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JOURNAL OF EASTERN-EUROPEAN CRIMINAL LAW

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Journal of Eastern-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.

Any correspondence with the journal editors shall be sent with the mention for the JOURNAL of Eastern European Criminal Law at the following mail addresses: viorel.pasca@e-uvt.ro; gal.istvan@ajk.pte.hu

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LAUDATIO

In honorem magistri profesor doctor VALERIU STOICA

***Honoured Praesidium,
Distinguished members of the Senate of the West University of Timișoara,
Esteemed guests,
Dear colleagues, dear students,
Honoured audience,
Dear Professor Valeriu Stoica, Ph.D.,***

We are extremely privileged to draft this *Laudatio* in honour of Professor Valeriu Stoica, a distinguished figure of the academic world, one of the most valuable specialists in the field of civil law in Romania, on the occasion of the award of the honorary title of *Doctor Honoris Causa Legum Scientiae*, the most important honorary distinction of the West University of Timișoara, granted at the proposal of the Faculty of Law.

Professor Valeriu Stoica is a member of the academic body of the Faculty of Law of the University of Bucharest, a Ph.D. supervisor at the same university, a founding partner of the *STOICA & Asociații* Civil Society and the director of the *Romanian Journal of Private Law*. In the public space, he is known for having occupied the portfolio of minister of justice in the Government of Romania, held between 1996-2000, for the quality of president of the National Liberal Party, exerted in the period 2001-2002, for the dignity of deputy in the Parliament of Romania, with two mandates, won in 1997 and 2003. Professor Stoica also activated in the International Human Rights Institute in Strasbourg, the Council of Europe's Committee on Racism and Intolerance (1994-1996), in the Commission for Democracy through Law (Venice Commission, 1998-2002) and has served as an arbitrator at the International Court of Commercial Arbitration within the Chamber of Commerce and Industry of Romania (1993-2004).

Professor Valeriu Stoica started his professional career as a magistrate, from 1976-1987 having served as a judge at the 5th District Court of Bucharest and the Bucharest Tribunal, later on abandoning this career in favour of the academic one. Between 1991 and 1993, he was a professor and dean of the National Institute of Magistracy, an institution which was founded in 1991, through his efforts.

Professor Valeriu Stoica launched his academic career at the University of Bucharest, where he has been working ever since 1987. In 1997, he was awarded the title of Doctor of Laws for an exceptional thesis on the rescission and termination of civil contracts, for which he received the distinction *Magna cum laudae* and the "Mihail Eliescu" Prize of the Romanian Jurists' Union.

In 1991 he initiated the *Human Rights studies'* program at the University of Bucharest. Between 1990 and 1996, he prepared the teams of students who participated in the "René Cassin" International Human Rights Contest, organized by the *Juris Ludi* Association in Strasbourg, under the auspices of the Council of Europe. The results obtained under Professor Valeriu Stoica's wand were among the best: in 1993, the team from the University of Bucharest won the award for best participation from Central and Eastern Europe and, in 1996, the team won the first prize, whilst competing with 50 other universities from across the world. In 1997, Professor Stoica was invited to chair the grand jury of this contest.

In 1992, he was elected member of Council of the Human Rights Centre within the Human Rights Association, coordinating the first information meeting organized by the Council of Europe in Romania regarding the European Convention for the Protection of Human Rights and Fundamental Freedoms.

As a minister of justice, in the period 1996-2000, Professor Valeriu Stoica contributed decisively to the reforms that this field has made. Thus, he was the initiator of some normative acts that proved their necessity and efficiency, including Law no. 7/1996 on cadastre and real estate publicity, Law no. 54/1998 on the transfer and ownership of land, the title on the privatization of state-owned companies under Law no. 99/1999, as well as the reforms regarding the Civil Procedure Code, the new Tax Code and the new Tax Procedure Code. At the same time, Professor Stoica had a decisive participation in the elaboration of the new Civil Code, the backbone of the Romanian legal system. His contributions to the reforms of the regulatory frameworks exceed Romania's borders, as in 2002 he received the recommendation as an expert for the reform of the Ukrainian pledges law, in a World Bank project.

In parallel with his academic career, after 1990, Professor Valeriu Stoica practiced as a lawyer, establishing in 1995, together with Mrs. Cristiana Irinel Stoica, *STOICA & Asociații*

law firm, one of the leaders in the field in Romania. As the coordinator of this firm, he has been constantly recognized at the international level as one of the best litigation lawyers, the most recent distinctions being that of *Eminent Practitioner* (granted by Chambers Europe in 2017) and *Leading Individual* (in Legal 500, 2017 edition).

Professor Valeriu Stoica is the author of a landmark book, during the last decades, in the field of civil law, *Civil Law. Property rights*, published in two volumes at Humanitas publishing house, in 2004 and 2006. Being the first Romanian author to support and develop the role of potestative rights among the modes of acquisition of ownership, Professor Stoica revolutionized the doctrines concerning goods. Professor Stoica's theories on the patrimony, inalienability clause, real property accession, occupation, usucaption, the effects of good faith possession of personal property, apparent authority as an originary mode of acquisition of ownership, and the grounds for termination of contracts are unquestionable today, and adopted and developed by his younger disciples.

Professor Valeriu Stoica is a visionary of civil law, that he perceives and masters in its systemic evolution, understanding the importance of confronting ideas with practical experience. He has always linked research in the legal field to practice, considering that "theory without practice is empty and practice without theory is blind" and that "the legal space created by law cannot be one of freedom unless there is continuity, stability, predictability and coherence in the regulatory system".

Professor Valeriu Stoica has always offered the saving solution for the controversies in literature and court practice, approaching the science of law with the depth and rigor of the best researcher, his opinions being embraced by theoreticians and practitioners precisely because his exceptional intelligence was doubled and permanently guided by balance.

We all know the impact that the Law on debt discharge has had on the legal environment in Romania. In the context of the live controversies that this law has generated among law theorists and practitioners, Professor Stoica anticipated and proposed the solution that abolished the arbitrary and even abusive effects that the application of this deficient law would otherwise have had in practice, emphasizing the role of hardship in the context of the mechanism of debt discharge. His opinions, published in the volume *The Law on Debt Discharge. Arguments and Solutions*, at Hamangiu Publishing House, in 2016, were embraced by the Constitutional Court of Romania in a decision that was subsequently magistrally explained by the great professor.

Professor Valeriu Stoica is the coordinator of the most important civil law conference in the country, "Difficult Problems of Civil Law", an annual conference that today bears his name and discusses controversial issues that the eminent professor, with his sharp legal spirit and perfect logic, solves in the name of what is always just.

Starting this year, Professor Valeriu Stoica is the director of the *Romanian Journal of Private Law*, one of the most popular legal publications in the country. This prestigious journal has dedicated him all its 2013 issues, as a tribute to his excellent scientific work.

The significant books written by Professor Stoica are complemented by publications that include analyzes in different areas of law (civil law, commercial law, private international law and human rights), and by various political analysis.

It is impossible to talk about Professor Valeriu Stoica without emphasizing the major role he has played in reforming the liberal doctrine in Romania and in the leadership of the exponential parties adhering to this doctrine. As Professor Corneliu

Bîrsan used to say, the merit of Professor Stoica as a politician is an incontestable fact, for he is one of the few Romanian politicians who have elaborated ideas and political concepts appropriate to their country's social and political context. In our view, his presence on the current political stage nowadays is missed.

A fine researcher of civil law, a skilled practitioner, an outstanding professor, passionate about poetry and politics, Professor Stoica is, above all, a pillar of the law in Romania in the last decades, reforming the doctrine and practice of civil law, to which he has given coherence and predictability and which he has made accessible and flexible, shaping it with the force of his thinking and offering us his interpretations with the generosity of a veritable mentor.

The legal environment in contemporary Romania bears the unmistakable mark of Professor Valeriu Stoica, and it is a great honor for all of us to welcome him in the academic community of the West University of Timisoara. The honorary title granted to Professor Valeriu Stoica today is a concrete example of the successful collaboration between the West University of Timisoara and prestigious academic institutions, as well as a proof that science is remarkable bond, one of the most important elements of human crystallization.

We are honored that, by awarding you this title, we contribute to strengthening the relationship between our institutions. We are glad to honor the scientific work of an exceptional lawyer, whose reputation is well known both in Romania and in the international academic community.

In the light of these considerations, the proposal of the Faculty of Law of the West University of Timisoara to award the honorary title of *Doctor Honoris Causa Legum Scientiae* to Professor Valeriu Stoica is fully justified.

Dear Professor Valeriu Stoica,

We welcome your presence today within our academic community, occasioned by the award of the honorary title of *Doctor Honoris Causa Legum Scientiae* by the West University of Timisoara, for the recognition of your remarkable merits in the development of Romanian law.

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A Few Thoughts on Justice and the Legal Imagination

Valeriu Stoica

We know from Hegel that the desire for recognition is the engine of everyone's life. He also discovered that the foundation stone on which our personality is built, and from which originates this desire for recognition, is the appropriation of one's own body, the only perfect synthesis between being and having (the intuition of such synthesis was first imagined by the English who, a long time before, in the *habeas corpus* procedure, consolidated in 1679 by the Habeas Corpus Act, but shaped throughout a long evolution, which started in 1166, with Assize of Clarendon and was completed in 1862). It would not, however, be possible to fulfil this desire without an area of freedom, identified by Hegel in the form of the Prussian state, as *staatsrecht*. In the middle of last century, Alexandre Kojève, perhaps the most subtle among the thinkers who developed the conceptual infrastructure of the European construction, was animated by this Hegelian idea; for him, the unification of the old nations within a new European homeland meant, first of all, the widening of the area of freedom in order to increase the chances of fulfilling the desire for recognition. At the end of last century, excited by the implosion of the communist system, Francis Fukuyama hastened to proclaim the end of history (another Hegelian idea) and the reign of freedom in a globalized world; Hegel's late disciple, this American-born philosopher of Japanese origin associated the end of history with the last man, so that the desire for recognition could have been accomplished - from that moment on - within an area of freedom extended to the size of the entire planet. *Nota bene*: none of these philosophers understood that the fulfilment of the desire for recognition of a single man would require the gradual expansion of the area of freedom, until it reaches a global dimension; this extension would only be a prerequisite for everyone - irrespective of their ties of belonging (ethnic, racial, national, religious or cultural) - to have access to the area of freedom in which it is possible to achieve this desired goal of recognition. It is easy to identify in this evolution the utopian project of the universal republic, present, explicitly or implicitly, at first in the ideology that triggered the French Revolution, then, on a larger scale, in the ideology that prepared the Bolshevik Revolution, and finally, in the globalized ideology of political correctness. The desire for recognition is not to be blamed for this evolution; the "guilty" one is the rational fervour that nourished the utopian project for a universal, undifferentiated space of liberty, capable of dissolving the boundaries between diverse, and, often, adverse community identities. It is reasonable to believe that, for the fulfilment of our desire to be recognized, we need an area of freedom, but it is equally reasonable to associate the realization of this desire with the virtues of those who recognize and those who are recognized, as well as with a decent state of prosperity, understood not as a target, but as a premise on which the natural efforts to find and identify the personality's river bed can be grounded.

It is no coincidence that today I share with you these thoughts about the desire for recognition.

Being awarded the *honoris causa* title by the West University of Timișoara is, for me, undoubtedly, a sign of recognition of what I have done so far in the field of law. Many a times, those who recognize are more virtuous than those who are being recognized. Anyway, modesty should prompt us not to accept any kind of recognition.

Otherwise, we would be lured by the temptation of vainly glory, a sinful capital against which St. John “golden-mouthed” Chrysostom railed with grace and a verb of fire. But, today, it is not about any kind of recognition, but one that honours me deeply since it comes from an elite institution. The prestige of the academic community of this university, as well as that of the entire academic community from Timișoara, is associated with the prestige of a city that was not only a capital of a kingdom and a Pashalik, but also of a region which, beyond its exemplary multiculturalism, managed to preserve the Romanian identity. The area of intellectual freedom, built and perpetuated in Banat and its capital, Timișoara, made it possible to revive the sentiment of national dignity at a time when it seemed to be lost forever. From December 1989 until today, the citizens of this city have associated virtue, freedom and prosperity in order to offer to the whole of Romania a model appropriate for the fulfilment of the desire to be recognized. That is why, without abandoning modesty, I am glad to be awarded this title, especially as in the academic community of the University of the West there are friends and professors whom I cherish: Ion Lulă, Mircea Mihăeș, Marcel Tolcea, Vasile Popovici, Daniel Vighi, Victor Neumann, Radu Motica, Silviu Cernea, Lucian Bercea, Irina Sferdian, Loredana Pungă, and, beyond the boundaries of this community, I have friends who make me feel at home in Timișoara: Eugen Ciorăcă, Andrei and Delia Herzeg, Alexandra Răzvan and Florian Mihalcea.

Although united in the Timișoara model, virtue, freedom and prosperity have long been, and still are today, dissociated in the moral, political and legal thinking about justice. More specifically, each of these three elements has established a distinct model of justice and, implicitly, of the most appropriate form of society to fulfil the desire for recognition.

The most succinct description of the first model of justice, the one based on the idea of virtue, was given by Ulpian, in a text kept in Justinian's *Digest*: *Justitia est constans et perpetua voluntas jus suum quique tribuere. Juris praecepta sunt haec: honeste vivere, neminem laedere, suum quique tribuere.*

The repetition of *suum quique tribuere* in two different phrases does not have a stylistic function only. In the first phrase, the syntagma is related to justice, understood not as an institution, but as equity, righteousness. Understanding righteousness as a constant and perpetual will to give everyone what is right brings to light the moral significance of this notion. Before being a legal value, justice is a moral value, and the will to constantly pursue justice as a goal is merely an expression of the virtue of pursuing good as the ultimate goal of life. In a similar, but more direct sense, Celsus, quoted by Ulpian in another text from *Digest*, has defined law (*jus*) as *ars boni et aequi*. In other words, the law would lose its moral foundation if it were founded only on the idea of equity, abandoning the good as an ultimate goal. In order to preserve its function of creating order in the city-state, justice must be a form of accomplishment of the good. Thus understood, the first sentence from Ulpian's text is a takeover, in the lapid form specific to the Latin language, of the conception on justice that Aristotle puts forth in the 5th Book of his *Nicomachean Ethics*.

Before building up the architecture of the concept of justice, Aristotle emphasizes the natural connection between virtue and the practice of virtue. It is not enough that the acts performed according to virtue “possess in themselves the respective qualities in order to be accomplished”; furthermore, the one who acts “must do so in a certain way: firstly, by being aware of what they are doing, and then by having a precise intent, namely, to perform that act in accordance with virtue, and thirdly, by performing that

act with great firmness". Only in this way "any virtue, in its quality of virtue, perfects the possessor, as well as their work". Only the one who practices virtue "could become a virtuous man". In this context, righteousness as virtue is "the moral disposition by which we are fit for acts of righteousness, and by virtue of which we actually accomplish them or wish to accomplish them". But righteousness is not just one of the virtues; it is, as the philosopher says in a poetic language, "a sovereign of all virtues, brighter than the evening stars, brighter than the daylight", while also quoting a proverb "justice concentrates in itself the whole virtue", and then it adds: "Justice is not a part of virtue, but virtue in its entirety...; injustice is not only a part of vice, but vice in its entirety". A special reason justifies this position of righteousness as sovereign of all virtue: "He who possesses it uses his virtue also for the sake of others, not only for himself". And then, Aristotle resumes and strengthens this idea: "Justice is the only virtue that does something good for another, manifesting itself in favour of another". It is the point where justice as a moral value meets with justice as a legal value.

Since morality aims at perfecting and harmonizing inner life, its norms and values relate to the relationships we have with ourselves. It is the luminous significance of Kant's famous saying "The starry heaven above me and the moral law within me", words also written on his funeral stone in Königsberg (it is still an irony of history the fact that the city where he was born, where he lived - without ever travelling beyond its borders - and where the German philosopher died, is today called Kaliningrad). However, as virtue and moral value, justice does not only relate to the relationships we have with ourselves, but also to the relationships with have with others, thus entering into the regulatory field of the law, which pursues the harmony of the city-state. Therefore, justice is aimed both at the harmony of inner life and that of the city-state.

For this reason, Ulpian emphasizes in the first sentence of the quoted text the moral and legal, double senses of justice, and in the second sentence, its legal dimension, transposed into three rules. *Juris praecepta sunt haec: honeste vivere, neminem laedere, suum quique tribuere.*

For the Romans, as well as for the ancient Greeks, the moral foundation of the law was self-evident, so that it was not unnatural at all for a moral value to be explicitly included in the legal rules. Aristotle himself states in "Nicomachean Ethics": "the legislators make the citizens become good, by accustoming them to the good ...; there lies the difference between good and bad law". And then he concludes: „For justice exists only between men whose mutual relations are governed by the law ... This is why we do not allow a man to rule, but rational principle, because a man behaves thus in his own interests and becomes a tyrant ... He who is vested with authority is the guardian of justice". One could easily recognize in these words the roots of the modern concept of supremacy of the law, whether asserted in practical terms, as English law does (rule of law), or in rather theoretical terms, as under German law (Staatsrecht) or French law (L'Etat de droit).

The double reflection of justice, in our relations with us and with others, allows the mathematical expression of the criterion of justice, respectively of equality. By identifying this criterion, Aristotle begins building the architecture of the concept of justice. It is easy to say that justice means to give to each his own, but it is harder to answer to the question: what is one's own?

To answer this question, starting from the equality criterion, Aristotle states that justice functions as a middle term between two pairs of terms: two things and two people. Equality is this middle term. Mathematically expressed, equality, as a criterion of

justice, is not only purely arithmetic but also proportional. Proportional equality better reveals its meaning in the context of the two types of justice described by the philosopher: distributive justice and corrective justice.

In case of the first, the distribution of what is to be allocated will be based on merit. Everyone's part is equal to what they deserve. The criterion of justice functions in this case as proportional equality. There are thus two criteria when it comes to distributive justice, that of merit and that of proportional equality. Today we would say that, from the viewpoint of substantive law, distributive justice is applied in hierarchical structures such as labour contractual relations, corporate entities, public administration, competitions and exams in the education system and competitive activities.

Corrective justice will apply whenever there is an imbalance in equality relations, so that one person gets a benefit to the detriment of another, and this appears as an injustice. Aristotle said that it is better to suffer injustice than to cause it to another. By this idea, Nicomachean Ethics anticipates the ethics of Jesus. To restore equality, it is necessary to repair injustice. As in the case of distributive justice, there is also a second criterion in this case, but not of merit: the idea of equality is doubled by the idea of reparation or, more generally, by the idea of sanctioning. In current terminology, it would either be the case of tort or contractual liability, or of a relation arising from a lawful legal fact, which implies an obligation upon the recipient to make restitution, or of criminal or administrative sanctions.

Corrective justice presupposes the existence of the judge, as an intermediary, respectively as a middle term between plus and minus, that is, between the one who suffers injustice and the one who causes injustice or benefits from it. It follows that, by default, corrective justice has not only a substantial meaning, but also a procedural one.

The equality criterion is emphasized by Aristotle through the etymological meanings of the used terms: *dikaion* means not only just, but also division into equal parts; *dikha* means equal parts; *dikhaion* means divided into equal parts; *dikastes* means judge, *dikhastes* means the one who divides in two.

Equality is therefore the common criterion for both distributive and corrective justice.

In addition, this criterion also works in reciprocal relations. Although Aristotle does not state it expressly, it follows that he has in mind the third sense of justice, which we can call mutual justice. After recalling the Pythagorean idea that "It is right to suffer in your turn the wrong that you have done to others", a formula in which we recognize the law of talion, Aristotle specifies that economic activity is the true field of reciprocity "as an exchange governed by the principle of equality" through the common unity of measure that is the currency. The legal form specific to this activity of economic exchange, based on reciprocity, is, as we would say today in the terms of civil law, the onerous, commutative *synallagmatic* contract.

In all these three, distributive, corrective and reciprocal meanings, "justice is a kind of mean... because it relates to an intermediate amount, while injustice relates to the extremes."

Reuniting these three concepts, which configure the architecture of the concept of justice as a legal value, and the idea of virtue, Aristotle returns to the moral meaning of the concept. The definition he elaborates is comprehensive for both of the dimensions: "justice is that in virtue of which the just man is said to be a doer, by choice, of that which is just, and one who will distribute either between himself and another or between two others not so as to give more of what is desirable to himself and less to his

neighbour (and conversely with what is harmful), but as to give what is equal in accordance with proportion; and similarly in distributing between two other persons”.

Aristotle's concept of justice underpins Roman law, and it preserved its relevance for a long time, to the the fall of the Western Roman Empire, and of the Eastern Empire, in its Byzantine form, and long after, throughout the Middle Ages, as Roman law was applied, directly or indirectly, in many parts of Europe, beyond the borders of the state that once created it.

In modern - moral, political and legal thinking - Aristotle's concept of justice gradually lost its influence, though it is still to be found, in more or less disguised forms, in most codes of the Romano-Germanic legal system. It is modern Anglo-Saxon thinking that has especially contributed to the development of a new concept of justice.

The theory of justice based on the idea of prosperity, called utilitarianism - elaborated, in its classical form by Jeremy Bentham, James Mill (father) and John Stuart Mill (the son) - states that just actions are the ones that provide the greatest good possible for most members of the community, thereby maximizing the benefits of these actions.

The idea of freedom has founded distinct concepts of justice. It could not have been otherwise, as liberalism is an extremely diverse family of thought, covering a broad doctrinal area, from left to the right, which explains why the concepts of justice based on the idea of freedom are sometimes opposed to each other. In the United States, especially, a net polarity occurred between left-wing liberalism, a promoter of egalitarianism, on the one hand, and right-wing liberalism, called libertarianism, a promoter of the minimal state, on the other. John Rawls's theory of justice, drawn from the position of left-wing liberalism, opposes the concepts of justice elaborated by Robert Nozick, a radical libertarian, and David Schmidtz, a moderate libertarian.

John Rawls believed that differences in democracies are natural, and that liberal society is only possible if one recognizes the existence of comprehensive, conflicting and irreconcilable doctrines, on the one hand, and one identifies the constitutional foundations that allow for the coexistence of these doctrines. From this perspective, liberal society must be founded on mutual recognition. The recognition, as an official doctrine, of a set of values and principles, with the consequence of cancelling other doctrinal identities and ideological heterogeneity, would contradict the very foundations of liberal society. It follows that justice implies respect for human rights, with all the involved identity diversity. John Rawls, however, makes a distinction between reasonable and unreasonable comprehensive doctrines, the former agreeing, and the others disagreeing with the constitutional foundations of society, but he is not further preoccupied with finding a solution to the conflict arising from this disagreement. Instead, he builds a theory of equal spaces of freedom for all individuals, with the consequence that the emergence of inequality justifies redistribution for the disadvantaged. The theory of equal freedom spaces is doubled by the theory of positive discrimination.

Robert Nozick and David Schmidtz prove, with different but convergent arguments, that not all inequality is unjust, but only that whose sources are unjust. The concept of justice cannot solely be based on the criterion of equality and, to a lesser degree, on egalitarianism. David Schmidtz especially develops a theory of justice based on a plurality of criteria.

In addition to equality, other criteria are to be regarded - either complementary or separately, according to the context taken into consideration - such as the criterion of merit, the criterion of reciprocity or the criterion of need. I share this author's

preference for the criterion of reciprocity, emphasized, as we have already seen, by Aristotle as well, but this time considered autonomously, and not as a mere complement to equality. Schmitz's thesis is that "No single principle is more than an element of justice. Principles of reciprocity, though, are the core of a just society". Unlike Aristotle, who understood reciprocity as a way in which the parties maintain their initial position, without any loss or gain, the only hypothesis compatible with the criterion of equality, David Schmitz highlights the reciprocity's role in increasing cooperation, that is, a mutually beneficial exchange. This understanding of reciprocity explains, to a great extent, the potential of capitalism to create prosperity. Moreover, without necessarily implying the absolute equality of reciprocal benefits, exchange is the binder that gives cohesion to any kind of community, not only in economy, but also in culture and in political organization. Societies based on constitutional democracy and on market economy are just due to the freedom of their individuals, which is not only guaranteed, but exists in the patrimonial and non-patrimonial communication relations between individuals, through which they mutually enrich. In this way, justice is associated not only with freedom, but also with prosperity.

Are these modern theories of justice - based on either the idea of prosperity or the idea of freedom - incompatible with the concept of justice, founded on virtue, as envisaged by Aristotle, Ulpian and Celsus?

I gave a partial answer to this question in 1999, at a conference entitled "Moral and Institutional Reform" held at the Institute of Liberal Studies. My starting point then was the way in which Kant defines virtue, calling upon the idea of courage. Just as courage is the well-thought determination to oppose the action of another brave and powerful, but unfair man, virtue is the will to face the unjust action of the enemies existing in our own selves, which implies an inner dialogue, that is, the discovery of our own moral knowledge. Only in so far as we are talking to ourselves, confronting our inner enemies, we have the possibility to discover *alterity*, which may be either a friend or an enemy. From this perspective, *virtue* is precisely the power to confront our inner enemies, in order to gain the moral competence to face our external enemies and their unfair actions; we must first face the unfair action of ourselves, in order to later face the unfair action of the outside world.

Such an interpretation of virtue is not incompatible with the concept of justice founded on the idea of freedom. Ultimately, the area of freedom cannot be built without virtues and values compatible with this idea, such as tolerance, dialogue, trust, contract and property. Certainly, liberal ethics is a minimalistic one, for, while defending these values, it remains neutral in relation to other sets of moral values shared by different groups in society. This type of ethical minimalism avoids the danger of ethical maximalism, that is, of any ideological or religious fundamentalism. At the same time, I used to affirm that ethical minimalism must not be mistaken for indifference, which is as dangerous as fanaticism.

I must confess that, although I have not lost the liberal beliefs I used to embrace twenty years ago, they have clearly been tempered by an increasingly conservative perspective I have acquired, not only due to age, but also to a series of events I have witnessed in the last two decades. The nature of these events and the accelerated rhythm in which they have taken place opposed the idea of "the end of history" and revealed new and dangerous forms of injustice, in Romania as well as in Europe and all over the world. I do no longer believe that the minimalist and neutral ethics is always an effective way of preserving our national identity and the identity of the European

culture and civilization, or of coping with the aggressions threatening them. Ultimately, beyond the neutral values of tolerance, dialogue, trust, contract and property, there are other values showing that we belong to both these identities. All these values must be defended, for those defining our European identity cannot survive without those expressing our national identity. And the law - without becoming an instrument for regulating moral principles - has to be based on the values of both categories. Otherwise, we will be the sad spectators not only of the disintegration of national identities, but also of the loss of the Euro-Atlantic identity and civilization. Respect and tolerance towards others are indeed defining virtues of both the national and the European constitutional and legal space, but in order for this true homeland of ours not to dissolve in the future, we must redeem the virtues promoting the feelings of national and European affiliation. Certainly, the revival of these feelings must not be aggressive, but only defensive, aiming at protecting the identity of the European culture and civilization as well as of the national identities comprised in it: *si vis pacem, para bellum*.

I also believe, following an idea expressed by Mircea Dumitru, that a concept of *justice* based on a variety of criteria, acting jointly or separately, depending on the context, and bringing together *virtue, freedom and prosperity*, is to be sought. Such a concept cannot, however, be applied in an abstract space, without identity determinations; it is functional only within concentric community identities, starting from the narrower ones, such as the family and the neighborhood, continuing with the village or the city we live in, and eventually climbing up to the national and the European community.

But no matter how comprehensive a theory of *justice* is developed, it remains inefficient in the absence of *legal imagination*. Freedom, prosperity, equality, merit, need and reciprocity are not rigid units for the measure of justice. They can be operational only through the virtues of those who are animated by the ideal of righteousness. Legal imagination is the ferment and the catalyst through which these virtues can make justice in a given context. All jurists must have legal imagination, regardless of their specialty and the position they occupy. Legislators must have legal imagination. The administration must have legal imagination. Judges are, however, the most important characters in the work of doing justice. In the adagio *Justitia est fundamentum regnorum*, the term justice has both the meaning of righteousness and the meaning of institution meant to accomplish it.

This is why judges must, first and foremost, be animated by the virtue of equity, which is the vector of legal imagination.

Let us go back to Aristotle now. For him, equity is the superior form of justice: "And this is the nature of the equitable, a correction of law where it is defective owing to its universality. In fact this is the reason why all things are not determined by law, that about some things it is impossible to lay down a law... For when the thing is indefinite the rule also is indefinite... It is plain, then, what the equitable is, and that it is just and is better than one kind of justice". Moreover, the Stagirite defines the nature of the equitable man: "the man who chooses and does such acts, and is no stickler for his rights in a bad sense but tends to take less than his share though he has the law on his side, is equitable, and this state of character is equity, which is a sort of justice and not a different state of character".

Even though Aristotle does not use the notion of *legal imagination*, it is obvious that the way in which he defines equity implies legal imagination.

Much later, Edmund Burke will use the concept of "moral imagination" in his "Reflections on the Revolution in France" (1790). This is a book which he speaks about "the super-added ideas, furnished from the wardrobe of a moral imagination, which the

heart owns and the understanding ratifies as necessary to cover the defects of our naked, shivering nature, and to raise it to dignity in our own estimation". And later on, Russell Kirk, a profound conservative American thinker, will resume and develop the concept of *moral imagination*, defined as "that power of ethical perception which strides beyond the barriers of private experience and momentary events... The moral imagination aspires to the apprehending of right order in the soul and right order in the commonwealth".

If Edmund Burke has properly appreciated that moral imagination is manifested at a higher level in poetry and art, and Russell Kirk added that "moral imagination was the gift and the obsession of Plato and Vergil and Dante," we can nowadays add, following Aristotle, that legal imagination, the pendant of moral imagination, must be the gift and the obsession of jurists, in general, and of judges in particular. And all of them must always return to the cultural sources of justice, the only ones able to feed legal imagination.

In conclusion, the virtue of justice and the legal imagination are consubstantial. This is how they are depicted in the *Sermon on the Mount*, which is reproduced in the Book of Matthew, in the passage of the *Beatitudes*: "Blessed are they which do hunger and thirst after righteousness: for they shall be filled.... Blessed are they which are persecuted for righteousness' sake: for theirs is the kingdom of heaven."

Inadmissibility of notification to the High Court of Cassation and Justice in order to obtain some preliminary rulings on matters of criminal law – a prerequisite for the reflection process on the formulation of questions that become the subject to notification

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Abstract:

The introduction in the Code of Criminal procedure of a new legal institution, which has consolidated the mechanism of providing consistent legal practice consisting in notification of the High Court of Cassations and Justice in order to give a prior decision for solving some matters of law gives through means of the court resolutions rendered, consistency to the process of interpreting and application of legal dispositions of criminal nature that were the object of such a notification.

This new legal institution has led to a relatively large number of jurisprudence cases by offering solutions for admitting the complaints formulated, but also solutions for rejecting some complaints as inadmissible.

The solution of rejection as inadmissible of the notification, might bring us to the conclusion that there appear negative consequences over the process of uniformization of legal practice, which cannot be sustained, as decisions from the supreme court, on the considerations exposed have highlighted what exactly has determined the ruling of such a decision, imposing a need for a careful conduct on behalf of the court of notification regarding the way in which the question is formulated and a more careful analysis of the conditions stipulated in the paragraph 475 from the Code of Criminal Procedure.

The existence of a jurisprudence of the judge panels for solving legal matters regarding the rejection solution, as inadmissible of the notification of the High Court in the period May 2014 - May 2017 has been a preoccupation for us and it is at the core of the present study, with the goal of contributing to the improvement of the process of ensuring a consistent legal practice.

Key words: *solution, inadmissibility of the intimation, consistent practice, type of formulation, conditions, conduct of the court of law in charge with instituting the proceedings.*

I. General considerations

During the broad reform process that has taken place in recent years for the criminal law proceeding activity in Romania, there have been changes at institution level and at legal dispositions level, following the entry into force of the new Criminal Code and the Code of Criminal Procedure on February 1st 2014, that both of them contain new approaches, by introducing new institutions of substantial criminal law but also some of criminal procedure law.

Referring to the latter one it may be included here those facts that constitute Section 2 "Referral to the High Court of Cassation and Justice, with the purpose of issuing a preliminary decision for legal ruling" from Chapter VI: "Dispositions on ensuring a consistent legal practice" from Title III "Judgment".

This legal institution along with the recourse in the interest of law is subject to regulations, however being meant, through court procedure, object, content and effects of the decisions, through the termination or modification of the effects of the decision, to ensure a much more efficient and faster interpretation of a legal dispositions, which is therefore a matter of law, on whose explanation depends the resolution on the merits of the case in which the notification was formulated to, which gives a new dimension over the judicial process meant to ensure uniform and consistent practice in relation with another mentioned judicial institution.

The need for such a tool for interpretation of laws has been assessed as a result of the fact that the appeal in the interest of the law, has as its main objective the pronouncement by the High Court of Causation and Justice on matters of law that have been dealt with differently by courts, through final decisions, which triggers a longer process of analysis and with effects and consequences in the future.

However, in order to give a prior decision on issues of law, as it is regulated, it ensures the legal interpretation of the less clear legal provision, in a reasonable timeframe, subsequently the Court which notified, pronouncing the judgment in relation to the interpretation of the Supreme Court, which ensures a consistent and clear solution in the application of law.

In the case of this legal instrument aimed at ensuring a unified practice there is coordination, in real time, between the competent court of law and the court in charge with the interpretation and consistent application of the law, in order to effectively ensure the justice act, in accordance with the specific competencies of each of the courts.

Following the court proceedings over the notifications with which panels for solving matters of law have been invested, these have given two types of solutions, either some of admittance, that led to the interpretation of the unclear disposition, which was subject of the notification, existing previously to the process of interpreting the legal matter, an examination over the admissibility of the notification, from the perspective of fulfilment of the express conditions shown in paragraph 475 from the Code of Criminal Procedure, either some of rejection, as unacceptable of the notification, as a consequence of unfulfilling one of more conditions from the contents of the mentioned norm, which has as a consequence, failure to analyse the object of law for which the supreme court has been notified.

In the case of the second solution that may be pronounced, namely the one of rejecting the notification on grounds of being unacceptable, as we are going to demonstrate on the occasion of our research, we will emphasize the fact that the High Court of Cassation and Justice has brought arguments for the failure of fulfilling the

conditions from paragraph 475 from the Criminal Procedure Code, having a variety of aspects related to the interpretation of one of the prerequisites stipulated by the law maker in order to be able to rule on the matter of law, even offering criteria for examination by the referral court, resulting in a reflection on how questions are formulated on the question of law to be solved at the competent court. We believe that such analysis might guide competent courts to ask questions related to solving of law issues in a clear, concise manner on whose clarification depends the settlement on the merits of the case for the question in which the notification was issued.

II. Contents

The law maker has regulated within the contents of paragraph 475 from the code of Criminal Procedure referring to the object of notification, express conditions, cumulative and imperative, some with a positive character, while some of negative character, regarding such aspects as: the procedural stage when the notification may take place, competent courts that may formulate the notification, the type of the question of law and the consequence that this will have over the merits of the case, as well as the inexistence of a resolution given at the previous High Court of Cassation and Justice, either by a prior decision, either by recourse in the interest of law, absence of any recourse in the interest of the law currently pending to be resolved.¹

Throughout this study we do not intend to make some kind of quantitative or percentage evaluation of the importance and weight of the rejection solution, dismissed as inadmissible of the notification, in relationship with the solution of acceptance, that has its role by all means, but with this study we are aiming to analyse the conditions that the courts have violated and which have made the Supreme Court, to reject, as inadmissible the notification.

Thus, regarding the condition concerning the nature of the courts that may appeal to the supreme court, the lawmaker has ruled that only “a panel of judges from the High Court of Cassation and Justice, of the court of appeal or the courthouse, invested with resolving the case as a last resort... will be allowed to request from the High Court of Cassation and Justice to deliver a judgment through which to offer a solution in principle to the points of law for which it has been notified”.

By examining the decisions given, in one decision² it was mentioned that “the sentence by which the appeal court resolves the appeal against execution introduced

¹ Art. 475 reproduced as it has been modified by art 102 point 284 from Law nr 255/2013, respectively the „Subject of Notification” Regulating the conditions of admissibility of the motion. If, during the trial, a panel from the High Court of Cassation and Justice, appeal court or court house, entrusted with solving a case as a last resort it is ascertained the existence of an issue of law of whose settlement depends the ruling of the case and upon which the Supreme Court has not ruled yet by a prior decision or an appeal on points of law nor is subject to any such appeal, to refer the matter to the High Court of Cassation and Justice in order to give a ruling by which to settle as a matter of law principle the given legal issue.”

² Decision nr. 18 from 4th June 2015 of the panel of judges from Criminal Division of the High Court of Cassation and Justice for solving legal matters pertaining to criminal law in the file number 1.098/1/2015 by which it was rejected as inadmissible the notification issued by the Appeal Court from Galați – Department for criminal cases and for cases involving under age in court file nr. 93/44/2015 regarding the issue of preliminary ruling for deciding in relation to certain points of law in the criminal matter: “Given the case of people tried and finally convicted in Italy, who were transferred to Romania to continue the completion of their sentence and who benefit from the early release ordinance, the

against a decision of acknowledging a decision given in a member state of the European Union through which it was disposed to transfer the convicted person to execute the prison sentence in a Romanian penitentiary can be challenged by appeal, the law enforcer providing for the rule of double jurisdiction. Thus, the High Court notices that the Court that has made the notification, namely the Appellate Court of Galati, has not judged the case as the last resort, therefore not being fulfilled the first imperative condition imposed by the dispositions of art 475 from the Criminal Procedure Code.”

In another decision³, it was stated that reporting the notification on giving the preliminary ruling to prerequisites imposed by article 475 from the Code of Criminal Procedure, it is noted that previously mentioned prerequisites are not cumulatively fulfilled in the sense that, although the notification is given related to an ongoing trial (Court Case nr 10.640/196/2015 from Panciu Courthouse) and the matter of law referred to is not subject to a recourse in the interest of law, and the High Court of Cassation and Justice has not ruled any decision about the legal matter that is subject to the notification, condition imposed by art 475 from the Criminal Procedure Code is not to be found in the present case, as the notification of the High Court, supreme instance has been issued by a district court. Thus from writing of the aforementioned legal text it becomes clearly that a panel of judges belonging to a district courthouse cannot notify the High Court of Cassation and Justice with a view of getting a preliminary decision, even if the respective legal actions are to be judged ultimately at the district courthouse.

A further condition stipulated of a negative nature that may conduct to the notification of the High Court of Cassation and Justice, with a view to rule a preliminary decision is that the supreme instance not to have previously decided through a previous decision over the legal matter with which it is again notified and asked to solve.

