0,04	0,2	0,14	0,72
	Female	14	0,00	0,0		

Gender		N	Mean	SD	Sig.	t
Went to see an attorney	Male	83	0,02	0,2	0,24	0,58
	Female	14	0,00	0,0		
Traveled abroad	Male	83	0,02	0,2	0,09	-0,88
	Female	15	0,07	0,3		
Moved away	Male	83	0,10	0,3	0,46	0,36
	Female	15	0,07	0,3		
Mixed socially with others	Male	83	0,14	0,4	0,11	0,74
	Female	14	0,07	0,3		
I was sad *	Male	106	1,12	0,8	0,03	-0,93
	Female	16	1,31	0,5		
I felt ashamed	Male	106	1,05	0,8	0,14	-0,98
	Female	16	1,25	0,6		
I felt guilt	Male	104	1,21	0,8	0,17	-0,25
	Female	15	1,27	0,7		
I was satisfied **	Male	105	0,12	0,4	0,01	1,21
	Female	16	0,00	0,0		
I was scared and anxious	Male	105	1,08	0,8	0,09	-0,51
	Female	16	1,19	0,7		
I was happy *	Male	104	0,11	0,4	0,01	1,15
	Female	16	0,00	0,0		
I felt calm, reflective and acive	Male	103	0,31	0,6	0,25	-0,41
	Female	16	0,38	0,7		
I felt in secure **	Male	106	0,25	0,5	0,00	1,57
	Female	16	0,06	0,3		
I felt tired	Male	103	0,88	0,7	0,61	-3,02
	Female	16	1,44	0,5		
I felt numb	Male	101	0,85	0,7	0,75	-1,74
	Female	16	1,19	0,8		
I felt confident **	Male	104	0,34	0,6	0,00	1,86
	Female	15	0,07	0,3		
I felt normal like nothing happened *	Male	104	0,28	0,6	0,03	1,03
	Female	16	0,13	0,3		
I experienced paranoia, I felt	Male	105	0,78	0,8	0,37	1,31

Gender		N	Mean	SD	Sig.	t
suspicious and being prosecuted	Female	16	0,50	0,7		
I felt lonely	Male	90	0,82	0,8	0,38	-1,43
	Female	15	1,13	0,7		
Post-offence anxiety (PO STAI state) *	Male	106	63,31	12,3	0,02	-2,32
	Female	17	70,47	7,7		
Problem-centric reaction	Male	100	28,40	6,4	0,94	2,84
	Female	16	23,44	6,9		
Social support seeking	Male	101	14,98	5,3	0,49	1,25
	Female	16	13,19	5,4		
Pressure control	Male	101	40,47	8,1	0,57	1,03
	Female	16	38,13	10,1		
Distraction	Male	101	31,80	6,6	0,84	1,52
	Female	16	29,06	7,4		
Emotion focus	Male	101	25,86	7,0	0,55	-0,10
	Female	16	26,06	9,0		
Emotion discharge	Male	101	14,93	4,4	0,69	0,26
	Female	16	14,63	3,9		
Self-punishment	Male	101	14,36	3,7	0,51	0,82
	Female	16	15,38	4,0		
Deference	Male	101	12,17	4,3	0,41	-0,25
	Female	16	11,25	3,5		

* p<0,05; ** p<0,01

For variables of post-offence behaviors coding was the following: 0 = not present; 1 = present

For variables of offence related and post-offence emotions coding was the following: 0 = not at all; 1 = yes; 2 = very much

Amendments to the Criminal Offense of Rape in the Criminal Code of Serbia

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Abstract

After the introductory part, the paper points out to the essence of the criminal offence of rape that had been prescribed by the Criminal Code of the Republic of Serbia with amendments made before the entry into force of the Criminal Code from the year 2005. Following that, a criminal offence prescribed by this code with amendments made by the end of the year 2016 is discussed. Each of the prescribed forms is analyzed separately, with analysis of intention and negligence of this criminal offence. Requirements of the Istanbul Convention put in front of the countries that signed the convention with regard to this criminal offence are also discussed. Finally, concluding arguments are given.