So, within one decision it has been argued that ⁴ “In conclusion, Decision nr. 7 from 2nd March 2016 of the High Court of Cassation and Justice – the panel for criminal law

duration of early release is deducted from the imposed sentence, as it is viewed and considered as time served when calculation is performed for the mandatory minimum part needed for granting conditional release, according to Romanian law, should not exceed the date of early release according to the Italian legislation.” published in Official Gazette of Romania, Part I nr 538 from 20th July 2015.

³ Decision no. 23 of October 25, 2016 of the panel for legal matters within the Supreme Court of Cassation and Justice, file no. 2608/1/2016 dismissing, as inadmissible, the complaint filed by the Panciu District Court in file no. 10.640 / 196/2015, requesting a preliminary ruling on the following principle: "if, in application of the provisions of Art. 264 of the Code of Criminal Procedure with reference to Art. 269 paragraph (4) of the Criminal Procedure Code, it is compulsory for the postman to communicate the procedural documents within 24 hours of receiving the documents for communication ", published in the Official Gazette, Part I, no. 1003 of December 14, 2016.

⁴ Decision no. 12 of April 25, 2017 of the panel for legal matters within the High Court of Cassation and Justice in file no. 389/1/2017 dismissing, as inadmissible, the complaint filed by Ialomița District Court in File no. 4.953 / 312/2016, requesting a preliminary ruling on the question of law: "If, in application of the provisions of art. 585 par. (1) Letter. A) of the Criminal Procedure Code, in the case of a plurality of offenses consisting of an offense for which, according to the previous Criminal Code, a punishment with suspension under custody of the execution was imposed according to art. 86 1 of the previous Criminal Code and, respectively, an offense for which, according to the new Criminal Code, a punishment with suspension under custody of the execution under art. 91 of the Criminal Code, the establishment and execution of the punishment following the cancellation of the suspension under supervision shall be carried out according to art. 16 par. (1) of Law no. 187/2012 referring to art. 86 5 par. 1 of the previous Criminal Code or according to art. 97 of the Criminal Code referring to art. 583 of the Criminal Procedure Code, with the consequence of the modification of the method of execution of the punishment for the first time during the execution ", published in the Official Gazette, Part I no. 412 of 31 May 2017.

matters offers not only the criteria based on which the referring court may establish the applicable criminal law for the sanctioning treatment in the case of a multitude of offenses similar in nature to the one retained by submitting a document instituting the proceedings, but also even the solution for this legal matter. In this context, to make a new preliminary ruling on the issue of the law applicable to a variety of offenses of the kind of the incidental one means in fact, to resume, using substantially similar terms, the solving of the legal matter that has already been given a plurality of offenses such as the one in question means practically resuming, in substantially similar terms, the solution already given to the question of law by an earlier decision of the Supreme Court, which is contrary to a requirement of admissibility expressly provided by Art. 475 of the Code of Criminal Procedure.

Ensuring the compulsory character of the solution of the questions of law on which the Supreme Court has ruled within the mechanism of the preliminary ruling expressly acknowledge by art. 477 par. (3) of the Code of Criminal Procedure implies not only the future compliance with the requirements of the decision, but also the proper application of all the legal reasoning which necessarily preceded it.

Preliminary rulings resulting from the unification of practice provided by Article 475 of the Code of Criminal Procedure contain resolutions of principle of legal issues, clarifying the way in which the legal provisions which generated that problem are to be interpreted in the future.

The solution of the Supreme Court is therefore applicable not only to the case in which the mechanism of unification of the practice under consideration intervened, but in all cases where a substantially similar question of law arises and where the particularities of the procedure under consideration do not significantly affect the coordinates of that law problem”.

In another decision⁵, it was essentially stated that "in regard to a condition of a matter of law on whose clarification depends the solution on the substance of the case pending at the referring court.

In this regard it is retained that the notification should aim to obtain an interpretation *in abstracto* of determined legal dispositions, and not the implicit solution of some issues that are connected to the specificity of the case in its substance referring to legal dispositions (interpreting art 175 from the Criminal Code regarding the profession of medical doctor) that formed previously the subject of the same procedure (decision nr 14 from May 12th 2015, given by the High Court of Cassation and Justice (HCCJ) – Division for Criminal Law, published in the Official Monitor of Romania, Part 1 nr 454 from June 24th 2015).

⁵ Decision nr. 5 of 28 February of the panel from the High Court of Cassation and Justice, in the court case 4087 /1/2016 that has rejected as inadmissible, the notification formulated by Appeal Court from Constanta – Criminal Department and for cases involving under age and family matters in the case file nr 4318/118/2015 on issuing a preliminary ruling for the next issue of law: He/she is public officer in the grounds of art 175, paragraph 1, letter b) second thesis from the Criminal Code or he/she is considered a public officer in the grounds of art 175, paragraph 2 the physical person acting a Medical Doctor –chief of department from a state hospital, as the art 163 from the law 95/2006, based on an administration contract, stipulated by art. 185 paragraph. (5) from Law nr. 95/2006 without having, at the same time, signed a separate individual employment contract for an indefinite period with that public hospital, regarding his/her participation as treating physician in the department he is managing”, Published in The Official Gazette, Part I nr. 254 of 12th April 2017.

Moreover, in order to be examined under the scope of procedure stipulated by Art 475 from the Criminal Procedure Code, the question of law must come from an unclarity regarding the law, as it cannot be classified as question of law the solution given to a specific situation. Thus the specific situation of having an administration contract, instead of employment contract, is rather imposing an adjustment to this factual circumstance by referring to the considerations of Decision 26 from 3rd December 2014 of the panel of the criminal law department

Thus, the particular situation of the existence of a management contract, instead of an employment contract, requests an adaptation to that factual circumstance in the light of the recitals of Decision No. 26 of 3 December 2014 of the Criminal Law Enforcement Unit and a clarification of the case-law, and not the use of the High Court's petition, which has previously interpreted the provisions of Art. 175 of the Criminal Code referring to the profession of physician, but being bound by the limits of the investiture, did not mention in the operative part of the judgment an exhaustive list of situations which might arise in the practice of the courts....

It is clear from the wording of the question that the defendant acted as a chief medical officer at a public hospital, although he had not been held to commit the bribery offense in the exercise of the managerial role for which he had been employed under a management contract but to commit that offense as a physician, member of the surgical team who performed the surgery on the denouncing witness.

Therefore, the solution to the question of law does not meet the condition of being connected with the outcome of the case, since the referring court states that the defendant "acted" as a chief doctor of a department at a public hospital and the offense with which he was charged, according to the factual situation resulting from the decisions of the court of first instance, is not related to the exercise of the duties of head of department.

For the above-mentioned arguments, it is considered that the condition that the High Court of Cassation and Justices has not been upheld on the matter is not satisfied by a prior decision.

At the same time, it is noted that the requirement of a matter of law whose clarification depends on the substance of the case pending before the referring court is also not met. As, it is found that two of the admissibility conditions provided by art. 475 of the Code of Criminal Procedure ... "

The panel of judges for solving matters of law within the considerations of the given decision⁶ has retained that "...according to its jurisprudence, the High Court of Cassation and Justice- the panel for solving legal matters of criminal nature has established that for solving certain matters of law in criminal matters, it has established, with reference to the meaning to be given to the phrase 'a matter of law which depends on the substance of the case', that it is necessary for the referring court to refer to the interpretation *in abstracto* of certain legal provisions rather than the implicit resolution

⁶ Decision no. 4 of 28 February 2017 of the panel for solving law matters within the Supreme Court of Cassation and Justice in the file no. 4020/1/2016, dismissing as inadmissible the appeal filed by the Court of Appeal Constanța - the Criminal Division And for juvenile and family cases in File no. 685/36/2015, requesting a preliminary ruling on the principle of the following legal issue: "If, in interpreting and applying the Constitutional Court's Decision no. 397 dated June 15, 2016, regarding the conclusion of a mediation agreement regarding the offenses for which reconciliation may take place, the provisions of Art. 5 of the Criminal Code. ", Published in the Official Gazette, Part I no. 255 of 12 April 2017.

of certain issues related to the peculiarities of the case of the case (Decision No. 22 of October 25, 2016, published in the Official Gazette of Romania, Part I No. 1.057 of December 28, 2016).

Or, regarding this case, by notifying the High Court of Cassation and Justice we tend, on the one hand, to resolve a procedural incident, namely resolving a misunderstanding between the members of the panel of judges at the deliberation day, and, on the other hand, takes into consideration a particular situation, generated by the way in which the judgment in question was conducted (the existence of a mediation agreement concluded after the publication of the Decision of the High Court of Cassation and Justice - the panel of judges named for the resolution of criminal law issue no. 9 of 17th of April, 2015, which did not recognize its effects until the date of publication of the Constitutional Court's Decision no. 397 in 15th of June 2016).

Beyond the imprecise character of the question of law subject to analysis, it can be noted that the notification of the supreme court through the mechanism of unification of the jurisprudence provided by art. 475 of the Code of Criminal Procedure, essentially questions the interpretation and application of the Constitutional Court's Decision no. 397 of 15th of June, 2016 ..."

Other aspects relating to the non-fulfilment of the condition that refers to the matter of law, on whose clarification depends the settlement of the respective cause targets " nature of the appeal" (recourse, appeal or contestation) although it influences the structure of the court panel and, consequently, the legality of the judgment given by means of the appeal, it does not, however, determine the fulfilment of the condition for the admissibility of the application for a preliminary decision, since it does not lead to the establishment of a dependence relationship between the law question submitted and the solution to be put in the way of appeal with which that court is invested; the interpretation aims to know the exact meaning of the norm, clarifying its meaning and purpose, so that the preliminary procedure cannot be used in case the correct application of law is imposed in a way so obvious that leaves no doubt about how to handle the settlement method of the issue addressed.

Concerning the matter for which a solution is requested, namely persons who may file an appeal in annulment, there is no evidence of any element of novelty which would make mandatory the interpretation of these provisions, the situation being solved identically, both, in the new criminal procedural provisions, as well as in previous procedural regulations⁷;" in regards to the manner in which the question was formulated by the referring court, it is ascertain that the conditions for the admissibility of the notification are not fulfilled, the issue which arose not being an object of law but more on the application of the law to the issue in fact, as a result of establishing the patrimony or patrimonies in which are located the resulting damage / resulting damages from the criminal activity.

⁷ Decision Nr. 3 from 10 February 2016 of the panel from the High Court of Cassation and Justice in the case 4292/1/2016, through which was rejected as inadmissible, the notification formulated by the Court of Appeal from Bucharest,- Division II Criminal Law in the case file nr.4.796/2/2015, by which it is required to give a preliminary ruling for solving the legal matter." If in applying dispositions of art 427 paragraph 1 from the Code of Criminal procedure referring to art 426 letter a from the Code of Criminal procedure, the legal person or physical person that did not have the capacity to be a party in the criminal lawsuit has the procedural capacity to formulate an appeal in annulment as it was not summoned for the appeal, in the conditions in which his rights and interests were affected by a measure ordered by the appeal court by final decision.", published in the Official Gazette, Part 1 Nr. 195 from March 16th 2016.

Thus, the problem posed by the Court of Appeal from Iasi, as resulting from de facto situation exposed in the notification request Which the Iași Court of Appeal makes, as is apparent from the factual situation set out in the notice, is not that of a conflict between a general qualification (Article 215 of the Criminal Code of 1969) and a special one (Article 18¹ of Law No. 78/2000 on the prevention, detection and sanctioning of corruption offenses), but that of establishing the legal framing of the act in the case where the use or presentation of false or inaccurate or incomplete documents resulted in unfair of funds, both from the general budget of the European Union and from the state budget ...

In these circumstances, it is noted that what is required in the procedure provided by art. 475 and the following of the Code of Criminal Procedure is not the interpretation of legal provisions in abstracto, but by transforming its own opinion into the hypothesis of the question, the Iași Court of Appeal asks to establish the legal classification of the facts with which it has been notified ⁸;" the object of the referral is the aspect which is circumscribed to the scope of the rules relating to civil action, the object of which is to order the payment of material and moral damages to the defendant brought to trial for committing the offense of forgery in documents under private signature

Examining the conclusion by which the High Court was notified, it is observed that the court does not request the interpretation of legal provisions *in abstracto*, but the ruling on the admissibility of civil action, annexed to the criminal legal report brought before the court. However, the way of solving a civil action carried out inside the criminal trial is the sole attribute of the instance in charge with solving the case. As such, the question which may be raised by the High Court should be limited to issues of interpretation of the law and not matters of fact, the analysis of which is the exclusive attribute of the court"⁹;"or, the establishment of the judicial body competent to resolve a request for review against a final order made by the judge of the preliminary chamber in the procedure regulated by art. Article 341 of the Code of Criminal Procedure, the type of decision to resolve such a request for review and the admissibility of the ordinary course of action against this judgment do not have the nature of decisive law matters to resolve criminal action or civil action in criminal proceedings, The substance of the case The subject matter of the case, where the present law matters arose is comprised from

⁸ Decision no. 23 of September 16, 2015 of the Senate for the Delegation of Criminal Matters in the High Court of Cassation and Justice in file no. 2.195 / 1/2015 dismissing, as inadmissible, the appeal filed by the Iasi Court of Appeal - the Criminal Section and for the cases with juveniles in File no. 2.604 / 189/2013, requesting a preliminary ruling on the principle of the principle of legal separation: "if the offense of using or presenting false, inaccurate or incomplete documents, which results in unfairly obtaining funds from The general budget of the European Union or the budgets administered by it or on its behalf provided for in art. 18 1 paragraph (1) of Law no. 78/2000 on the prevention, detection and sanctioning of corruption acts can be retained in an ideal contest with the offense of deception provided by art. 215 par. 1, 2, 3 of the Criminal Code of 1969, only the offense provided by art. 18 1 of the Law no. 78/2000 on the prevention, detection and sanctioning of corruption acts in the case of a single damage caused to the contracting authority ", published in the Official Gazette, Part I no. 824 of November 4, 2015.

⁹ Decision no. 16 of May 22, 2015, of the Senate for the Elimination of Criminal Matters in the High Court of Cassation and Justice, file no. 1.062 / 1/2015 / HP / P dismissing, as inadmissible, the appeal filed by the Timișoara Court of Appeal - the Criminal Section, file no. 2.834 / 325/2014, with a view to giving a preliminary ruling on the question of the law, if: "Civil proceedings for the payment of pecuniary and non-pecuniary damages in the criminal proceedings against the defendant sued for the offense False in documents under private signature ", published in the Official Gazette, Part I no. 490 of 3rd July 2015.

the request for revision, and the way in which its main cause it is settled depends neither on the High Court's clarification of the jurisdiction and competence rules in solving the claim nor on the determination of the way in which the judgment was given nor on the determination of its definitive or non-definitive character."¹⁰ etc.

In our opinion we consider that the courts of law that initiate proceedings have all the criteria, in the jurisprudence of the High Court of Law and Cassation, from which we have exemplified a part of the relevant decisions, that contain arguments leading to the avoidance of formulating some unclear, ambiguous questions that are not relevant at all to the solution given on the merits of the cause.

Moreover, the judge panels specialized in solving matters of law whenever they had to interpret unclear dispositions and admit notifications, by which they have emphasized interpreting criteria, and later on, still the High Court of Cassation and Justice has been notified with a similar question, rejected the notification, as inadmissible, stating that the arguments of the decision by which previously the notification was accepted contained the criteria that ensured verification of those in the later situation, and there was the possibility of direct ruling on the merits by the court, no longer referring to the supreme court

Therefore, we have the opinion that in this moment, in relation with the existing case-law about the rejection solution, as unacceptable of the notification, in the conditions of unfulfilling the conditions stipulated by Art 475 from the Code of Criminal Procedure, the courts have the obligation to assume the verification of incidence or not of criteria presented by the Supreme instance and the delivery of a solution on the merits, with the explanation in the judgments of the mechanism which the High Court of Cassation and Justice detailed in the recitals of the judgments.

Thus, on one side notifications are avoided, that lead to the solution of rejection as inadmissible, and on the other hand there is a direct application of decisions ruled with a view to achieve uniform practise.

III. Conclusions

The study presented emphasizes the multitude of matters of law that the High Court of Cassation and Justice has been notified with, with the purpose of issuing a preliminary ruling for solving matters of law, that have conducted to the rejection solution as inadmissible, by analysing whether the pre-requisites from Art. 475 from the Criminal Procedure Code have been fulfilled or not, which has contributed to interpreting *in abstracto*, but also *in concreto* the condition: "object of law, on whose clarification depends the awarding of a solution on the main issue of the matter on trial."

¹⁰ Decision no. 7 of April 17, 2015 of the Criminal Law Enforcement Unit of the High Court of Cassation and Justice in file no. 523/1/2015 dismissing, as inadmissible, the complaint filed by the Ploiesti Court of Appeal - the Criminal Section and for Minors and Family Affairs in File no. 555/42/2014 / a1 on giving a preliminary ruling on the resolution of the following issues of law: "1. If a request for review is filed against a ruling given by the preliminary chamber judge, according to art. 341 of the Code of Criminal Procedure, which is the judicial body competent to resolve such a request, the judge of the preliminary chamber or the court; What judgment is to be pronounced: a termination, as in the original proceedings, or a sentence as appealed against by the review; If the judgment given in such a case is susceptible of being subjected to any ordinary means of attack. ", Published in the Official Gazette, Part I, no. 359 of May 25, 2015.

We consider that the direct application of the decisions of the High Court of Cassation and Justice, even of those, by which they have been rejected as inadmissible, the notifications, as a follow up of examining the criteria that are considered, gives to the resolution that will be given subsequently, that led to the unitary interpretation and application of less clear legal dispositions.

In conclusion the rejection solution as inadmissible of the notification, is a premise for the reflection process over the way of formulating questions that make up the subject of notifications.

European Supervision Order – Is it the Ballast for Law Enforcement or the Way out of the Deadlock?

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Abstract

The article analyses the conception of the European supervision order (hereinafter – the ESO) as well as some theoretical and practical problems arising in the process of implementation and effectiveness of the ESO. The authors, being guided by the currently existing legal provisions, legislative ideas and jurisprudence of the European Court of Human Rights (hereinafter - the ECHR), formulate the question whether the ESO is an operating mechanism of the international cooperation in criminal proceedings or a nice idea remaining on paper.

The attention is hereby drawn to the fact that this segment still remains at the search-discovery-search stage. The today's topical issues compel to acknowledge that in the absence of the criteria that are regulated at the level of the European Union, which must be taken into account by the issuing State when considering the person's or his/her defender's application to issue the ESO, the niche is left for Member States to misuse their right and not to issue the ESO even in the justified cases. Finally, it is hereby emphasized that the significant aspects that are related to the realization of the person's right to defence, to the appeal against the decisions, which were made by the issuing and executing States, remain not covered by Council Framework Decision 2009/829/JHA "On the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention" of the 23rd of October, 2009 (hereinafter - Framework Decision). The article calls into question whether it is appropriate to move the issue on the compensation of costs on the issuing State's shoulders.

A relatively short time has passed since the implementation of this document in the national law of Member States; therefore, the ESO topic remains relevant and new in the scientific plane; the future prospects of application of this legal mechanism are of interest. The authors are not inclined to submit final answers at this stage of the ESO existence, but they suggest some possible ways for the solution of problematic issues.

Keywords: *European supervision order, supervision measures, adaptation of supervision measures.*

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1. Introductory remarks

The Framework Decision is an "<...> instrument – on which the Council had already reached the general approach on the 27th of November, 2008 – is now adopted. It lays down the rules, according to which one Member State recognises a decision on supervision measures issued in another Member State as an alternative to provisional detention. Compared to the similar FD applicable to probation measures (FD 2008/947/JHA), this FD creates the regime, where the issuing authority remains to a larger extent in control of the measure. Surrender of the person concerned to the issuing State in case of breach of those measures will require the issuing of an EAW and the executing authority will be able to use all grounds for non- recognition provided for in the FD on the EAW to refuse the surrender¹".

The prehistory of this document is explained in detail in the Explanatory Memorandum, which accompanied the original proposal for the Framework Decision of the Commission of the European Communities. The Commission noted "<...> EU citizens, who are not residents in the territory of the Member State, where they are suspected of having committed a criminal offence, are sometimes – mainly owing to the lack of community ties and the risk of flight - kept in pre-trial detention or, perhaps, subject to a long-term non- custodial supervision measure in a (for them) foreign environment. A suspect, who is a resident in the country, where he or she is suspected of having committed an offence, would often benefit in a similar situation from a less coercive supervision measure, such as reporting to the police or travel prohibition²". Firstly, such perverse application of the law violates the principle of equality; besides, it causes harmful consequences to a foreign citizen's social contacts in his or her legal place of residence: "Typically a foreign suspect will be in a more vulnerable position than a person, who normally is a resident in the country. Apart from being more or less cut off from contacts with his or her family and friends, there is a clear risk that a non-resident suspect in such a situation could lose his or her job as a coercive measure (e.g. travel prohibition) that the judicial authority of the trial State has imposed on the suspect would stop this person from going back to his or her country of normal residence"³. Secondly, "keeping persons in pre-trial detention has also an important cost implication for the public authorities involved. Moreover, the excessive or unnecessary use and length of pre-trial detention contribute to the phenomenon of prison overcrowding, which continues to blight penitentiary systems across Europe and seriously undermines improvements in conditions of detention"⁴. The European judicial supervision order, as the solution of these problems in the Union, was necessary: "The problem is that the different alternatives to pre-trial detention and other pre-trial supervision measures (e.g. reporting to the police) cannot presently be transposed or transferred across borders as States do not recognise foreign judicial decisions in these matters. This means that the implementation of the right to liberty and the presumption of innocence in the European Union seen as a whole still must be considered as incomplete"⁵.

¹ European Criminal Law Academic Network. Newsletter, Issue No. 3, September – December 2009. <[http://www.ja-sr.sk/files/ECLAN%20Newsletter%20-%20Issue%20No3%20\(2009\).pdf](http://www.ja-sr.sk/files/ECLAN%20Newsletter%20-%20Issue%20No3%20(2009).pdf)>.

² Proposal for a Council framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union COM(2006) 468 final, 29 August 2006, p. 2. <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0468:FIN:EN:PDF>>.

³ *Supra note 4*, p. 2.

⁴ *Ibid.*

⁵ *Ibid.*

The Commission drew attention to one more important aspect of the ESO: "<...> the European supervision order is not only an alternative to pre-trial detention. It may also be issued in relation to an offence, for which only less severe coercive measures (e.g. travel prohibition) than pre-trial detention are allowed, i.e. where the threshold may be lower than for remand in custody"⁶. It is important that the ESO is sought for encouraging "<...> where appropriate, the application of non-custodial measures as an alternative to detention on remand"⁷.

Prior to adoption of the Framework Decision, the law enforcement authorities had essentially two choices when settling the issue on supervision measures for foreign nationals: either to apply the detention on remand that is associated with imprisonment or to release a person to freedom to move under no control. Both those variants were dangerous. Imprisonment, which is directly or indirectly motivated by foreign citizenship as the main argument, creates the situation that does not meet the principle of equality, puts foreign nationals into a worse situation than they would have occurred, if they have had the citizenship of the state, in which the issue on the supervision measure is solved. Detention of a non-permanent resident can be applied even in the case, when the supervision measure would not be imposed on a constant resident in the similar circumstances. Such perverse application of the law diminishes the principle of the presumption of innocence, which is conditioned by the circumstances that the freedom of a person in criminal proceedings is understood as a rule, whereas detention - as the exception to this rule⁸.

Such rules are followed also in the ECHR case-law, which has made it clear that the priority should be given to the release of a person to freedom, when considering the authorization of detention⁹. In the case of *Ambruszkiewicz v. Poland* the Court applied a proportionality test to detention falling under Article 5 § 1 (c) of the Convention, when considering whether the applicant's detention on remand was strictly necessary to ensure his presence at the trial and whether other, less stringent, measures could have been sufficient for that purpose. Applying the proportionality test, the Court found that the failure to consider release subject to financial security and police surveillance meant that the detention was not in accordance with Article 5 (No. 38797/03, §29-33, 4 May of the year 2006). The duty of States to consider the measures, which are alternative to detention, was construed in a number of judgments, for eg., *Idalov v. Russia* [GC], No. 5826/03, ECHR 2012, *Bolech v. Switzerland*, No. 30138/12, ECHR 2013, etc. As the ESO is also the measure, which encourages the application of supervision measures that are alternative to arrest, so the conclusion can be drawn that the States, which unreasonably do not consider the application of this measure in the case, would violate the Convention.

Moreover, such perverse application of the law deepens the problem, which is topical for whole Europe¹⁰ - the overcrowding of imprisonment institutions. Keeping of

⁶ *Supra* note 4, p. 8.

⁷ Opinion of Advocate General Campos Sánchez-Bordona delivered on 19 July 2016. *JZ v Prokuratura Rejonowa Łódź – Śródmieście*. Case C-294/16 PPU; View of Advocate General Jääskinen delivered on 2 May 2014. Criminal proceedings against Zoran Spasic.

⁸ Gialuz M.; Spagnolo P. Reasonable length of pre-trial detention: rigid or flexible time limits? A study on Italy from a European perspective. *European criminal law review*. 2013. 3(2): p. 220.

⁹ *McKay v. the United Kingdom* [GC], No. 543/03, ECtHR 3 October 2006, *Estrikh v. Latvia* [III], No. 73819/01, ECtHR 18 January 2007.

¹⁰ Voyatzis, P. Alternative measures to detention in the European Court of Human Rights' case law. *European criminal law review*. 2014, 4(2): 169.

a foreign national imprisoned solely because he is a foreign national and has no social ties with that State, in which he does not live and even did not create such ties, does not seem to be progressive in the context of protection of human rights. On the other hand, though the free movement of persons is a value, the uncontrolled movement of the persons, who possibly have committed a criminal offence, would cause danger to the security of citizens and the society. The Framework Decision was adopted to this end; it must harmonize the right of the persons, who possibly have committed a criminal offence, to freedom with the security for the aggrieved parties and society, must encourage the application of non-custodial measures in criminal proceedings against the persons, who do not constantly reside in the Member State, where the criminal proceedings are held (Article 2(1) of the Framework Decision). Attention must be drawn to the fact that the Framework Decision also encourages using the electronic monitoring for monitoring the supervision measures (paragraph 11 of the preamble of the Framework Decision).

Member States had to implement this Framework Decision no later than before the 1st of December, 2012. Currently, almost all States of the European Union implemented the Framework Decision, but the implementation process is still going on in Ireland and Belgium¹¹. It remains to rejoice that the ESO has almost established itself in the national law of Member States. It is worth paying attention in this context to the circumstance that the transfer process was not fast in all States. Only Denmark, Finland, Latvia and Poland can be mentioned as the States, which timely implemented the Framework Decision before the 1st of December of the year 2012.

2. European supervision order and principle of recognition of the coercive measure in the Framework Decision

"Effective criminal justice is a basic prerequisite for peaceful coexistence in any society¹²". However, the effective criminal proceedings would not be possible without the "mutual recognition, whereby decisions made by the judicial authorities of one Member State are given effect by the judicial authorities of another with minimum formality and only very limited grounds for refusal¹³". The mutual recognition of procedural coercive measures is sought in the Framework Decision; this is stated in the very beginning of the document – in paragraph 2 of the preamble.

As was already mentioned, the Framework Decision together with the other relevant documents was adopted with taking into account a considerable number of citizens of the European Union, who are imprisoned in the other Member States. In a common European area of justice based on mutual trust, the European Union has taken action to ensure that non-residents subject to criminal proceedings are not treated

¹¹ European Judicial Network. Judicial library (Last reviewed on 6 March 2017 by EJM Secretariat). <https://www.ejn-crimjust.europa.eu/ejn/EJM_Library_StatusOfImpByCat.aspx?CategoryId=39>.

¹² European Criminal Policy Initiative. A Manifesto on European Criminal Procedure Law. This project has been funded by the European Commission's Criminal Justice 2010 Programme and the Ragnar Söderbergs Stiftelse. <https://www.juridice.ro/wp-content/uploads/2013/11/manifesto.pdf>

¹³ The European Union Committee. The European Union's policy on criminal procedure. 30th Report of session 2010-12. <https://pdfs.semanticscholar.org/230f/4d46ac4b9c7142452b5b474e1b94f89f554b.pdf>, article 2.

differently from residents¹⁴. Thus, the goal is pursued to restrict arrest of citizens of the European Union in the country, in which they constantly reside, and to encourage the application of supervision measures in his or her natural environment in the Member State, while his or her criminal case is being examined in a foreign Member State. Such aspiration confirms the respect, which is enshrined by the European Union for human rights and freedoms. The procedural coercive measures associated with deprivation of freedom, which are applied in the absence of absolute necessity, are not only incompatible with the principle of the presumption of innocence and freedom (as a rule in criminal proceedings), but also produce a negative impact on the person's social relations, financial situation, hold back the career progress and hinder his or her family, private life.

In the Explanatory Memorandum, which accompanied the original proposal for Framework Decision 2009/829/JHA of the Commission of the European Communities, the ESO is defined as a decision issued by a judicial authority (i.e. a court, a judge, an investigating magistrate or a public prosecutor) in one Member State that must be recognised by a competent authority in another Member State¹⁵. According to the authors, the ESO can be defined as the enforceable decision made by the competent authority of the issuing State of the European Union in accordance with the national law in the course of criminal proceedings, according to which one or more non-custodial supervision measures, as an alternative to detention, are applied against a natural person, who does not permanently reside in the State and is suspected of having committed a criminal offence, and addressed to the executing Member State, in which that person resides. It is one of the possible definitions of the ESO, which is more detailed; however, it does not claim to be the only true and final definition of the ESO.

The executing State's obligation to accept the transfer of supervision measures and to recognize the decision made by the judicial authority of the issuing State (except for the cases, when there are the grounds for refusal, which are foreseen in Article 15 of Framework Decision and in paragraph 16 of the preamble) arise from the principle of mutual recognition.

However, the issuing State itself is not obliged to issue the ESO: "It is for the issuing authority to decide whether it wants to use it"¹⁶. The issuing State has the right to decide whether it will apply the European judicial supervision order in the definite criminal case. It must be also noted that a natural person's consent is necessary for the application of the European judicial supervision order (Article 9(1) of the Framework Decision). The voluntary principle is applied also in the case, when the country, in which the person permanently and lawfully resides, is not a Member State of the European Union. In such a case a person has the right to request an application on the ESO to the issuing State. The issuing State has the right to transfer the decision on the ESO to the competent authority of the non-Member State, if the latter agrees to such transmission

¹⁴ European Commission. Report from the Commission to the European Parliament and the Council on the implementation by the Member States of the Framework Decisions 2008/909/JHA, 2008/947/JHA and 2009/829/JHA on the mutual recognition of judicial decisions on custodial sentences or measures involving deprivation of liberty, on probation decisions and alternative sanctions and on supervision measures as an alternative to provisional detention, 5 February 2014, <http://ec.europa.eu/justice/criminal/files/com_2014_57_en.pdf>, 4 p.

¹⁵ *Supra* note 4, p. 8.

¹⁶ Libor Klimek „Mutual Recognition of Judicial Decisions in European Criminal Law“ 403 p., Springer, 2016.

(Article 9(2) of the Framework Decision). Article 9(3) of Framework Decision gives the discretion to Member States, i.e. in which cases they would transfer the decision on the ESO to the non-Member State.

The European judicial supervision order is applied under Article 8(1) of the Framework Decision to the following foreseen six supervision measures: 1) an obligation for the person to inform the competent authority in the executing State of any change of residence, in particular for the purpose of receiving a summons to attend a hearing or a trial in the course of criminal proceedings; 2) an obligation not to enter certain localities, places or defined areas in the issuing or executing State; 3) an obligation to remain at a specified place, where applicable during specified times; 4) an obligation containing limitations on leaving the territory of the executing State; 5) an obligation to report at specified times to a specific authority; 6) an obligation to avoid contact with specific persons in relation with the offence(s) allegedly committed. Member States may impose more supervision measures than it is foreseen in the mentioned provision. For this reason, it is very important that the national law of all Member States would adequately regulate the ESO issues. Otherwise, nationals of the State, which does not follow this obligation, who are detained in the other Member State, would not be able to use this legal mechanism.

The issuing Member State retains its competence for monitoring the supervision measures, if the executing Member State does not recognize the decision on the ESO and does not inform the issuing State about its decision not to recognize it. Under Article 11(2) of the Framework Decision, if the competence for monitoring the supervision measures has been transferred to the competent authority of the executing State, such competence shall revert back to the competent authority of the issuing State: (a) where the person concerned has established his/her lawful and ordinary residence in a State other than the executing State; (b) as soon as the competent authority in the issuing State has notified withdrawal of the certificate referred to in Article 10(1), pursuant to Article 13(3), to the competent authority of the executing State; (c) where the competent authority in the issuing State has modified the supervision measures and the competent authority in the executing State, in application of Article 18(4)(b), has refused to monitor the modified supervision measures because they do not fall within the types of supervision measures referred to in Article 8(1) and/or within those notified by the executing State concerned in accordance with Article 8(2); (d) when the period of time referred to in Article 20(2)(b) has elapsed; (e) where the competent authority in the executing State has decided to stop monitoring the supervision measures and has informed the competent authority in the issuing State thereof, in application of Article 23.

The absence of the relevant supervision measure in the national law of the executing Member State does not serve as the grounds for refusing to recognize the decision on the ESO. In such a case the executing Member State may adapt it in line with the types of supervision measures, which apply, under the law of the executing State, to equivalent offences. The adapted supervision measure shall correspond as far as possible to that imposed in the issuing State (Article 13(1) of the Framework Decision). Attention must be drawn to the fact that under part 2 of this Article the adapted supervision measure shall not be more severe than the supervision measure, which was originally imposed. As the process of adaptation is not regulated in detail in the document itself, so the issue to decide, which supervision measure could be equated to the other supervision measure, is left to the discretion of the executing State. On the

other hand, after having received the information about adaptation of the supervision measure, the issuing State, which does not recognize the adapted application of coercive measures to the specific criminal case, under Article 13(3) of the Framework Decision has the right to decide to withdraw the certificate as long as monitoring in the executing State has not yet begun.

Under Article 19(3) of the Framework Decision the executing State is obliged to inform the issuing State about of any breach of the supervision measure, and any other finding, which could result in taking any subsequent decision referred to in Article 18(1). Accordingly, afterwards the issuing State takes further decisions on the application of the supervision measure.

For illustration purposes the example of the Republic of Lithuania can be briefly mentioned. Special Law No XII-1322 of the 13th of November of the year 2014 on the mutual recognition and enforcement of judgments in criminal matters by Member States of the European Union (Law No XII-1322) based on the Framework Decision was implemented in Lithuania. When the Republic of Lithuania is the executing State, the entities competent for the recognition of the decision on the supervision measure under Article 6 of the Framework Decision are a prosecutor of the Vilnius Regional Prosecutor's Office according to the place of residence of the person, in respect of whom this decision is made (Article 40(1) of Law No XII-1322), and where appropriate - a prosecutor of the Prosecutor General's Office of Lithuania or a pre-trial investigation judge (Articles 40(2) and 40(3) of Law No XII-1322). A decision on a supervision measure imposed in respect of a person not ordinarily resident in the Republic of Lithuania, may also be recognised and executed in the Republic of Lithuania at the request of that person and if the prosecutor agrees to take over the execution of the decision on the supervision measure. In this case, the decision to recognise the supervision measure is issued by a prosecutor of the Prosecutor General's Office of the Republic of Lithuania. In accordance with Article 8(2) of the Framework Decision, as well as the supervision measures set out in Article 8(1) of the Framework Decision, the Republic of Lithuania also recognises and executes decisions on supervision measures issued in criminal proceedings in other Member States of the European Union, imposing, as an alternative to the detention of the suspect, defendant or sentenced person, one or more of the following obligations and prohibitions: a) a prohibition from engaging in certain activities related to the alleged offence; b) a driving ban; c) an obligation to deposit a certain sum of money or to give another type of guarantee, which may either be provided through a specified number of instalments or entirely at once.

When the Republic of Lithuania is the issuing State under Article 6 of the Framework Decision, the decision to transmit a supervision measure to another EU Member State at the pre-trial stage is taken by a prosecutor, while at the trial stage, such decision is taken by the trial court (Article 44(1) of Law No XII-1322). The following procedural coercive measures, which were imposed in the course of criminal proceedings ongoing in the Republic of Lithuania, can be transmitted to the other State of the European Union for execution: 1) the supervision measures – intensive supervision, house arrest, bail, seizure of documents, obligation to report regularly to the police institution and written undertaking not to leave the place; 2) the procedural coercive measure – temporary removal from the held duties or temporary deprivation of the right to be engaged in certain activities (Article 43(1) of Law No XII-1322).

The ESO legal regulation allows drawing the conclusion about the importance of the principles of cooperation between the countries, the presumption of innocence,

recognition of the procedural coercion and voluntariness. The purposes of criminal proceedings can remain unachieved, if the States do not sufficiently cooperate with each other; therefore, it is very important that the executing State would properly supervise the compliance with the supervision measure and as soon as possible would inform about the violations. The non-recognition of the measures of procedural coercion by the issuing State in the case of adaptation can lead to difficulties in application of the ESO.

3. Some theoretical and practical problems with the regulation of the European judicial supervision

It would be difficult to deny that a suspect's legal position during the investigation, the trial, or after the trial may vary significantly, depending on whether he is prosecuted in one Member State or the other¹⁷. Nevertheless, the issuing State makes the decision on the application or non-application of the ESO in the particular case. It is supposed that the issuing State's unlimited discretion to refuse applying the ESO is one of the most problematic aspects, which can lead to the non-application of the Framework Decision or to its unreasonably unequal, discriminatory application, for eg., against the persons, whose social status is perfect and they have the possibility to make use of the services rendered by lawyers of the highest professional level.

As is rightly noted by some authors, namely "<...> the harmonized level of procedural safeguards becomes an essential aspect of criminal procedure, in all legal systems of the Member States¹⁸". Thus, the ESO regulation must be such, so as to provide at least the minimum criteria to be taken into account by the national competent authorities, when solving the applications on issuance of the ESO. This is necessary, so that the competent authorities of the issuing State would not have the unlimited discretion, which can turn into the misuse, not to apply the ESO through various reasons, for eg. through the lack of competence or inflexible attitude towards novelties, avoidance to pile on oneself additional work and so on or the discriminatory application of these measures, oriented, for eg., towards the social status, sexual orientation, etc. The Framework Decision does not foresee the cases, when a Member State is obliged to issue the ESO. It is left to the discretion of Member States. Finally, the national case-law on this issue will form in the long run and namely the courts, prosecutors or other competent authorities will finally decide on the ESO in each case whether it is worth to transfer the particular person to the other state with the aim to impose or not to impose the supervision measure on him or her. On the one hand, clearly unregulated issues always cause problems and create preconditions for the application of a different case-law. On the other hand, to oblige the relevant state to transmit the execution of supervision measures that are applied against a citizen, who does not constantly reside therein, also would be a difficultly doable task due to the state's sovereignty and the state's right arising from the territorial principle of the

¹⁷ Michiel Luchtman. Choice of forum in an area of freedom, security and justice. *Utrecht Law Review*. Volume 7, Issue 1 (January) 2011, p. 75.

¹⁸ Joanna Beata Banach-Gutierrez. Protection of Fundamental Rights in the 'Globalised' Criminal Justice and its Impact on the National Human Rights Policies in Europe. <http://www.culturaldiplomacy.org/academy/content/pdf/participant-papers/2010biec/Protection_of_Fundamental_Rights_in_the_Globalised_Criminal_Justice_and_its_Impact_on_the.pdf>.

international criminal law to maintain the jurisdiction over the criminal offences committed in its territory, even in relation to foreign nationals¹⁹.

Political barriers also cannot be rejected. The probability that the states, the mutual relations of which are tense, will not be inclined to apply the ESO, remains. As a result, citizens of the relevant state will suffer the most, i.e. the imprisonment together with all the ensuing consequences will threaten them more than it will threaten residents: the dying out family ties, stopped career progress, decreasing income, etc. Thus, the question, in which cases and how often Member States will use the ESO as well as the national courts and the criminal prosecuting authorities will apply the ESO, remains open as well as the question, how to deal with this potential problem, does.

According to the authors, persons in all Member States of the European Union must have the guarantees compatible with each other, including the unanimous criteria adopted at the European Union level, which must be taken into account by the issuing State when deciding on the issue of the ESO. These criteria could resemble the ones, when the issue on extradition detention is solved and the person's social relations are assessed at the national level. The issuing State could also assess social relations of that person in the executing State according to the objective data submitted by the person, his or her personality and criminal experience. The person's marital status, constant place of residence, labour relations, health condition, previous convictions, possessed assets and the other circumstances could be taken into account in the executing State. The absence of similar criteria can lead to the circumstance that the ESO in some Member States can remain as a nice idea on paper.

It is foreseen in paragraph 15 of the preamble of the Framework Decision that since the objective of this Framework Decision, namely the mutual recognition of decisions on supervision measures in the course of criminal proceedings, cannot be sufficiently achieved by Member States acting unilaterally and can therefore, by reason of its scale and effects, be better achieved at the Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 2 of the Treaty on the European Union and Article 5 of the Treaty establishing the European Community. In accordance with the principle of proportionality, as set out in that Article, this Framework Decision does not go beyond what is necessary in order to achieve that objective.

It is worth remembering that under Article 70 of the Treaty on the Functioning of the European Union, without prejudice to Articles 258, 259 and 260, the Council may, on a proposal from the Commission, adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct objective and impartial evaluation of the implementation of the Union policies referred to in this Title by Member States' authorities, in particular in order to facilitate full application of the principle of mutual recognition. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation.

Thus, we see that in the case, when Member States do not sufficiently cooperate with each other, the European Union reserved the right to take the appropriate measures to regulate the problematic issues in more detail. Having identified that the ESO in Member States is applied in violation of the European Union policy, the national parliaments could adopt additional measures in their national law, so that the proper

¹⁹ Peter Malanczuk. *Akehurst's modern introduction to international law*. Seventh revised edition. Routledge: London and New York, 1987, p. 110.

operation of the ESO would be ensured and so that this advanced idea on transmission of the execution of supervision measures in the context of human rights would not remain only on paper.

It is also important that the issue of defence remains non-discussed in the Framework Decision, though there are many places in the Framework Decision, where the issue of defence is relevant and causes unclearness.

The first situation is related to the issue on the extension of supervision measures, which is being solved in the executing State. Attention must be drawn in this context to the fact that such legal regulation is rather inconsistent, as the issuing State has jurisdiction to take all subsequent decisions relating to a decision on supervision measures. Such subsequent decisions include notably: 1) renewal, review and withdrawal of the decision on supervision measures; 2) modification of supervision measures; 3) issuing an arrest warrant or any other enforceable judicial decision having the same effect (Article 18(1) of the Framework Decision). It remains unclear until the end what makes the issue on the extension of supervision measures be particular, so that namely this issue is transferred not to the competence of the issuing State, but to the competence of the executing State. Where the time period referred to in Article 20(2)(b) is due to expire and the supervision measures are still needed, the competent authority in the issuing State may request the competent authority in the executing State to extend the monitoring of the supervision measures, in view of the circumstances of the case at hand and the foreseeable consequences for the person if Article 11(2)(d) would apply. The competent authority in the issuing State shall indicate the period of time for which such an extension is likely to be needed (Article 17(1) of the Framework Decision). If the issuing State can impose the supervision measure and transmit it for execution to the executing State, and if the issuing State can review, annul, change and so on the supervision measure, it remains unclear why it cannot extend it, whereas the latter is transferred to the competence of the executing State.

The conclusion is to be drawn that the person, who wishes to have a defence lawyer, may need even two defence lawyers: the actions on imposing, renewal, revision, change and so on of the supervision measure, which are provided in Article 18(1) of the Framework Decision, are attributed to the competence of the issuing State and the law of the issuing State is applied to them (Article 18(2) of the Framework Decision). Whereas the issue on the extension of the supervision measure is within the limits of the competence of the executing State and the law of the executing State is applied to this issue (Article 17 of the Framework Decision). If a person wishes to have a defence lawyer, he or she needs either one defence lawyer, who knows the national law of the executing State and the national law of the issuing State or he or she needs two separate defence lawyers both in the process of issue of the ESO and when disputing the necessity to extend the supervision measure. It is supposed that, if the issue on the extension of the supervision measure is attributed to the competence of the issuing State, there would be no problem in this place, whereas the problem exists under the current legal regulation. It remains unclear whether the executing State would provide the person with the state advocate, because it is not clear whether Member States have regulated this issue in their national law, for eg. by foreseeing the necessity of participation of an advocate when solving the issue on enforcement of the ESO. The same can be said about the process of issuing the ESO – it is unclear whether Member States have foreseen the mandatory participation of the defender in such proceedings, which misses even clear criteria for the court to be guided by. The prosecutor or the

court may not issue the ESO without giving detailed reasons, since the Framework Decision does not provide any criteria that should be taken into account when solving this issue. It is very complicated for the person to defend himself or herself in such proceedings. The more so, the professional defence would be necessary in such circumstances, seeking for withstanding the possible appeal of the public prosecution against such judicial decision.

The defensive position can be very important in the executing State when solving the issue on the adaptation of supervision measures (Article 13 of the Framework Decision). The adapted supervision measure cannot be more severe than the supervision measure, which was originally imposed. However, it is difficult to assert with certainty that the executing State will never violate this imperative and will properly adapt the measure. It must be noted in this context that the Framework Decision does not provide the decision on the mechanism of appeal against the adaptation of the supervision measure, i.e. to be more precise – generally nothing is mentioned in the document about the procedures of appeal against the decisions made by the competent authorities of the issuing State and of the executing State and about the impact of the appeal against the decision on execution of the adaptation, etc.

In this context paragraph 17 of the preamble of the Framework Decision provides a certain answer to problematic issues, which foresees that this Framework Decision does not prevent any Member State from applying its constitutional rules relating to entitlement to due process, freedom of association, freedom of the press, freedom of expression in other media and freedom of religion. One could think that the Framework Decision did not specially discuss the issue of defence, but the general principles of law, the law of national states as well as the International and European Union legislation are applied to the issues of defence. Certainly, it is a certain answer to the questions, but, as was already mentioned, the national law does not regulate certain issues, which are related to defence.

So, it is supposed that the person's position must be ensured and secured even more when staying in a foreign country and solving the issue on issuance of the ESO. It is supposed that it would be most appropriate to regulate this issue at the European Union level, because this would ensure the uniformity of application of the law. On the other hand, having not regulated this issue in the Framework Decision, Member States could foresee the mandatory participation of the defender when solving the issue on issuance of the ESO in their national criminal procedural laws or special laws. Accordingly, the issue of defence must be also discussed in the legal acts when solving the issue on extension of the supervision measure, as this issue is solved according to the law of the other state. The attorney, who had been defending the person in the issuing State, can have no knowledge about the legal base of the executing State. The executing State's defence position is important also when solving the issue on adaptation of supervision measures. In general, it must be said that, when solving the issues of the European supervision order and its transmission for execution, it would be appropriate to foresee the procedures of appeal against the decisions of the issuing State and the executing State in order to ensure the imperatives of legal clarity and legal certainty arising from the rule of law.

The issue of the costs, which are incurred, remains topical. Under Article 25 of the Framework Decision, the costs resulting from the application of this Framework Decision should be borne by the executing State, except for costs arising exclusively within the territory of the issuing State. Also paragraph 14 of the preamble of the

Framework Decision must be systemically construed together with this provision, i.e. that the "costs relating to the travel of the person concerned between the executing and issuing States in connection with the monitoring of supervision measures or for the purpose of attending any hearing are not regulated by this Framework Decision. The possibility, in particular for the issuing State, to bear all or part of such costs is a matter governed by national law". It must be assumed that, when transporting a person from the issuing State to the executing State, the costs are incurred by the issuing State; thus, the issuing State must cover these costs. In cases, when a person is transported from the executing State to the issuing State and back due to the pre-trial investigation actions of the issuing State or court sittings, it must be assumed that the costs have also formed in the issuing State, which made the decisions, as a result of which that person must be transported.

On the one hand, we seek for reduction of the level of deprivation of freedom, which is still considerable, by measures that are not associated with deprivation of freedom. On the other hand, we seek for saving the state budget funds, which would be allocated for persons in custody. However, the transportation of suspects and accused persons, including the costs, which accrue to their safekeeping, would also affect the state budget, if such phenomenon is frequent. Seeking for solving this issue of costs, which accrue to the state budgets, it is provided in paragraph 10 of the preamble of the Framework Decision that in order to avoid unnecessary costs and difficulties in relation to the transfer of a person subject to criminal proceedings for the purposes of a hearing or a trial, Member States should be allowed to use telephone and videoconferences. The authors think that, seeking for solving this problem, Member States can also attribute such costs to the costs of proceedings in the national legal acts and recover them from a person, who caused them. However, this issue is sensitive, as it would be complicated or even impossible for certain indigent citizens to make use of the ESO mechanism, whereas such situation is incompatible with the principle of equality, the rule of law aspiration; thus, as regards this issue, it would be progressive to foresee the financial relief or compensation mechanisms for indigent persons.

Final remarks

1. The ESO was adopted as a legal instrument intended for solving the issue on keeping foreigners under detention and the tendencies prevailing in the national courts when solving the issue of supervision measures, for creating the unequal conditions for foreigners, if compared with residents of that state. The EU citizens, who are not residents in the territory of the Member State, where they are suspected of having committed a criminal offence, are sometimes – mainly owing to the lack of community ties and the risk of flight - kept in pre-trial detention or perhaps subject to a long-term non-custodial supervision measure in a (for them) foreign environment, whereas a suspect, who is a resident in the country, where he or she is suspected of having committed an offence, would in a similar situation often benefit from a less coercive supervision measure.

2. ESO solved the problem that the different alternatives to pre-trial detention and other pre-trial supervision measures cannot presently be transposed or transferred across borders as States do not recognise foreign judicial decisions in these matters.

3. The ESO could be defined as the European Union enforceable decision made by the competent authority of the issuing State under the national law during criminal

proceedings, according to which one or several supervision measures not associated with deprivation of freedom, as an alternative of detention, are imposed on a natural person, i.e. a non-permanent resident, who is suspected of having committed the criminal offence, which is addressed to the executing Member State, in which that person resides.

4. The ESO is an innovative and advanced measure, which, when applied, allows reducing the level of keeping in custody, ensures better the principle of the presumption of innocence, the right to liberty, helps the persons, who are suspected of having committed criminal offences, and the accused persons to preserve their family ties, workplace and income. However, non-legal reasons related to a large workload of the law enforcement institutions, lack of the initiative for novelties, political mutual disagreements can lead to the sluggish application of the European judicial supervision order. States' discretion in the application of the European judicial supervision order would be hardly restricted due to States' sovereignty and the territorial principle of the international criminal law.

5. The procedural guarantees to be harmonized between Member States at the European Union level must be secured for persons, also including the unanimous criteria, which must be taken into account by the competent authorities of the issuing State when solving the issue on issuance of the ESO. These criteria could be similar to the ones, when the issue of extradition detention is being solved at the national level and a person's social relations are being assessed. The absence of similar criteria may lead to the circumstance that the ESO in certain Member States may remain only as a nice idea on paper.

6. The ESO legal regulation raises the importance of cooperation between states, of the principles of the presumption of innocence, recognition of the measures of procedural coercion and volunteering. Insufficient cooperation between States can become an obstacle to achieving the objectives of criminal proceedings.

7. Member States, without any reason not considering the application of the ESO in the criminal case, would violate the Convention, as the ESO is a measure, which encourages the application of supervision measures that are alternative to detention, whereas the responsible consideration of the measures of procedural coercive in each case serving as an alternative to detention is the duty of States, which is clarified in the ECHR jurisprudence.

8. The issues of defence, which also are not regulated by certain Member States in their national law, remain not covered by the Framework Decision. It is to be considered whether the state attorney must be guaranteed for persons in the ESO sanctioning process. In the absence of any minimal criteria, which must be taken into account by courts when solving the issue of the ESO, it is difficult for a person to defend his or her rights. The issue, whether a person, due to different national legal bases, must hire two advocates in the course of adaptation and extension of the supervision measure under the ESO, which is transmitted to the competence of the executing State, unlike all the other actions on sanctioning the supervision measure, as well as how the organizational issues must be settled, is not solved. Also the issues of appeal, on the consequences of appeal for execution of the decision, on adaptation of the supervision measure, etc. remain not discussed in the Framework Decision.

9. The Framework Decision does not completely regulate the issue on compensation of the costs; thus, this issue is left to be decided by Member States. It is supposed that the issue on transportation of suspects and accused persons as well as of

the costs, related to it, must not be a mere issue of the issuing State's budget; the costs must be recovered from the transported suspects and accused persons; the financial relief or compensation mechanisms must be foreseen for indigent persons.

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The Tendency of Criminalizing Preparatory Acts as Self-Standing Offences or Attempt to Commit an Offence

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Abstract

The present study aims to analyze the criminalization as self-standing offences of some preparatory acts which are, in fact, merely the material conditions for the execution of the offence itself. The criminalization of preparatory acts as self-standing offences has become a widely used legislative instrument, despite the adverse consequences on the inviolability of citizens' fundamental rights.

Keywords: *preparatory act, criminal resolution, trafficking in human beings, trafficking in minors, trafficking in migrants.*

Introduction

The Romanian criminal law only punishes preparatory acts in exceptional cases, when the legislator assimilates them to the attempt to commit an offence or when they are incriminated as self-standing offences¹.

The exclusion from criminal prosecution of the preparatory acts has constituted, at least at the doctrinal level, a general principle. Impunity is justified by the fact that “the preparatory act does not damage the protected social value and does not affect the legal order”². Besides, the doctrine is also the one which defines the preparatory acts, in the absence of an express intervention of the legislator - who, within Article 32 of the Criminal Code, limits himself to define the attempt to commit an offence as being “*the execution of the intention to commit the offence*”.

The preparatory acts are the material acts which facilitate the commission of the offence and which do not fall within the constitutive content of the offence, being situated in the phase prior to the execution of the intention to commit the offence.

The legislator conditions the criminalization of the majority of offences by the production of a result or, at least, by the possibility of the production of a result.

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¹ C. Bulai, B. Bulai, *Manual de drept penal*, Ed. Universul Juridic, Bucharest, 2007, pp. 422-423.

In the doctrine, a third way to sanction preparatory acts is also laid down. If preparatory acts are committed by a person other than the author, preparatory acts shall be sanctioned as acts of prior complicity.

² F. Stretanu, *Tratat de drept penal*, vol. I, Ed. C.H.Beck, Bucharest, 2008, p. 607.

However, the preparatory acts do not reveal the offence that a person intends to commit, but are only directly related to the offence that the perpetrator has projected and represent the acts that unveil this projection.

By criminalizing them, the objective theory, according to which only the beginning of the execution is sanctionable, loses its supremacy in favour of the subjective theory, according to which criminal behaviour, i.e. the criminal resolution manifested externally in any way that allows its identification, can be sanctioned independently of the beginning of the execution. Consequently, what is being sanctioned through the criminalization of the preparatory acts is the offender's state of mind, which denotes a dangerous conduct and, theoretically, the irrevocability of the criminal plan, and not the materiality of the acts.

The current tendency is, however, to extend the area of the incriminated preparatory acts. If in the beginning, their incrimination was justified by the need to combat the phenomenon of organized crime, nowadays their sphere has been extended to cover many other categories of offences.

Their criminalization is justified not by the nature of the incriminated behaviour, but by the possibility it creates for the prevention of serious offences, being called, consequently, obstacle-offences. The obstacle-offences imply not only a concrete material act, but also the possibility of causing danger, namely the awareness of the projection of a future danger.

Hence, unlike basic offences, which are grouped according to the protected interest, the obstacle-offences are the result of the legislator's imagination. The legislator cannot conceive as many obstacle-offences as to cover all the means of committing a basic offence.

In the category of preparatory acts incriminated as self-standing offences or attempts to commit an offence, in the Romanian Criminal Code we find certain ways of committing the following offences: trafficking in human beings (Article 210 of the Criminal Code), trafficking in minors (Article 211 of the Criminal Code), smuggling of migrants (Article 263 of the Criminal Code), the possession of instruments for the purpose of counterfeiting valuables (Article 314 of the Criminal Code), illegal operations with IT devices or software (Article 365 para.(2) of the Criminal Code), treason (Article 394 of the Criminal Code), the constitution of an organized criminal group (Article 367 of the Criminal Code), the terrorist offences provided for in Law no. 535/2004 on the prevention and combating of terrorism, the provision of a home or a place for illicit drug use (Article 5 of Law no. 143/2000), the financing of trafficking and illicit drug use (Article 9 of Law no. 143/2000), etc.

In what follows, we will analyze the offences of **trafficking in human beings**, **trafficking in minors** and **smuggling of migrants**.

The offence of trafficking in human beings / The offence of trafficking in minors

With regard to the provisions of Articles 210 and 211 of the Criminal Code, which provide for the criminalization as offence of the trafficking in human beings/minors the act of "*recruiting, transporting, transferring, housing or receiving a person/minor for the purpose of their exploitation*", it should be noted that the criminal law does not define the

notions of recruitment, transportation, transfer, shelter or reception, so that the incriminating rule is presently vague, unequivocal and unpredictable.

Thus, regarding the **concept of recruitment**, in the absence of a definition provided by the law, it is unknown whether the legislature has considered an action envisaged by the perpetrator (the grooming, inciting the victim to perform certain activities for the purpose of exploitation, regardless of whether these exhortations or proposals are accepted or not by the victim), or has considered an action which was actually performed (when, after the grooming activities undertaken by the perpetrator, the victim actually goes under their influence or control).

As regards the **notions of transportation and transfer**, the legislature does not provide any criteria for demarcating the acts of transport from those of transfer, although the transfer of a minor also implies their transportation, and, vice versa, and therefore the exact definition of the two different terms used in the incrimination rule should have been done, in order to know the exact meaning and scope of the law, as a condition of clarity and predictability in its application.

Similarly, the legislature has not defined, with a view to a clear differentiation, the **notions of housing and receiving**, any act of harbouring/sheltering a person involving also their receipt within a home, leaving unclear what should be understood by the act of receiving a person with a view to their exploitation, in the absence of offering shelter.

Therefore, it is not clear whether a series of activities such as welcoming, facilitating food or clothing represent or not an act of receipt within the meaning of the criminal law, different from the activities of hosting or harbouring, distinctly incriminated by the criminal rule, so that the respect of the law cannot be secured without the possibility of knowing the exact explanation of the meaning and scope of the terms used by the legislator.

The offence of smuggling of migrants

Incriminated by the provisions of Article 263 of the Criminal Code, the offence in the matter regards the security of the state border, the act aiming at its fraudulent passage, without the fulfilment of the legal conditions by persons who neither have the nationality of the state of destination, nor legally reside on its territory. Therefore, this offence is different from the offences previously analyzed, which are directed against vulnerable people, because in the case of the smuggling of migrants, they are not the victims of the offence itself, at least not in its basic form.

In the case of this offence, the actions constituting the material element consist in the "*rallying, guidance, leading, transportation, transfer or housing of a person*, in order to fraudulently cross the state border of Romania".

As we can see, a number of notions are identical to those underlying the other two offences, such as **transportation, transfer** and **housing**, so that the criticisms expressed hereabove are fully applicable also in this case.

It is noted that in the case of migrant trafficking, the legislator used the notion of **rallying**, instead of recruitment, as in the other two cases. The term "rallying" seems more appropriate to define the action prohibited by the law, although the two terms are synonyms, although not perfect synonyms. Thus, while the notion of rallying can also be used in connection to reprehensible activities, being appropriate in the context of defining an offence, the notion of recruitment may have, depending on context, both a positive and a negative meaning, in the latter case being a perfect synonym for rallying.

The **guidance** and **leading** actions are specific to this offence, but their joining seems redundant, the two notions being synonymous. Therefore, a clear distinction between the two actions is difficult to make, the rule thus becoming imprecise. The only difference may be at most of nuance, the legislator probably wanting to distinguish between the action of guiding, which would involve the orientation of the migrant in space, by accompanying them, and that of leading, which lacks the accompanying component, limiting itself to the verbal orientation, namely advice on the direction to follow.

Conclusions

This lack of clarity, precision and predictability of the notions of *recruitment, transportation, transfer, housing or receiving* from the provisions of Articles 210, 211 and 263 of the Criminal Code contravenes the principle of the legality of incrimination, stipulated by Article 1 of the Criminal Code and Article 7 of the Convention for the Protection of human rights and fundamental freedoms.

Easily accepting the incrimination of the preparatory acts signifies accepting the incrimination of a mere psychological attitude towards an event or thing and the shifting of criminal liability, in the sense of incriminating criminal resolution, which, obviously contradicts the basic principles of criminal law.

A preparatory act is inherently ambiguous, while the beginning of the execution represents a material act that leaves no doubt about the intention to commit an offence. The anticipated incrimination of some actions without having a constitutive element of the offence, and, respectively, a result, will prevent the perpetrator from reverting to their criminal intentions, thus excluding institutions such as discontinuance or obstruction of the outcome.

The drawbacks posed by the incrimination of preparatory acts arise, in our opinion, from the ineffectiveness in the discovery and fight against such offences in the absence of special investigative techniques that could identify ever since the earliest stages the possible criminal intention. Therefore, the widespread criminalization of preparatory acts will result in an expansion of special investigative methods, characteristic to serious offences, with adverse consequences on the inviolability of the fundamental rights of citizens.

The legitimacy of the fight against crime cannot serve as a basis for the legislature to extend the exceptional procedures at the expense of the common criminal law, having the obligation to avoid all authoritarian tendencies in the development of criminal law, "which must remain faithful to the democratic principles, especially the principle of legality, the principle of the criminal intervention as the *ultima ratio* and the respect for fundamental rights and freedoms"³.

Last but not least, we believe that the legislature must exercise caution regarding the incrimination as self-standing of the preparatory acts also in terms of the increased risk of judicial errors, because the more a preparatory act is situated further away in the

³ L'élargissement des formes préparatoires et de participation, Projet de Résolution, XVIII-è Congrès International de Droit Pénal, Istanbul 2009, Turk Ceza Hukuku Dernegi, p. 69.

causal chain of actions of the offence, the harder it is to identify its criminal or, conversely, lawful nature. An ambiguous act, inviting several meanings, can be labelled, with equal ease, either a preparatory act offence, or an act without criminal connotation, which allows that, in the lack of a clear regulation, there might be a higher risk of triggering the criminal liability of persons who had no intention whatsoever to commit an offence. The act of a simple transport of people could be subsequently described as an act in the causal chain of trafficking of persons, just as the sheltering with good intentions of a person found in difficulty could be performed as easily as an act of charity or as a consumed preparatory act offence of trafficking of human beings.

Criminal Sanctions and their Development in the Socialist Federal Republic of Yugoslavia

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Abstract

It is not necessary to indicate the special character of criminal sanctions in the criminal-legal sense, as well as their importance for every society and country. Even during the Second World War on the liberated territories the first rules of national authorities were adopted, that have had a broader significance of the "criminal justice" although they predicted actions of punishing the enemies of the people and confiscation. In this paper, as and derives from its title, we will deal with the development of criminal sanctions in SFRY, which represents a time period from Second World War until the breakup of the state in the nineties of the twentieth century. Research of development of criminal sanctions during this period due expediency of representation, will be considered in three separate stages. Through a period from 1944 to 1951, from 1951 to 1976 and the period from 1976. Each of these stages have particular significance for the development of criminal sanctions and each of them represents a specific social circumstance, as well as clearly visible borders and crossings. In a separate part of the study we will make a reference to the period after the collapse of SFRY and which manner of what kind of impact on criminal sanctions it had. The primary objective of this study is to examine and consider the development of criminal sanctions in the period of the SFRY. In the last part of the paper, conclusions will be presented that have been reached in this study.

Keywords: *criminal sanctions, the development of criminal sanctions, the period after the Second World War.*

1. Opening remarks

The criminal legislation of the Socialist Federal Republic of Yugoslavia celebrated its temporal and spatial validity of an important stage not only in the criminal sense, but also in social and national terms.

The criminal legislation of SFRY, was valid as far as it SFRY existed as a state, and includes the period of the last year of Second World War until the breakup of the state of the twentieth century.

During this period, the development of society and the state, was also followed by development of criminal legislation.

In criminal law, during this period, one can distinguish three major stages of development of criminal sanctions in the legislation from the aspects from which we are considering the types of criminal sanctions.

By analyzing this period, it can be seen that in almost any change or amendment to the criminal legislation there were also some changes in criminal sanctions. New

criminal sanctions have been introduced and existing were abandoned or what followed was their prequalification into other forms of criminal sanctions. On this state, respectively to this changes, significantly affected social development, and within it especially should highlight the construction of socialist self-management system, but also the position of man in socialist society.

In addition to the social development, the development of criminal justice, was influenced by the foreign criminal law and criminal law doctrine. One of the main features of this development is a constant tendency for humanization of criminal sanctions.¹

As already mentioned, the criminal legislation of SFRY lasted until until the breakup of country in early nineties of the twentieth century, that is, it lasted a few years after the collapse because it remained in the then newly established countries.

In brief, it is necessary to point out the reasons for the breakup of SFRY. During the period of the nineties of the twentieth century in Europe, especially in those parts, *i.e.* states that have previously been subject to a 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 from a single one, as can be seen in the case of SFRY, or what followed was internal changes, as can be seen in the case of Hungary and other countries of the former so-called. Eastern Bloc.

SFRY 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.²

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.³

After a small outing, we emphasize that the central aim of this research will be based on the development of criminal sanctions in SFRY to be viewed through the aforementioned stages of development.

2. First Stage of Development of Criminal Sanctions - period from 1944 to 1951

After the capitulation of the Kingdom of Yugoslavia a previously applied laws ceased to exist.

During the war, more precisely, between the second and third offensive of February 1942, the liberated territory of Foca, the Supreme Headquarters of the People's

¹ Srzentić, N., Stajić, A. i Lazarević, Lj.: *Krivično pravo Socijalističke Federativne Republike Jugoslavije - opšti deo*, Savremena administracija, Beograd, 1981, pp. 312.

² Bingulac, N. i Dragojlović, J.: *Development of criminal sanctions in Serbia after the breakup of SFR Yugoslavia*, Journal of Eastern Criminal Law, no. 2/2016, Faculty of law, University of Timisoara, pp. 216.

³ *Ibid.*

Liberation Army (PLA) and Yugoslav partisan (PMUs) adopted the first regulations on the organization and operation of National Liberation Committee (NLC), as follows: Explanations and instructions for the work of the National Liberation Committee and the tasks and organization of National Liberation Committee. These two documents, known as Foca's regulations.⁴

With Foca's regulations as first codified provisions of the liberated territory, people's government becomes institutionalized. Mentioned documents with a ten-point regulated the questions of ways and forms of realization of the revolutionary-democratic self-government during the war, electoral principles, sources of supply of army actions to punish enemies of the people and the confiscation.⁵

During that period, namely in May 1944, the Supreme Headquarters PLA and PMUs issued a decree on military courts and the National Liberation Army and in that way re-established system of criminal sanctions in Yugoslavia after the Second World War.

Article 16 Regulation prescribes that military courts impose penalties and protective measures: a) reprimand, b) a material penalty (monetary in nature, in the part), v) from the expulsion of residence, g) *i.e.* deprived of the rank titles, d) removing from the position, f) the forced operation for a period of three months to two years, e) a heavy forced operation for a period of three months to two years or more, and g) a death sentence. In addition to these penalties the court may impose the loss of military honor, the loss of civic honor at a certain time or forever, and confiscation of property.

It can be seen that this Regulation prescribes eight sentences and three protective measures.

The Law on the types of penalties in Democratic Federal Yugoslavia (DFY), which was adopted in 1945, stipulates in Article 1 of the following penalties: a) fine, b) the compulsory operation without detention, c), the expulsion of the place of residence, d) a loss of political and some civil rights, e) the loss of the public service, f) the prohibition to act as a specific activity and craft, g) or loss of demotion or positions, h) detention, i) seizure of property, j) arrest with hard labor, k) loss of citizenship and l) death sentence.⁶ Mentioned penalties may be imposed on civil and military courts, as stipulated by the same article.

After adjustment of the Law on the types of penalties DFY in 1945 with the first Constitution of the SFRY of 1946 (which is modeled after the Constitution of the USSR from 1936 known as Stalin's constitution), which is also represented and comply with emerging changes in society, criminal sanctions sitem included, in addition to those already mentioned in the Law on the types of penalties DFY from 1945, with minimal changes and merger of some sentences, there is an obligation to repair the damage.

In this newly-reaffirmed law called Act on the certificate and amendments to the Law on the types of penalties from 1946, included are the provisions for juvenile offenders.⁷ For them, it was prescribed that instead of fines, a corrective measures can

⁴ Ferdo Čulinović (1949) *Razvotak ZAVNOH-a*, Historijski zbornik, year 2, no.1-4, pp. 14-15.

⁵ Petranović, B: *Istorija Jugoslavije 1918-1988, druga knjiga - Narodnooslobodilački rat i revolucija 1941-1945*, Nolit, Beograd, 1988., pp. 210.

⁶ Uredba o vojnim sudovima Narodnooslobodilačke vojske, Vrhovni štab NOV i POJ, maj 1944. godine

⁷ Zakon o potvrdi i izmenama Zakona o vrstama kazni iz 1946. godine, Službeni list FNRJ, br. 66/46.

be imposed, namely: a) handing over the education of their parents or other persons who care for them, b) reprimand and v) referral to a correctional institution.⁸

As it can be seen, the system of criminal sanctions in this period consisted of twelve penalties and three corrective measures.

The Criminal Code of SFRY from 1947, chapter four, predicted the three types of criminal sanctions: a) fines; b) health-protective measures; c) corrective measures.

Fines which may be prescribed are: a) death penalty, b) arrest and forced labour, c) arrest, d) the corrective work, e) loss of citizenship, f) the confiscation of property, g) loss of civil rights, h) loss of rank, i) prohibition on practicing a profession, j) expulsion, k) fines and l) repairing the damage.

It can be seen that in turn was followed by some changes in the system of penalties, including former sentence of forced labor with deprivation of liberty can be replaced by a fine or a proportionate penalty of deprivation of liberty; but can not be imposed to the Army officers or soldiers who are in active service, and also to the policemen and Peoples Militia. Former penalty of expulsion from the place of residence now allows, in addition to expulsion from the place of residence and expulsion. The penalty losing political and individual civil rights, which prescribed deprivation: a) active and passive electoral rights, b) right to take elective positions in community organizations, v) rights of wearing honorary titles, medals and other public honors, g) the right-taking state or any public or service titles, d) the right to pension and social insurance and f) parental rights; now represents the penalty of losing the civil rights, and in addition to the prescribed added the invalidation of the public appearance; it is necessary to indicate that no such penalty has included the former separate penalty of losing the right to a public service. The former ban on practicing certain activities and craft now has a different name and to ban specific occupations. The former penalty of demotion of the title is replaced by a term loss of rank and it only applies to the officers and NCOs in an active capacity.⁹

When it comes to corrective measures, it is pointed out that the Law on the types of penalties from 1945 (*i.e.* the Law on the Confirmation and Amendments of the Law on the types of penalties from 1946) provide three corrective measures, unlike the Criminal Code of FPRY 1947, which lays down four corrective measures, namely: a) handing to parents or guardians with the obligation to take extra supervision over the minor, b) a reference to an corrective institution, c) accommodation in a correctional facility, and g) a reference to a medical correctional institution.

In addition to a more corrective measures (numerically speaking) the difference is that the reprimand as an corrective measure no longer exist, but they are introduced two new, namely: corrective measure of committal to an corrective institution shall ensure that the court will refer the juvenile to an corrective institution if it is in the interest of his upbringing, or if the parents or guardians are unable to provide for its education and training; and corrective measure of committal to a medical correctional institution shall ensure that in cases where the health situation of minors requires

⁸ Perić, O.: *Razvoj maloletničkog krivičnog prava i rešenja zastupljena u novom krivičnom zakonodavstvu o maloletnicima u Republici Srbiji*, Branič - časopis Advokatske komore Srbije, vol. 119, br. 1-2, 2007, pp 139.

⁹ Krivični zakonik FNRJ iz 1947. godine, Službeni list FNRJ, br. 106/47, član 34, član 37, article 48. and article 51.

treatment and medical care, especially if the mentally ill, retarded, blind or deaf, the juvenile will be referred to the Medical Correctional Institution.¹⁰

It is pointed to penalties and corrective measures, therefore, it is necessary to specify and health-protective measures.

Health-protective measures relating to the offender who is found to be mentally incompetent or has diminished mental capacity, and that his behavior was dangerous to society. Then the court may order the referral to institution for mentally ill persons or other institution for treatment.¹¹

A comparative review of the Law on the types of penalties DFY in 1945, the Law on the Confirmation and Amendments of the Law on the types of penalties from 1946 and the Criminal Code of FPRY of 1947 pointed to significant differences in terms of regulatory and criminal sanctions that concludes with an analysis of the first stages of development of criminal sanctions in legislation in the period immediately after the Second World war.

3. Second Stage of Development of Criminal Sanctions – Period from 1951 to 1976

The second stage of development of criminal sanctions SFRY, during this period, begins with the adoption of the Criminal Code of Federal People's Republic of Yugoslavia (FPRY) from 1951, because that was followed by significant changes in the system of criminal sanctions.¹²

One of the major changes to the Criminal Code of the FPRY from 1947 is to reduce the prescribed penalties from twelve to „only "seven.

Article 24 of the Criminal Code FPRY 1951 prescribes the following penalties: a) the death penalty, b) maximum-security prison c) prison, d) the restriction of civil rights, e) prohibition on practicing a profession, f) the confiscation of property and g) fine.

The difference can be seen in the fact that instead of health protection measures (as was stipulated in the Criminal Code FNRY 1947) now uses the term security measures. They are prescribed in the Chapter 5 of the Criminal Code of FPRY of 1951, and these are: a) a reference to an institution for safekeeping and treatment, b) Forfeiture and c) expulsion from the country.

The difference can be observed in corrective measures, so in the Criminal Code of FPRY of 1951, stipulated four corrective measures: a) handing the minor to their parents or guardians, b) a reference to an corrective institution, if the juvenile is mute and blind he will be sent to a institute for the deaf and the blind, v) reprimand and g) a reference to a correctional home.¹³

The Criminal Code of FPRY from 1947 has also stipulated four corrective measures, provided that in relation to the law omitted corrective measure of committal to a medical correctional institution or reprimand was added as an corrective measure.

¹⁰ Krivični zakonik FNRJ iz 1947. godine, op.cit., article 72, article 74. and article 76.

¹¹ *Ibid.*, article 79. and article 80.

¹² Krivični zakonik FNRJ iz 1951. godine, Službeni list FNRJ, br. 13/51.

¹³ *Ibid.*, article 65. i article 68.

Subsequent changes to the system of criminal sanctions was followed by the Law on Amendments to the Criminal Code of 1959.¹⁴ At the outset it is necessary to indicate that in addition to the existing criminal sanctions incorporates another, so that the system of criminal sanctions prescribes four criminal sanctions: a) fines; b) security measures, v) corrective measures, and d) a judicial admonition.

This law provides that the court reprimand, as a separate criminal sanctions may be imposed for criminal offenses punishable by imprisonment of up to one year or a fine and if there are certain mitigating circumstances. The Law on Amendments to the Criminal Code of 1959, Article 5 prescribes the following penalties:

- a) the death penalty,
- b) maximum-security prison in) prison, g) confiscation of property and d) fine.

It can be seen that the number of sentences reduced to five from seven that were stipulated by the Criminal Code of SFRY in 1951 and sentences that were left out are: the punishment of civil rights restrictions and ban on practicing a profession.

When it comes to security measures, in addition to existing ones (which were prescribed in the Criminal Code FPRY 1951) also prescribes: a) mandatory treatment of drug addicts and alcoholics, b) prohibition on practicing certain profession, c) suspension of the driver license and d) confiscation.

It can be concluded that there is a total of seven prescribe security measures.¹⁵

The Law on Amendments to the Criminal Code of 1959 have seen significant changes in terms of corrective measures because it completely changes Chapter 6 that prescribes and regulate them.¹⁶

The changes apply not only to the increased number (four corrective measures, as it was prescribed FPRY Criminal Code of 1951, as many as eight), but the difference can be seen and in their classification.

The amendments to the Criminal Code, they are grouped into three types, namely: a) disciplinary measures, including: (a1) a reprimand and (a2) a reference to a disciplinary center for juveniles, b) increased supervision, including: (b1) increased supervision by parents or guardians, (b2) increased supervision in another family and (B3) intensified oversight by custodial and c) institutional measures, including: (c1) referral to an corrective institution, (c2) referral to a correctional home and (c3) referral to institution for defective minors.

It is necessary to point out that older juveniles can be sentenced to juvenile prison. It may not be shorter than one year or longer than ten years. Juvenile prison sentence may be imposed for a crime that is punishable by more than five years of rigorous imprisonment, and because of the serious consequences of work and a high degree of criminal responsibility would not be justified by the application of corrective measures.

The criminal legislation of Yugoslavia in 1962, was followed by another change in the system of criminal sanctions and the adoption of the Law on Amendments to the Criminal Code.¹⁷

One of the changes related to the security measures so that in addition to the now prescribed measures, prescribes a security measure prohibiting public appearance. This system of criminal sanctions prescribes a total of eight security measures.

¹⁴ Zakon o izmenama i dopunama Krivičnog zakonika iz 1959. godine, Službeni list FNRJ, br. 30/59.

¹⁵ *Ibid.*, article 36. and article 38.