***Key words**: rape, sexual intercourse, coercion, force, threat, consent.*

Introduction

Rape as one of the forms of violent criminality causes significant attention of criminologists because it raises a question of perpetrator and victim personalities in a specific way, their relation and symptoms of rape trauma as a serious and long-term consequence of victimization. At the same time, it considers the problem of false reporting, relation of formal social control bodies towards the victim and perpetrator, severity of the sentences, re-socialization of the perpetrator, the attitude of the environment towards the victim and perpetrator, etc.[2] In addition, the general and in particular the professional public within the field of criminal law is very interested in the criminal offence of rape which is a central criminal offence in the group of offences against sexual freedom. Due to all previously stated, a fierce debate is led in the scientific and professional circles which eventually leads to relatively frequent changes in the very essence of this criminal offence. The previous changes apart from introducing heavier punishments have been also aimed at wider protection of the victim in terms of criminal law as well as the expansion of the scope of acts representing the criminal offence. Unlike the previous solution when the passive entity could be only a woman with whom a perpetrator does not live in a marriage, today the victim can be both, a woman with whom a perpetrator does not live and also a woman with whom a perpetrator lives in a marriage as well as a male. As for the amendments to this criminal offence, particular attention is aroused by the requirements of the Istanbul Convention which imposes the obligation to significantly modify this criminal offence which requires a thorough and serious discussion so as not to achieve opposite effects from desired.

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[2] Игњатовић Ђ., *Криминологија*, Београд, 2000, стр. 209.

1. Criminal offence of rape according to the Criminal code of the Republic of Serbia from 1977 with the amendments to the criminal code from 2005

Criminal Code from 1977[3] pursuant to Article 103 prescribed the criminal offence of rape which besides the basic type also implied the more severe types. The act within basic type was sexual intercourse while for the existence of criminal offence it was necessary that the act is undertaken by force implying the use of force or qualified threat that the life or the body of the passive entity or person close to them was going to be attacked. For the existence of the criminal offence, it was also necessary that the act was undertaken against a female followed by the additional requirement that the offender does not live in a marriage with the person in question. The sentence prescribed was imprisonment lasting from one to ten years.

More severe type of the criminal offence existed if in case of basic type the serious bodily injury or death of a female person occurred, or if the criminal offence was done by several persons or in the particularly cruel or humiliating way or in other particularly serious case. The sentence prescribed was imprisonment lasting for at least three years.[4]

According to this legal solution, only the sexual assault of a female person i.e. the penetration of the male sex organ into the female sex organ i.e. vaginal coitus was subsumed under the act of criminal offence of rape. Other sexual acts undertaken by the use of coercion were regarded as other criminal offences, therefore oral and anal sexual intercourse called sodomy between male and female or two males represented the criminal offence of sodomy prescribed by Article 110 of the same Law.

The perpetrator of criminal offence of rape could be only a male while a passive entity could be only a female who did not live with a perpetrator in the marriage. In other words, a legislator did not envisage the possibility of marital rape or the rape of a spouse.

The Law on Amendments to the Criminal Code of the Republic of Serbia[5] of 3 December, 1990 amended the qualified form of criminal offence of rape so that the words "in other particular case" were changed for "against an underage person". Accordingly, since then the qualified form of rape has existed if the basic type is committed against an underage person or if the passive entity is an underage female person. The underage person is considered to be the person below the age of eighteen.

The following amendments relating to the criminal offence of rape are prescribed by the Law on Amendments to the Criminal Code[6] of 14 July, 1994, when along with the basic type which has remained unchanged, two qualified forms were prescribed. More severe type existed if the serious bodily injury of a female person occurred in case of basic type or if the offence was committed by several persons or in a particularly cruel and humiliating way. For this type, the sentence prescribed was the imprisonment of at least one year. The most severe form, for which the sentence prescribed was an imprisonment of at least three years, existed if the basic type is committed against an underage person or if the result of its execution was death of a female person.

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[3] "*Службени гласник Социјалистичке Републике Србије*", број 28 од 30. јуна 1977. године.

[4] General maximum stiplulated by Article 38 of the Criminal Code of SFRY was 15 years.

[5] "*Службени гласник Републике Србије*", број 16 од 3. децембра 1990. године.

[6] "*Службени гласник Републике Србије*", број 47 од 14. јула 1994. године.

More significant amendments to the criminal offence of rape were prescribed by the Law on Amendments to the Criminal Code[7] of 1 March, 2002. This law changed the basic type of the criminal offence by the omission of the words "with whom they do not live in a marriage", so that for the first time the possibility of raping the spouse has been envisaged. From that moment on, the passive entity of the criminal offence of rape can be a female person not only out of the wedlock but also in the wedlock. This law stipulated that the more severe type, besides the already prescribed situations, would also exist if the basic type resulted in the pregnancy or severe infectious disease. In addition, the sentences for all three types of criminal offence of rape became stricter so that the envisaged imprisonment sentence for the basic type was at least two years, for more severe type at least three years and for the most severe type at least five years.

2. Criminal code from 2005[8] with the amendments up to 1 december, 2016

Criminal Code from 2005 prescribes the criminal offence of rape by Article 178 in a fundamentally different way than it was previously. The basic type is committed by the one who compels other person to sexual intercourse or an equal act by force or threat to immediately attack the victim or a person close to them and it was punishable by the imprisonment lasting from two to ten years. The special type exists if the basic type is committed by threatening that something which could harm the honour or reputation of that person or the person close to them will be revealed or that other severe harm will be done and it was punishable by the imprisonment lasting from one to eight years. More severe type exists if in case of basic or special type occurred the serious bodily injury of the person against which the offence is committed or if the offence is committed by several persons or in a particularly cruel or humiliating way or against an underage person or if it resulted in pregnancy. This type was punishable by imprisonment sentence lasting from three to fifteen years. The most severe type exists if in case of basic or special type occurs the death of the person against whom the offence is committed or if the offence is committed against a child. The sentence prescribed for the most severe type is the imprisonment lasting from five to eighteen years.

The Law on Amendments to Criminal Code[9] of 3 September, 2009 increased the stipulated sentences so that the sentence prescribed for the basic type was from three to twelve years of imprisonment, for the specific type from two to ten years, for more severe type from five to fifteen years while the prescribed sentence for the most severe type was minimum ten years of imprisonment. Last Amendments from 2016 that enter into force on 1 June, 2017 prescribe the sentence of five to twelve years of imprisonment for the basic type.

3. Basic type of criminal offence of rape

The criminal offence of rape (Article178 Criminal Code) inculpates one less severe and two more severe types in addition to the basic type. The basic type of rape is

[7] "*Службени гласник Републике Србије*", број 10 од 1. марта 2002. године.
[8] "*Службени гласник Републике Србије*", број 85 од 6. октобра 2005. године.
[9] "*Службени гласник Републике Србије*", број 72 од 3. септембра 2009. године.

committed by the one who forces another person to sexual intercourse or equal act using force or threatening to immediately attack the life or body of that person or the person close to them. The term sexual intercourse implies the penetration of male sex organ into female sex organ, i.e. vaginal coitus, while the term equal to sexual intercourse implies anal and oral coitus.

For the existence of the criminal offence of rape, it is necessary that the sexual intercourse or an equal act has happened due to coercion in the form of force or threat. When it comes to threat, there is no dispute either in theory or in practice. Apart from the general characteristics a threat should fulfill in order to be relevant in the sense of criminal law, for the existence of this criminal offence it is also necessary to be qualified i.e. that the life or body of the passive entity or the person close to them is threatened to be immediately attacked. The term close person when it comes to this criminal offence, implies the persons who have the special, positive, emotional relation with the passive entity based on blood relation or close friendship such as children, parents, brother, sister, godparents, close friends and similar.

However, the term of force within this criminal offence is debatable as some theorists and practitioners require the existence of certain intensity of force for the existence of this criminal offence. It is deduced from existence or absence of resistance whether the sexual intercourse or equal act are the result of corresponding force. In fact, according to their standpoint, it is necessary for the existence of criminal offence of rape that the passive entity has provided the resistance.[10] If the resistance is missing, this criminal offence is not considered to have been committed and if the resistance is provided, its corresponding characteristics are required in order to accept the existence of criminal offence of rape. Thus, it is considered that the resistance should be real, serious and steady.[11] "In theory and court practice the prevailing view is that only the force able to overpower strong and steady resistance of the victim may be an element of the criminal offence of rape. Lack of resistance of certain intensity results in the conclusion on the absence of power."[12] It is also required that the resistance lasts throughout the whole sexual intercourse or an equal act whereas it is considered that subsequent consent or allowance of the passive entity excludes the existence of criminal offence.[13]

The acknowledgement of the fact that the criminal offence is completed in the moment of commencement of vaginal, anal or oral coitus and that for the completed criminal offence it is not necessary that the sexual intercourse or an equal act is also completed in physiological terms resulted in another view. This view suggests that the resistance should be provided up to the moment when the offence is completed. According to this view, the resistance should be continuous and it is such when provided from the moment of coercion commencement up to the moment when the criminal offence has been completed. [14] If the passive entity consents to sexual intercourse or an equal act after such an action started by the use of coercion and before such an action has been completed in physiological terms, it does not influence the existence of