¹⁶ *Ibid.*, article 41.

¹⁷ Zakon o izmenama i dopunama Krivičnog zakonika FNRJ iz 1962. godine, Službeni list FNRJ, br. 31/62.

Comparative review and analysis of the Criminal Code of FPRY of 1951 with its amendments of 1959 and 1962 can be seen significant changes in the system of criminal sanctions in the form of the tendency to reduce the number of penalties, but also increasing the number of security measures and corrective measures. It is obvious that in this way the legislator wanted to increase security measures to eliminate conditions or conditions that may affect the future of the offender not to commit criminal offenses, and that's how some authors call,¹⁸ for a specific set of personality of certain categories of offenders who are ineligible to motivate fines through application security measures which aim to remove the cause of the delinquent behavior *i.e.* treatment, repairing, or in special cases, the insulation.

Processed stage, in which the emphasis was on the development of criminal sanctions, is also significant in that it was during this period codified criminal legislation (the adoption of the Criminal Code of FPRY, 2 March 1951) was carried out.

For its time, highly advanced Criminal Code remained in force until 1977, when political reasons replaced the Criminal Code of SFRY six republican criminal law and two provincial criminal law, which lead to disappearance of the unity of the criminal legislation of Yugoslavia.¹⁹

With this we will finish with an analysis of the second stage of development of criminal sanctions in legislation in the period after the Second World War.

4. Third Stage of Development of Criminal Sanctions – period of 1976 year

The third stage of the development of criminal sanctions, in the mentioned period, started with the adoption of the Criminal Code of SFRY in 1976.²⁰

In Article 5 of the said Act, prescribes criminal penalties which there are four, namely: a) punishment, b) a suspended sentence and judicial admonition c) security measures and g) corrective measures.

The difference compared to the Criminal Code of SFRY of 1951 as amended in 1959 and 1962 is that it is next to a judicial admonition, as an independent criminal penalties, a suspended sentence can be prescribe.

Their relationship is to some extent an alternative character, but they can not be viewed as two different criminal sanctions, even as one. They can, in fact, be classified in precautions even though they are not so prescribed in the said Article 5.

The solution of this dilemma is found in Article 51, pointing out that the general purpose of criminal sanctions, the purpose of the suspended sentence and judicial admonition is to treat the criminally responsible perpetrator not to apply the penalty to less socially dangerous acts, when it is not necessary for the legal protection of and when you can expect that warning with a threat of punishment (suspended sentence) or a warning (court reprimand), enough to affect the offender from committing criminal acts.²¹

¹⁸ Drakić, D. i Drakić, G.: *Sistem mera bezbednosti u našem krivičnom pravu – kroz istoriju i danas*, TEME XXXIX, br. 4, 2015, pp 1403.

¹⁹ Tišma, M.: *Krivična dela protiv oružanih snaga u domaćem i uporednom zakonodavstvu*, Vojno delo, zima/2011, pp 169.

²⁰ Krivični zakon SFRJ iz 1976. godine, Službeni list SFRJ, br. 44/76.

²¹ *Ibid.*, article 51.

Minor differences can be realized with prescribed penalties. According to the Criminal Code of SFRY from 1976 stipulates four penalties as follows: a) the death penalty, b) prison, c) fine and g) seizure of property, in contrast to the prior Law which provided for five. The penalty, which was no longer included in the system of criminal sanctions is strict imprisonment.

A significant difference in security measures may be noted between the Criminal Code FNRJ 1951 with its amendments of 1959 and 1962, and the Criminal Code of SFRY in 1976. Numerically speaking, eight measures of security are still prescribed provided that some were expanded, and there are also newly-prescribed, so that the mentioned law in Article 61 lays down the following safety precautions: a) Mandatory psychiatric treatment in a medical institution, b) the compulsory psychiatric treatment at large, v) required treatment of alcohol and drug abusers, g) prohibition of doing professional, business office, d) eliminating the public appearance, f) prohibition of driving a motor vehicle, e) forfeiture and f) expulsion of foreigners from the country.

When it comes to corrective measures, the SFRY Criminal Code of 1976 provides in Article 75 that there are:

a) disciplinary measures,
 b) increased supervision and
 c) institutional measures but does not prescribe specific corrective measures. Prescribing is within the jurisdiction of the republics and autonomous provinces, but these laws prescribe the following corrective measures:

a) reprimand,
 b) a reference to a disciplinary center,
 c) supervision by a parent, adoptive parents or guardians,
 d) supervision by a control in another family,
 e) intensified oversight of Social Welfare,
 f) increased care and monitoring,
 g) increased care and supervision in a living room in a corrective institution,
 h) a reference to a corrective institution,
 i) reference in a correctional facility, and
 j) a reference to a facility for the treatment and training. It should be noted that the institute of juvenile prison had no changes.

Based on the results shown so far, it can be seen that the third stage of development of criminal sanctions in legislation, in the period being processed, only marks the passing of the Criminal Code of SFRY in 1976 and the way they are prescribed criminal penalties. In a comparative overview and analysis of the Criminal Code of SFRY of 1951 with its amendments of 1959 and 1962, and the aforementioned Criminal Code of SFRY pointed to changes in the system of criminal sanctions, which also ends with an analysis of the third stage of development of criminal sanctions in the period after the Second World War.

5. Legal continuity of SFRY Criminal Legislation- the period immediately after the dissolution of SFRY

During this period, the development of criminal sanctions is marked with the criminal law of the Federal Republic of Yugoslavia and the Republic of Serbia. Although it is not the subject of this study, it is necessary to point out the most important elements in the development of criminal sanctions for this period.

During the period of validity of the criminal legislation of SFRY, a several amendments were made, but significant changes followed in the criminal law of the Federal Republic of Yugoslavia.

In the mentioned Criminal Law significant changes and additions were made, starting with the name change until substantial changes.

Total has made seventeen amendment, ten in the period from 1976 to 1990 (published in the Official Journal of the SFRY), *i.e.* during the validity of the Criminal Code of SFRY, six amendments to the period from 1992 to 2001 (published in the Official Journal of the FRY) and one amendments to the 2003 (published in the Official Gazette of RS).

According to official presented papers (Gazette) we can see changes in society, in the political arena but also the chronology of the disappearance and the emergence of the state.

After the breakup of Yugoslavia, the former SFRY Criminal Code is fully retained by the Federal Republic of Yugoslavia. Following the same principle the Criminal Code of the Socialist Republic of Serbia was also retained, which forms part of the criminal law system. In changes mentioned Criminal Code it is necessary to point out the Law on amendments to the Criminal Code of the Socialist Republic of Serbia from 1992, which prescribes the change of the name of the existing laws with the Criminal Code of the Republic of Serbia.²² 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 is added to the Article 2a. called the death penalty in which precisely determines prescribing the death penalty.²³

In federal law, it is primarily necessary to point out that they retained all criminal sanctions that have been prescribed in the Criminal Code of SFRY from 1976, *i.e.*, Article 5 shall continue to prescribe four criminal penalties and they are: a) penalty, b) a suspended sentence and judicial admonition c) security measures and d) corrective measures.

The first significant changes from retained Criminal Code of SFRY from 1976 were followed by the Law on Amendments to the Criminal Code of the FRY in 2001.²⁴ Article 34 lays down only two sentences, as follows: a) prison and b) a fine, unlike the Criminal Code of SFRY from 1976, which provided four penalties. Penalties that are not prescribed are a) the death penalty and b) confiscation of property.

Unlike penalties, with the suspended sentence and judicial admonition, were not followed by changes.

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. Left out security measure is the prohibition of public appearance.

In the end, it is necessary to point out that even with the corrective measures, there were no changes in relation to the Criminal Code of SFRY from 1976, so in the Article 75 are the same measures and they are: a) disciplinary measures, b) increased

²² Zakon o izmenama Krivičnog zakona Socijalističke Republike Srbije iz 1992. godine, Službeni glasnik RS, br. 49/92.

²³ Zakon o izmenama i dopunama Krivičnog zakona Republike Srbije iz 1994. godine, Službeni glasnik RS, br. 47/94.

²⁴ Zakon o izmenama i dopunama Krivičnog zakona SRJ iz 2001. godine, Službeni list SRJ, br. 61/01.

supervision and c) institutional measures, but there are not prescribed specific corrective measures.

Conclusions

The importance of the development of criminal sanctions demonstrates the need to achieve the best possible individualization. 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.²⁵ 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, *i.e.* convicted.²⁶

The topic of this work referred to the development of criminal sanctions in the period of the SFRY, since the end of Second World War until the breakup of the state nineties of the twentieth century, 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 to protect society.

It is interesting to point out that some of the sanctions that have ceased to exist, again were classified in this corpus sanctions of in order to promote the purpose of criminal sanctions.

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 period SFR Yugoslavia it can be seen the evolution of social awareness and the development of society.

In this research of the development of criminal sanctions, it could be seen that due to the expediency of view of development, the most appropriate thing to do was to perceive this period of development of criminal sanctions through three separate stages, whereas after these three, maybe the fourth stage was their development after the breakup of SFRY.

Each of these stages have particular significance for the development of criminal sanctions and each of them represents a specific social circumstances, but with clearly visible borders and crossings.

From the standpoint of temporal existence of the criminal legislation of SFRY, there are about fifty years, that depending on the angle of observation may or may not represent a long period, or if viewed from the starting point of the development of criminal sanctions, or from the Regulation on Military Courts National Liberation Army of 1944 all the way to complex and layered SFRY criminal Code from 1976, which lasted until the dissolution of that country nineties, can be seen as significant development and progress in criminal sanctions.

²⁵ Srzentić, N., Stajić, A. i Lazarević, Lj.: *Krivično pravo Jugoslavije (opšti deo), Savremena administracija, Beograd, 1995.*, pp 308.

²⁶ Janković, S: *Pretpostavke za individualizaciju kazne*, Bilten Apelacionog suda u Beogradu, 2012., pp1., <http://www.bg.ap.sud.rs/images/pretpostavke%20za%20individualizaciju%20kazne19.10.2012.pdf>, 20.03.2015.

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Deterrence and Incapacitation Effects of the Criminal Sanctions

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Abstract

When we study prevention as a broad approach and response to crime, we inevitably study preventive role of the criminal justice system which can be seen through a number of interventions and processes. Those are: processes of criminalization, tightening the penal policy, imposition of criminal sanctions, as well as through the process of their execution. All those processes and interventions can exert preventive influence through the effects of incarceration and incapacitation, general and special deterrence, rehabilitation and increased supervision and control over the offenders in the community. But their positive impact is put under question and in this regard, in this article, we open up current debates about the crisis of legitimate preventive effects of the punishment. In addition, a special emphasis is given to the Macedonian criminal justice reforms in the last decade. Brief analysis of the new amendments of the Criminal code (increased incriminations, prescribing more severe penalties and the introduction of new criminal sanctions) will show that crime and crime control are dynamic phenomena, susceptible of modern and global processes in society. However, the current system of crimes and punishments in the country opens up a number of questions: whether the new incriminations and additional criminal legal protection of certain values (family and children) can make a special and general preventive effect or whether the new incriminations have deterrent effect on offenders and potential offenders? In the absence of appropriate research and research results in our country, this article opens up several concerns and issues which are challenge for further studies by the scholars and other professionals in this area.

Key words: *deterrence, incapacitation, crime prevention, punishment, offenders.*

1. Introduction

Criminal justice system and criminal law have a function to protect, not only citizens and society from crime but also fundamental freedoms and human rights by abuse of power. Both of them are accomplished through repressive function of the state. That's way; the criminal justice system is a form of formal crime control, as opposed to

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preventive policy that exercises its activities and tasks outside that system. Distinction between penal and preventive role of the crime control is understandable for pragmatic reasons and is based on the repressive nature of the measures imposed by the criminal justice system that limit or control certain behaviors and phenomena and reveal, prevent and punish the perpetrators. However, while studying prevention as a broad approach and response to crime, we inevitably study the preventive role of the criminal justice system. We do this for the following reasons: the purpose of the criminal justice system is to reduce the crime, and therefore we talk about its function in crime prevention, the aim of the sanctions is to prevent and deter the offender (and potential perpetrators) to commit crimes and that's why we talk about preventive purposes of criminal sanctions, the activities and measures of the criminal justice system are taken both, before and after the execution of certain crimes in order to prevent, detect and deter potential offenders. So, we talk about the preventive purpose of the activities and measures of the criminal justice system.

Given the above, apart to protective and repressive function of the criminal justice system, in this article we put emphasis on its preventive role i.e. on deterrent (through special and general prevention as main purposes of the criminal sanctions¹) and incapacitation effect of the punishment.

In addition, a special emphasis is given to the reforms in the Macedonian criminal legislation in the last decade (2004 - 2016). Brief analysis of the new amendments of the Criminal code (increased incriminations, prescribing more severe penalties and the introduction of new criminal sanctions) shows that crime and crime control are dynamic phenomena, susceptible of modern and global processes in society. However, the current system of crimes and punishments in the country opens up more questions: whether the new incriminations and additional criminal legal protection of certain values (family and children) can make a special and general preventive effect or whether the new incriminations have deterrent effect on offenders and potential offenders? In the absence of appropriate research and research results in our country, this article opens up several concerns and issues which are challenge for further studies by the scholars and other professionals in this area.

2. About the preventive role of the criminal justice system: introductory remarks

Criminal justice system, respectively the system of crimes and criminal sanctions is exercising its preventive function through a number of interventions and processes that are part of penal policy. It is a state policy design not only by the criminal justice system (the police, prosecution and judiciary), but also by the legislative authority through the processes of incrimination and prescription what behaviors would be considered as crimes due to their social danger and seriousness of the consequences (Arnaudovski, 2013: 46). Therefore, the manner in which the penal policy is running has a major impact on the prevention of crime, both as an individual human act and as a mass social

¹ According to the Macedonia Criminal Code (article 32), objectives of the punishment are, besides the exercises of the justice, (1) to prevent the perpetrator to commit crimes and his re-socialization and (2) to exert positive influence on others to avoid crimes (Official Gazette of the Republic of Macedonia, No. 80/99, 4/02, 43/03, 19/04, 81/05, 60/06, 73/06, 7/08, 139/08, 114/09, 51/11, 135/11, 185/11, 142/12, 166/12, 55/13, 82/13, 14/14, 27/14, 28/14, 115/14).

phenomenon. So, the preventive role of the penal policy can be recognized through (1) the processes of criminalization, (2) tightening the penal policy, (3) imposition of criminal sanctions, as well as through (4) the process of their execution. The same *process of criminalization* of the new human behaviors as crimes and education of the public with the new incriminations fulfills moral and educational function of the criminal law. This means that simply by stipulating what human actions are going to be incriminated as crimes can increase collective belief in traditional social values, as Kanduc names *positive general prevention* (Kanduc, 2009: 70). In terms of *prescribing severe penalties* for certain crimes, it is presumed that severity has preventive effect in reducing crime, although, many findings (Tonry, 2008, Wright, 2010, Vito F. Gennaro at all, 2006) show that it has limited effect. Besides, *the process of determining criminal responsibility* and the imposition of criminal sanctions can affect preventively, not only for the concrete offender, but for all potential offenders. This effect is greater if the imposition of sanctions is certainly and immediately after the commission of the offense. And, at last, the *manner of executing criminal sanctions* in penitentiary institutions or in the community has a significant impact on rehabilitation and re-integration of offenders, which in turn, are the basis for reduction of recidivism.

All those processes and interventions can exert preventive influence through the effects of (1) incarceration and incapacitation, (2) general and special deterrence, (3) rehabilitation and (4) increased supervision and control over the offenders in the community (Mackenzie L. Doris, 1997). The *incarceration and incapacitation* of the offenders have a preventive effect because they are temporarily or permanently deprived of their freedom in correctional institutions, and actually are moved from the society. At the time of confinement, they are prevented and unable to commit crimes. *Deterrence* has a preventive effect with the imposition of criminal sanctions which can be special (to concrete offender) and general (to potential perpetrators). This means that the thought of the perpetrators of the possibility to be sentenced creates fear which deters. *Rehabilitation programs and treatments* are directed to re-socialization of the convicted offenders. By development and improvement of the social and cognitive skill of the offenders, the skills for stress and aggression management and for conflict resolution and by the chance to gain certain working qualification, the offender might strengthen his capacity and can be able to live life free of crime. On the other hand, the *enhanced supervision and control of offenders in the community* have a preventative effect with the increased surveillance and threat that if they commit a crime, than they will be returned to penitentiary institutions or that punishment will be replaced by another, more severe sanction.

3. Criminal sanctions and the concepts of deterrence and incapacitation

3.1. Theoretical background

The basics of criminal law and the purposes of punishment are established with the Classical (and neoclassical) School of criminology before and after the French revolution (1789-1799), who introduced revolutionary changes in the perception of the crime, the offender, his responsibility, and system of criminal sanctions. The Classical School laid down the foundation for understanding the preventive role of the criminal justice system and the penitentiary institutions. For example, Beccaria (1738-1794) in 1764 in

his short publication "*The crime and punishment*" has set the basic tenets of the criminal law and the basic functions of penalties, while Feuerbach (1775-1833) also set the thesis for general deterrent effect of punishment. The basis is that the punishment for the potential perpetrators represents a threat that will be applied and therefore has deterrent effect from committing crimes. In addition to general prevention, the founders of the Classical School have written for the special prevention as one of the objectives of the sanction which meant, not just to punish the concrete offender, but to deter him from further crimes. Actually, deterrent effect of the punishment is based on intimidation, which is supposed to happen when the punishment is proportionate and inevitable. In particular, Beccaria (1764) is known for his views on proportionality, swift, severity, reliability and the certainty of punishment. In this sense, the sentence must be proportionate to the seriousness of the offense, because the crime is prevented not by severity of punishment, but with its inevitability (Arnaudovski 2007: 164). This means that penal policy should avoid severe and disproportionate penalties in terms of the seriousness of the offense. This is in line with the thesis that severity of the penalties does not deter offenders to commit more serious crimes.

In short, the theory of deterrence assumes that sanctions (those which are already imposed and those which represent threat that will be imposed, like *Damocles sword over the heads of the offenders*) will intimidate and deter perpetrators (and potential perpetrators) from committing crimes. The basis of that effect is that they pose a threat and risk for punishment and cause feelings of fear. In that sense, deterrence will be effective when motivated offender to commit an offense refrained from commission, because of fear of the consequences (Wikstrom, 2008: 376). So, the concept of deterrence based on the threat of punishment, presumes that offenders are rational and can calculate with the consequences of their actions, both with the gains and losses. The later means that the criminal justice system relies on trust and expectations that the penalties will deter crime, and the former, that if the losses exceed gains, motivated offender will commit a crime. Such a choice is a calculated risk and for offenders, in certain situations, is not worth to take it (Paternoster, 2010: 783).

In addition, the penalties have to be certain, swift and severe. In that sense, surveys which study deterrent effect usually want to consider (1) the relationship between severe penal policy and deterrence, (2) the citizens' perception of severity, certainty and swift of the punishment and (3) the familiarity of citizens with the penal policy in their country. Empirical findings regarding the effect of deterrence of envisaged and imposed penalties are disappointing, and the same, as the rehabilitation treatment doesn't work, "deterrence doesn't work", either.

3.2. *Certain empirical findings*

Relationship between severe penal policy and deterrence

Pursuit for effective preventive criminal policy reshapes the criminal justice system and the perception of the offender as an enemy who should be punished. Criminal justice system is, also, perceived as too "lukewarm" to the crime, and therefore, instead to re-integrate and rehabilitate, the penal purpose, after 70s is shifted to greater protection of victims and to the public (Selih, 2009: 47-48). Thus, the old ideals of welfare, like *help, advise, be a friend* are abandoned (Garland, stated in Owen, 2007). In such conditions, in the late 20th-century, crime control systems move to two trends. The first response is adaptation including greater rationalization and commercialization of the functions of the criminal justice system (in particular, the formation of multiagency

partnerships for crime prevention). The second answer is committed to applying prison sentences and zero tolerance policing (Hughes & McLaughlin, 2003). The latest tendency is in line with the theory that the punishments, in particular the prison sentence will deter the offender from reoffending. But, soon after the severe criminal policy was established, it has shown its weakness and not promising effects in crime reduction.

For example, under the influence of the theory of deterrence, the United States adopted many amendments to tighten penal policy. One concerns the increased application of the death penalty, which relies on data which shows that each execution saves eight (Ehrlich, 1975) or 18 lives (Dezhbakhish, Rubin and Shepherd, 2003). Despite the few positive views about the effectiveness of the death penalty in reducing crime, most findings suggest that it has not a deterrent effect. Even, it can increase suicide because of its brutality (Paternoster, 2010: 783). Ultimately, we can say that the death penalty (or state execution) legitimizes the use of violence, showing that it is permitted to kill a man for a serious crime (Vito F. Gennaro, Maahs R. Jeffrey, Holmes M. Ronald, 2006: 60). In addition to the above, the research results gathered by the National Research Council (USA) in 2012 and published in the *Deterrence and the Death Penalty Report* (Nagin, Pepper, 2012) show that the death penalty has no effect on murder rate. Therefore, one of the recommendations is that deterrence should not affect and should not be taken into account when judge consider whether to impose it for more severe crimes (referred to Daniel S. Nagin, 2013: 24).

Another reform to penal policy is the right of citizens to carry concealed weapons, although no positive link is perceived between carrying a weapon and the rate of crime, on the other side. Moreover, that reform is contradictory to the increase of the penalties for gun crimes. However, despite the imposition of more severe sanctions for gun crimes, statistics show that even those sanctions have no deterrent effect and impact on reducing gun crime (Raphael I Ludwig (2003), stated in Daniel S. Nagin, 2013: 35).

An important reform in American Criminal Law is the adoption of "three strikes and you are out" Law, which has been passed, first in California in 1994 and then in many US states. That law provides that after third offense and after second sentence, the offender may be sentenced to imprisonment of minimum 25 years (Paternoster, 2010: 783). The argument is that more than a three crimes (after imposed sentences) are an indicator of offender's danger, consistency and failure of rehabilitation applied during previous convictions. Research on the effectiveness of the Law showed that serious crimes are reduced up to two (2) %. For example, by 2002, based on the Law, over 42,000 offenders have been convicted (Vito F. Gennaro, Maahs R. Jeffrey & Holmes M. Ronald, 2006: 263). According to another study (Helland & Tabarrok, 2007), the rate of apprehension is reduced by 20 % for those who committed two crimes (Nagin S. Daniel, 2013: 37).

In short, the analysis which is based on the initial thesis that the severe punishments and long-term prison sentences increase public safety and reduce recidivism shows that the rate of recidivism, instead to be reduced, is increased by 3%. The explanation is that when inmates serve longer sentences, they, as a result of prison life under strict institutional regime, lose social contacts in the community. Such loss of links with the outside world reduces the chances of restoring normal social relations after release from penitentiary institutions, which increases the risk for recidivism, on the other hand. Thus, those studies (Cook, 1984, Nagin, 1998, Van Hirsh, 1999), have proven that severe penal policy has no, or has limited deterrent effects.

Perceptions of citizens for the certainty, swift and the severity of the punishment

Related to citizens' perception of certainty, swift and severity of the punishment, within the surveys are set several research hypotheses: (1) *the greater certainty of legal sanction is, the lower the crime rate will be*, (2) *the greater severity of legal sanction is, the lower the crime rate will be* and (3) *the greater speed of legal sanction is, the lower the crime rate will be* (Paternoster, 2010: 784). About the connectivity of the variables can be found different views among scholars, especially about the impact of the severity on the reduction of crime. Majority believes that the certainty of punishment causes a stronger deterrent effect than the severity of the stipulated sanction. This position is supported by the survey data on public opinion about the certainty of arrest and punishment. Namely, the data confirm that the citizens build their opinions based on their own and others' experience. For example, those who are discovered and caught while committing a crime believe that the certainty of the punishment is inevitable (Paternoster, 2010: 809). Also, the answer of the question: *what has greater deterrent effect, severity or certainty of punishment?* depends on the willingness of the offender to take the risk of committing the crime. For example, severity of punishment exerts much more influence on decision of those offenders who are not willing to take the risk. Conversely, certainty of punishment has a greater deterrent effect for those offenders who are willing to take the risk. It follows that, certainty has a stronger influence on motivated offenders to commit a crime (Becker, 1968 stated in Mendes, 2004: 64).

Regardless of the factors which affect the perceptions of citizens, the criminal justice system needs to increase its efficiency and to increase the level of risk for the perpetrator to be caught and sentenced. This is due to the fact that penal policy relies much more on incarceration and the fear of punishment rather than on rehabilitation and reintegration of the offenders in the community (Sparks & McNeill, 2009).

Familiarity of the citizens with the national penal policy

Deterrence has an effect assuming that citizens are aware of the current punitive policies (about the criminal acts and their penalties). Hence, when considering the general and special prevention of criminal sanctions, we also need to consider the following questions: (1) whether the potential offender knows which activities are crimes? (2) if he knows, whether that awareness affects his decision to commit a crime? and (3) If he knows the law and the implications for certain crime, whether he will respect the law? Those questions are subject to certain studies, and one has shown following findings: (1) 22% of the questioned inmates knew exactly what is the length of the prescribed prison sentence for the committed crime, (2) 18% had no idea of the punishment, but they knew that the act is a crime and (3) 35% of the inmates said that they even didn't think about the possible punishment before the crime. Those findings are indicator that a large percentage of citizens are not fully aware of the prescribed crimes and the penalties in their national criminal legislations (Robinson H. Paul & Darley M. John, 2004: 174-176).

Similar data were obtained in another study conducted on inmates in California. Many of them said that before committing the crime, they were not aware, nor knew about the envisaged sanction for the concrete crime (Paternoster, 2010: 804-805). In fact, citizens build their perceptions based on their own intuition and attitudes of justice that often differ from the legal rules. The fact is that perceptions of threat of punishment are strongly associated with current levels of punishment, which suggests that the criminal justice system fails to establish proper crime control through transparent

policies on certainty, the severity and swift of the punishment (Paternoster, 2010: 810). Notwithstanding, when we investigating the effect of deterrence, it is important to examine the decision-making process on whether to commit the crime because that process is connected not only with the perceptions of their sentence, but also with the *suitable opportunity* and with other situational circumstances (Robinson H. Paul & Darley M. John, 2004: 177-178).

4. Relationship between the prison sentence, the concept of incapacitation and the rate of crime

The concept of incapacitation relies on the proposition whereby, until the offender is imprisoned, he cannot commit criminal acts outside the prison. This means that if society confines more offenders, crime will decrease. In addition, crime reduction will follow as result of long-term imprisonment and as result of their frequent application. This logic was followed by the policy of incapacitation and incarceration which becomes dominant in the US in the 80s and after. Consequently, in the United States between 1990 and 2000 have been registered an increase of the prison population and reduction of crime. Statistics show that for 23 years, the prison population is gradually increasing and from 200,000 thousand prisoners in 1980, their number reach two million prisoners in 2003, which is 10 times more. However, such a drastic variation in the use of imprisonment slightly reduces crime rates. For example, 10% increase in incarceration results in a 2% reduction in crime.

But, despite these findings, however, we cannot determine with accuracy whether the reduction in crime is a result of the effect of deterrent or due to the incapacitation of offenders (Paternoster, 2010: 803). This dilemma arises because, for example, in Canada in the period from 1993 to 2001, crime is decreased by 10%, but the rate of imprisonment is increased. This means that, in the case of Canada, the policy for frequent use of prison sentences is not crucial for reducing crime at that time (Paternoster, 2010: 819). Other studies show that the penalty for murder, rape and physical assault, does not reduce their number. Therefore, the effect of incapacitation and length of the prison sentences cannot be justified as a means to achieve crime prevention (Nagin S. Daniel, 2013: 5). Although the penal policy is based on several effects, the analysis and researches cannot determine which effect what and how much influence exert, because they might have both, positive or negative impact, and instead to reduce, might increase the crime. Therefore, because of (methodological) problems to estimate how much crime will be reduced while offenders are in prison, and because of the increase in the prison population, the scholars are oriented towards two strategies related to the incapacitation effect: (1) incapacitation and incarceration of smaller group of high risk offenders and (2) reduction of long-term imprisonment for low-risk criminals.

The first strategy starts from the assumption that a smaller percentage of offenders are responsible for a greater percentage of crime. Therefore, we should identify the perpetrators who are likely to re-commit serious crimes for which are prescribed longer prison sentences. Thus, the public will be protected from dangerous offenders. *The second strategy* aims to reduce the prison population or to decrease the length of the sentence for those offenders, who do not pose a risk to the public and therefore, there is no need of prolonged isolation from the outside world. Such strategies (first and second), although seem contradictory, they complement one another. The first wants to

protect the public from high-risk offenders, while the second to reduce the negative consequences of long-term imprisonment for low risk offenders. In that context, because these strategies are based on risk, the risk need to be carefully identified in order to avoid possible abuse because, as Sutherland and Grease (1978) had claimed, the danger of offenders should be manifested, not assumed (Sutherland & Cressey, 1978: 659), in order to avoid possible abuses in determination *situation of risk*.

5. Criminal sanctions in the Republic of Macedonia and prevention of crime

5.1. Introductory remarks on the reform of the Criminal law

Macedonian criminal law is subject to constant reforms and amendments. It is the result of persistent social and global processes that influence and impact on threats to fundamental human rights and freedoms, on the threat to the security and the quality and quantity of crime in our country. Such processes and consequences, actually affect the efficiency or inefficiency of the existing criminal law system (the system of criminal sanctions) to respond and to deal with them. It causes many changes within period of 20 years (from 1996 to mid-2016) and the Criminal Code of the Republic of Macedonia in that period was amended more than 24 times². At that time, significant reforms have been made in 2004, 2008, 2009 and in 2014. Those reforms have included new criminal sanctions, new crimes and new serious forms of basic crimes and more severe sentences.

Significant changes in 2004 are the introduction of: (a) alternative measures in the system of criminal sanctions (conditional termination of criminal proceedings, community service, house arrest), (b) criminal liability of corporations, (c) serious (qualified) forms of certain crime, such as domestic violence, when the child is a victim etc.), (d) new incriminations (for example certain forms of cybercrime, crimes against power, against the state, against the judiciary, etc. and (e) tightened penalties for many crimes. With the reforms in 2008 and 2009 has been extended the confiscation of property, introduced serious aggravating circumstance for hate crimes, introduced new crimes against morality and sexual freedom, against the cultural heritage, against public finances, payment and economy and public order. Also, many crimes got higher prison sentences. The reform in 2011 introduced a special register of convicted of crimes against sexual freedom and morality and trafficking in human beings. In this regard, the Ministry of Labor and Social Policy in 2012 adopted a *Law on a special register of persons convicted for crimes of sexual abuse of minors and pedophilia*³, in which photography and information about the perpetrators shall be made public on a website of the state Institute for social Affairs. The latest amendments to the Criminal Code in 2014 increase the maximum prison sentence of 20 years (previously 15 years). Respectively, the offender may be sentenced to imprisonment of 40 years (previously 20 years) for those cases for which the law prescribes life imprisonment. The new punishments include *ban on attending sports competitions (Article 38 d of the Criminal Code)* and a new security

² Official Gazette of the Republic of Macedonia, No. 80/99, 4/02, 43/03, 19/04, 81/05, 60/06, 73/06, 7/08, 139/08, 114/09, 51/11, 135/11, 185/11, 142/12, 166/12, 55/13, 82/13, 14/14, 27/14, 28/14, 115/14.

³ Official Gazette of the Republic of Macedonia, No. 11/2012.

measure *chemical castration* (Article 65 a). The latest amendment introduce new crimes against life and body, against sexual freedom and morality, the environment, the cultural heritage and against humanity and international law, and (d) tightened penalties for certain crimes, especially for crimes against sexual freedom and morality when committed against a child.⁴

Mentioned reforms of the Criminal Code show that, although on the one hand, they have introduced certain alternative measures and victim-offender mediation in order to decrease the imprisonment rate, on the other hand, more legal changes have increased the prison length for many crimes. Thus, in the last 10 years (2004-2015) in the Republic of Macedonia criminal sanctions are increased for at least 70 crimes, which represent about 1/5 of all crimes in the Criminal Code. For most crimes (and qualified forms) the prison sentence is increased: (1) from a minimum of three to a minimum of four years, (2) from a minimum of six months to at least one year and (3) from a minimum of at least three years in prison. This trend of penal policy in the country shows that, due to the seriousness of the consequences and the object of protection (sexual morality and sexual freedom, the state, property and family), the criminal justice system increases its repressive policy towards the offenders who attack and jeopardize those values which should be protected. It shows that the legislator, on the one hand follow public demands for greater protection of vulnerable victims, and thereby for harsher treatment of offenders, and on the other hand, for increased protection of public safety. In fact, the threat of public safety requires harsher treatment for perpetrators of crimes against the state and against the public order.

5.2. Some statistics of condemned offenders and imposed sanctions in the Republic of Macedonia

The movement and the rate of convicted offenders in one country are indicators of many situations. They indicate the quantity of crime, the effectiveness of the criminal justice system in the detection and prosecution of offenders, the severity or leniency of the judicial system and the exercise of the preventive effect of punishment. On the other hand, the movement and the rate of convicted offenders are, also indicators for the realization and effectiveness of preventive policies outside the criminal justice system. But which factors and what impact they have on the number of convicted offender should be subject to permanent and long-term analysis and research. Although, either criminologists or other scholars for criminal law which deal with these issues cannot give full answers, however, legal reforms and policy for crime prevention must be based on proper scientific analysis and knowledge. Through analysis of the crime statistics (for example, of the convicted offenders and imposed prison sentences) in a certain period can be considered only the officially registered convictions, not the real crime, because the crime is not just a number, and due to a dark figure of crime.

⁴ For example, the prison sentence for *Sexual assault on a minor under 14 years (art. 188)* of 2004 is increased four times (in 2004, 2006, 2008 and in 2014), from a minimum of four years imprisonment in 2004 to a minimum of 12 years imprisonment in 2014 with the last amendment of the Criminal Code. Also, for criminal acts: *Rape of a helpless person (art. 187)*, *Rape by abuse of position (art. 189)*, *Mediation in prostitution (art. 191)* and *Incest (art. 194)*, both, the minimum and maximum of the prison sanction are drastically increased. For example, from (1) three months to three years imprisonment, (2) from three to five years and (3) from three months to five years imprisonment.

In this context, the number of convicted offenders in the country for 15 years (2001 to 2015) has been steadily increasing. Besides crimes against sexual freedom and morality, which have small fluctuations, the number of convicted offenders for crimes against property, against public order and against official duty for a period of 15 years, has doubled or tripled. For example, according to the State Statistical Office⁵, in 2001 2.133 offenders who had committed property crimes were convicted, while in 2015, that number was doubled, i.e. 4.295 offenders were convicted. Or in 2001, 310 offenders for crimes against public order were convicted, while in 2015, that number reached 821 offenders. Another example shows that from 2001 until 2015, the number of convicted for crimes against official duty is gradually increasing, and from 66 convicted offenders in 2001, that number in 2015 has reached 201.

In terms of imposed sentences, statistics show a slight increase in imprisonment and fine in the last five years (2011-2015), while a small decrease of probation (conditional sentence). Considering that the number of convicted offenders has decreased in 2015, while the number of prison sentences is increased that year, we can assume that the use of imprisonment, compared to other sanctions, is much more imposed in recent years.

Regarding the length of the prison sentence in the Republic of Macedonia, there are small fluctuations of the imprisonment of six months to two years in the period 2011-2015. But in 2014 and 2015, the imposition of a prison sentence of two to five years is significantly increased. For example, in 2012, i.e. in 2013 was issued 271, i.e. 359 prison sentences of two to five years, while in 2014 and 2015 that number was 610 or 606. Also, statistics indicate an increase in long-term prison sentences ranging from five to 10 years, and in 2015 the number of life imprisonments (and prison sentences over 15 years) is also significantly increased.

Table: Overview of the imposed prison sentences according to their length
Source: Annual Reports for perpetrators of Crime of State Statistical Office⁶

Offenders sentenced to prison sentence % (percentage)	2010	2011 %	2012 %	2013	2014 %	2015 %
up to 6 months	997	1230	1206	1148	1372	1276
% (percentage)	38,4	40,7	43	37,5	39,1	36,2
From 6 months to 2 years	1199	1386	1226	1421	1403	1491
% (percentage)	46,1	45,9	43,7	46,4	40	42
From 2 years to 5 years	331	302	271	359	610	606
% (percentage)	12,7	10	9,6	11,7	17,4	17,2
From 5 years to 15 years	46	74	74	114	97	120
% (percentage)	1,8	2,4	2,6	3,7	2,8	3,4
From 10 years to 15 years	21	18	27	27	24	24
% (percentage)	0,8	0,6	1	0,9	0,7	0,7
Over 15 years and life imprisonment	2	10	3	3	1	7
% (percentage)	0,1	0,3	0,1	0,1	0,02	0,2
Total offenders sentenced to prison sentences	2596	3020	2807	3064	3507	3524

⁵ www.stat.gov.mk

⁶ stat.gov.mk

The current prison statistics show that the length of imprisonments which are imposed is gradually increasing. This sentencing policy is a consequence of both, more punitive law (having in mind the latest amendments of the Criminal Code) and more punitive courts policies. Such policies raise many questions for further studies and debates: *does this punitive penal policy turn back the perception of the offender as dangerous and a risk to public safety? Does our society only rely on penal policy for the crime control, which is primarily repressive and retributive? And whether and how much the new harsher and severe punishments could accomplish intimidating and deterrent effect on offenders and on potential offenders?* These questions and concerns should be subject to analysis and research because the introduction of significant reforms that deeply touch and concern the fundamental human rights should be constantly checked and their effectiveness in achieving its intended purpose should be under permanent scrutiny.

Regarding incriminations, criminal law should actually accomplish its educational and moral - educational function by acquainting the public that certain behaviors are illegal and punishable. For that purpose, it is useful to find out how much the public is acquainted with the crimes and new incriminations in the Criminal Code. Ignorance, on the other hand means that criminal law should increase and strengthen its transparent and educative function. Through study and evaluations, we can observe and verify the usefulness and justification of certain reforms, including the possibility to fulfil both, special and general prevention as main purposes of the punishment. Because if the new reforms such as (1) the ban on attending sports competitions, (2) chemical castration, (3) severe punishments for hate crimes, (4) publication of the register of pedophiles and (5) many new incriminations and increases of the penalties, fail to prevent and deter offenders from further crimes, than we should put into questioning their existence and imposition. Criminal law should be respond to crime as a social and deep social problem because if it fails to reduce the crime, then we should raise and support other mechanisms to solve these social problems.

Also, excessive criminalization of criminal law and the severe penal policy reveals the problem of the penal system, which consequently becomes selective and can cause new dangers (Rodriguez, M. Anabela, 2003: 201). In other words, the criminal law should not be turned into an instrument in the hands of the ruling class that wants to discipline offenders and citizens in general.

Conclusions

In a world of globalization, migrations, terrorism and political struggle between left and right political wings, hate, fear and uncertainty is increased among citizens. In such conditions of increased uncertainty and threatening of the fundamental human rights, the public demands severe penal policy and public condemnation of the perpetrators. Criminal justice system, instead to rehabilitate the offenders, turns towards greater protection of victims and the public and toward harsher treatment of offenders. In particular, the penal policy in many countries is becoming more severe in 90-is, because is assumed that by increasing the severity of punishments and with their frequent application, the crime will be reduced. The backgrounds of this policy, apart from the theory of deterrence, comes from new policies based on risk, which become the dominant way of managing all types of problems, including crime, as well (O'Malley, 2010: 3). The intention is to reduce the risk of victimization and recidivism, which are

considered as everyday risks in modern society. Part of these policies is the increased imprisonment which is seen as a mean to remove the risk of society. It starts from the assumption that if the offenders cannot be rehabilitated (in line with the paradigm "nothing works") the risk can be reduced by imprisonment (O'Malley, 2010: 24). Also, the new repression which can be recognized through the "law and order" paradigm, talks about being *taught on crime*. It is implemented by new incriminations, namely by criminalizing minor offenses, which wide the net of crime control, as well. Another sign of increased repression is the central role that is given to the victims, because their feelings and needs become justification for repressive penal response. Previously, they had a marginal role in the court trials, and in the late 20th century, their right to "revenge" is highlighted and becomes a leading force in the penal system. Third, as Selih notes, the criminal policy increasingly becomes central to any election campaign. The views of politicians who often call on *law and order* and on *severe penal policy* play an important role in determining the election result, and that calls are expected to be justified after elections (Selih, 2009: 52).

In addition, the failure of rehabilitation and reintegration treatment of offenders, lays in the fact that it is vain to punish offenders one by one, out of the social context in which they act and which produces the crime. Crimes, although are individual human behaviors and are related to certain subjective factors, represent the product of interaction and action of many social macro and micro factors. Hence, any attempt to eradicate crime through greater repression is vain, because crime cannot be considered only as a statistic within the criminal justice system. Limitation only on the legal elements (place, time, manner of execution, harm) means looking only to certain situational factors which affects the commission of crimes. Also, considering only offender and his responsibility gives short-term results. His punishment and imprisonment, does not address the causes of crime, but leaves them aside. And so long as society relies solely on the criminal justice system as the only solution to reducing crime, it also grows. This is in line with the radical criminological theories, respectively the peacemaking criminology (that strongly advocate for restorative justice as crime response) which derive from the premise that the traditional criminal system is violent and causes suffering. Specifically, penal policy expressed by the repressive measures of social control through formal and strict court trials prove that sentences do not reduce crime, the proceedings are stigmatizing for offenders and do not meet the needs of the victim (Barak, 2005).

Regarding the concept of general deterrence, the justification of punishment can be found in a future fact. For example, we punished the offender in order to exert positive influence on other potential offenders to avoid crimes. This means that the state, through the criminal law, wants to threaten the entire population, which creates a suitable climate for the application of repressive laws, and thus to legitimize repressive measures. For example, the introduction of rubber bullets (Persak, 2009: 115), the electronic monitoring (leg or arm) bracelets (O'Molley, 2010: 4), the increase of the length of the prison sentence etc. represent a legal basis for the state's right to discipline its citizens. Most of the public agree with such a policy, because they require more severe punishments and want *just desert* for the offender. But in terms of general-preventive effect of the punishment and deterrence, we raise a few questions: *Is it possible to apply sanctions (and other measures) in the name of deterrence not only to potential offenders who have a potential to commit a crime, but also to all other citizens who don't have any potential to commit a crime?, are all citizens potential perpetrators?, is*

the policy of risk justified for all citizens? and Does the policy of deterrence increases the feeling of fear and insecurity among the citizens? Considering the challenges and the crisis of the new penal policy, as quoted by Kambovski (2002), general prevention is reasonable and justified, but only to the extent that do not enter in the space of undisputable human rights. Moreover, it can be achieved, not by severity of the punishments, but by their certainty and swift, and, in that part, the criminal law should do its function (Kambovski, 2002: 79). Because the criminal justice system exists and operates under the assumption that criminal sanctions will achieve their goals, their prescription, imposition and implementation should be treated and monitored in light of the special and general prevention.

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The New Concept of Sex-Crimes in Croatian Criminal Law

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Abstract

The new Croatian Criminal Code entered into force on January 1 2013, introducing the new concept of sexual crimes into Croatian criminal law. The reform was, above all, motivated by the efforts of the legislator to follow international standards, especially the ones imposed by the European Union and Council of Europe. However, it is interesting that creators of the new Criminal Code did not follow the usual German model in the case of sex-crimes. Instead, they chose to model sex -crimes on the English example. Such a solution is untypical for the Croatian legal tradition. The new concept significantly expands criminal liability for sexual crimes in several ways. Typical examples can be found in the criminalization of negligent forms of rape and the incrimination of rape by deception. These types of sexual offence are atypical in continental law tradition. Until now, they have not been characteristic of Croatian criminal law and it will be interesting to see how the courts will accept and apply the new model. In this paper, the authors discuss these changes from a theoretical and also a practical point of view. They give a critical analysis of the new concept of sex crimes under the new Croatian CC and comment on some interesting cases from recent court practice in Croatia. Using the examples from case-law, the authors identify some of the main problems underlying the new concept.

Keywords: *rape, deception, mistake of facts, consent, perpetration, mental capacity, age limit.*

1. Introduction

For the last twenty years, Croatian criminal law in the field of sex crimes has been characterized by a double trend. On the one hand is a trend of constant liberalization manifested through the decriminalization of certain behaviours. For example, homosexual relations, life in an extramarital community and incestuous activities have mostly been decriminalized (only incest is still punishable, but in a limited scope). On the other hand is a diametrically opposite trend: strengthening of repression in this

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sensitive area of criminal law. This strengthening can primarily be noticed in the regulation of new forms of criminal offences against sexual freedoms.

Croatian criminal law underwent significant reforms in 2011. In that year a new Criminal Code was passed by the Croatian Parliament. The new code introduced several important changes in the fields of sex crimes and, among others economic crimes, environmental crimes, the principle and the concept of guilt, statute of limitations etc. Probably the best proof for the scope of these changes is the fact that the legislator imposed an unusually long *vacatio legis* of almost two years. This time was given to practitioners to prepare themselves for the application of the new regulations. The new Criminal Code started to apply on January 1, 2013. Since this period, the verdicts reached by the courts have shown how the new solutions function in practice.

The purpose of this paper is to give a critical analysis of the new concept of sex crimes, three years after the new Criminal Code entered into force. This analysis will be given from both a theoretical and a practical point of view. First, the authors will present the most important changes in a brief analysis of the new concept. Second, they will analyse available case law. Third, they will identify and discuss the main issues revolving around the new concept of sex crimes and give their suggestions for future improvements.

2. Reform overview

The concept of sexual crimes has probably gone through most significant changes in this latest reform of Croatian criminal law. This fact was visible from the very beginning of the reform, when the sex crimes chapter of the new Criminal Code received a new title. Instead of the earlier title "*Criminal offences against sexual freedoms and morality*", the chapter was renamed "*Criminal offences against sexual freedoms*" (Chapter XVI). This change was explained by the fact that the term *sexual morality* can be misused as a ground for limiting of sexual freedoms, and can also be a potential cause of secondary victimization.¹ The new title has therefore emphasized what is considered to be most important: protection of the right to sexual self-determination. Below, we will discuss the most important changes introduced into Croatian criminal law by this reform. In our opinion, these changes can be distilled into three main features: the new legislative concept of non-consensual sexual acts; the criminalization of negligent forms of non-consensual sexual acts; and raising the age limit for involvement in voluntary sexual acts.

2.1. The new concept of non-consensual sexual acts

As has already been pointed out, many changes have been made to the new chapter on sexual crimes. However, for the purposes of this paper, the attention will focus only on the most significant ones that change the character of these crimes in Croatian criminal law. Without any doubt, the first and most important such change is the adoption of the new legislative concept of non-consensual (involuntary) sexual intercourse. Involuntary sexual intercourse is criminalized through three criminal offences:

¹ Turković, K. and Maršavelski, A. "The draft of special part of the new Criminal code – an overview of five chapters". *Croatian Annual of Criminal Law and Practice* 17 -(2), p. 513.

1. *Non-consensual sexual intercourse* (Art. 152), as a basic offence;
2. *Rape* (Art. 153), as the first qualified form, which is committed by the use of force or direct threat;
3. *Most severe criminal offences against sexual freedoms* (Art 154), as the second qualified form, which is qualified either because of some special characteristics of the victim (victim closely related to the perpetrator, especially vulnerable victim etc.), because of the motive (hate) or because of the especially dangerous *modus operandi* of the perpetrator (i. e. the usage of weapons etc.).

The new concept of involuntary sexual intercourse emphasizes the lack of the victim's consent as the key point of criminal liability. Earlier case-law has shown that Croatian courts have often tended to require the victim to demonstrate physical resistance as a *condition sine qua non* of rape and similar crimes. A good example is the verdict of the Supreme Court of Croatia from 1994 in which it was clearly stated that "*the victim did not show resistance in a clear and undoubtful way, because she stopped resisting at the key moment when the naked defendant approached her and spread her legs.*"² As a consequence of this, the Court found that the defendant was not guilty of the criminal offence of rape. However, such practice was in direct opposition to the practice of the European Court of Human Rights in Strasbourg (ECHR). The ECHR has made it very clear in many verdicts that the physical resistance of the victim should not be considered as a necessary element of *actus reus* of involuntary sexual intercourses (see for example the verdict *M. C. vs Bulgaria*, 4th Dec 2013, para 166). Other relevant international standards also require incrimination of any non-consensual sexual intercourse, regardless of the physical resistance of the victim. This was the main reason why the new Criminal Code's Art. 152 stipulated that the sexual act without consent should be a constitutive element of *actus reus*.

The Criminal Code has also defined when to presume that there is no consent of the victim. According to Art. 152, para. 3, legally relevant and valid consent exists "*if a person has decided to engage in a sexual act by his or her own will and was able to make and express such decision*". Further on, para. 3 stipulates that it will be presumed (*praesumptio iuris tantum*) that such consent does not exist, especially "*if a sexual act has been performed by the use of threat, fraud, the abuse of position that makes the victim dependent to a perpetrator, the abuse of the inability of the victim to express rejection, or to a person who has been kidnapped*". While most of these forms were already criminalized by the old Criminal Code, the fraudulent form is new in Croatian criminal law. That means that the Croatian legislator has decided to expand the criminal zone into the field of sex crimes by introducing liability for so-called rape by deception. The legislator, however, did not define what is to be considered as fraudulent behaviour. Is every misrepresentation of facts important enough to be qualified as fraudulent? In official commentary the authors of the new Code claim that the prosecutor will have to prove that falsely represented facts were key for the victim to decide to have sexual intercourse (or any other sexual act) with the perpetrator.³ This means that every misrepresentation of fact can be considered fraudulent, as long as the prosecution is able to prove a causal nexus between such fact (f.e. religion or ethnicity, marital status etc.) and a victim's decision to have sex with the perpetrator. The *Kashour* case in Israel in 2010 is an illustrative example. A man from Jerusalem was convicted of rape because

² Supreme Court of Croatia, I Kž – 473/94.

³ Turković, K. et al. (2013) *Komentar Kaznenog zakona*. Zagreb: Narodne novine, p. 207.

he told the victim that he was a Jewish bachelor instead of an Arab married man, as he was in reality.⁴ Similar examples can be found in recent case law in England.⁵ It will be interesting to see how Croatian courts will interpret these types of cases when they appear. To our knowledge there haven't yet been any similar cases in Croatian practice.

2.2. *The negligent form of non-consensual sexual acts*

The second very important change is that the legislator has decided to criminalize negligent form of non-consensual sexual offences. This is stipulated in Art. 152, para. 2, and Art. 153., para. 2. However, we must notice that the negligent form has not been criminalized for the most severe forms of non-consensual sexual acts in Art. 154. There is no explanation for this omission, so we must conclude that this has been done by a mistake. This solution is confusing because, if the legislator wanted to enlarge the criminal zone to give additional protection to the victim, *argumentum a minori ad maius* would be even more logical to criminalize negligent form of the most severe criminal offence of this type.⁶

The legislator stipulated liability for the perpetrator who mistakenly assumed that consent existed. That basically means that the Croatian legislator has introduced criminal liability for negligent form of rape. The model for this change has been found in the English Sexual Offence Act of 2003.⁷ The English literature also concludes that this type of guilt should be qualified as negligence.⁸ However, one has to notice that Sexual Offence Act has been an object of a serious criticism in British literature.⁹

Such a solution is new to Croatian legal tradition and has never been criminalized, either in Croatian or Yugoslavian criminal law. Moreover, the negligent form of rape cannot be found in the German, Austrian or Swiss criminal codes, or in any other code of continental Europe. The idea is to share the burden of proof in such cases. Prosecutors must prove sexual act(s) and one of the above-mentioned circumstances (for example the abuse of position), and the defendant must prove the existence of consent.¹⁰ In the next section, we will present recent case law to show how this solution has been accepted by Croatian courts.

2.3. *The age limit for voluntary sexual intercourse*

The new Criminal Code has regulated sex crimes against children into a separate chapter (Chapter XVII: Criminal Offences of Sexual Abuse and the Exploitation of Children). This was done because the creators of the new Code wanted to emphasize the protection of children against sexual abuse. This chapter has been modelled on the

⁴ Kashour v. State of Israel, Crim. C. (Jer.) 561/08 (2010) (Isr.)

⁵ Sjölin, C. (2015), „Ten years on: Consent under the Sexual Offences Act 2003“, *The Journal of Criminal Law* 79 (1), p. 28.

⁶ Vuletić, I. (2016) "Non-consensual sexual intercourse in Croatian criminal law". *Crimen* VII (1), p. 30.

⁷ Turković, K. and Maršavelski, A. "The draft of special part of the new Criminal code – an overview of five chapters". *Croatian Annual of Criminal Law and Practice* 17 -(2), p. 514.

⁸ Card, R. (2006) *Criminal Law*, 17. ed. Oxford/New York: Oxford University Press, p. 111, 311.

⁹ See for example Sjölin, C. (2015), „Ten years on: Consent under the Sexual Offences Act 2003“, *The Journal of Criminal Law* 79 (1), pp. 20 – 35.

¹⁰ Turković, K. in Derenčinović, D. (ed.) (2013) *Posebni dio kaznenog prava*. Zagreb: Pravni fakultet u Zagrebu, p. 162.

Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse.

The new Criminal Code has adopted the new definition of child as “*every person who is younger than eighteen*” (Art. 87). When it comes to children as the victims of sexual abuse and exploitation, Chapter XVII differs between two categories of victims. The first category consists of children under the age of fifteen. These children are considered unable to give legally valid consent to engage into sexual intercourses. In the old Code, the age limit for valid consent was fourteen, and now it has been raised by one year. We may notice that such a solution is stricter than in some other continental European systems, For example Germany, where the age of consent is fourteen.¹¹ Consequently, if a person commits sexual acts with a child younger than fifteen, they will be liable for sexual abuse of a child punishable by one to ten years in prison (Art. 158, para. 1). However, sexual acts between children are not punishable: there will be no criminal liability if the age difference between persons who perform sexual acts is not more than three years (Art. 158, para. 3).

The second category consists of children between the age of fifteen and eighteen. These children can give relevant consent for sexual actions. However, if someone commits sexual act(s) with such a child who has been entrusted to them for education, learning, safekeeping or similar, he or she will be criminally liable and punished with six months to five years in prison (Art. 159, para. 1).

3. Recent case law

Sexual crimes are not at the top of the list of convictions. Official statistics for 2014 show that only 1.04% of all convictions for that year are convictions for sexual offences. Similar statistics apply to earlier years as well. Criminological debates in Croatia point to relatively large dark statistical figure as one of the key problems when it comes to sexual crimes. There are many reasons for this. Probably the most important reason is the fear of secondary victimization, which is why victims often decides not to report sexual crime.¹² In this section, we will examine recent verdicts in Croatian courts under Arts. 152, 153 and 154 of the Criminal Code. We have chosen these verdicts as the most interesting ones to illustrate the criminal policy of Croatian courts in the field of sex offences.

Croatian case law unfortunately shows examples of brutal sexual crimes, very often committed towards special categories of victims. One such example is the case of the defendant who committed several rapes during four months in 2014. The victim was mentally challenged person who lived with him in the same household. On several occasions during this period he beat her and forced her to have vaginal and anal sex with him. He was found guilty of seven crimes and convicted to five years and six months in prison (Varaždin County Court, no 2 K-33/14-59). Although the defendant was convicted and received a multi-year prison sentence, one may ask whether the penalty should have been even stricter due to the fact that he brutally and repeatedly

¹¹ Weigend, T. in Heller, K. J. and, Dubber, M. D. (2011) *The handbook of comparative criminal law*. Stanford, CA: Stanford Law Books, p. 278.

¹² Derenčinović, D. and Getoš, A. M. (2008), *Uvod u kriminologiju s osnovama kaznenog prava*. Zagreb: Pravni fakultet u Zagrebu, p. 61.

abused a person with a mental disorder, especially if one bears in mind that the Criminal Code has prescribed a punishment of three to fifteen years for each such crime.

Another interesting verdict to debate is the verdict no Kov-41/15 (Split County Court). The defendant was found guilty of a criminal offence under Art. 154 para. 2 (the most severe criminal offence against sexual freedoms committed by the use of force and in a very humiliating way). According to the verdict, he and his two friends took a girl (aged 17) to the men's room of the bar where they were all drinking together and then held her by her hands and hair while forcing her to have sexual intercourses several times with each of them, despite the fact that she has shown verbal and physical resistance. What is interesting about this case is the fact that the defendant was given a parole, despite the fact that this was very serious crime, punishable by between three to fifteen years in prison. If he breaches the parole terms he will be sent to prison but only for one year, which is also a very mild punishment. Such criminal policy is not adequate for this type of crimes.

In a very similar case (K-23/14, Zadar County Court), three defendants were found guilty, also under Art. 154 para. 2. They had sexual intercourses several times with a drunk victim and they used force. Although they had committed the same offence as in the previous example, they were given much stricter punishment. The first defendant was sentenced to four years and ten months in prison, the second to three years, and the third to one year. This shows that Croatian courts have very different criminal policy in similar criminal matters, which is not good for the reasons of legal certainty and the principle of *nullum crimen sine lege certa*.

It seems that Croatian courts generally have a relatively soft criminal policy toward sexual offenders. During our research we have studied several verdicts for non-consensual sexual intercourse under Art. 152 and mostly found parole sentencing, even when the circumstances of the act suggested that the perpetrator acted fraudulently or abused the fact that the victim was unable to resist. We can mention two such cases. In the first (Split Municipal Court, no K-677/14) the defendant sneaked into a sailing boat in a harbor at Bol Island in Croatia. The victim was sleeping naked so approached her and started to perform sexual acts on her naked body. She then woke up and started screaming and calling for help so he ran away. He was convicted, but sentenced to parole.

In the other case (Osijek Municipal Court, no 24 K-653/2015-15) the defendant met the victim in a bar and started trying to persuade her to have sex with him. After she rejected him several times he decided to deceive her, so he told her that father and his brother wanted to speak with her in his brother's house. She believed and went with him to the house. When they arrived, she saw there was no one there and tried to leave but the perpetrator had already locked the door. He told her to sit on the bed and started to kiss her and undress her and, although she repeatedly asked him to stop, had sexual intercourse with her. He was convicted to one year in prison, but the Court did not force him to serve the sentence. Instead he worked community service. In our opinion this case is interesting, not only because of the relatively lenient sentence, but also because of the arguable qualification of the defendant's behavior as a non-consensual act under Art. 152: one can argue that the act described should be qualified as rape (Art. 153) because the victim repeatedly asked the defendant to stop. Instead, he continued to kiss her and undress her and have sexual intercourse despite the fact that she had actively

(and above all verbally) resisted him. Such behavior can be qualified as the use of force, which is a constitutive element of the *actus reus* of rape, as a qualified form of non-consensual sexual intercourse.

Probably the most controversial case in our research was a verdict of Zagreb County Court (no 5-K-133/2013). This verdict has already been criticized in Croatian literature.¹³ The defendant was convicted for non-consensual sexual intercourse because he had sexual intercourse with the victim on the back seat of his car. She voluntarily entered his car, kissed him, removed her clothes and had sexual intercourse. However, later she claimed that she had agreed to have sex with him only because she saw a knife on the back seat when they were transferring from the front to the back. She claimed that seeing the knife caused fear and that she was afraid to reject sexual intercourse, although she did not say anything to the defendant or show him in any other way that she did not want to have intercourse with him. The Court convicted him under Art. 152. This case clearly demonstrates that the existing legislative definition of consent can be abused by excessively broadening the interpretation of consent.¹⁴ This is not acceptable because it questions the *nullum crimen* principle, and the subsidiarity character of criminal law in a very dangerous way.

4. Critical comments on the reform

In the first two sections we have presented the main characteristics of the recent legislative reform of sex crimes in Croatian criminal law and also shown some illustrative examples from recent case law. In this section we will give our critical remarks on the new concept.

There is no doubt that the last reform of Croatian criminal law has introduced a significantly stricter regime of sex offences than the one it replaced. This claim can be supported by several facts. Above all, the new regime is based on the new concept of consent followed by a legislative definition of it, which was not the case in the old Criminal code. The new definition is based on the so-called "consent plus" approach, which requires each time that consent be given clearly and without any doubt by a person capable of making and expressing such a decision. This concept has already been criticized by Croatian authors. Ritossa and Martinović point out that this definition moves the focus from the quality of the consent to the capability of the person (victim) to give and express consent. They claim that such a solution is not sufficient because it puts certain categories of persons into the position of potential victims. They cite the example of mute persons who, because of their inability to speak, have potential problems in expressing their clear and direct consent.¹⁵ We agree with these remarks and may also add that the new concept of consent could limit the right to free engagement into sexual intercourses for certain persons, especially the mentally challenged. It is important to notice that persons with mental difficulties often have strong sexual urges, so is it justified to ask that a person who is not mentally incapable should *a priori* avoid engaging in sexual intercourse with a mentally challenged person because they can never be certain that they will not be charged and prosecuted for a

¹³ Ritossa, D. and, Martinović, I. (2014) "Non-consensual sexual intercourse and rape: theoretical and practical issues". *Croatian Annual of Criminal Law and Practice*, 21 -(2), p. 535.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

criminal offence as a result? It has already been pointed out in the literature that it is not justified to emphasize the protection of “especially vulnerable groups” without a deeper examination of their vulnerability.¹⁶ Moreover, does the new concept actually imply that one should always ask for clear consent before having sex with someone? What should the quality of the consent be? Should it be verbally articulated, or even written? The above-mentioned verdict of the Zagreb County Court (5-K-133/2013) obviously indicates that one should never presume the existence of consent based only on victim’s behaviour. These questions are not clearly answered by the Criminal Code which significantly diminishes the level of legal certainty. The *nullum crimen sine lege certa* principle, which is one of the basic principles underlying continental criminal laws, requires that everyone must know what they may or may not do. Only then does the law have the legitimacy to convict and punish perpetrators for their crimes. In our opinion, the existing regulation of consent for sexual intercourses and other sexual acts does not provide the required level of legal predictability.

Increased strictness of the new regime can also be seen through the fact that the new Code has introduced negligent forms of non-consensual sexual intercourse and rape. We have already pointed out the illogical solution that these negligent form haven’t been incriminated by the most severe forms of sexual offences (Art. 154). Moreover, we have difficulty imagining how it could even be possible to act with negligence in cases of rape? The crime of rape in Croatian criminal law implies that the perpetrator has used either physical force or threatened direct usage of such force. In that kind of circumstance, it is not clear what the legislator had in mind when it regulated a situation in which a perpetrator may not be conscious that he or she is acting without consent of the victim. Is it possible to use force or to threaten someone and still think that this person agrees to whatever you are forcing him or her to do? Such a claim is just not empirically correct or logical. That is why it is not clear why the negligent form of rape has been criminalized. It seems that the only effect will again be to increase legal uncertainty.

Finally, the increased strictness of the new regime is also visible from the fact that the legislator decided to raise the age of consent for involvement in sexual intercourse from fourteen to fifteen. The age limit varies from state to state. The overview of comparative law in Europe shows that countries decide to set the age limit between fourteen (for example Germany, Hungary, Italy, Portugal, Serbia, etc.) and eighteen (Malta, Turkey and the Vatican City). This decision of the legislator is above all based on estimating of the average age of children’s psychological maturity. However, it can also be influenced by other factors (state politics, different lobbies, etc.). We will not argue whether it was good or bad to raise the age limit. This question requires more detailed psychological and sociological research and is beyond the scope of this paper. However, we must notice that this important change has not been explained in any of the scientific papers or comments on the Criminal Code written by the members of work group responsible for drafting it. The fact remains that this change expands the zone of criminal liability.

¹⁶ Dubber, M. D. and Hörnle, T. (2014) *The Oxford Handbook of Criminal Law*. Oxford: Oxford University Press, p. 765.

5. Instead of a conclusion, suggestions *de lege ferenda*

The previous sections have pointed to the main features of the latest reform of sexual delicts in Croatian criminal law. A critical overview of the changes and of the relevant case law was also given. Based on the presented material, we will try to give our suggestions for future legislative changes.

Above all we strongly argue for repeal of negligent forms of sexual crimes. As we explained above, the negligent form brings confusion to the theory and practice of criminal law. It also causes legal uncertainty. Moreover, negligence is not in the nature of sexual crimes, as crimes which are always committed with *dolus directus*. The main goal of these crimes is to express aggression, to humiliate the victim and to satisfy sexual urges. That is why it is not to be expected that these crimes will be committed through negligence. The negligent form allows criminalization and punishment for behaviour which should not be treated as a criminal offence due to the subsidiarity principle. The negligent forms of sexual crimes is not in the tradition of continental Europe and none of the countries which have traditionally been a role models for Croatian criminal law have a similar categorization.

The next problem in our opinion is the legislative definition of consent in Art. 152 para. 3 of the new Criminal Code. As we already explained, this definition implements the *consent plus* concept, which requires three cumulative elements for legally valid consent: willingness of the consent, capability to make the decision and capability to express the decision. As Ritossa and Martinović correctly point out, it is arguable whether willingness of the consent should be an element. Earlier practice did not give gravity to unwillingness of the consent if it was only of internal nature and was not in any way manifested. As we have already shown through the example of the Zagreb County verdict, the new case law tends to require both internal and manifested willingness, which introduces too wide a definition of criminal liability for sex offences. It also favors the outdated theory that the state has the obligation to protect the sexual freedom of those people who are unable to decide for themselves.¹⁷ We agree with the argument of Ritossa and Martinović and strongly suggest that the definition of consent should be erased in future reforms of the Croatian Criminal Code.

Finally, we believe that the legislator should limit the courts' ability to impose parole sentences and other alternatives for a prison sentence in cases of sexual crimes. These crimes are among the most difficult and most dangerous, and imposing such lenient sentence is not in accordance with the purposes of punishment, especially not with general and special deterrence in mind. It would be desirable for the legislator to cancel the possibility of parole, at least in cases of rape and the most severe criminal offences against sexual freedoms.

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¹⁷ Ritossa, D. and, Martinović, I. (2014) "Non-consensual sexual intercourse and rape: theoretical and practical issues". *Croatian Annual of Criminal Law and Practice*, 21 -(2), p. 536.

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The Economic Crime Activity, Terminological and Systematic Questions of Economic Crime in Hungary

Dr. Richárd Nagy

Abstract

The legal protection of the institutes of the economic life by criminal law is much more sophisticated, more fragmented than it would be possible to place them under only three specific subjects.

The conceptual sphere of the so-called black market is closely related to the economic crimes and offenses. The relatively-new concept in the Hungarian criminology terminology, however, has long been known in the developed countries, the so-called white-collar crime has long been present in the Anglo-Saxon countries. According to the foundation of this approach, the economy can be divided into black and white economy in terms of criminology, the latter term refers to the lawful, legal economy, where the economy actors fully comply with the legal requirements.

Keywords: *economic crime, economic crime activities, changes, state-socialist regime, state property.*

Definition of the concepts of the economic crime and of the economic crime activities

Several authors have dealt with the terminological and systematic problems of the criminal offenses related to the economy during the twenty-seven years following the change of political system in Hungary; even more, a lot of experts had examined these questions already during the so-called state-socialist regime, and experiments were also done to create definitions for 'economic crime' and for 'economic crime activities', and for the 'black economy' as another term closely related to the earlier two ones.

During the definitions of concepts, it is essential to make difference between the economic crime activity as social phenomena, which can be also approached from criminological, sociological and ecological point of view; the crime in connection with economy; and the economic crime. About these three concepts the actual Criminal Code provides exact definitions¹.

The priority of state property, the exclusiveness of state activities and the centrally regulated socialist economy planning were the starting points for the definitions created during the state-socialist regime. According to this 'the economic crimes hurt or jeopardize the economic activities (the state budget or the control of the executive power) of the state'.² These concept definitions are outworn by the economic changes especially by introducing of the market economy, which were going hand-in-hand with the change of the political system, actually it was part of the changes

¹ In. Gál István László: Régi és új kísérletek a gazdasági bűnözés fogalmának meghatározására. *Rendészeti Szemle*, 2009/7-8., 25. oldal

² Wiener A. Imre: A gazdasági bűncselekmények. Közgazdasági és Jogi Könyvkiadó, Budapest, 1986., 137. oldal

Following Mihály Tóth, whose generally accepted and regularly cited criminological concept definition of economic crime activity is: 'economic crime activity is that form of crime, which is realized within the process of the economy itself or close to it, and which – either due to its modus operandi (often using the legal forms and frames of economy, or misusing them), or due to its results – is capable to hurt or jeopardize, beyond the possible crime committed to the injury of individual interests, first of all and typically the order of economy, the obligations of economy or the frames of fair and legal economy'³.

Crime in connection with economy, based on the legal definition of László PUSZTAI, included the so-called economic crimes listed in Section XVII of Act IV of 1978 on the Penal Code ('The Old Penal Code'), further on the offenses against property, malfeasance in office, and those offenses against pureness of public life and offenses against public security which were committed within the economy or in connection with it.⁴

Concluded from the above given definition, those crimes were understood as crime in connection with economy, which were listed in the Section XVII on the Old Penal Code. The crimes in connection with economy were those ones listed in Sections XV (offenses against public administration, jurisdiction and pureness of public life), Section XVI (offenses against public security) and in Section XVIII (offenses against property) on the Old Penal Code.

As far as the systematic order is concerned, time has passed it. The legal protection of the institutes of the economic life by criminal law is much more sophisticated, more fragmented than it would be possible to place them under only three specific subjects. So there were certain types of criminal activities (like for example crimes involving computer sciences or money laundering), which were not covered by the crimes in connection with economy declared in Section XVII of the Old Penal Code.⁵

The Act C. of 2012 on the Penal Code – giving up the old system – having taken into account the legal subject of the single crime activities, regulates in separate Sections the offenses in relation to economic crime or to crime in connection with economy:

- Section XXIII of Penal Code – Criminal offenses against the environment and nature
- Section XXVII of Penal Code – Crimes of corruption
- Section XXVIII of Penal Code – Malfeasance in office
- Section XXXI of Penal Code – Criminal offenses against economic sanctions imposed under international commitment for reasons of public security
- Section XXXVI of Penal Code – Offenses against property
- Section XXXVII of Penal Code – Crimes against intellectual property rights
- Section XXXVIII of Penal Code – Criminal offenses relating to counterfeiting currencies and philatelic forgeries
- Section XXXIX of Penal Code – Criminal offenses against public finances
- Section XL of Penal Code – Money laundering
- Section XLI of Penal Code – Economic and business related offenses

³ Tóth Mihály: Gazdasági bűnözés és bűncselekmények. KJK Kerszöv Kiadó, Budapest, 2002., 22. oldal

⁴ Pusztai László: A gazdasági bűnözés megelőzésének koncepcionális kérdései. Ügyészek Lapja, 1996/3., 28. oldal

⁵ Molnár Gábor: Gazdasági bűncselekmények. HVG-ORAC Lap- és Könyvkiadó, Budapest, 2009., 31. oldal

- Section XLII of Penal Code – Crime against consumer rights and any violation of competition laws
- Section XLIII of Penal Code – Illicit access to data and crimes against information systems

Thus, it can be seen from the list that the management-related crime is a broader, criminological category. Should be noted that also in terms of statistical data collection those crimes from the group of crimes against property also fall within the scope of economic crimes besides the offenses violating the order of economy, management nominated by the Penal Code, which are committed within or in connection with the management, furthermore, based on the systematization carried out by the science of criminology and considering law enforcement aspects including the crimes against the environment and the nature, the corruption, office or intellectual property right, and those damaging the budget.

The conceptual sphere of the so-called black market is closely related to the economic crimes and offenses. The relatively-new concept in the Hungarian criminology terminology, however, has long been known in the developed countries, the so-called white-collar crime has long been present in the Anglo-Saxon countries. According to the foundation of this approach, the economy can be divided into black and white economy in terms of criminology, the latter term refers to the lawful, legal economy, where the economy actors fully comply with the legal requirements.

According to some theories, the so-called grey economy can be found between the two, which include those businesses, which mainly carry out lawful activities, but have tax avoidance behaviour in emergency situations.⁶

Some authors also attempts the further grouping of the off-white economy behaviours, therefore, the informal economy (the sum of the activities that are done to a lesser extent, do not appear in the statements of national income, but increase the welfare of the society), the second economy (the secondary activity carried out for the purpose of income supplement), the grey economy (those manifestations, which in themselves are not prohibited, but suitable for – and usually also serve to – that the people exempt themselves from the obligation of personal income tax payment), and the black economy (does not increase the welfare, operated specifically to gain criminal profit) can be distinguished.⁷

In the absence of exact, generally accepted definition, the above definitions may, of course, overlap each other in several cases, and – as shown below – opposing views have also been developed.

For the definition of the concept black economy, mainly the following definition is suitable: “the black economy is the illegal activity in the field of distribution and sales of the goods and services, as well as labour employment, which provides undue advantages in the market competition for the companies, persons and organizations carrying out that, by the violation and non-compliance of the tax, social security, customs, excise and other regulations in force, against the entrepreneurs and business organization acting lawfully. The essential feature of a criminal organization is that they

⁶ Gál István László: Régi és új kísérletek a gazdasági bűnözés fogalmának meghatározására. *Rendészeti Szemle*, 2009/7-8., 25. oldal

⁷ Barabás Andrea Tünde – Irk Ferenc: Gazdaság, bűnözés, gazdasági bűnözés, szervezett bűnözés, szervezett gazdasági bűnözés. In: Irk Ferenc (szerk.): *Kriminológiai Tanulmányok*, XXXVIII., OKRI, Budapest, 2001., 12. oldal

aim to achieve the highest profit very quickly, and its members, as well as its managers wish to acquire the financial means necessary to the luxury lifestyle only by crime. During their activity they build up an illegal second economy, and to maintain this, an illegal second power structure"⁸.

The criminology distinguishes two broad areas of the black economy: on the one hand the illegal activity of the legal economy sector players (e.g. tax fraud), on the other hand the prohibited activities of illegal businesses (e.g. money laundering by establishing fictitious companies). Tax evasion is often stipulated as the central element of the black or grey economy, which is not accurate, because they often just try to legalize the actions carried out in circumvention of the law by taxation. In case of money launderings, for example, a common mean of disguise of guilty origin is the tax payment after income, and thus making the gain to appear lawful. (I note that economically the tax evasion is not a criminal category. The three stages distinguished by the tax teachings forming part of this: tax planning – tax evasion – tax fraud.)

According to some authors, yet there is no single definition for economic crime, the reason for which is that the approaches of economics and criminology have not met, and there are substantial content and understanding differences in the criminal law, and in the criminology approach.⁹

The determining of the scope of economic crimes is also possible from the approach of the completeness of the economy's protection – as a system –, which covers:

- the state's revenue eligibility,
- the use of public funds,
- the lawful order of the economy's operation, and the fair management rules,
- the copyright and related rights, the operation of virtual spaces,
- the relations between economic agents, especially the relations of the economic race, as well as the employers and the employees,
- occurring in the economic relations of the economic agents and the consumers,
- the legal and institutional system of combating illegal behaviour violating or threatening the built and natural environment.

The state's economy protection responsibility itself constitute a system in the jurisdiction of the government and the individual sectoral or functional ministries, acting between administrative forms.¹⁰

Summarizing the above, based on these approaches and theories the economic crimes can be categorized as follows:

- Economic crimes in the narrow sense (offenses violating the order of management listed in Section XLI of Penal Code),
- Economic crimes in the broader sense (crimes described above, in particular certain crimes committed against property in relation to management listed in Section XXXVI of Penal Code, such as economic fraud, the management-related fraud,

⁸ Vidus Tibor: A Nemzetbiztonsági Hivatal feladatai a feketegazdaság elleni fellépésben. *Ügyészek Lapja*, 1995/5. szám

⁹ Barabás Andrea Tünde – Irk Ferenc: *Gazdaság, bűnözés, gazdasági bűnözés, szervezett bűnözés, szervezett gazdasági bűnözés*. In: Irk Ferenc (szerk.): *Kriminológiai Tanulmányok*, XXXVIII., OKRI, Budapest, 2001., 66. oldal

¹⁰ A Magyar Köztársaság Rendszertani Stratégiája, Budapest, 2009. (munkaanyag), 91. oldal, In: *Rendszertani Szemle Különszáma*, 2010.

embezzlement, misappropriation, mismanagement and receiving stolen goods, the offenses damaging the budget listed in Section XXXIX of Penal Code and the money laundering regulated in Section XL of Penal Code),

- In the broadest sense, the offenses violating the management as a protected legal object, listed in other sections of the Penal Code, committed in the context of certain illegal activities (e.g. prostitution, drug trafficking) are also included here.

The criminal legislation

In respect of the broader period covered by the study, basically four different stages of the criminal legislation can be distinguished.

Act V of 1961 (Penal Code of 1961) on the Penal Code of the Hungarian People's Republic came into force on 1 July 1962, which was in force until the old Penal Code's entry into force on 1 July 1979. In the Penal Code of 1961 – in addition to the political nature of crimes against the state – appeared with significant emphasis the crimes against the national economy and the social property, to which the law defined severe penalties. According to the socialist conception of ownership the crimes damaging the personal property and the social property was also distinguished in this act, assigning more severe sanctions to the latter.

From 1978 in the structure of the old Penal Code, the economic crimes in the system of the Specific part moved backwards compared to those specified in the previous Penal Code, the crimes “violating management duties” separate out from the group of crimes violating the order of management, and form a separate title, while other criminal activities previously regulated here moved to the chapter more appropriate to the protected legal interest.