[10] Tomković B., *Krivično pravo posebni dio*, Podgorica, 1998, p. 288.
[11] Lazarević Lj., *Krivično pravo Jugoslavije posebni deo*, Beograd, 1995, p. 448.
[12] Stojanović Z. - Perić O., *Krivično pravo posebni deo*, Beograd, 2003, p. 178.
[13] Bačić F. - Šeparović Z., *Krivično pravo posebni dio*, Zagreb, 1982, p. 154.
[14] Lazarević Lj., *Komentar Krivičnog zakonika*, Beograd, 2006, p. 508.

criminal offence of rape because it has already been completed. Such consent could be taken into account only during the sentencing.[15]

However, any standpoint which for the existence of criminal offence of rape requires the passive entity's resistance is not acceptable. The essence of the criminal offence of rape is completely clear and the will of legislator cannot be changed by the interpretation or application of this legal provision by tapering the incrimination. Namely, for the existence of criminal offence of rape, its essence requires that the sexual intercourse or an equal act occurred by the use of coercion. This implies that the legislator does not require from the passive entity to provide the resistance of a certain quality and lasting during the certain period of time. The essence of criminal offence of rape does not require serious, strong and steady resistance from the part of the passive entity. The resistance is not required to be overpowered by the use of coercion i.e. the perpetrator is not required to constantly and simultaneously overpower the resistance of the passive entity during sexual intercourse or an equal act. On the contrary, the legislator does not require any kind of resistance for the existence of this criminal offence.[16]

According to the current decision, the criminal offence of rape is completely completed when an action has been committed by the use of force or qualified threat regardless of the fact whether the passive entity has provided any resistance or not. It is important for the existence of the criminal offence that the sexual intercourse or an equal act occurs by the use of coercion, that the passive entity does not consent to that act but it is completely unnecessary for the existence of criminal offence that the passive entity expresses their disagreement by providing resistance. Resistance of the passive entity can be manifested in different ways ranging from implicit actions demonstrating the absence of desire or consent to sexual harassment or an equal act, by uttered words expressing that such an action is not desired or that there is no consent to such an action, via the most humiliating petitions, crying, up to the extremely strong physical resistance.[17]

Accordingly, criminal offence also exists in those situations where resistance is missing due to any reason and the action is committed by the use of force. It is not disputable that the existence of resistance facilitates proving the existence of force. However, it was exactly this statement that led to mistaken views of theory and practice on the need of resistance. Namely, in the practice there is a problem to prove the use of force, i.e. it is noted that sometimes the passive entity submits the false report when a serious procedure problem occurs concerned with whom to believe- the accused that negates the use of force or passive entity stating the opposite. Due to that, the wrong standpoint stating the need of resistance from the part of passive entity certainly contributes to the wrong prejudice about the existence of significant number of false reports for the criminal offence of rape that is also considered to be a characteristic of this criminal offence. Sometimes, mainly in a very general sense, the information being operated is that about 30% and even up to 40% of the reports for raping are false. This

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[15] Delibašić V., *U kandžama prostitucije - krivičnopravni aspekt prostitucije*, Beograd, 2010, p. 110-111.

[16] Delibašić V., Krivično delo silovanje, *Arhiv za pravne i društvene nauke*, 2009, p. 72.

[17] Memedović N., *Krivično delo silovanja u jugoslovenskom pravu*, Beograd, 1988, p. 133.

cannot be accepted and much more real is the estimation that the percent of false reports for raping does not significantly differ in relation to false reports of other criminal offences.[18]

Due to these reasons it should be acknowledged as unacceptable to require from the part of the passive entity to provide the resistance as obligatory because "in the criminal law it has long been widely accepted that the problems in terms of proving shall neither condition the material and legal solutions nor cause the declination from certain basic principles."[19] It should be emphasized that the problem in terms of proving has not condition the material and legal solutions because the essence of criminal offence remained unchanged. This is something even less acceptable, the theory and practice find the solution for the problem of providing evidence of the used force in the unallowable change of criminal offence essence i.e. the change of legislator's will.