After the end of communism the criminal legislation accompanying the transition to the market economy was always constant, in the 1990s almost there was no such Penal Code amendment that would not have affected economic crime. Based on the codification needs generated by the changes in the economic life in 1992 a special codification committee was established to the re-regulation of economic crimes. From then the material of economic crimes has been under constant revision and development, but in the just completed legislative term no changes have been made basically.

From 1990 to 2013 the groups of crimes violating management duties and the order of management were merged again. The itemized legal material of the economic criminal law was virtually replaced. An economic criminal law with new approach and content has been created, but which is still teething, from which the most important are: codification “seeking overinsurance” embodied in the multitude of facts, frequent amendments of certain facts threatening legal certainty, and the lack of consistency between criminal law facts and the background standards¹¹.

The previous Penal Code regulated the behaviours considered to be economic crimes in three titles. The crimes violating the management duties and the order of management were included in the first, this was followed by a traditional cash and stamp forgery, while the financial crimes were included in the third. The section also

¹¹ Tóth Mihály: Adalékok a magyar „gazdasági büntetőjog” fejlődéstörténetéhez. *Belügyi Szemle* 2000/6. szám, 31. oldal

included a fourth title, which, however, included only interpretative provisions after the amendments.

In recent years, due to the change of the scope of economic crimes and the powers of the competent investigating authorities and the constantly changing legal environment the economy protection tasks of the police have been significantly changed, partly expanded. New crime types and behaviours have appeared, the prevention and detection of which requires new methods and knowledge of the members of the investigating authorities.

The changes in the scope of economic crimes has been continuous after the end of communism, however the Penal Code entered into force on 1 July 2013 basically regulates the economic crimes along a new structure (it has filed new criminal offenses, it orders to punish independently under the specific facts the offense behaviours previously treated in one factual situation). In case of the main crime types treated among the broader economic crimes (corruption, environmental, computer and against property crimes) a significant change has also been made, however, this was justified by the more simple applicability and easier viewing.

Over the past twenty-six years, as a result of economic and social changes, the legal facts of crimes of economic nature have been characterized by significant changes and – with greater or lesser intensity – constant modifications.

Consequently, the number of crimes related to economy and management does not show significant differences in whole in each year, however, the scope of crimes constituting the scope of these violations does so.

Also in respect of the economy and management crimes the Police is the general investigative authority, however as a result of the repeated amendment of Act XIX of 1998 on Criminal Procedure (CP.) the range of offenses has increasingly broadened in the recent years, in which not the Police but the National Tax and Customs Administration carries out the investigation.

The crimes under the jurisdiction of different authorities are defined by Section 36 of CP. Based on Section 37 of CP, however, the prosecutor may appoint the authority to the investigation of the crime being not within its competence, or the leaders of each body may agree on the establishment of a joint investigation team with the approval of the prosecutor.

The tasks related to the prevention, detection, investigation and interruption of offenses set out above, the ensuring of the recovery of damages caused and the recovery of asset, the prevention of input and legalizing of illegally acquired wealth into the economy, and the initiation of crime prevention measures are meant under the economy protection activities within the remit of the police.

Brief history of economic crime

Before the comprehensive analysis of the characteristics of economic crime, a broader examination of the social, political and economic system immediately prior to the end of communism, during the period of the appearance of private management, and in the period elapsed since the end of communism is essential. The period under review involves two different types of social, political and economic systems, arrangements.

The period of socialist arrangement

In the decades prior to the end of communism, there was the so-called state socialist arrangement in Hungary.

The characteristics of the socialist system basically determined the social, political and economic life, and thus, of course, the legal system and the penal policy as well. Its main characteristics can be summarized as follows:

- the priority of state property (so-called social property), the suppression and making secondary of the private property
- the priority of planned economy, the so-called centrally planned system
- the principle of exclusivity of state activity, the “socialist economic management” based on the central regulation
- the centralized nature of the economic management and control (so-called people’s control)

Based on the above characteristics it is clear that the legislation in force were designed to protect the economic system characterized above, defined the concept of crimes against the economy under these guidelines, which focused on the management’s plan nature, and put the criminal protection of the planned economy to the forefront. Accordingly “the crimes against the economy are such guilty violations of the social system of the economy and the social relations defining the essence and the function of this system, which threatens the development of the national economy. Since the management’s plan nature is the precondition of this inevitable development, the hazardous nature of the crimes against the economy to the society usually manifests in the interfering of the plan nature.”¹²

As a result of the socialist industrialization several large producing company was created. Some of these companies produced good quality, “current” products (a definition of that time) even in the early 1970s, most of which were exported to the Western countries and to the United States. Trading with these commodities meant temptation to commit theft, embezzlement crimes not only among the workers, but also made available for the company managers to “reward” other company managers, public bodies and the decision makers working in the public administration by the usage of these goods (or the financial gain from them), and to perform almost expected allocations to them. The fraud, embezzlement, misappropriation committed by corporate executives were also typical.

Another major area of crimes against social property are the acts committed against the agricultural cooperatives. A significant part of the agricultural production plans belonged to the less favoured plants, therefore they received substantial state aid, which created the opportunity of abuses related to these. Furthermore, a significant number of cases of theft and vandalism crimes committed by employees became known.

From the early 1980s the build-up of entrepreneurial activity has started in Hungary, which, due to the development and continuous spreading of small businesses, mainly played a significant role in the expansion of the private economic sector and the private property, and later in the transformation of the economic system. The definitions created in the mid-1980s focused on the exclusivity of state activities and the centrally controlled socialist economy management. Accordingly “the economic crimes

¹² Magyar Büntetőjog Különös Része. BM Könyvkiadó, 1981., 417. oldal

violate or threaten the state's economic activity (the budget and the economic management of public authority)".¹³

From the late 1980s – as the imitation of market economy was more and more replaced by the need for real market economy, and later its attempts – due to the expansion of economic agents, and the becoming independent and activization of companies and private entrepreneurs – and at the same time, of course, due to the appearance of new forms of crimes – it became clear that the economic crimes moved to a much broader and more heterogeneous sphere.¹⁴

From 1 January 1989 – when the new economic law came into force – the companies has appeared as a more significant economy transformation step – such as the limited liability company (ltd.) and the public limited company (plc.), and later due to the legislation created almost simultaneously with the end of communism and promoting the economy's transformation, it continued with the transformation resulting from the privatization of state-owned companies, the investments of foreigners in Hungary, and the powerful creation of market economy.

Thereby the economic criminal law's role, focusing on the protection of planned economy and central economic management, simultaneously with the end of communism, has been replaced by its function focusing on the protection of modern market economy.

From the end of communism until today

The system change meant the break with the socialist social, political and economic system and the transition to the democratic constitutional arrangement. However, the transformation of the arrangement inevitably brought the immaturity, the confusion arouse due to the operational problems of the existing system and the obstacles to the transition, which allowed the emergence of new forms of economic crimes and criminals. With the system change the private property has become priority, the banking system has been transformed, a multitude of financial institutions have been established, registering a new company has become available, and the freedom of enterprises has been put on general principle level.

In the prior and subsequent years of the system change the number of crimes against property – including management-related crimes –, and the economic crimes, as well as the number of persons who have committed these crimes showed a strong, dynamic growth. The crimes and committing behaviours typical in the period of the end of communist appeared, to which the investigating authorities were unprepared, and also the legal background necessary for the detection of these crimes were missing – not to mention here that legislative anomaly that the criminal operating with new committing methods could continue their activities between unregulated conditions, the legislation responded only with delay to the new criminal methods in the early 1990s by creating appropriate facts. The detection of crimes was made more difficult due to the lack of information systems and databases, and their independent functioning.

¹³ Wiener A. Imre: A gazdasági bűncselekmények. Közgazdasági és Jogi Könyvkiadó, Budapest, 1986., 137. oldal

¹⁴ Tóth Mihály: Gazdasági bűnözés és bűncselekmények. KJK Kerszöv Kiadó, Budapest, 2002., 18. oldal

The Economic Coordination Committee made an attempt in 1995 to explore the causes of economic crime, according to the resolution made on this basis the factors supporting economic crime after the creation of the institutions of the system change were the following:

- the economic recession and crisis,
- the insecurity, the decline in living standards, the unfair social distribution of incomes,
- the state's intervention in the economy, the high income deprivation, the high tariffs and the strict requirements of the currency market on the one hand,
- the lack of state control on the other hand,
- the weaknesses in internal control,
- the legal form of certain companies,
- the underdevelopment of the economic system,
- the weakness of informal social control.

After the end of communism, a new ownership layer was created by exploiting the opportunities of corruption arising from the unsuccessful privatization as clearly defined by a number of economists today, the so-called E-credit invented in connection to it, and the contemporary contact systems. After the period of the previous, centrally controlled state economic management system, the liberal development of the market economy accelerated by the state started, which inevitably brought with it the economic crimes with new nature, previously not known types of committing, a new form of economic crime has been developed. The transformation and the changed circumstances made the transformation of the former legal environment necessary, thus the transformation of the criminal law, which, however, only followed the appearance of new crime forms with significant "phase delays", until the mid-1990s, mostly just "ran after the events".

The main features of management-related offenses in the mid-1990s:

- management-related offenses, in addition to economic crimes, appear as crimes against property, their committing and unveiling is sometimes justified by position gained by bribery,
- breaches mainly occur in the field of cash and commercial crediting, insurance, trade, foreign exchange management and customs administration, tax and social security, privatization, state aid, accounting discipline, environmental and nature protection,
- some of the economic crimes has international nature and increasingly characterized by crime forms and committing methods known in the European market economies,
- the management-related committing value, damage caused, financial loss, loss of revenue related to crimes is extremely high, which is borne by the nation's economy,
- a significant portion of businesses in the wide range of management-related offenses has an illegal nature,
- at the establishment of joint-owned enterprises, privatization, financial operations conducted in commercial banks, unexplained capital from specifically guilty sources is also present,
- some of the offenders attempt to gain positions in the state administrative bodies making economic decisions, monitoring and exercising powers, their offenses are characterized by plan nature and organization. Their businesses are created for the

purpose of illegal profit-making or illegal income “laundering”, and form a “closed” circle.¹⁵

The practical forms of appearance of the black economy are mainly the carrying out of illicit activities, and the legalization of income derived therefrom, the activities carried out without assuming public burden, the creation of incomes excluded from public burdens, the continuation of black market not registered goods and services (smuggling), black labour, money laundering, claiming fictitious subsidies, and the unauthorized tax refunds, which forms are still present in the area of economic crime.

Mihály Tóth has grouped the most typical forms, areas of economic crime after the end of communism as follows:¹⁶

- the so-called “oil business”
- the abuses of the privatization’s “first wave”
- the guilty exploitation of subsidies, public benefits, aids, benefits
- the behaviours embodying typically in counterfeiting violating consumer and competitor interests, but even public interest as well
- the so-called “corporate” crime forms affecting the money and the capital market, including environmental crime

In the mid-1990s, the economic crime, the black economy have assumed such proportions due to the above reasons, that the review of the previous government measures or the absence of these measures, as well as the development of a new strategy to ensure more effective action have become justified. For this purpose, the Economy Protection Coordination Secretariat established in the organization of the Prime Minister’s Office justified the measures imposed as follows: “By recognising that the incomes produced in the black economy and re-distributed there, the spread of economic crime and the increasing damage value of crimes seriously endanger the stability of the domestic economy, and threatens with that the citizen’s confidence will be shaken in the state and its bodies, and in the idea of the rule of law, the Government has continuously introduced a number of legislative, organizational and other measures since 1994.”¹⁷

Due to this, the legislative background has constantly changed and better adapted to the occurring new challenges, and the economy protection organization has been strengthened, which enabled fasted and more decisive response by the investigating authorities to the new methods of crimes. Due to the measures introduced, the police and the relevant state departments has given priority to the combating economic crime and the black economy from the mid-1990s.

But the progress has been broken by the end of the 1990s, and in the absence of the solid legal background and the large number economy protection experts, who left the body, the new economy protection structure was not capable of providing adequate performance to the state of the economy and the actual social demands. To all this contributed that the state’s economic, financial supervisory bodies operated in the state

¹⁵ Dr. Kacziba Antal: A gazdaság, a fekete gazdaság, a gazdasági szervezett bűnözés és korrupció. *Kriminológiai Közlemények* 54. Kiadta: Magyar Kriminológiai Társaság, Budapest, 1996., 59. oldal

¹⁶ Tóth Mihály: Húsz év mérlege. *Rendészeti Szemle*, 2009/7-8. szám, 6. oldal

¹⁷ Bencze József: Összehangolt kormányzati intézkedésekkel a feketegazdaság ellen. *Gazdaságvédelem '94-'96*. Kiadta: Miniszterelnöki Hivatal, Budapest, 6. oldal

of being collapsed and uncertain for a long time, whereupon the detection and evidence of economic crimes encountered serious difficulties.¹⁸

Furthermore, after the end of communism, such a new criminal layer has been formed, who tries to gain extra profits with illegal means and offenses in the still-evolving economic sphere by exploiting the opportunities provided by the frequently changing legislations and the legal “loopholes” left open. These activities has been often supported by well-educated professionals, lawyers, tax experts. The legislative changes initiated for the elimination of “loopholes” unfortunately often react with a considerable delay to these new criminal methods.

By the millennium, in parallel with the development of technology and information technology, new opportunities and committing methods have appeared in the economic crimes. The intellectual nature economic crimes have appeared and showed a steady increase in the number and ratio, such as computer frauds (including countless, constantly expanding and becoming ever more sophisticated criminal forms, which require continuous, high-quality work, further development appropriate to the new requirements from the legislators and those performing the detection), credit card forgeries (credit card “cloning”), credit card frauds, crimes committed with the transformation of automated teller machines (ATM), counterfeiting, and money laundering committed in order to the legalization of incomes earned with these crimes. The increasing role of international, cross-border and organized crimes can be observed among these crimes. In Hungary, the appearance of Romanian, Ukrainian, Russian and Serbian offenders has been mainly typical in the recent years.

After the end of communism, money laundering, as a crime form, has appeared in Hungary, which was almost completely unknown until that. According to the criminological definition generally accepted by the expert on the subject, money laundering is the process in which the offenders wish to appear their assets arising from illegal sources – from the so-called predicate offense – as being from legal sources, that is they confer such properties on them – place of origin, title –, which are suitable to conceal, disguise their origin from the authorities, thus from the investigating authority and the tax authority. The predicate offense behind money laundering is economic crime or crime against property usually committed by organized crime.

Money laundering as a crime – as well as a phenomenon – was completely unknown before the end of communism, which was due to the lack of convertibility of the domestic currency and the underdevelopment of the banking system. As a result of the economic transition, the two-tier banking system¹⁹ was created, which was defenceless against financial transactions with illegal background and the black economy until the development of the legal system adapted to the new economic system.

On 8 November 1990 the member states of the Council of Europe have signed the International Convention for the Prevention of Money Laundering and Seizure and Confiscation of products derived from criminal activities, which made mandatory the criminalization of money laundering, that is making it punishable, for the member states. Based on this, money laundering, as a crime, has been involved in the Penal Code

¹⁸ A Magyar Köztársaság Rendészeti Stratégiája, Budapest, 2009. (munkaanyag), 94. oldal, In. Rendészeti Szemle Különszáma, 2010.

¹⁹ A kétszintű bankrendszer első szintjén a központi bank (az ún. jegybank, Magyarországon a Magyar Nemzeti Bank), második szintjén a kereskedelmi bankok állnak. A kereskedelmi bankok (és valamennyi pénzintézet) felügyeletét Magyarországon hatóságként a Magyar Nemzeti Bank látja el.

in 1994, the clarification of which lasts until today. In recent years, international action was necessary in order to detect the crimes, on the basis of which the cooperating countries have created the conditions for cooperation and information flows. The fight against money laundering has been regulated by law.

Nowadays, criminals also take advantage of the opportunities offered by the global computer network, the economic crimes committed on and by using the internet, so the tax-related abuses enabled by these, as well as by the single economic area of the European Union, by the removal of the internal borders, and the illegal employment means a gradual challenge for the law enforcement.

Besides the above – and in connection with it – it has appeared as a common method that most of the businesses took goods or money loans to get started, however, in many cases the sole purpose of starting a business was to take out the loan without the commencement of actual operation and the intention of debt repayment.

A special form of credit fraud has also appeared, the method of which is that the financial institution's head of department engaged in lending allows large amount of loans to the entrepreneurs, who are mostly unable to credit, for "adequate" portion. The loan application is accompanied by false valuations, balance sheet accounts and fictitious business contracts, and disburse the loans approved on the basis of this.

In the past decade, the environment-related crimes, traditionally included in the scope of economic crimes by scientist, has also appeared and show an increase in their number, such as environmental damage, nature damage and the offenses related to waste management. These offenses are often linked to other crimes, mainly to crimes against property or economic crimes. During the detection of these crimes, it can be concluded that organized criminal circles can be found in the background.

Necessarily resulting from the modus operandi, mostly private document abuses, and in a lower proportion forged document crimes are linked to the most economic crimes.

New areas of the economic crimes are the public procurement, the state and municipal companies, the state and municipal investments, and the related tenders, the tenders related to the grants provided by the European Union, the concessions, the founding of fictitious firms, company pantomiming, business chain contracts creating opportunities for gridlock, the forgery of food, rugs, lifestyle improvers, real estate fraud, credit frauds, and crimes committed by using the internet or in the cyberspace.

Among the economic crime offenders, in the recent years, have appeared both the domestic and the international organized crime circles. The detection and proof of the crimes impose a significant task to the investigation authorities, to the successful detection of which the secret information gathering and the use of secret interception forces and assets are essential.

Une réponse pénale pour la victime

L'équité et la justice restaurative en France

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Abstract

The initiative to set up guarantees for victims of crime to avoid secondary victimization has developed in France through the various manifestations of restorative justice that have put the victim in a central plan. These measures have been implemented through legislative reforms. The French criminal justice system offers a real response to the victims and effective possibilities of asserting their rights. The hereby article aims at the identification of these elements and shows an analysis of these legislative aspects. The author appreciates them as an element of fairness in the French criminal justice with regard to the victims and the penal laws.

Keywords: *fairness, restorative justice, guarantees, compensation for damage, judge delegated to victims, assistance in the recovery of victims of offenses, remedy for damages, offices for victims*

Apparue dans les années 1970 aux Etats Unis, sur l'impulsion de Howard Zehr, professeur de criminologie, et explorée dans une dizaine des pays comme Canada et Belgique, cette forme de justice s'était remarquée dans le débat public français en 2010 avec la médiatisation qui a entouré la correspondance échangée entre les parents d'un jeune homme assassiné en raison de son homosexualité et l'un des agresseurs de leur fils.¹ Puis, une expérience tendant à organiser une série de rencontres entre des victimes et des auteurs de délits, impliqués dans des affaires différentes, a été menée en 2010. En mars 2011, l'École nationale d'administration pénitentiaire a organisé la première journée d'études consacrée à la justice restaurative. Lors des XXVII^{èmes} assises de l'Institut d'aide aux victimes (INAVEM), en juin 2012, la garde des sceaux française a annoncé son intention de développer en France les expériences de justice restaurative. Dans ce cadre, une nouvelle expérience de rencontres « détenus - victimes » a été conduite en début d'année 2014.

Ces expériences disposent désormais d'un cadre législatif européen, avec la Directive 2012/29/UE du 25 octobre 2012 établissant des normes minimales concernant les droits, le soutien et la protection des victimes de la criminalité, qui devra être transposée par les Etats membres au plus tard le 16 novembre 2015. Aux termes de son considérant n°46, celle-ci considère que « les services de justice réparatrice, tels que la médiation entre la victime et l'auteur de l'infraction, la conférence en groupe familial et les cercles de détermination de la peine, peuvent être très profitables à la victime *mais nécessitent la mise en place de garanties pour éviter qu'elle ne subisse une victimisation*

¹ Yves Mayaud, Droit Pénal Général 5e édition mise à jour, Paris: Presses Universitaires de France, 2015.p.687, note - commentaire n. 3 sous page.

secondaire et répétée, des intimidations et des représailles. » Par conséquent, ces services devraient accorder la priorité aux intérêts et aux besoins de la victime, à l'indemnisation du préjudice qu'elle a subi et à la prévention de tout nouveau dommage.

Des éléments tels que la nature et la gravité de l'infraction, le niveau du traumatisme occasionné, la violation répétée de l'intégrité physique, sexuelle ou psychologique de la victime, les déséquilibres dans les rapports de force, l'âge, la maturité ou la capacité intellectuelle de la victime, qui pourraient limiter ou réduire son aptitude à décider en connaissance de cause ou compromettre une issue positive pour elle, devraient être pris en considération lorsqu'il s'agit de renvoyer une affaire aux services de justice réparatrice et durant ce processus de justice réparatrice. Les processus de justice réparatrice devraient, en principe, être confidentiels, sauf accord contraire entre les parties ou lorsque le droit national en décide autrement en raison d'un intérêt général supérieur. Certains éléments, tels que l'expression de menaces ou toute autre forme de violence commise durant le processus, peuvent être considérés comme exigeant d'être divulgués dans l'intérêt général ». Sur ce fondement, l'article 12 de la directive dispose : « 1. Les États membres prennent des mesures garantissant la protection de la victime contre une victimisation secondaire et répétée, des intimidations et des représailles, applicables en cas de recours à tout service de justice réparatrice. Ces mesures garantissent l'accès de la victime qui choisit de participer au processus de justice réparatrice à des services de justice réparatrice sûrs et compétents aux conditions suivantes : a) les services de justice réparatrice ne sont utilisés que dans l'intérêt de la victime, sous réserve de considérations relatives à la sécurité, et fonctionnent sur la base du consentement libre et éclairé de celle-ci, qui est révocable à tout moment ; b) avant d'accepter de participer au processus de justice réparatrice, la victime reçoit des informations complètes et impartiales au sujet de ce processus et des résultats possibles, ainsi que des renseignements sur les modalités de contrôle de la mise en œuvre d'un éventuel accord ; c) l'auteur de l'infraction a reconnu les faits essentiels de l'affaire ; d) tout accord est conclu librement et peut être pris en considération dans le cadre d'une procédure pénale ultérieure ; e) les débats non publics intervenant dans le cadre de processus de justice réparatrice sont confidentiels et leur teneur n'est pas divulguée ultérieurement, sauf avec l'accord des parties ou si le droit national l'exige en raison d'un intérêt public supérieur. 2. Les États membres facilitent, le cas échéant, le renvoi des affaires aux services de justice réparatrice, notamment en établissant des procédures ou des directives relatives aux conditions d'un tel renvoi. »

Afin de donner un cadre législatif aux expériences mises en œuvre en France, le présent article avait proposé d'insérer un nouvel article 10-1 dans le Code de procédure pénale aux termes duquel « les victimes et l'auteur d'une infraction, *sous réserve que les faits aient été reconnus*, pourraient se voir proposer une mesure de justice restaurative à l'occasion de toute procédure pénale et à tous les stades de la procédure, *y compris lors de l'exécution de la peine.* » Conformément à la définition proposée par l'article 2 de la directive précitée, la justice restaurative serait définie comme « toute mesure permettant à une victime ainsi qu'à l'auteur d'une infraction de participer activement à la résolution des difficultés résultant de l'infraction, et notamment à la réparation des préjudices de toute nature résultant de sa commission ». Cette mesure ne pourrait intervenir qu'après que la victime et l'auteur de l'infraction ont reçu une information complète à son sujet et ont consenti expressément à y participer. En tout état de cause, elle ne pourrait être mise en œuvre que par un tiers indépendant formé à cet effet, sous

le contrôle de l'autorité judiciaire ou, à la demande de celle-ci, de l'administration pénitentiaire.¹

Donc par la loi Taubira du 2014, a été créé l'article 10-1 du Code de la procédure pénale dans la section Sous-titre II intitulé *De la justice restaurative*. En France est instituée en effet, une nouvelle réponse pénale à l'infraction à côté de les classiques: l'action publique et l'action civile. La victime se retrouve au cœur de cette institution qui entend progresser un peu plus à partir de la tradition de restauration qui existait déjà par la médiation pénale au stade des alternatives aux poursuites. La justice restaurative peut être proposée, par contre, à toute occasion et à tous les stades de la procédure, compris lors de l'exécution de la peine, nous indique le premier alinéa de l'article 10-1 du Code de procédure pénale français. Le même article offre une définition générale des « mesures de justice restaurative » en pleine concordance avec la directive européenne précitée dans le rapport du Sénat selon lequel « constitue une mesure de justice restaurative toute mesure permettant à une victime ainsi qu'à l'auteur d'une infraction de participer activement à la résolution des difficultés résultant de l'infraction, et notamment à la réparation des préjudices de toute nature résultant de sa commission. »

Concernant l'effectivité de la procédure restauratrice et de son bon déroulement en plein connaissance de cause et capacité rationnelle entre les deux acteurs du rapport pénal, le législateur avait pensé statuer qu'elle est confidentielle, sauf accord contraire des parties et *excepté les cas où un intérêt supérieur lié à la nécessité de prévenir ou de réprimer des infractions justifie que des informations relatives au déroulement de la mesure soient portées à la connaissance du procureur de la République*. Il est parfois besoin donc de l'intervention d'un professionnel qui est habilité de vérifier les capacités de les deux (victime et l'infracteur) à raisonner dans leur démarches. Nous apprécions qu'en effet, ce soit toujours l'équité qui exige l'existence des droits effectifs pour la victime et aussi des institutions qui peuvent garantir l'obtention, ou la mise en valeur de ces droits.

Interpréter l'équité comme étant l'équilibre entre les parties du rapport pénal de conflit, nous nous imaginons: le délinquant, ses droits et ses obligations et la victime (si on vise le terme de parties dans le procès pénal, nous parlons de « la partie civile ») et les modalités offertes par les textes légaux à ces dernières de faire valoir leurs droits et aussi de se sentir protégés par le droit pénal. Le juge d'application des peines, aussi que le tribunal d'application des peines, à côté des institutions comme le Conseil national de l'aide aux victimes (CNAV), les bureaux d'aide aux victimes (BAV), le service d'aide au recouvrement des victimes d'infractions (SARVI), la commission d'indemnisation des victimes d'infractions (CIVI), le juge délégué aux victimes sont des piliers principaux dans les étapes de la justice pénale française qui existent afin de garantir le respect des droits des victimes. Ces droits sont respectés dans une manière effective par des indemnisations comme par l'intermédiaire des fonds de garantie des victimes. D'ailleurs, les victimes peuvent être également protégés par des préventions des rencontres des victimes par le condamné, etc.

En France, comme en Roumanie, les textes légaux règlementent cette protection des intérêts des victimes. Comme point de départ il est règlementé le principe général

¹ Projet de loi relatif à la prévention de la récidive et à l'individualisation des peines : Rapport, Chapitre II bis - Dispositions relatives à la justice restaurative, source : <http://www.senat.fr/rap/113-641-1/113-641-110.html>.

de respect des droits des victimes par l'article 707-IV du Code de procédure pénale, dans la rédaction de la loi Taubira no.2014-896 du 15 août 2014 ou il est mentionné que la victime a des droits et « l'autorité judiciaire est tenue de garantir l'intégralité de ces droits tout au long de l'exécution de la peine quel qu'un soient les modalités. » Cette protection existe aussi au niveau de l'Union Européenne, par la Directive no. 2012/29/UE du 25 octobre 2012, qui établit des normes minimales concernant les droits, le soutien et la protection des victimes de la criminalité » notamment par une participation à la procédure pénale. L'article 707-IV du Code de procédure pénale fixe les prérogatives qui sont reconnues au cours de l'exécution de la peine à la victime. La victime peut alors: « saisir l'autorité judiciaire de tout atteint à ses intérêts, obtenir la réparation du préjudice par indemnisation, ou autre moyen adapté et s'il est le cas elle peut aussi proposer une mesure de justice restauratrice.» Elle peut «rester informé si elle souhaite sur la fin d'exécution d'une peine privative de liberté, en conformité avec la procédure prévue par le Code de procédure pénale, finalement, la victime peut être prise en compte, s'il y a lieu, afin de respecter la nécessité de garantir sa sûreté.»

Une tentative de justice-remède-compensation qui devait être ressentie immédiatement par les victimes avait été initiée par la loi Taubira qui avait essayé d'instaurer une majoration de 10% des amendes pénales, douanières et certains amendes prononcées par des autorités administratives par l'intermédiaire de l'article 707-6 du Code de procédure pénale français aux termes duquel: « Les amendes prononcées en matière contraventionnelle, correctionnelle et criminelle, à l'exception des amendes forfaitaires sont affectées d'une majoration de 10 % perçue lors de leur recouvrement », majoration destinée de financer «l'aide aux victimes». En tenant compte du fait que ces majorations constituaient des *peines accessoires* revêtues d'une *automaticité d'application* sans que le juge ne les prononce par rapport aux circonstances de l'individualisation des peines, propres à chaque espèce, elles ont été jugées non conformes au ce principe d'individualisation découlant de l'article 8 de la Déclaration française de 1789.²

Il est vrai qu'en France la préoccupation pour les victimes avait été marquée par des nombreuses manifestations et cette manifestation est de plus en plus accentuée, même le législateur va règlementer des « droits pour les victimes au cours de l'exécution de la peine ». En ce sens, *grosso modo*, les victimes sont dotées d'une instance nationale qui représente leurs intérêts: le *Conseil national d'aide aux victimes*, créé en 1999 en France par décret et modifié par un autre décret en 2010. Cette instance a le rôle de formuler des propositions concernant l'accueil, les informations les prises en charges et les indemnisations des victimes en pénal et elle est présidé par le garde des sceaux le Ministre de la Justice et compte des représentants d'associations du domaine de l'aide aux victimes. Cette institution fait preuve de l'engagement de la part des pouvoirs publics auprès des victimes et de la participation de ces dernières à la politique pénale qui les vise.³

Les *Bureaux d'aide aux victimes* ont le rôle des institutions d'accueil reposant à la besoin immédiate du justiciable qui se trouve dans des difficultés en raison de la méconnaissance du fonctionnement de la justice, ou en raison du traumatisme causée par l'infraction. Ces institutions ont été lancées en France au titre d'expérimentation en 2009, reconnus à titre expérimental dans certaines juridictions seulement et confirmées et généralisées dans la circulaire de politique pénale de la Gard des Sceaux date 2013.

² Cons. constit. 7 août 2014, Décision no 2014-696 DC, JO 17 août, p. 13659, considérant 28.

³ Yves Mayaud, *op. cit.* p. 678.

Aujourd'hui elles sont règlementées dans le contenu du Code de la procédure pénale française dans l'article 716-15-4 qui consacre un tel bureau dans chaque tribunal de grande instance. Leur composition, missions et fonctionnement sont prévues par voie de décret. Le gouvernement français dégage chaque année les crédits nécessaires pour assurer le bon fonctionnement de l'institution.⁴

Les missions de ces bureaux sont celles d'informer les victimes, de répondre aux difficultés qu'elles sont susceptibles de rencontrer. Le bureau traite automatiquement des données à caractère personnel dénommé « Cassiopée ».⁵ Ce sont ces bureaux qui doivent orienter les victimes vers les magistrats, juridictions compétentes, notamment les juridictions d'application des peines pour exemple pour la mise en exécution des dispositions relatives à l'interdiction pouvant peser sur le condamné d'entrer en relation avec elles si on parle d'une incidence d'une cessation temporaire de l'incarcération, ou des réductions des peines⁶. Un aspect qu'on trouve vraiment équitable pour les victimes

⁴ *Ibid*, p. 679.

⁵ Article R15-33-66-7, Modifié par Décret n°2010-671 du 18 juin 2010 - art. 7 Code de Procédure Pénale:

«I. Conformément à l'article 48-1, la durée de conservation des informations et des données à caractère personnel enregistrées dans le cadre d'une procédure pénale est de dix ans à compter de leur dernière mise à jour enregistrée ; cette durée est portée à :

-vingt ans lorsque la personne a été condamnée à une peine criminelle ou lorsque la procédure porte sur une infraction à laquelle s'applique le délai de prescription de l'action publique prévu au troisième alinéa de l'article 7 et au deuxième alinéa des articles 706-25-1 et 706-31;

-trente ans lorsque la procédure porte sur une infraction à laquelle s'applique le délai de prescription de l'action publique prévu au premier alinéa des articles 706-25-1 et 706-31.

II. La durée de conservation des informations et des données à caractère personnel enregistrées dans le cadre des autres procédures, mentionnées à l'article R. 15-33-66-4, est, en application de l'article 3-1 de la loi n° 91-650 du 9 juillet 1991 portant réforme des procédures civiles d'exécution, de dix ans à compter de la date à laquelle la décision a acquis force exécutoire. Toutefois, cette durée courte à compter des vingt et un ans de la personne concernée ou du dernier enfant de sa fratrie lorsque les données sont enregistrées dans le cadre d'une procédure d'assistance éducative ou d'une mesure judiciaire d'aide à la gestion du budget familial. Elle court à compter des vingt et un ans de la personne concernée lorsqu'elles ont été enregistrées dans le cadre d'une mesure de protection judiciaire des jeunes majeurs».

⁶ L'article 712-16-2 Code de Procédure Pénale, modifié par Loi n°2011-939 du 10 août 2011 - art. 21 :

«S'il existe un risque que le condamné puisse se trouver en présence de la victime ou de la partie civile et qu'au regard de la nature des faits ou de la personnalité de l'intéressé il apparaît qu'une telle rencontre paraît devoir être évitée, les juridictions de l'application des peines assortissent toute décision entraînant la cessation temporaire ou définitive de l'incarcération d'une interdiction d'entrer en relation avec la victime ou la partie civile et, le cas échéant, de paraître à proximité de son domicile et de son lieu de travail.

Le prononcé de cette interdiction est obligatoire, sauf décision contraire spécialement motivée, lorsque la personne a été condamnée pour l'une des infractions visées à l'article 706-47.

La juridiction adresse à la victime un avis l'informant de cette interdiction; si la victime est partie civile, cet avis est également adressé à son avocat. Cet avis précise les conséquences susceptibles de résulter pour le condamné du non-respect de cette interdiction.

La juridiction peut toutefois ne pas adresser cet avis lorsque la personnalité de la victime ou de la partie civile le justifie, lorsque la victime ou la partie civile a fait connaître qu'elle ne souhaitait pas être avisée des modalités d'exécution de la peine ou dans le cas d'une cessation provisoire de l'incarcération du condamné d'une durée ne pouvant excéder la durée maximale autorisée pour les permissions de sortie.

est le fait que l'article 712-16-1 du Code de procédure pénale indique clairement que *«les juridictions de l'application des peines prennent en considération les intérêts de la victime ou de la partie civile au regard des conséquences pour celle-ci de cette décision. Les mesures prévues à l'article 712-16 peuvent porter sur les conséquences des décisions d'individualisation de la peine au regard de la situation de la victime ou de la partie civile, et notamment le risque que le condamné puisse se trouver en présence de celle-ci. Si elles l'estiment opportun, les juridictions de l'application des peines peuvent, avant toute décision, informer la victime ou la partie civile, directement ou par l'intermédiaire de son avocat, qu'elle peut présenter ses observations par écrit dans un délai de quinze jours à compter de la notification de cette information. Ces observations peuvent être adressées à la juridiction par la victime ou la partie civile par tout moyen à leur convenance.»* Même plus, la Cour de cassation française avait statué que *« les juridictions de l'application des peines qui statuent sur une demande de libération conditionnelle ont l'obligation de prendre en compte les intérêts des parties civiles »*.⁷

C'est aussi l'obligation de ces bureaux d'aide aux victimes de les orienter vers le service d'aide au recouvrement des victimes d'infractions (SARVI), ou vers la commission d'indemnisation des victimes d'infractions (CIVI).

Quant 'au *juge délégué aux victimes* qui a été créé par le décret no 2007-1605 du 13 novembre 2007 en France, il est un magistrat qui *« vieille dans le respect de l'équilibre des droits des parties à la prise en compte des droits reconnus par la loi aux victimes. »*⁸ On peut oser affirmer qu'il est le magistrat qui siège les droits des victimes au nom de leur placement équitable dans le rapport pénal. C'est un véritable progrès du droit pénal vers l'équité. Il a plusieurs attributions en ce sens, administratives, mais aussi d'administration judiciaire. Une de ces attributions est cela de participation à l'élaboration et la mise en œuvre de dispositifs coordonnés d'aide aux victimes. Dans le cadre de l'exercice de ses fonctions, le juge délégué aux victimes participe, sous l'autorité du président du tribunal de grande instance et en lien avec le procureur de la République, à l'élaboration et la mise en œuvre de dispositifs coordonnés d'aide aux victimes sur le ressort du tribunal de grande instance.⁹ En ce sens aussi, l'article D47-6-12, du Code de procédure pénale français créé par Décret n°2007-1605 du 13 novembre 2007 statue que: *«Le juge délégué aux victimes vérifie les conditions dans lesquelles les parties civiles sont informées de leurs droits à l'issue de l'audience conformément aux dispositions de l'article D. 48-3.»* L'article D.48-3 statue à son tour que: *« Lorsqu'il*

Pour l'application du présent article, la victime ou la partie civile peut informer la juridiction de l'application des peines de ses changements de résidence ou de lieu de travail.

Lorsque la personne a été condamnée pour une infraction visée à l'article 706-47 et si la victime ou la partie civile en a formé la demande, le juge de l'application des peines ou le service pénitentiaire d'insertion et de probation informe cette dernière, directement ou par l'intermédiaire de son avocat, de la libération de la personne lorsque celle-ci intervient à la date d'échéance de la peine».

⁷ Cour de Cassation, Cass.crim.,28 avr. 2011, Bull.79.

⁸ L'Article D47-6-1 Code de Procédure Pénale, Créé par Décret n°2007-1605 du 13 novembre 2007 - art. 1 JORF 15 novembre 2007 en vigueur le 2 janvier 2008 définit le magistrat et son but:« Le juge délégué aux victimes veille, dans le respect de l'équilibre des droits des parties, à la prise en compte des droits reconnus par la loi aux victimes.

A cette fin, il exerce les fonctions juridictionnelles et, sans préjudice du rôle de l'avocat constitué ou à venir de la victime, les fonctions d'administration judiciaire et les fonctions administratives prévues par le présent titre. »

⁹ Article D47-6-13, Code de Procédure Penale, Créé par Décret n°2007-1605 du 13 novembre 2007 - art. 1 JORF 15 novembre 2007 en vigueur le 2 janvier 2008.

n'existe pas de bureau d'aide aux victimes au sein de la juridiction et que la condamnation est rendue en présence de la partie civile, *le bureau de l'exécution des peines peut être chargé de recevoir cette dernière à l'issue de l'audience*, assistée le cas échéant par son avocat, pour l'informer notamment des *modalités pratiques lui permettant d'obtenir le paiement des dommages et intérêts* qui lui ont été alloués et, s'il y a lieu, des démarches devant être effectuées pour saisir le service d'aide au recouvrement des victimes d'infractions ou la commission d'indemnisation des victimes d'infractions ainsi que du délai dans lequel elles doivent intervenir. Le bureau de l'exécution des peines informe également la partie civile de sa possibilité de saisir le juge délégué aux victimes.»