Accordingly, for the existence of criminal offence it is necessary that due to coercion in the form of force or qualified threat, the sexual intercourse or an equal act occurred i.e. that it is the result of coercion, not of a desire or voluntary consent of the passive entity. In relation to the previous, the use of force does not assume the existence of resistance which may or may not exist. For this criminal offence, the force should be undertaken in order to overpower the resistance of the passive entity who has provided it or in order to overpower the resistance which has not been provided but that is expected by the perpetrator i.e. it is presumed or thought that the resistance is going to be provided by passive entity.[20] It may occur that the perpetrator has used force precisely in order to avoid any kind of eventual resistance because they do not want it i.e. they have used the force in order to, helped by it, commit the sexual intercourse or an equal act without resistance. In this situation, the offender is fully aware that the passive entity has not given the consent and that the consent will not be given and therefore, the offender uses force precisely in order to prevent the provision of resistance.[21]

On the side of the passive entity, besides the absolute lack of consent to sexual intercourse or an equal act, the resistance could be missing although the force has been applied, due to several reasons. It is possible, as it is the case regarding other criminal offences[22], that the passive entity has become afraid because of applied force and due to that reason has not been at all capable of providing any resistance. It may also happen that the passive entity estimates, real or not, that in a particular situation resistance to the applied force may only make the already bad situation even worse and that sexual intercourse or an equal act is not possible to avoid. In that case the passive entity provides no resistance because they want to reduce the negative consequences of the criminal offence they are exposed to i.e. in order to minimize the evil which is happening to them for certain but not because they give the consent to the sexual intercourse or an equal act. Requirement from the passive entity to express the lack of consent to sexual intercourse or an equal act by providing the resistance would largely restrict the right of passive entity to sexual self-determination which is absolutely unacceptable.[23]

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[18] Aleksić Ž. - Škulić M., *Kriminalistika*, Beograd, 2004, p. 286.

[19] Stojanović Z., *Međunarodno krivično pravo*, Beograd, 2004, стр. 98.

[20] Atanacković D., *Krivično pravo posebni deo*, Beograd, 1985, p. 271.

[21] Delibašić V., *U kandžama prostitucije - krivičnopravni aspekt prostitucije*, Beograd, 2010, p. 113.

[22] Opposed to rape, with robbery neither theory nor practice recquire the passive entity to provide resistance, especially not resistance of certain quality and duration, but only recquire used force, so there is no reason to act diferrently when it comes to rape.

[23] Delibašić V., Krivično delo silovanje, *Arhiv za pravne i društvene nauke*, 2009, p. 74-75.

4. Less and more serious criminal offence of rape

Less serious type of criminal offence prescribed by paragraph 2 differs from the basic type only in terms of coercion form used in this type of criminal offence due to a threat to a passive entity that something which could harm their honour and reputation will be revealed about them or a person close to them or by other severe evil. In the first case it is a special kind of blackmail while in the second case it is a threat of evil that should be severe enough to force the passive entity to sexual intercourse or an equal act. It can be a threat that the life or body of the passive entity or a person close to them are going to be attacked providing that they are not threatened by an imminent attack but the attack after a certain period of time. When it comes to this type of criminal offence of rape, a threat of attack may also refer to other resources of the passive entity such as the property of great value, for example that the offender is going to set fire to the house of the passive entity, blow up their car or the like.

More serious type of criminal offence of rape, prescribed by paragraph 3, shall exist if in the course of any of the types from the first two paragraphs, occurred a serious bodily injury of the person against whom the offense was committed or if the offense is committed by several persons or if it is committed in a particularly cruel or humiliating way or against an underage person or if it resulted in pregnancy. The term of serious bodily injury should be interpreted as it is envisaged by criminal offense of serious bodily injury from Article 121 of the Criminal Code. A term of several persons implies two or more persons. "Thereby, the co-offenders have to be in question. For this qualified type of rape, it is enough that every offender applies only a part of the enforcement action."[24] Every rape implies cruel and humiliating treatment of the passive entity. However, for the existence of this type of criminal offence of rape, it has to be an especially cruel or especially humiliating manner. These are the cases when much greater physical and psychological suffering is inflicted upon the passive entity than it is necessary for the criminal offence of rape to be committed i.e. when the passive entity is additionally humiliated. The term of an underage person, pursuant to Article112, paragraph 9 of the Criminal Code, implies the person who has attained the age of fourteen and has not attained the age of eighteen.

It is absolutely undisputable that there will be a qualified type of criminal offence of rape from paragraph 3 if the criminal offense has as a consequence the pregnancy of the passive entity. However, with regard to the fact that the female person can also commit the criminal offence of rape against a male, the question which may arise is whether there is a qualified type of criminal offence of rape if it resulted in the pregnancy of the perpetrator of this criminal offence. In the response to this question, it should be taken into account that the legislator requires that the criminal offence results in the pregnancy without specifying whose pregnancy- pregnancy of the perpetrator or pregnancy of the passive entity. Accordingly, in the moment of the conception i.e. in the moment of pregnancy occurrence, certain family or inheritance rights and duties are exercised. The passive entity does not absolutely consent to them since they have not consented to the sexual intercourse as well. Due to given reasons, it should be realized that there is also going to exist a qualified type of criminal offence of rape in the case when the pregnancy of perpetrator is a consequence of the offence.[25]

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[24] Stojanović Z., *Komentar Krivičnog zakonika*, Beograd, 2006, p. 442.

[25] Delibašić V., *op. cit.*, стр. 80.

The most severe form of this criminal offence prescribed by the paragraph four exists in case of death of the passive entity in the course of the offence from the paragraph one and two or if the offence is committed against a child. Pursuant to Article 112, paragraph 8 of the Criminal Code, it is considered that a child is a person who has not attained the age of fourteen.

5. Intent to commit rape and negligent rape

The criminal offence of rape can only be committed with intent which in the basic type, among other things, must include the awareness that sexual intercourse or an equal act has been committed by force or qualified threat and against the will of the passive entity. For less serious type of criminal offence referred to in paragraph two, the intent includes an awareness that an action is undertaken under threat that something that could harm the honor or reputation of the passive entity or a person close to them will be revealed or under threat that other severe harm against the will of the passive entity. As for the more serious forms of this criminal offence, the existence of negligence is necessary in relation to more severe consequence, while in relation to the aggravating circumstances that do not have the character of a serious consequence the action of the perpetrator has to be intended.

As for the more serious type of this criminal act prescribed by paragraph three, the occurrence of the serious bodily injury of the person against whom the criminal offence is committed has to be covered by the negligence of the perpetrator. If the serious bodily injury were covered by the intent of the perpetrator, then it would be the concurrence of criminal offence of rape and criminal offence of serious bodily injury. Otherwise, there must be the casual relation between the sexual intercourse or an equal act and the occurrence of serious bodily injury. Such situation would include the situation in which the passive entity jumps out of the window of the apartment or a moving vehicle in order to avoid rape and on that occasion gets serious bodily injury or the like. Court practice has taken a unique stand that this qualified type is also in question in those situations when the basic type of criminal offence remained only an attempt and the serious consequence appeared. The standpoint also present in the court practice is that this type of criminal offence may also exist in case when a passive entity in suicide attempt due to a rape inflicts upon themselves serious bodily injuries. In these cases, it is justifiable to consider more serious consequences to be in a casual relation to a rape.[26] As for the most serious type of rape prescribed by paragraph 4, the circumstance that death of the passive entity occurred due to committed or attempted criminal offence of rape must be covered by the negligence of the perpetrator. Otherwise, if the death of the passive entity was covered by the intent of the perpetrator, the concurrence of the criminal offence of rape and criminal offence of murder or first degree murder would be in question.

More serious consequence of criminal offence of rape consisting of the pregnancy occurrence given that the pregnancy does not generate the characteristics of other criminal offence may be covered not only by negligence but also with the intent of the perpetrator.

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[26] Lazarević Lj., *op. cit.*, стр. 511.

As for the aggravating circumstance referred to in paragraph three, that the offense has been committed by several persons, or that the offense has been committed in a particularly cruel or humiliating way, or against an underage person, or in the worst type referred to in paragraph four that the offense has been committed against a child, these circumstances have to be regarded as the intent of the perpetrator. In determining whether the fact that the underage person or a child is in question is a qualifying circumstance covered by an intent or negligence of the offender, it should be noted that sometimes it is difficult to determine how old the passive entity is. It is known that persons from 12 to 13 years old may be developed with visible sexual signs corresponding to persons from 16 to 17 years old. In such cases, the perpetrator may be mistaken regarding the age of passive entity as the aggravating circumstance i.e. it may happen that the age of passive entity is not covered by the intent of the perpetrator when the more serious type of this criminal offence is not in question.