Voilà donc, une réglementation complexe, qui précise effectivement les modalités concrètes pour la victime de commencer faire valoir de ses droits et de sentir que la justice pénale est là pour elle aussi. Le juge délégué aux victimes et la loi sont là de façon effective pour la victime et cette collaboration entre les institutions est essentielle du point de vue de l'équité en droit pénal.¹⁰

¹⁰ Ce juge avait à un moment donné dans le droit procédural pénal français, des attributions d'administration judiciaire qui donnaient lieu à des décisions ou des ordonnances non susceptibles de recours qui consistaient à saisir le juge d'application des peines afin d'attirer son attention sur la situation et les intérêts de la victime en rapport avec les différentes mesures relevant de sa compétence, les articles D.47-6-4 à D.47-6-11 du chapitre II, Titre XIV du décret, chapitre intitulé «Attribution d'administration judiciaire du juge délégué aux victimes ». Ces attributions ont été annulées par la Décision du Conseil d'Etat du 28 décembre 2009, no.312314 sur les considérants suivants: « En ce qui concerne les articles D. 47-6-4 à D. 47-6-11 du Code de Procédure Pénale: Considérant, en revanche, qu'en application des articles D. 47-6-5 à D. 47-6-7 créés dans le Code de Procédure Pénale par le décret attaqué, le juge délégué aux victimes adresse au juge de l'application des peines des ordonnances afin de l'informer de la situation d'une victime; que saisi par le juge délégué aux victimes, le juge de l'application des peines peut être conduit à compléter les obligations auxquelles le condamné est soumis et, le cas échéant, à envisager la révocation du sursis avec mise à l'épreuve ou le retrait ou la révocation de la mesure d'aménagement; que nonobstant les dispositions de l'article D. 47-6-8 introduit dans le Code de Procédure Pénale, aux termes desquelles au vu de l'ordonnance du juge délégué aux victimes, le juge de l'application des peines soit se saisit d'office, soit est saisi sur réquisitions du procureur de la République, conformément aux dispositions de l'article 712-4 du même code, les dispositions des articles D. 47-6-5 à D. 47-6-7 du Code de Procédure Pénale sont susceptibles d'avoir une incidence sur les modalités d'exécution des peines et, partant, touchent à des règles de procédure pénale; qu'elles ne peuvent être regardées comme ayant simplement déterminé les modalités d'application des règles fixées en ce domaine par le législateur ; que ces dispositions relèvent, par suite, du domaine réservé à la loi par l'article 34 de la Constitution Article 34 de la Constitution française, Modifié par Loi constitutionnelle n°2008-724 du 23 juillet... - art. 11; qu'il y a lieu, pour ce motif, d'annuler les dispositions des articles D. 47-6-4 à D. 47-6-11 du Code de Procédure Pénale l'ensemble des dispositions issues du décret relatives aux attributions d'administration judiciaire du juge délégué aux victimes n'étant pas dissociables de celles des articles D. 47-6-5 à D. 47-6-7... » - Conseil d'Etat, 6ème et 1ère sous-sections réunies, 28/12/2009, 312314, disponible sur <https://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000021630721>. «La loi fixe les règles concernant: - les droits civiques et les garanties fondamentales accordées aux citoyens pour l'exercice des libertés publiques; la liberté, le pluralisme et l'indépendance des médias ; les sujétions imposées par la Défense nationale aux citoyens en leur personne et en leurs biens ; -la nationalité, l'état et la capacité des personnes, les régimes matrimoniaux, les successions et libéralités; -la détermination des crimes et délits ainsi que les peines qui leur sont applicables ; la procédure pénale ; l'amnistie ; la création de nouveaux ordres de juridiction et le statut des magistrats ; -l'assiette, le taux et les modalités de recouvrement des impositions de toutes natures ; le régime d'émission de la monnaie.

La loi fixe également les règles concernant: - le régime électoral des assemblées parlementaires, des assemblées locales et des instances représentatives des Français établis hors de France ainsi que les conditions d'exercice des mandats électoraux et des fonctions électives des membres des assemblées

Un autre élément qui montre que la victime est bien prise en considération par le droit pénal français est le fait qu'elle est représentée devant la Chambre de l'application des peines de la Cour d'appel. En ce sens, pour l'examen des appels des jugements du tribunal de l'application des peines concernant le relèvement de la période de sûreté, la libération conditionnelle, ou la suspension de peine, cette cour comprend deux conseillers assesseurs, un responsable d'une association de réinsertion des condamnés et un responsable d'une association d'aide aux victimes.¹¹ De nouveau, un détail qu'on trouve vraiment équitable parce que l'équilibre s'avère présent entre les deux acteurs principaux du procès pénal. Encore, le dossier individuel du chaque condamné, tenu au greffe du juge de l'application des peines doit comporter une cote spécifique dans laquelle sont contenues l'ensemble des pièces et informations relatives à la victime, ou à la partie civile de l'infraction visée.¹² On trouve cet aspect comme preuve d'une effectivité des actes de procédure qui facilitent le travail des institutions qui sont là pour rendre la justice, parce qu'ils peuvent apprécier tous les éléments du rapport pénal de conflit dans leur complexité.

Nous venons de mentionner le travail des juridictions d'application des peines qui est vraiment important. Ces juridictions peuvent faire, sur l'ensemble du territoire français, des examens, auditions, enquêtes, expertises, réquisitions, ou autres mesures efficaces¹³. Ce sont des « enquêtes victimologiques sur les retombées des mesures d'individualisation »¹⁴. Ces enquêtes portent sur les conséquences des mesures d'individualisation de la peine au regard de la situation de la victime, notamment dans le cas dans lequel est envisagée une cessation temporaire, ou définitive d'incarcération avant la date d'échéance de la peine. Préalablement à toute décision entraînant la cessation temporaire ou définitive de l'incarcération d'une personne condamnée à une peine privative de liberté avant la date d'échéance de cette peine, les juridictions de l'application des peines prennent en considération les intérêts de la victime ou de la partie civile au regard des conséquences pour celle-ci de cette décision. Les mesures prévues à l'article 712-16 Code pénal peuvent porter sur les conséquences des décisions d'individualisation de la peine au regard de la situation de la victime ou de la partie civile, et notamment le risque que le condamné puisse se trouver en présence de celle-ci. « Si elles l'estiment opportun, les juridictions de l'application des peines peuvent, avant toute décision, informer la victime ou la partie civile, directement ou par l'intermédiaire de son avocat, qu'elle peut présenter ses observations par écrit dans un délai de quinze jours à compter de la notification de cette information. Ces observations peuvent être adressées à la juridiction par la victime ou la partie civile par tout moyen à leur convenance. »¹⁵ Cette dernière disposition implique directement la victime dans la

délibérantes des collectivités territoriales; - la création de catégories d'établissements publics; -les garanties fondamentales accordées aux fonctionnaires civils et militaires de l'Etat; -les nationalisations d'entreprises et les transferts de propriété d'entreprises du secteur public au secteur privé.

La loi détermine les principes fondamentaux: - de l'organisation générale de la Défense nationale; - de la libre administration des collectivités territoriales, de leurs compétences et de leurs ressources; - de l'enseignement; - de la préservation de l'environnement; - du régime de la propriété, des droits réels et des obligations civiles et commerciales; - du droit du travail, du droit syndical et de la sécurité sociale(...).

Les dispositions du présent article pourront être précisées et complétées par une loi organique. ».

¹¹ Art.712-13, al.2 ; art. D. 49-9 Code de Procédure Pénale.

¹² Art. D.49-29 ; Art.D. 49-65 Code de Procédure Pénale.

¹³ Art. 712-16, Loi no. 2010-242 du 10 mars 2010, Code de Procédure Pénale.

¹⁴ Expression empruntée de professeur Yves Mayud, *op. cit.* p. 681.

¹⁵ Art. 712-16-1, Modifié par Loi n°2011-939 du 10 août 2011 - art. 15, Code de Procédure Pénale.

procédure d'application des peines elle-même sous forme de manifestation écrite et lui offre une chance de contradictoire, aspect aussi essentiel de la cote de l'équité en procès pénal. Dans l'exemple particulier de la libération conditionnelle, ce droit de la victime consiste dans une simple communication. « Lorsque cette libération vise des personnes condamnées à une peine d'emprisonnement égale ou supérieure à cinq ans, ou à une peine de réclusion, l'avocat de la partie civile peut s'il en fait la demande, assister au débat contradictoire devant le juge de l'application des peines, le tribunal de l'application des peines ou la chambre d'application des peines de la cour d'appel statuant en appel pour y faire valoir ses observations avant les réquisitions du ministère public. »¹⁶ « Emblème de l'aménagement de la peine, la libération conditionnelle est ainsi associée à une meilleure représentation des victimes dans le processus de décision. »¹⁷

Cette idée d'apprécier et de tenir compte de l'impact des décisions sur les victimes représente néanmoins un élément essentiel de l'équité en droit pénal et dans la procédure pénale qui se fait ressenti en France. La victime a aussi des sensibilités sur les mesures prévues, de la même raison comme le condamné à ses propres sensibilités qui relèvent de l'application effective de la peine, face au pouvoir de l'Etat qui l'accuse et le condamne.

En connexion immédiate avec la condamnation, les obligations des condamnées de ne pas se rencontrer avec la victime bénéficient d'une réaction immédiate des organes d'application des peines en nom de la protection des droits de la victime. En cas des aménagements comme la cessation temporaire ou définitive de l'incarcération avant la date d'échéance de la peine¹⁸ s'il existe un risque que le condamné puisse se trouver en présence de la victime, et qu'au regard de la nature des faits ou de la personnalité de l'intéressé il apparait qu'une telle rencontre doit être évitée, la juridiction d'application des peines interdit au condamné d'entrer en relation avec elle, ou de paraître à proximité de son domicile et de son lieu de travail. La juridiction adresse à la victime un avis l'informant de cette mesure, si celle-ci est partie civile, l'avis est également adressé à son avocat. La juridiction peut ne pas adresser l'avis lorsque la personnalité de la victime ou de la partie civile justifie, ou lorsqu'elle a fait connaître qu'elle ne souhaitait pas être avisée des modalités d'exécution de la peine, ou dans le cas d'une cessation provisoire de l'incarcération du condamné d'une durée ne pouvant excéder la durée maximale autorisée pour les permissions de sortie.¹⁹ On retrouve ce principe de précaution lorsque le condamné a bénéficié d'une ou plusieurs réductions de peines.²⁰

¹⁶ Art. 730, al. 4 red. Loi n° 2009-1436 du 24 nov. 2009 pénitentiaire.

¹⁷ Yves Mayaud, *op. cit.* p. 682-683.

¹⁸ Art. 712-16-1 et 712-16-2 Code de Procédure Pénale.

¹⁹ Art. 712-16-2 al 1^{er}, al. 3 à 5 red. Loi. n. 2010-242 du 10 mars 2010.

²⁰ Art. 721-2 Code de Procédure Pénale.: « (...)II. -Dans tous les cas, le juge de l'application des peines peut, selon les modalités prévues à l'article 712-6, ordonner que le condamné ayant bénéficié d'une ou plusieurs des réductions de peines prévues aux articles 721 et 721-1 soit soumis après sa libération à l'interdiction de recevoir la partie civile ou la victime, de la rencontrer ou d'entrer en relation avec elle de quelque façon que ce soit, pendant une durée qui ne peut excéder le total des réductions de peines dont il a bénéficié. Cette décision est prise préalablement à la libération du condamné, le cas échéant en même temps que lui est accordée la dernière réduction de peine.

L'interdiction mentionnée au premier alinéa du présent II peut être accompagnée de l'obligation d'indemniser la partie civile. En cas d'inobservation par la personne condamnée des obligations et interdictions qui lui ont été imposées, le juge de l'application des peines peut, selon les modalités prévues à l'article 712-6, retirer tout ou partie de la durée des réductions de peines dont elle a bénéficié et ordonner sa réincarcération. L'article 712-17 est applicable».

La réglementation légale française relève d'une forte prévention relayée par la Directive 2011/99/UE du Parlement Européen et du Conseil du 13 décembre 2011 relative à la décision de protection européenne (JOUE 21 dec.2011). Cette directive a pour objectif de garantir la reconnaissance mutuelle, dans l'entier espace européen, des décisions de protection des victimes lorsque celles-ci se déplacent au sein de l'Union. Il est essentiel donc que les victimes sauf consentement de leur part, n'aient pas à souffrir de la présence physique de l'auteur de l'infraction.²¹ Le cas des infractions violentes ou de nature sexuelle est géré par des dispositions plus radicales, parce que l'interdiction et son prononcé pour le condamné est obligatoire, sauf décision contraire, mais spécialement motivée²². Si la victime, ou partie civile en ont formé la demande, le juge d'application des peines, ou le service pénitentiaire d'insertion et de probation informe cette dernière directement, ou son avocat de la libération du condamné lorsque celle-ci intervient à la date d'échéance de la peine.²³

Aussi à la raison de protection de la victime, les condamnées peuvent encourir des sanctions pour avoir rencontré des victimes. « La police et la gendarmerie peuvent d'office, ou sur instruction du juge de l'application des peines, appréhender toute personne condamnée placée sous son contrôle et à l'encontre de laquelle il existe une ou plusieurs raisons plausibles de soupçonner qu'elle n'a pas respecté les obligations qui lui incombent « en application de la condamnation », ce qui inclut son interdiction d'entrer en relation avec la victime, ou de paraître en un lieu, ou catégorie de lieux. » Celui visée peut sous décision d'un officier de police judiciaire être retenue vingt-quatre heures au plus dans un local de police, ou gendarmerie afin que soit vérifiée sa situation et qu'elle soit entendue sur la violation de ses obligations. Les droits relatives à la garde à vue s'appliquent, les pouvoirs conférés au procureur de la République pour la garde à vue, sont exercés en ce cas particulier par le juge d'application des peines qui peut ordonner que la personne soit conduite devant lui, le cas échéant pour ordonner son incarcération provisoire. L'ancien article 712-16-3 du Code de procédure pénal français contenait ce dispositif, avant la loi Taubira de 2014 qui a transféré son contenu dans le nouveau article 709-1-1 du même code, mais cette fois dans le sens d'une portée beaucoup plus large parce qu'elle ne concerne pas seulement les personnes placées sous le contrôle du juge de l'application des peines, mais encore celles placées sous le contrôle du parquet, soit condamnées à titre principal à une peine alternative à l'emprisonnement en conformité avec le deuxième alinéa de l'article 131-9 du Code pénal, soit condamnées à titre principal à une peine complémentaire, en application du second alinéa de l'article 131-11 du même Code pénal.²⁴ Par ce porté plus large, on assiste à un élargissement de la protection des victimes aussi. Donc, c'est une stratégie idéale de la politique pénale française mise en œuvre par la loi Taubira du 2014.

«Les services de police et de gendarmerie peuvent, sur instruction du juge de l'application des peines, procéder sur l'ensemble du territoire national si ces mesures sont indispensables pour rapporter la preuve de la violation des interdictions résultant

²¹ Yves Mayaud, *op.cit.* p.683.

²² Art.712-16-2 al.2, red. Loi n°2010-242 du 10 mars 2010.

²³ Article 712-16-2, al.6 Modifié par Loi n°2011-939 du 10 août 2011 - art. 21: « Lorsque la personne a été condamnée pour une infraction visée à l'article 706-47 et si la victime ou la partie civile en a formé la demande, le juge de l'application des peines ou le service pénitentiaire d'insertion et de probation informe cette dernière, directement ou par l'intermédiaire de son avocat, de la libération de la personne lorsque celle-ci intervient à la date d'échéance de la peine. ».

²⁴ Yves Mayaud, *op. cit.* p. 684.

de la condamnation, ces organes peuvent aussi enregistrer et transcrire des correspondances par voie de télécommunications, ou procéder à la localisation en temps réel d'une personne, d'un véhicule, ou tout autre objet, même sans le consentement de son propriétaire, ou de son possesseur.» Pour éviter l'arbitraire, la loi française encadre bien ce type d'activités et statue que « ces investigations ne sont pas possibles si elles n'ont pas de lien avec les crimes et délits mentionnés aux articles 100 et 230-32 du Code de procédure pénale relatifs aux interceptions de correspondances et à la géolocalisation, elles doivent être opérées en respectant les modalités qui leur sont propres »²⁵ comme dans l'autre cas, ces dispositions s'appliquent pareil aux personnes placées sous le contrôle du parquet donc soit condamnées à titre principal à une peine alternative à l'emprisonnement en conformité avec le deuxième alinéa de l'article 131-9 du Code pénal, soit condamnées à titre principal à une peine complémentaire, en application du second alinéa de l'article 131-11 du même Code pénal français.

A notre avis, l'indemnisation des victimes a un rôle clé par l'intermédiaire de la justice restaurative comme manifestation de l'équité en droit pénal. Il est prévu par l'article 728-1 du Code de procédure pénale français que dans les établissements pénitentiaires ils figurent des comptes nominatifs ou les valeurs pécuniaires des détenus sont inscrites. Un tel compte est divisé en trois parties: la première sur laquelle seules les parties civiles et les créanciers d'aliments peuvent faire valoir leurs droits, la deuxième affectée au pécule de libération qui ne peut être exécuté par aucune modalité d'exécution, et la troisième laissée à la disposition des détenus. Le même article statue que « lorsque l'auteur de l'infraction a été condamné au paiement de dommages et intérêts et que la part des valeurs pécuniaires affectée à l'indemnisation des parties civiles en application du premier alinéa du I n'a pas été réclamée, ces valeurs sont, lorsqu'elles sont supérieures à un montant fixé par décret et sous réserve des droits des créanciers d'aliments, versées au *fonds de garantie des victimes des actes de terrorisme et d'autres infractions à la libération du condamné*. » si par exemple les victimes ne demandent pas des dommages pécuniaires, ce défaut de versement des sommes qui sont réservées à leur indemnisation, ne bénéficie pas au condamné, mais ces sommes sont versées dans *les fonds plus générales de garantie de toutes les victimes d'infractions pénales*. Même en cette situation, la victime peut toujours se manifester pour en avoir le profit, elle est directement indemnisée par les fonds à hauteur, le cas échéant, des versements effectués et à hauteur de ces versements, sans subrogation contre le responsable particulier du dommage.²⁶

La Loi n.2008-644 du 1^{er} juillet 2008 avait créé des nouveaux droits pour les victimes et a en même temps amélioré l'exécution des peines. En ce sens, cette loi avait inséré dans le Code de procédure pénale et dans le Code des assurances²⁷ des mesures destinées à aider les victimes à recouvrer les dommages et intérêts.²⁸

²⁵ Art. 709-1-3 Code de Procédure Pénale.

²⁶ Code d'assurances, art. L. 422-1, dernier alinéa, red. Loi. n°. 2014-896 du 15 août 2014.

²⁷ Code d'assurances. Art. L. 422-7 à L. 422-10.

²⁸ Art. 706-15-1, créé par Loi n°2008-644 du 1er juillet 2008 - art. 1: «Toute personne physique qui, s'étant constituée partie civile, a bénéficié d'une décision définitive lui accordant des dommages et intérêts en réparation du préjudice qu'elle a subi du fait d'une infraction pénale, mais qui ne peut pas obtenir une indemnisation en application des articles 706-3 ou 706-14, peut solliciter une aide au recouvrement de ces dommages et intérêts ainsi que des sommes allouées en application des articles 375 ou 475-1.

Dans le titre XIV du Code de procédure pénale français intitulé: « Du recours en indemnité ouvert à certaines victimes de dommages résultant d'une infraction » dans le contenu des articles comme l'article 706-3 et l'article 706-4, le législateur français prévoit des conditions d'obtention d'une indemnisation qui peut être obtenue par les victimes au titre de *recours en indemnité*. Ce recours en indemnité est offert à certaines catégories de victimes et des dommages résultant d'une infraction²⁹. Donc si cette indemnisation ne peut pas être obtenue par les victimes³⁰, « toute personne qui s'était constitué partie civile et a bénéficié d'une décision lui accordant des dommages intérêts

Cette aide peut être sollicitée y compris si l'auteur de l'infraction fait l'objet d'une obligation d'indemnisation de la victime dans le cadre d'une peine de sanction-réparation, d'un sursis avec mise à l'épreuve ou d'une décision d'aménagement de peine ou de libération conditionnelle».

Art. 706-15-2, Créé par Loi n° 2008-644 du 1er juillet 2008 - art. 1: « En l'absence de paiement volontaire des dommages et intérêts ainsi que des sommes allouées en application des articles 375 ou 475-1 par la personne condamnée dans un délai de deux mois suivant le jour où la décision concernant les dommages et intérêts est devenue définitive, la partie civile peut saisir le fonds de garantie des victimes des actes de terrorisme et d'autres infractions d'une demande d'aide au recouvrement. A peine de forclusion, la demande d'aide au recouvrement doit être présentée dans le délai d'un an à compter du jour où la décision est devenue définitive. Toutefois, le fonds de garantie peut relever la victime de la forclusion pour tout motif légitime. En cas de refus opposé par le fonds, la victime peut être relevée de la forclusion par le président du tribunal de grande instance statuant par ordonnance sur requête. A peine d'irrecevabilité, la requête est présentée dans le mois suivant la décision de refus. La victime est tenue de communiquer au fonds tout renseignement de nature à faciliter le recouvrement de créance. Agissant seule ou conjointement avec le débiteur, la victime peut renoncer à l'assistance au recouvrement. Toutefois, les frais de gestion et les frais de recouvrement exposés par le fonds demeurent exigibles».

²⁹ Art. 706-3 Code de Procédure Pénale, modifié par Loi n°2013-711 du 5 août 2013 - art. 20 spécifie que: « Toute personne ayant subi un préjudice résultant de faits volontaires ou non qui présentent le caractère matériel d'une infraction peut obtenir la réparation intégrale des dommages qui résultent des atteintes à la personne, lorsque sont réunies les conditions suivantes: 1° Ces atteintes n'entrent pas dans le champ d'application de l'article 53 de la loi de financement de la sécurité sociale pour 2001 (n° 2000-1257 du 23 décembre 2000) ni de l'article L. 126-1 du code des assurances ni du chapitre Ier de la loi n° 85-677 du 5 juillet 1985 tendant à l'amélioration de la situation des victimes d'accidents de la circulation et à l'accélération des procédures d'indemnisation et n'ont pas pour origine un acte de chasse ou de destruction des animaux nuisibles; 2° Ces faits :-soit ont entraîné la mort, une incapacité permanente ou une incapacité totale de travail personnel égale ou supérieure à un mois ; -soit sont prévus et réprimés par les articles 222-22 à 222-30, 224-1 A à 224-1 C, 225-4-1 à 225-4-5, 225-14-1 et 225-14-2 et 227-25 à 227-27 du code pénal; 3° La personne lésée est de nationalité française ou les faits ont été commis sur le territoire national.

La réparation peut être refusée ou son montant réduit à raison de la faute de la victime.»; Voir aussi les articles suivants: 706-4 à 706-14 du même Code de Procédure Pénale.

³⁰ Les infractions pour lesquelles les victimes peuvent prétendre à une indemnisation de leur préjudice, sont limitativement énumérées par l'article 706-14 du Code de procédure pénale: « Toute personne qui, victime d'un vol, d'une escroquerie, d'un abus de confiance, d'une extorsion de fonds ou d'une destruction, d'une dégradation ou d'une détérioration d'un bien lui appartenant, ne peut obtenir à un titre quelconque une réparation ou une indemnisation effective et suffisante de son préjudice, et se trouve de ce fait dans une situation matérielle ou psychologique grave, peut obtenir une indemnité dans les conditions prévues par les articles 706-3 (3° et dernier alinéa) à 706-12, lorsque ses ressources sont inférieures au plafond prévu par l'article 4 de la loi n° 91-647 du 10 juillet 1991 relative à l'aide juridique pour bénéficiaire de l'aide juridictionnelle partielle, compte tenu, le cas échéant, de ses charges de famille. L'indemnité est au maximum égale au triple du montant mensuel de ce plafond de ressources.»

Ces dispositions sont aussi applicables aux personnes mentionnées à l'article 706-3 qui, victimes d'une atteinte à la personne prévue par cet article, ne peuvent à ce titre prétendre à la réparation intégrale de leur préjudice, les faits générateurs de celui-ci ayant entraîné une incapacité totale de travail inférieure à un mois. »

en réparation si le préjudice était la conséquence de l'infraction pénale, peut solliciter au fonds de garantie des victimes des actes de terrorisme et d'autres infractions qu'il intervienne pour en permettre le recouvrement, de lors que le condamné n'avait pas effectué aucun paiement dans un délai de deux mois suivant le jour ou la décision est devenue définitive.» C'est exactement en ce sens que l'article 706-15 du Code de procédure pénale prévoit que «lorsqu'une juridiction condamne l'auteur d'une infraction mentionnée aux articles 706-3 et 706-14 du même code, à verser des dommages intérêts à la partie civile, elle informe cette dernière de la possibilité de saisir la commission de l'indemnisation des victimes de l'infraction.» Il est encore un élément que nous trouvons vraiment important à la lumière d'une garantie équitable. Ça veut dire l'équilibre que l'équité cherche à établir de façon effective, cette aide peut être obtenue même si l'auteur de l'infraction fait l'objet d'une obligation d'indemnisation de la victime par l'intermédiaire d'une peine de sanction réparation, d'un sursis avec mise à l'épreuve, ou une décision d'aménagement de peine ou libération conditionnelle.

Cette formalité pratique est perçue par la doctrine³¹ comme une « *modalité de prolongement civil* au soutien des victimes par ces facilités prévues par la loi destinées à permettre aux victimes de faire valoir leurs droits par voie de la procédure pénale.»

Pour conclure, nous apprécions que la possibilité pour les victimes de récupérer leurs préjudices, par voie d'une règlementation de telles modalités par le législateur représente un prolongement civil en droit pénal et dans la procédure pénale effective. Ces aspects sont destinés au soutien des victimes afin de leur offrir un chemin ouvert pour une compensation immédiate dans la sphère pénale. Il n'est qu'une initiative législative qui confère aux victimes le sentiment, encore plus vif, que la justice pénale est effective. C'est un bon signe qui démontre que l'équité existe.

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³¹ Yves Mayaud *op. cit.*, p.687.

The assessing a penalty in criminal law of Republic of Serbia

- notion and characteristics -

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Abstract

For the purpose of providing an efficient and adequate protection of the most important social values and benefits, criminal law provides for several kinds of criminal sanctions. These include legislative measures of social reaction to perpetrators of criminal offences, imposed by courts in conformity with the legally conducted procedure. In terms of their significance, character and nature, as well as content, particularly distinguished among criminal sanctions are the penalties. These are basic criminal sanctions that are provided for in the particular part of the criminal laws, and applied to handle most criminal offences – independently, cumulatively or alternatively with other criminal sanctions.

In order for the penalties to be apt to reach their purpose – and this is to prevent a perpetrator of criminal offence to commit again the offence, and to make possible his/her re-education, as well as to realise other requirements in the sphere of general prevention, it is necessary in every concrete case to pronounce upon a liable perpetrator of a criminal offence that kind and degree of penalty which corresponds to social danger of the committed offence, as well as to the personality of its perpetrator. To reach that goal, criminal law provides for an institute known as the assessment (meting out) of penalty. The basic, i.e. regular way to mete out a penalty, that is obligatorily applied by the court in every concrete case, is to consider the attenuating and the aggravating circumstances. These circumstances are provided for in criminal law in Republic of Serbia in the provision of Article 54. of the Criminal code of 2005 with more novels to 2016.

Keywords: *criminal offence, perpetrator, criminal liability, penalty, assessment of penalty, court, attenuating circumstances, aggravating circumstances, purpose of penalty.*

Word of introduction

The most dangerous kind of phenomena by which most important social values and protected values are put in danger in a legal system – are the criminal offences¹. They are specified in criminal law of Republic of Serbia in the basic² and subordinate

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¹ D. Jovašević, Leksikon krivičnog prava, Beograd, 2011. p.247.

² Official Gazette of Republic of Serbia, No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014 and 94/2016. More: D. Jovašević, Krivični zakonik Republike Srbije sa komentarom, Beograd, 2007.

legislation. Since the time immemorial, the history has been recording various forms and ways of committing punishable, prohibited, socially dangerous and unlawful conduct of individuals and groups, in various spheres of social life. All these types of unallowed, banished and punishable conduct may be covered by one cumulative term – criminality (Latin: *crimen* – crime), for which perpetrators are liable to be exposed to legally prescribed kinds and degrees of criminal sanctions. The aim of the system of such social measures attempting to influence the reduction, prevention and suppressing of various ways of punishable conduct was to realise a guaranteeing, i.e. protective function of the criminal legislation in general³.

For the purpose of providing an efficient and high-grade protection of the most important social values and benefits, criminal law provides for several kinds of criminal sanctions. These are legally specified measures of social reaction applied to perpetrators of criminal offences, that are pronounced by courts in legally conducted procedure. In terms of their significance, character, nature and content, particularly distinguished among the criminal sanctions are the penalties. These refer to basic criminal sanctions specified in the particular part of criminal laws and statutes for most of criminal offences independently, cumulatively or alternatively with other criminal sanctions.

In order for penalties to be apt to put into effect the legally provided purpose⁴ (Article 42. of the Criminal code of the Republic of Serbia – CCRS) – and this is to prevent a perpetrator of criminal offence to commit it again, as well as to make possible his/her re-education (special prevention) and/or realise other requirements of the general prevention. This has to be done by pronouncing upon a criminally liable perpetrator of criminal offence, in every concrete case, that kind and that degree of penalty which corresponds to the social danger of the committed offence, and to the personality of perpetrator. This is why criminal law provides for the institute of assessment of penalty. In legal theory there are also conceptions according to which assessing (meting out) a penalty means determining such penalty that would be most adequate in attempting the resocialisation of the condemned persons⁵.

The basic or regular and usual way of assessing a penalty to a perpetrator of criminal offence, that is obligatorily applied by the court in every concrete case, is to assess (mete out) a penalty by means of attenuating and aggravating circumstances. These circumstances are specified in criminal law of Republic of Serbia in the provision of Article 54. of the Criminal code of the Republic of Serbia by 2005.

Concept and kinds of assessing a penalty

There exist different forms and ways of unlawful, *i.e.* socially dangerous conduct of individuals and groups by which protected social values and benefits are violated or put in danger. The laws in all modern countries provide against the persons committing

³ D. Jovašević, Komentar Krivičnog zakona SR Jugoslavije, Beograd, 2002. pp. 246-257; Lj. Lazarević, Komentar Krivičnog zakonika Republike Srbije, Beograd, 2006. pp. 184-196.

⁴ L. Cvitanović, Svrha kažnjavanja u suvremenom kaznenom pravu, Zagreb, 1999. pp.78-84; M. Simović, D. Jovašević, M. Simović, Politika suzbijanja kriminaliteta, Istočno Sarajevo, 2016. pp.56-68.

⁵ B. Čejović, Krivično pravo, Opšti deo, Beograd, 2002. p.446.

such acts specific criminal sanctions that are based on the principle of equity according to which every single perpetrator of a criminal offence should be punished for the offence he/she has committed. However, in order for the court to be able to pronounce upon a criminally liable perpetrator one or several penalties or other criminal sanctions (safety measures or warning measures), as specified by the corresponding legal rules, certain requirements have to be met that are provided by provisions of the Criminal code⁶. These requirements refer to the system of rules for the assessment of a penalty that should be individualised to correspond to a concrete perpetrator of a concrete criminal offence, as well as to be in conformity with the purpose of punishment (Article 42. of the CCRS).

By assessing (meting out) a penalty, the court in fact effects the individualisation of penalty by pronouncing upon a perpetrator of the criminal offence that penalty which, in terms of the kind and degree, would provide best chances for the realisation of the purpose of penalty, i.e. for putting into effect, on the one hand, the protection of society and social values and for re-education and resocialisation of the perpetrator of the criminal offence – the condemned person, on the other. The way is almost identical by which competent state agencies mete out the penalties to those persons who commit other kinds of violation in the sphere of public law, such as commercial infractions⁷ and violations⁸.

Assessing a penalty is an act of determination of kind and degree of the penalty that is to be pronounced upon a perpetrator because of the criminal offence he/she has committed⁹. When assessing a penalty, one has to consider the relevant circumstances, in order to determine for a perpetrator such penalty that, in terms of kind and degree, corresponds to the gravity of the criminal offence that was committed, as well as to the danger for society caused by the perpetrator, so that the purpose of punishment could be realised in the best way.

Various state bodies and agencies may take part in the process of determining a penalty for a perpetrator relating to the specific criminal offence, and they do this in various ways. In this respect it is possible to distinguish between legislative, judicial and administrative (executive) assessment of penalty¹⁰. However, it is possible to find in legal theory such conceptions according to which there exists only legislative and judicial assessment of penalty¹¹. In this respect some authors emphasise that only the judicial assessment of penalty is the one that is genuine¹², while the lawmaker just makes a general assessment of penalty – *in abstracto*.

⁶ D. Jovašević, Komentar Krivičnog zakona SR Jugoslavije, Beograd, 2002. pp.246-257.

⁷ For more details see: D. Jovašević, Komentar Zakona o privrednim prestupima, Beograd, 2001. ; D. Jovašević, Privredni prestupi u praksi – Praktikum, Beograd, 2001.

⁸ For more details see: P. Dimitrijević, D. Jovašević, Prekršajno pravo, Beograd, 2005.; D.Jovašević, Prekršajno pravo, Niš, 2012.

⁹ D. Jovašević, Krivično pravo, Opšti deo, Beograd, 2015.p.234.

¹⁰ B.Petrović, D. Jovašević, A.Ferhatović, Krivično pravo 1, Sarajevo, 2015. p.351.

¹¹ T. Živanović, Osnovi krivičnog prava, Opšti deo, Volume 2, Beograd, 1937.pp.325-327.

¹² D.Jovašević, Krivično pravo, Opšti deo, Beograd, 2015. p.305.

The attenuating and aggravating circumstances in criminal law of Republic of Serbia

In the sphere of regular or usual assessment of penalty to a perpetrator of criminal offence, the bench of judges determines, in the criminal proceedings the attenuating and the aggravating circumstances, so that they could be able to determine, within the framework of legally prescribed penalties, that kind and degree of penalty, which would most completely put into effect the purpose of punishment. In other words, the attenuating and the aggravating circumstances are those circumstances that relate to the criminal offence or the perpetrator, and that influence the penalty, by meting it out as milder or stricter, but always within the limits prescribed for the concrete offence. Those circumstances that have an impact on determining a milder penalty, within the particular minimum and the particular maximum, are called – attenuating, while the circumstances that make the ground for pronouncing a stricter penalty are called – aggravating¹³.

Attenuating and aggravating circumstances are the instruments of individualisation of penalty, of its concordance and adapting to the gravity of the criminal offence and to the danger of the perpetrator for society. Considering these circumstances makes possible to pronounce upon perpetrators of the same offences different penalties. In such a way, they become so significant that they serve as elements for the creation of criminal policy characteristic for the treating of perpetrators of criminal offences¹⁴.

In course of committing a criminal offence, a series of various circumstances do appear, and they are connected either to the very criminal offence, taken as an objective act, or to the perpetrator of the criminal offence viewed as a human and social being. In terms of their origin and effects in the sphere of danger for society, these circumstances are rather different. The problem of these differences arises in the sphere of their regulation by law with the aim of preventing arbitrariness and misuse of their application, and still meet the aim of enabling the courts to play an active and creative role in meting out the penalties on the ground of assessment of effects of all relevant circumstances of a concrete offence. Consequently, certain criminal legislation provide for three types of solutions.

The first solution concerns the method of enumerating all the circumstances – specifically, that have to be taken in consideration in assessing a penalty. Such enumeration ensures the legality and prevents the arbitrariness, but at the same time restricts the freedom of the court, preventing it to consider any circumstance that is not specified by law, regardless of its real influence in a concrete case¹⁵. The drawback of

¹³ D. Atanacković, *Kriterijumi odmeravanja kazne*, Beograd, 1975. p.139.

¹⁴ M. Đorđević, Đ. Đorđević, *Krivično pravo*, Beograd, 2005. p. 79; N. Mrvić Petrović, *Krivično pravo*, Beograd, 2006. pp.152-154.

¹⁵ According to article 61. of the Criminal code of the Russian Federation, circumstances are strictly enumerated that may be attenuating, while in terms of article 63. this is done with the aggravating circumstances (И. Федосова, Т. Скуратова, *Уголовный кодекс Российской Федерации*, Москва, 2005. pp. 47-49) The same solution is adopted in the Criminal code of Portugal, where article 34. specifies only

such solution is the impossibility to provide by a law circumstances that may take place in rather various concrete life situations.

The second solution provides for absolute freedom of the court through an explicit power, specified by law, in taking in consideration all the circumstances of specific case, without indicating individual circumstances that were taken as relevant. It goes without saying that this approach has developed a full range of freedom of the court, but at the same time that was also a way of creating the possibility of having a wide variety of solutions in the practice of administration of justice as well as the arbitrariness in assessing penalties as far as circumstances to be considered were concerned.

The third solution represents a combination of the preceding ones; *i.e.* the legislative text enumerates the circumstances that have to be considered by court, but at the same time authorises the court to take in consideration other circumstances as well, after finding that they are important in a concrete case for adequate assessment of penalty. The law, however, has no provision regarding the relevance and character of such circumstances (*i.e.*, are they attenuating or aggravating). Most of the modern contemporary criminal codes adopt this third solution because it ensures the legality and extends a wider freedom to the court in adapting the penalty to the gravity of the criminal offence and the personality of its perpetrator¹⁶.

New Criminal code of the Republic of Serbia from 2005 regulates the attenuating and the aggravating circumstances in the framework of basic rules of assessing penalties, where in article 54 the court is under obligation to mete out a penalty upon a perpetrator of criminal offence within the limits that are legally prescribed for the offence committed, while taking in consideration all the circumstances that make the penalty to be less strict or stricter, and particularly: the degree of guilt, motives of committing the criminal offence, the intensity of putting in danger or violating the protected value, circumstances of committing the criminal offence, previous conduct (life), personal situation and attitude of the perpetrator after the criminal offence has been committed (specially his/her relationship toward the victim of that offence – is a new solution in the criminal legislation in Republic of Serbia), as well as other circumstances relating to personality of perpetrator¹⁷.

These circumstances may be classified, on the basis of their relation to the criminal offence or to its perpetrator, as objective and subjective circumstances. Objective circumstances include the intensity of putting in danger or violating the protected value (consequently, the scope and the mightiness of the consequence of the criminal offence).

the aggravating circumstances, while article 39. does that with the attenuating circumstances (Code penal portugais, Les codes penaux europens, II Tome, Paris, 1958. p. 469).