6. Amendments for the purpose of compliance with the Istanbul Convention

The wrong standpoint of the theory and practice requiring from the passive entity to provide the resistance in the criminal offence of rape has led to a new mistake i.e. wrong view that the sexual intercourse or any other sexual act involving a lack of consent equal to sexual intercourse or other sexual act done by the use of coercion. This significant mistake represents the base of the Istanbul Convention[27] and the base for requiring the incrimination of every non-consensual sexual act even in those situations when no type of coercion is used. In relation to that, the question arising is whether the criminal offence of rape from Article 178 of the Criminal Code meets the requirements of the Istanbul Convention. It is immediately notable that under the convention all sexual acts done without the consent of the passive entity are subsumed as a rape without additional requirements i.e. the lack of consent when undertaking the sexual act is put in the first place instead of coercion. The difference is evident and contained in the fact that according to the Criminal Code, the existence of refusal and coercion is necessary and the convention requires that the essence of the criminal offence comprises the consent *i.e.* criminal offence shall exist whenever there is no consent regardless of the fact whether the coercion is used or not.[28]

Istanbul Convention imposes the obligation to adjust the Serbian criminal legislation to the requirements largely guided by feminist views concerning the issues related to the crimes against sexual freedom, as well as in relation to certain offenses against the rights and freedoms of man and citizen i.e. against marriage and family whereby the views of criminal and legal theory and practice have not been sufficiently taken into account. Primarily, it has been ignored that the criminal law is the last means (ultima ratio) as well as its fragmentary nature i.e. that neither can it provide a comprehensive protection nor is it advisable to enter into some sort of interpersonal relationships. Therefore, it is necessary to approach the amendments to the criminal

[27] The Council of Europe Convention on preventing and combating violence against women and domestic violence.

[28] Delibašić V., Usklađivanje krivičnog zakonodavstva sa Istanbulskom konvencijom, *Evropske integracije i kazneno zakonodavstvo (poglavlje 23 - norma, praksa i mere harmonizacije)*, Zlatibor, 2016, p. 186-188.

legislation for the purpose of compliance to the Istanbul Convention in a particularly cautious manner and to carry out previously a serious and thorough scientific discussion concerning this significant issue.[29]

It should be taken into account accordingly, that there is a danger that the consistent application of the Istanbul Convention could lead to absurd situation which would not have any criminal and political justification which is the best illustrated by the following example. If a husband wants to watch the finals of the World Cup and therefore does not want to have a sexual intercourse and does not consent to it while his wife wants a sexual intercourse exactly at that moment and starts a sexual act even if she does not use coercion according to Istanbul Convention, she would commit a criminal offence because there is no consent of her husband!? For example, if she on that occasion performs oral coitus even if the husband did not have an erection, according to Istanbul Convention it would be a completed criminal offence of rape.[30] Since according to this Convention Article 186 of the Criminal Code shall be abolished, in that case the proposal of the spouse is not necessary for the prosecution so the wife from the given example would be prosecuted. The possibility that the husband may exercise his right not to testify in the proceedings conducted against his wife does not diminish the absurdity of the situation because there is always a possibility that the wife recognizes the completion of these actions i.e. a criminal offense which means that she would be sentenced. Therefore, the changes in the Criminal Code should be done in an extremely cautious way in order to avoid the opposite effect from the desired one.[31]

In order to harmonize the criminal legislation of Serbia with Istanbul Convention particularly important are the obligations concerned with psychological violence, stalking, physical violence, forced marriage, female genital mutilation, forced abortion, forced sterilization and sexual harassment. However, the most important and the most significant change relates to criminal offence of rape as Istanbul Convention requires that all the acts undertaken without consent even in those situations when any coercion has not been used at all shall be prescribed as a criminal offence of rape.[32] This implies that the compulsory element of lack of consent shall enter in the essence of that new criminal offence of "rape". In other words, each partner in a sexual intercourse from now on shall be obliged to give their consent because otherwise their male or female partner shall be within the criminal zone.[33]

Considering that the provision 36 of the Istanbul Convention does not result in the obligation to amend the existing law description of the criminal offence of rape as well as that it does not require the incrimination of all involuntary sexual acts not merely those undertaken by the application of coercion, while retaining Article 178 of the Criminal Code, it is necessary to prescribe a new criminal offence which, considering that the coercion has not been applied, would be less serious than the criminal offence of rape. This new criminal offence would have to include not only sexual intercourse and

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[29] *Ibid.*, стр. 190-191.

[30] Feminists, under whose influence the Istanbul Convention was and whose attitudes prevail in it, definitely did not have in mind this possibility.

[31] Delibašić V., *op. cit.*, стр. 191.

[32] If the principle was applied in other criminal offences as well, then any theft would become a robbery.

[33] Delibašić V., *op. cit.*, стр. 191.

an equal act but also other sexual acts undertaken against a person without their consent.[34]

In relation to the previous, also acceptable seems to be the solution that the existing less serious type (paragraph 2) shall be changed by a new less serious type regarding the non-consensual sexual intercourse when there are no characteristics of the basic type from paragraph 1 which would also cover the criminal zone of the current less serious type.[35]

Finally, it should be noted that the Proposed Law on Amendments of the Criminal Code which entered the parliamentary procedure on 15 November, 2016 contains only one change regarding the criminal offence of rape and that is the increase of the specific minimum sentence of imprisonment for the basic type of the criminal offence of rape from three to five years.

Conclusion

Starting from the Criminal Code from 1977 up to now the criminal offence of rape has undergone several changes in a way that the scope of actions subsumed under the essence of this criminal offence has been expanded and therefore the scope of persons who may be passive entities also expanded and prescribed sentences significantly increased. Bearing in mind that the rape is a central criminal offence in the group of criminal offences against sexual liberties as well as indisputably harmful consequences which are long-lasting and difficult to remedy, such tendency of the legislator can be accepted and defended by valid arguments.

In the past, the theory and practice took a completely wrong standpoint that for the existence of criminal offence of rape when the force is used, it was necessary that the resistance was provided from the part of a victim. The resistance should have been of certain quality and intensity and there was a requirement that the resistance had certain duration. In that way, theory and practice roughly and unreasonably changed the will of legislator who in the essence of the criminal offence of rape had never required (as indeed in the case of other criminal offences committed by coercion, such as robbery) from the victim to provide resistance. The criticism of such a standpoint of theory and practice has led to the right standpoint that for the existence of criminal offence of rape it is enough that offence is committed by coercion (threat or force) regardless of the fact whether the victim provided the resistance or not. Current legal solution as well as the standpoint of the major part of theory and practice is completely correct.

However, the criticism of the standpoints requiring from the victim to provide resistance resulted in the fact that some theorists have gone to other extremes and therefore have made a mistake arguing that every non-consensual sexual intercourse represents the criminal offence of rape. This standpoint constitutes the basis of the Istanbul Convention which Serbia has signed and therefore committed itself to incorporate its provisions into domestic legislation. Bearing in mind that this is a very sensitive issue, it is necessary to proceed with an extreme caution during fulfillment of the obligations arising from this Convention so as not to achieve the opposite effect from desired.

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[34] *Ibid.*

[35] Stojanović Z., Usaglašavanje KZ Srbije sa Istanbulskom konvencijom, *Dominantni pravci razvoja krivičnog zakonodavstva i druga aktuelna pitanja u pravnom sistemu Srbije*, Kopaonik, 2016, p. 26.

Literature

1. Aleksić Ž. - Škulić M., *Kriminalistika*, Beograd, 2004.
2. Atanacković D., *Krivično pravo posebni deo*, Beograd, 1985.
3. Bačić F. - Šeparović Z., *Krivično pravo posebni dio*, Zagreb, 1982.
4. Delibašić V., Krivično delo silovanje, *Arhiv za pravne i društvene nauke*, 2009.
5. Delibašić V., *U kandžama prostitucije - krivičnopravni aspekt prostitucije*, Beograd, 2010.
6. Delibašić V., Usklađivanje krivičnog zakonodavstva sa Istanbulskom konvencijom, *Evropske integracije i kazneno zakonodavstvo (poglavlje 23 - norma, praksa i mere harmonizacije)*, Zlatibor, 2016.
7. Ignjatović Đ., *Kriminologija*, Beograd, 2000.
8. Lazarević Lj., *Komentar Krivičnog zakonika*, Beograd, 2006.
9. Lazarević Lj., *Krivično pravo Jugoslavije posebni deo*, Beograd, 1995.
10. Memedović N., *Krivično delo silovanja u jugoslovenskom pravu*, Beograd, 1988.
11. Stojanović Z. - Perić O., *Krivično pravo posebni deo*, Beograd, 2003.
12. Stojanović Z., *Komentar Krivičnog zakonika*, Beograd, 2006.
13. Stojanović Z., *Međunarodno krivično pravo*, Beograd, 2004.
14. Stojanović Z., Usaglašavanje KZ Srbije sa Istanbulskom konvencijom, *Dominantni pravci razvoja krivičnog zakonodavstva i druga aktuelna pitanja u pravnom sistemu Srbije*, Kopaonik, 2016.
15. Tomković B., *Krivično pravo posebni dio*, Podgorica, 1998.