¹⁶ This solution is accepted in article 54. of the Criminal code of Bulgaria (И. Ненов, А. Стојнов, Наказателно право на Република Блгария, Обш чест, Софиа, 1992. п.134), article 70. of the Criminal code of Italy (Compendio di Diritto penale, Parte generale e speciale, Napoli, 2004. p.316). In these criminal codes such circumstances are systematised as objective and subjective, without specifying their character and importance for the assessment of penalty in concrete cases.

¹⁷ This solution is accepted also in article 42. of the Criminal code of Montenegro from 2003. (Official Gazette of the Republic of Montenegro No. 70/2003, 13/2004 and 47/2006) – More : Lj. Lazarević, B. Vučković, V. Vučković, Komentar Krivičnog zakonika Crne Gore, Cetinje, 2004. pp.125-132.

The following are considered as subjective circumstances: degree of the guilt (criminal liability), motives of committing a criminal offence, previous conduct (life), personal situation and attitude of the perpetrator after the criminal offence was committed. Circumstances in which the offence has been committed may be both of an objective or a subjective nature. Such assessment of penalty on the ground of characteristics of the perpetrator of the offence (subjective individualisation) and meting out the penalty on the basis of characteristics of the criminal offence (objective individualisation) develops into a single subjective-objective individualisation of penalty, because only on the ground of such unified bases – while commencing with the penalty prescribed in the criminal law – it is possible to realise entirely to purpose of punishment by means of the pronounced concrete penalty.

In new criminal law in Republic of Serbia all aggravating and attenuating circumstances are not explicitly enumerated; instead, the Criminal code specifies only some of them. In addition to the above, no circumstance is designated either as aggravating or attenuating, and each one of them, depending on its content and nature in a concrete case, may take effect as aggravating or attenuating in assessing the penalty. And finally, all these circumstances are considered in their entirety and only in relation to concrete criminal offence and concrete perpetrator of a given offence¹⁸.

The individual of aggravating and attenuating circumstances

The degree of criminal liability (guilt) depends on the degree of expressing its two elements: mental soundness and guilt (intellectual element and intent). Since both of these subjective elements of liability consist of the mental capacity and the will, that circumstance, practically speaking, depends on the scope and intensity of expression of the intellectual element and that of the will (intent), both in the case of mental soundness and guilt. Consequently, the court is going to determine whether a given person was entirely of sound mind or – as the case may be – his capacity in this respect was reduced. It will also determine the degree of these elements, for instance, was the person involved of entirely sound mind, whether he/she has committed the offence with direct criminal intent (premeditation) or out of negligence – and which form of negligence etc.

In assessing the degree of criminal liability, the court shall also take in the consideration whether, on the part of the perpetrator at the time of undertaking the acts of execution of the offence, there was any kind of intent or purpose as him/her motive. This is particularly important where such circumstances are not encompassed by the description of the subject-matter of the concrete criminal offence.

Motives (incentives) are internal reasons and prime-movers that have guided the perpetrator of a criminal offence. There are opinions in the law theory according to which motives may not be qualified as particular circumstances. Instead, they should be evaluated in terms of the degree of criminal liability, while commencing primarily from the fact that the degree of liability is higher where the perpetrator's motive is more

¹⁸ Group of authors, *Komentar Krivičnog zakona SR Jugoslavije*, Beograd, 1995.pp. 208-218.

negative, and vice versa¹⁹. However, the lawmaker has separated the motives as a special circumstance that may be taken in consideration in assessing a penalty only where it does not make the component part, i.e. the element of the subject-matter of criminal offence. According to their nature, motives may be distinguished as positive and humane, so that they will take effect as attenuating circumstances (altruism, patriotism, compassion, love, feeling of duty or honour), or as negative and low-minded, in which case they are considered as aggravating circumstances (hatred, enviousness, malice, greed, jealousy, avarice). Where the incentive and/or the motive appears as a circumstance serving to qualify an offence, it is not possible to consider it simultaneously as an aggravating circumstance²⁰.

The intensity of putting in danger or violating a protected value depends on the scope and intensity of a consequence caused by the act of the perpetrator of the offence. Seriousness of the consequence determines the weight of a criminal offence and/or real and concretely demonstrated degree of its danger for the society. The fact that a consequence is expressed as a violation is a determinant for its character. Consequently, it may be described as destruction, damage (and its scope), or only making a specific general value unusable (and for how long). Furthermore, it can also be expressed as a real putting in danger of the protected value or only as a possibility of putting it in danger. These are all the elements influencing the degree of penalty, i.e. whether it shall be milder or stricter.

Circumstances of committing a criminal offence may differ in terms of their nature and character of their effect. These may be the circumstances of an objective nature, such as the following: place, time, means (instruments), way and natural conditions of commission of the offence, like: bad visibility, flood, fire, etc. However, they may be of a subjective nature as well, *i.e.* those relating to the personality of the perpetrator of the offence or the victim, such as mental condition, inter-personal relations, effect of a mistake, and the like. Particularly considered in this respect is the conduct of the person suffering damage (victim), *i.e.* whether and to what a degree he/she has contributed to the commission of criminal offence by which some of his/her legally protected values have been violated or put in danger. All these circumstances may be relevant in determining the degree of penalty.

Former conduct (way of life) is an indicator for characterising the perpetrator's personality and his life orientation. In fact, this is a circumstance through which the attitude is expressed of the perpetrator of the offence toward social and moral norms and/or values. The previous life includes all the circumstances and/or events that had taken place in the life of perpetrator before he has committed the criminal offence. Where the perpetrator had an exemplary way of life and an irreproachable past, and, in other words, where he had no criminal records (has never been punished), if he is a good worker on the job, and a good father of the family as well as if he is honest and respected in his surroundings – then such circumstances point to the fact that he is not a morally corrupted and socially deviant person, so that applying even a mild penalty would be apt to achieve the purpose of punishment. And vice versa, where the

¹⁹ F. Bačić, *Krivično pravo, Opći dio*, Zagreb, 1978. p.436.

²⁰ D. Jovašević, V.Ikanović, *Krivično pravo Republike Srpske, Opšti deo*, Banja Luka, 2012.p.227.

perpetrator is a habitual offender, or if his conduct and style of life are socially deviant, these circumstances point at the fact that in order to realise the re-educational purpose of the punishment, it would be necessary to pronounce a stricter penalty. Among these circumstances, the fact of being a habitual offender has the effect of an aggravating circumstance, while all other circumstances may be considered either as aggravating or attenuating depending on the concrete case.

Personal situation of the perpetrator represents the conditions characteristic of his way of life and conduct on the job, and include the following elements: health condition of the perpetrator and the members of his/her immediate family, relations within the family, housing situation, property status, employment status, number of family members, as well as other circumstances in the sphere of personal and family life.

The attitude of a perpetrator after the commission of the offence offers the picture of psychological personality of the perpetrator and of distinctive traits of his/her character. This circumstance is the ground not only for the evaluation of the perpetrator's attitude toward the committed offence, but also of his/her relationship toward the society as a whole and its values. This element may be significant for his/her future behaviour.

Two groups of circumstances are distinguished in this respect²¹. The first group of these circumstances concerns elimination or attenuation of consequences caused by a criminal offence, such as the following: apology (extenuation) to the person suffering damage, extending assistance to the person suffering damage, compensation of the damage caused by the offence, genuine repentance, and the like. The second group of circumstances of that kind includes those circumstances that relate to the accused in course of the criminal proceedings, such as the following: denying the guilt, repentance, changing the deposition, lying, influencing the witnesses, accusing of innocent persons and the like²².

It should be noted that the very refusal of admission of guilt and of taking the steps for concealing the evidence regarding the commission of offence, and the guilt of the perpetrator of the offence may, not be considered as aggravating circumstances, because all the above is included in the legally permitted group of rights to defense of the accused²³. A genuine repentance, however, is considered as an attenuating circumstance.

Property status of a perpetrator of the criminal offence is a circumstance to be taken as relevant only when assessing the money penalty (fine). According to article 54. of the new Criminal code, in assessing a fine, the court is obliged to take in consideration the property status of the perpetrator as well, while taking into account the amount of his personal income, his other revenues, his property, and his family commitments.

²¹ B.Petrović, D.Jovašević, A.Ferhatović, *Krivično pravo 2*, Sarajevo, 2016. p.179.

²² P. Novoselec, *Opći dio kaznenog prava*, Zagreb, 2004. pp.403-404.

²³ More .:Jovašević, *Praktikum za krivično pravo*, Opšti deo, Niš, 2013.

Appliance of the individual of aggravating and attenuating circumstances

In addition to the above precise list of typical circumstances that may have a character of either attenuating or aggravating circumstances in the process of assessment of penalty, the lawmaker has specified in the statutory text that courts are obliged to consider other circumstances as well, which may shed light on the personality of perpetrator. In committing certain offences such subjective circumstances may take place, too, that have a specific character and do not fall in any of the listed categories. In this respect it is possible to mention the circumstances relating to the perpetrator of the offence, such as the following: age, menopause, senility, special expertise, educational degree, delicacy of feeling and/or lack of sensibility, rudeness, and the like. The influence of these circumstances may be significant in the case of commission of a criminal offence and, by that very fact, in assessing the penalty.

All these circumstances have to be taken in consideration by the court, as well as evaluated in terms of their influencing the penalty that should be determined and pronounced. Almost in every concrete case of a committed offence, several circumstances do appear, among which some are attenuating and some aggravating. The procedure applied by the court in evaluating the effect of these circumstances may be either analytical or synthetic. The court may analyse every single circumstance, first of all, by determining its character. In other words, it should find out do they operate as attenuating or aggravating ones, meaning: are they to the benefit or at the detriment of the perpetrator of the offence. Only then the court should determine the intensity of their effect in terms of increasing or decreasing the degree of the prescribed penalty²⁴.

According to the synthetic method, and after making the classification, the court evaluates the overall influence of the first and the second circumstances on the degree of penalty. Which method will be applied by the court – the one or the other – or, as the case may be, their combination, shall depend on its discretion. But the essential thing in this respect is that the court is obliged to consider all the circumstances of the concrete case that are of key importance in assessing the penalty, as well as to adequately evaluate the effect of one or the other group of circumstances on the degree of penalty. The assessment of the court is free, but it has to be real, *i.e.* must correspond to the entire effect of all circumstances. In the assignment of reasons the court shall state which circumstances are taken as attenuating, and which are treated as aggravating ones – and why. The penalty pronounced by the court, by taking in consideration all attenuating and aggravating circumstances, has to be within the limits indicated between the prescribed minimum and the maximum, but not lower and/or above these.

The circumstances provided for by the law as attenuating or aggravating in assessing a penalty, may appear also as statutory, *i.e.* legal elements of the subject – matter of criminal offence, which is applicable either to the basic or the qualified, and/or privileged form. The rule in such cases is that the circumstances entering in the characteristics of the subject matter of criminal offence may not be taken as attenuating or as aggravating circumstance in assessing the penalty. Consequently, one and the same circumstance may not be accounted for twice to the perpetrator of criminal offence (the

²⁴ D. Jovašević, *Krivično pravo, Opšti deo*, Beograd, 2016. pp. 230-231.

principle of prohibition of double evaluation). Where one circumstance is taken in consideration in the legal text referring to prescribing the penalty, then it may not be considered also in the process of judicial assessing of penalty. In some cases, however, there exist exceptions to that rule, *i.e.* one and the same circumstance may have a character of a qualifying circumstance, while being apt at the same time also as an aggravating circumstance in assessing a penalty. This situation relates to cases where the qualifying circumstance is of such a nature that it may appear both in its more serious and the milder form.

The assessing a penalty in international criminal law

By the end of the twentieth century, a new branch of penal law has been constituted, *i.e.* the international criminal law²⁵, which establishes the system of international criminal offences, sanctions for their perpetrators and grounds and conditions of criminal liability and punishment. Consequently, an international criminal offence is a public law delict of international character by which universal and general civilisational values, such as humaneness and international law, are violated or put in danger. This means that an international criminal offence is a socially dangerous, illegal conduct of a guilt perpetrator, that is specified as a criminal act, and for whose perpetrator a criminal sanction is provided for, regardless of whether the international criminal offence is conceived in a limited or a wider sense²⁶. This offence is formulated on the basis of specific international legal acts, first of all such as the Statute of International Criminal Court, that was adopted at the UN Diplomatic Conference in Rome, in July 1998.

For administering justice and rendering judgments relating to international criminal offences, supranational, universal judicial bodies have been established (at the beginning these were military courts, and after that ad hoc tribunals, while at present this is the Permanent International Criminal Court in The Hague, that was formally constituted on 2002).

The Permanent International Criminal Court, in terms of article 77. of the Statute of Rome (which document is a fundamental source of international criminal law branch), is authorised to impose upon the perpetrators of international criminal offences the following criminal sanctions:

1) as principal penalties – a) penalty of imprisonment of specified duration for up to 30 years and b) imprisonment for life and

²⁵ More :B.Petrović, D. Jovašević, *Međunarodno krivično pravo*, Sarajevo, 2010. ; D.Jovašević, *Međunarodno krivično pravo*, Niš, 2010; V.Đ. Degan, B. Pavišić, *Međunarodno kazneno pravo*, Rijeka, 2005. ; D.Jovašević, V.Ikanović, *Međunarodno krivično pravo*, Banja Luka, 2015.

²⁶ This classification of international criminal offences was adopted at the 14th Congress of International Criminal Law Association in Vienna, in 1989. Following are international criminal offences in the narrow sense: genocide, crime against humanity, war crimes and the crime of aggression. For these criminal offences quite frequently the terms used are "crimes according to Nuremberg and Tokyo law". Conceived as international criminal offences in the wider sense are the ones violating the rules of international public law, and which international community intends to incriminate and to subject to sanctions in the national criminal legislations. They include offences relating to narcotics, air transportation safety, prostitution, pornography, trade of people, and the like – D. Jovašević, *Krivično pravo*, Opšti deo, Beograd, 2016. pp. 271-275.

2) as accessory penalties – a) a fine and b) confiscation of revenues, real property and values acquired directly or indirectly by means of the crime they have committed.

The rules of assessing penalties for the commission of international criminal offences are specified in the provision of article 78. of the Statute of Rome. According to these rules, the court is obliged to assess a penalty in conformity with the gravity of the offence committed, and the individual circumstances relevant in terms of the personality of perpetrator of the offence. Since no single international legal document providing for international criminal offences prescribes the range of penalties for committed offences, the court is authorised to impose the kind and degree of penalty freely, within the general minimum and the general maximum of the penalty.

In doing that, the court is only obliged to take into account two circumstances: 1) circumstances of objective and 2) circumstances of subjective character. An objective character circumstance relevant for assessing a penalty by the international criminal court is the gravity of the committed crime (scope and intensity of the committed offence as well as the circumstances relating to its commission that primarily involve: time, place, manner and the instrument of commission). The circumstance of subjective character that the court is particularly obliged to consider in assessing the penalty upon a perpetrator of an international criminal offence are the circumstances relating to perpetrator's individual situation as far as his/her personality is concerned. It is difficult to specify in advance what these individual circumstances are, because this is a factual question that has to be solved by the bench of judges in every concrete case.

Conclusion

Criminal legislation of all contemporary states tries to suppress various forms and types of socially dangerous and illegal conduct of individuals and groups, and to provide in such a way an efficient and high-quality protection of the most significant social values and benefits against violation or putting in danger of all kinds. This is to quite a degree achieved by applying penalties and other criminal sanctions to the perpetrators of criminal offences. These sanctions have their specific objective within the framework of the general purpose of criminal legislation.

In order to put into effect the specific purpose of penalties – as the most important kind of criminal sanctions provided for by the law – the bench of judges competent in deciding on criminal liability and punishment, must pronounce upon the perpetrator of criminal offence the kind and the degree of penalty by adhering to specific rules. These rules are the instrument for ensuring legality, but also the equity and/or proportionality in pronouncing the penalties, while the imposed penalty should correspond to the degree of social danger of the committed offence and of its perpetrator. However, a penalty pronounced in such a way should also achieve yet another objective, *i.e.* to provide the grounds for re-education, correction and re-socialization of the perpetrator of criminal offence, so that he/she would not continue to commit the criminal offences.

To realise in every concrete case all these objectives and to meet all the requirements expected from the court, all modern criminal legislations, in conformity with the principle of legality, establish a system of criminal sanctions – primarily the

penalties, as well as grounds and conditions for pronouncing them. However, in addition to the legal assessment of penalties that is conducted at two levels, *i.e.*: 1) regarding the general minimum and maximum of the specified kind of penalty and 2) regarding the particular minimum and maximum of penalty for each individual criminal offence, all countries widely apply today the judicial assessment of penalty as a regular way of assessing the penalty (which in some legal systems includes the administrative or executive assessment of penalty as well).

The most important one is judicial assessment of penalty which is the manner the court pronounces upon the concrete perpetrator of the concrete form of criminal offence, the specific kind and degree of penalty. In doing that, the court takes in consideration all the objective and subjective circumstances connected both with the offence committed and the personality of its perpetrator. Regardless of the specific criminal legislation, in all modern legal systems a considerable number of these circumstances are provided for. They serve as a sign-post to a competent bench of judges who are obliged to supply a well-grounded assignment of reasons for their decision, reached freely within the relevant legal framework. The importance of creative and dynamic role of courts in concrete assessment of penalties upon perpetrators of criminal offences is best illustrated by numerous cases in judicial practice, that point at wide variety of different objective and subjective circumstances, otherwise provided for in article 54. of the Criminal code of the Republic of Serbia, as well as at their nature, character and relevance in every concrete case.

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ICT (information and communication technologies) based children's protection in Serbia

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Abstract

The ICT development has introduced a new form of violence among children and juveniles, generally described as cyber bullying, but also known as electronic violence, online violence, cyber violence et al. It is regularly manifested through the following pattern: sending the threatening, insulting, vulgar or otherwise inappropriate messages either directly to victims, or through the public announcements available to larger groups (social networks in particular). It also includes libels, indiscreet behavior and revealing one's secrets, in the form of data, photos or videos, as well as the exclusion from the virtual social groups (forums, chat rooms etc.). However, some of the more specific forms of ICT-related exploitation are frequent as well: so-called grooming is the process in which children are persuaded or incited to participate in sexual interactions through Internet or electronic devices, thus being exposed to ill-favored pornographic texts or images, which in itself constitutes a criminal offence; sexting is an act of sending disturbing and sexually explicit content to another person, most often via SMS, MMS, electronic mail, or social networks and chat rooms.

Keywords: *ICT, cyber bullying, datas, grooming, indiscreet behaviour, children exploitation.*

Introduction

The most common aspect of the child exploitation phenomenon – *i.e.*, the abuse and violence against children through the information and communication technologies (ICT), especially Internet – is attributed to the area of the criminal law. In this case, the general legitimacy of such an approach is enhanced to the highest extent, in regard to the utmost importance of the subject of protection itself. Namely, when physical and mental integrity of children are being violated and threatened through the criminal acts of exploitation – punishable in accordance to the domestic legislation – the very necessity of the legal coercion is asserted as one of the ultimate protective bulwarks of humane values as the core societal tenet. Furthermore, it represents the primary

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legislative mechanism in every country, with respect to the defense against the socially damaging practices.

Nonetheless, the ICT-related child exploitation greatly predates and exceeds the sphere exclusively defined by the criminal law. There are, in fact, numerous activities linked to the “virtual world” that surpass the protective and institutional limits of the criminal law, exert a detrimental influence on children, and constitute violations of their rights. Possible consequences of such practices may be compared with the results of criminal acts, particularly in regard to the age-related psychological sensitivities of children. As demonstrated throughout the history of the prominent human achievements, the ICT – primarily the Internet – may serve as “the double-edged sword” and be misused for the illicit purposes. A fitting explanation of this paradox can be found in the old proverb: “Fire is a good servant, but a dreadful master”. In addition to the various learning and development opportunities, modern technologies also provide a plethora of means used for “social cruelty” (Shariff, 2008). Mark Prensky (Prensky, 2001) - an American expert on the hi-tech focused age groups - has coined the term “digital natives”. In recent decades, diverse authors have devised several neologisms (e.g. the Google generation, instant-message generation, new millennium students) in order to emphasize the unique experience of the generations raised in a digitally reshaped world. As a groundbreaking new force, Internet has presented a range of the entirely new prospects, most notably in the studying and thinking patterns, and has become a dominant communication platform among the younger age groups (Kuzmanović, Lajović, Grujić, Medenica, 2016). In terms of the psychological and social advance – availability of information, learning opportunities, communication, creative development – as well as education and social inclusion of the young people, benefits provided by the new technologies are indisputable. However, the unsafe use of digital technologies includes various risks, especially for children and juveniles.

The ICT development has also introduced a new form of violence among children and juveniles, generally described as cyber bullying, but also known as electronic violence, online violence, cyber violence et al. It is regularly manifested through the following pattern: sending the threatening, insulting, vulgar or otherwise inappropriate messages either directly to victims, or through the public announcements available to larger groups (social networks in particular). It also includes libels, indiscreet behavior and revealing one’s secrets, in the form of data, photos or videos, as well as the exclusion from the virtual social groups (forums, chatrooms etc.). However, some of the more specific forms of ICT-related exploitation are frequent as well: so-called grooming is the process in which children are persuaded or incited to participate in sexual interactions through Internet or electronic devices, thus being exposed to ill-favored pornographic texts or images, which in itself constitutes a criminal offence; sexting is an act of sending disturbing and sexually explicit content to another person, most often via SMS, MMS, electronic mail, or social networks and chat rooms. The child safety risks on Internet are numerous. They can be broadly classified as commercial, aggressive, sexual and value-oriented, in regard to the child as a recipient, a participant, or an actor. As a recipient, a child is exposed to the commercial risks of advertising, sponsorship and spam; aggressive risks of the violent and hateful content; sexual risks of pornographic and otherwise inappropriate sexual content; value risks of racism and misleading info (e.g. regarding the drug use). As a participant, a child can face commercial risks of tracking and harvesting personal information, aggressive risks of being bullied, harassed or stalked, sexual risks of receiving unwanted contacts from strangers and/or being

groomed, and value risks of inciting self-harm and unwelcome persuasion. Finally, as an actor, a child may be exposed to the commercial risks of gambling, hacking and illegal downloading, aggressive risks of bullying and harassing others, sexual risks of producing and posting pornography, and value risks of providing advice (*e.g.* pro-suicide or pro-anorexia) (Hasenbrick, Livingstone, Haddone, 2009). Without any doubt, sexual abuse of children through ICT poses the criminological problem of the utmost importance (Pavlović, 2016). Among many complexities of digital violence, an important feature stands out; namely, children may not be only the victims, but also the perpetrators of violence, as well as its witnesses. Another significant aspect is the perpetrator's possibility of remaining anonymous, while the victim may be instantly available. The very nature of the anonymous communication and the "invisible presence" may increase the numbers of harassers, witnesses and (seemingly, also anonymous) victims. Also, the long-standing online presence of the hurtful content may cause the long-term effects to the victim's integrity and dignity, and result in the feeling of the utmost shame, given the psychological sensitivity in this age group. In conclusion, the illusion of invulnerability in the virtual space – due to the absence of direct physical interaction – is among the most decisive factors in the complex issue of child safety in the ICT environment. By virtue of being "invisible" within the confines of virtual reality, children become all the more exposed to the great many dangers lurking therein. Family and social surroundings – the foremost safe havens – cease to exist by entering the virtual space. A considerable paradox lies in the fact that children join that space willingly and with deliberation, driven by the unique and genuine curiosity, spirit of exploration and yearning to discover new facts. Unfortunately, what may look like the newfound freedom beyond the parental control – and reinforced with the youthful earnestness and sincerity – may also lead to the loss of the key defense mechanism: childhood itself.

Therefore, this paper will present – in addition to the penal legislative measures – other forms of the institutional protection from the ICT-related child exploitation in the Republic of Serbia.

Target group, or the protected subject are children: in the more specific meaning of the term, and in accordance with the Criminal Code of the Republic of Serbia, children are persons under fourteen years of age. A juvenile is a person who has attained fourteen years of age and has not attained eighteen years of age. According to the the Law on Juvenile Criminal Offenders and Criminal Protection of Juveniles, a younger juvenile is a person who at the time of commission of the criminal offence has attained fourteen and is under sixteen years of age, while an elder juvenile is a person who at the time of commission of the criminal offence has attained sixteen and is under eighteen years of age.

There is, nonetheless, an ongoing issue that has contested various societal segments for a long time; namely, defining the age boundary that separates childhood from adulthood remains a crucial task in establishing the legal safety in general. At the same time, it poses a rather ungrateful challenge, given the largely subjective element of psychological and physical development that shape and define every person on an entirely individual level. In this context, this question needs to be broadly analyzed, as it substantially determinates a degree of legal and working capacity, as well as penal, misdemeanor, contractual and tort liability. This becomes acutely relevant when various – innumerable, even yet undiscovered – dangers of the virtual spaces are taken into

account, including the increasing vulnerability of children online, along with the fact that violent acts are sometimes being perpetrated by children themselves.

In accordance with the international law – the Article 1, the UN Convention on the Children's Rights – every human being under the age of eighteen is defined as a child. This definition is accepted by the majority of European legal instruments related to children. Examples include the Article 4 (d) of the European Council Convention on Action against Trafficking in Human Beings or the Article 3 (a) of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (the Lanzarote Convention). The European Human Rights Convention (EHRC) does not define children in particular, but its Article 1 demands that the rights are guaranteed by every country, to "everyone" under its jurisdiction. Article 14 of the EHRC warrants the exercise of the rights defined by the Convention as "without discrimination on any ground", including age. European Human Rights Court (EHRC) has accepted petitions submitted by children, or on their behalf, regardless of age. In its legal doctrine, the Court has adopted the definition of a child from the UN Children's Rights Convention, therefore reinforcing the designation quoted above, of any person "under eighteen years of age" (Priručnik, 2015).

Penal legislative protection

Legal foundations of the child protection in the Republic of Serbia are embedded in the constitutional clauses which guarantee the human rights to children; in accordance to their age and maturity level, children are particularly protected from the psychological, physical, economic (and any other) exploitation and abuse. The Republic of Serbia regulates and protects the systemic child care. The rights of children and their protection are regulated within the state legislation. Basic general legal acts which regulate the legislative child protection, as well as the main sources in regard to the material and process criminal law in the Republic of Serbia, Criminal Code and The Criminal Procedure Code. In addition to the articles pertaining to the juvenile criminal offenders, the Law on Juvenile Criminal Offenders and Criminal Protection of Juveniles also contains separate segments dedicated to the protection of children and juveniles as injured parties in criminal procedure.

Through the Law on Ratification of the Convention on Cybercrime ("The Official Gazette of the RS – International Agreements", No. 19/2009) the Republic of Serbia as a contractual party has pledged to adopt such legislative and other measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally and without right, the following conduct: producing child pornography for the purpose of its distribution through a computer system; offering or making available child pornography through a computer system; distributing or transmitting child pornography through a computer system; procuring child pornography through a computer system for oneself or for another person; possessing child pornography in a computer system or on a computer-data storage medium. The term "child pornography" shall include pornographic material that visually depicts: a minor engaged in sexually explicit conduct; a person appearing to be a minor engaged in sexually explicit conduct; realistic images representing a minor engaged in sexually explicit conduct.

Through the Law on Ratification of the Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse ("The Official Gazette of the RS – International Agreements", No. 1/2010), whose introduction

observes that the sexual exploitation and sexual abuse of children have grown to worrying proportions at both national and international level, in particular as regards the increased use by both children and perpetrators of information and communication technologies (ICTs), it is prescribed that each Party shall take the necessary legislative or other measures to ensure that children, during primary and secondary education, receive information on the risks of sexual exploitation and sexual abuse, as well as on the means to protect themselves, adapted to their evolving capacity. This information, provided in collaboration with parents, where appropriate, shall be given within a more general context of information on sexuality and shall pay special attention to situations of risk, especially those involving the use of new information and communication technologies. Each Party shall encourage the private sector, in particular the information and communication technology sector, the tourism and travel industry and the banking and finance sectors, as well as civil society, to participate in the elaboration and implementation of policies to prevent sexual exploitation and sexual abuse of children and to implement internal norms through self-regulation or co-regulation. Each Party shall encourage the media to provide appropriate information concerning all aspects of sexual exploitation and sexual abuse of children, with due respect for the independence of the media and freedom of the press. Also, the participation of children shall be encouraged, according to their evolving capacity, in the development and the implementation of state policies, programs or others in initiatives concerning the fight against sexual exploitation and sexual abuse of children. Each Party shall take the necessary legislative or other measures to criminalise the intentional proposal, through information and communication technologies, of an adult to meet a child - who, according to the relevant provisions of national law, has not reached the age below which it is prohibited to engage in sexual activities with a child - for the purpose of committing any of the pornography-related offences against him or her, where this proposal has been followed by material acts leading to such a meeting.

In relation to the final obligation from the Convention stated above, Criminal Code of the Republic of Serbia, in the Article 185b, incriminates the ICT abuse itself, as the Abuse of Computer Networks or other Technical Communication Means for Committing Criminal Offences against Sexual Freedom of Juveniles, when the offender arranges to make an appointment with a juvenile, and appears at the place of the appointment. This criminal offence **pertains to** the intended criminal acts **against the rights with the sexual freedom as the common protective denominator**: a rape that results in death of the person against whom it was committed, or it was committed against a child; copulation against a helpless person (mental illness, mental retardation or other mental disorder, incapacity or some other state due to which the person is incapable of resistance), if the offence results in death of the person against whom it was committed, or was committed against a child; copulation or an equivalent act against the child, if it results in grievous bodily harm to the child against whom the act was committed, or if the act was committed by several persons, or the act resulted in pregnancy; copulation or an equivalent act committed through abusing the position or authority, by teachers, educators, guardians, adoptive parents, parent, stepfathers, stepmothers or other persons against a juvenile entrusted to them for instruction, education, guardianship or care, or if the offence is committed against a child; other sexual acts, committed under the circumstances pertaining to the criminal offence of rape, copulation with a helpless person, or the sexual intercourse through abuse of position. Clearly, **the definition of this criminal offence penalizes the preliminary acts of some other criminal**

offences against the sexual freedom of juveniles. The twofold nature of this offence is noteworthy as well, as it primarily includes the act of proposing an appointment, followed by the offender's appearance. According to this, both actions would constitute the **committed act**, while the attempted offence is comprised of a proposed appointment by itself and via computer and/or other contemporary communication technology. This is particularly significant in the context of the article that incriminates the qualified (*i.e.*, harder) type of this criminal offence – committing the act against a child (a person under fourteen years of age), especially given the length of the **sentence** (1 to 8 years of prison) and its obligatory form in case that the punishment consists of the five-year or longer prison term (Pavlović, 2013). In regard to the fact that this criminal offence incriminates the use of ICTs for the arrangement of – and the appearance at – the appointment with a juvenile or a child, and with the intent of committing the criminal offence, the adequacy of the lawmaker's decision in this case may come into question. Namely, the inclusion of the cases resulting with the gravest outcomes (death and grievous bodily harm) among these criminal offences, may conflict with the law's insistence on the offender's negligence (Đorđević M, Đorđević Đ, 2010), while the intent to commit a criminal offence always requires premeditation. A critical overview of this legal solution is not limited to the necessity of the simpler and more clarified normative terms, in the context of their sufficiency in expressing the intent of these criminal offences (rape, copulation against a helpless person, copulation or an equivalent act against a child). Such phrasing may also bring the very existence of an act into question, as well as the incrimination of the ICT abuse, e.g. in case that the offender has used the computer network or other technical communication means in order to arrange a meeting, has appeared on the arranged location with the intent of committing a basic form of a criminal offence, but not its grave consequence.

Since the vast majority of the ICT-related criminal offences against children includes child pornography¹, we will now offer an abstract of the criminal offence of the Exhibition, Procurement and Possession of Pornographic Materials and Exploiting Juveniles for Pornography, as proscribed by the Article 185 of the Criminal Code, that incriminates selling, showing, publicly displaying or otherwise making available texts, images, audio-visual or other items of pornographic content to a juvenile (or a child) or showing them a pornographic performance. It also incriminates obtaining, for oneself or others, possessing, selling, exhibiting privately or publicly, or electronically or otherwise making available pictures, audio-visual or other items of pornographic content resulting from the abuse of juveniles.

Starting from June 1, 2017, an addition to this article comes into being, along with its use; whoever intentionally accesses pictures, audio-visual or other pornographic items resulting from the abuse of a juvenile, would be punished with a fine or a prison sentence of six months or less. This is the first instance in the Republic of Serbia that the very ICT-related access to the child pornography is being criminalized. In addition, a definition of the pornographic content resulting from the abuse of a juvenile (or a child) is also provided: it includes every material that visually depicts a juvenile engaged in a real or simulated sexually explicit behavior, and every depiction of a child's intimate organs for sexual purposes.

¹ According to INTERPOL, 50% of criminal offences committed online is related to the transmission, distribution and sale of the child pornography.

The Law on the Organization and Competences of Government Authorities Combating Cybercrime, enacted in 2005 (with changes from 2009) regulates the formation, organization, competencies and powers of special organizational units of government authorities for the purposes of detection, prosecution and trying of criminal offences specified in the law, which includes the criminal offences against the sexual freedom.

Cybercrime for the purposes of this law shall mean committing criminal offences where computers, computer systems, computer data and products thereof in hard or electronic form appear as the objects or the means of committing a criminal offence.

The Higher State Attorney's Office in Belgrade shall have the jurisdiction for the territory of the Republic of Serbia.

The Higher State Attorney's Office in Belgrade shall form a special cybercrime department to proceed in the cases of criminal offences referred to in the present law (hereinafter: Special Prosecutor's Office). The provisions regulating public prosecution shall apply to the Special Prosecutors Office.

For performance of work of the internal affairs department for the fight against cybercrime shall be established within the ministry responsible for internal affairs, while jurisdiction performs the High Court in Belgrade (Department for combating cybercrime).

In 2013, the Republic of Serbia has enacted the Law on Special Measures for the Prevention of Crimes against Sexual Freedom of Juveniles, better known by its colloquial title, "Maria's law", in the memory of an eight-year old girl who tragically lost her life as a victim of rape and murder. This law regulates the enactment of the special measures toward the perpetrators of criminal offences against the sexual freedom of the juveniles **and children**, including the criminal offence of showing, obtaining and possessing child pornography, or abusing a juvenile for the pornographic purposes. "Maria's Law" also enacts the measures against the criminal abuse of the computer networks or other technical means, against the sexual freedom of juveniles. This law also **prescribes** the means of maintaining directories of the persons legally sentenced for criminal offences of such nature. The law's purpose is in restraining the known offenders from repeating criminal offences against the sexual freedom of juveniles. Perpetrators of such offences cannot receive **judicial clemency**, nor be **pardoned or paroled** during their prison sentences. Criminal prosecution and punishment given by a lawcourt for the crimes committed against juveniles are not subject to statutes of limitations. Such a judicial sentence includes the following legal consequences: resignation from any publicly elected office; termination of any type of employment that might require interacting with the juveniles; banishment from any nomination for a public office; banishment from obtaining any new type of employment, if juvenile-related. After the full prison sentence is served, the perpetrator is required to comply to the following special measures: compulsory reporting to the designated police office and the **Administration of Criminal Sanctions** bureau; banishment from visits locations frequented by juveniles (kindergartens, schools etc.); obligatory visits to the professional counsellors' offices and institutions; compulsory reports of any changes of the home address, location of living or place of employment; compulsory reports in case of traveling abroad. These measures are being used up to 20 years from the cessation of prison sentence. Convicted persons are subjected to the special type of registry that contains their data on physical appearance - relevant in case of the identification process - as well as the DNA profile. This law does not apply against the juvenile criminal offenders

against other juveniles' sexual freedoms. Despite the lawmaker's commendable intentions, introduction of the non-**limitation** status in regard to the criminal prosecution and legal punishment for the criminal offences against the sexual freedom of juveniles, still represents a major deflection from the general legislative practices, especially in light of the fact that most of European states – like our own country, until now – maintains the non-limitation institute for the very special criminal cases against humanity and other goods protected by the international law, e.g. genocide as a singular "crime among crimes" (Škulić, 2013). Also, the Constitution of the Republic of Serbia acknowledges the statute of limitation for the criminal prosecution and legal punitive measure in cases of war crimes, genocide and the crime against humanity, whereas the Criminal Code maintains that the statute of limitation cannot be established for the criminal offences regulated through the international agreements. Such a stipulation partially refers to the the Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse, that does not prescribes the absolute non-limitation of the criminal offences against sexual freedom; in the Article 33, it determines that each Party shall take the necessary legislative or other measures to ensure that the statute of limitation for initiating proceedings with regard to the particular offences in this group shall continue for a period of time sufficient to allow the efficient starting of proceedings after the victim has reached the age of majority and which is commensurate with the gravity of the crime in question.

Taking these factors into account, **the constitutional adequacy** of this legal solution can be justifiably questioned. On the other hand, the solution that prohibits paroling persons imprisoned for committing one of the criminal offences (mentioned above) has also caused certain practical dilemmas. For example, since the criminal legislation cannot be retrospectively implemented (except when the latter solution benefits the perpetrator), a question arises whether "Maria's Law" could be implemented in case of relevant criminal offences which have taken place prior to the enactment of this law.

Other forms of legislative, otherwise normative and institutional protection

Violence of any kind is forbidden in the educational institutions, in accordance to the Law on the Bases of Education and Upbringing („The official Gazette of the RS", Nos. 72/09 and 52/11) and the Regulation on the Protocol of Practices and Reactions in response to the Violence, Abuse and Negligence ("The Official Gazette of the RS, No. 30/10). These regulations provide the foundation of practices and reactions on violence in every form and shape. According to the Regulation on the protocol, violence and abuse – in addition to the traditional forms (physical, mental and social violence) also include electronic (digital) violence, and sexual violence (online and offline).

According to the Regulation, electronic violence and abuse pertain to the ill-treatment of the information technologies that might result with hurting other people's personality and violating their dignity. This type of violence takes place via email messaging, SMS, MMS, through the websites, online chats, participating on Internet forums and social networks, etc. Sexual violence and abuse is a behavior that sexually disturbs a child / pupil, suggests the participation in sexual activities or forces such unwanted behavior upon him or her, despite the absence of maturity and interest. Also,

sexual violence includes the abuse for prostitution, pornography and other forms of sexual exploitation.

In the research conducted by the expert team from the Institute of Psychology (the Faculty of Philosophy, University of Belgrade) as a part of the project "Let's Stop the Digital Violence", within the program "School without Violence – Toward the Safe and Motivated Children's Environment", it was discovered that, through the last year, one-fifth of the primary-school 4th grade pupils has been exposed to the online violence at least once (19% via mobile phones and 12% via Internet). One-third of the older primary-school pupils has experienced digital violence of some form at least once (32% via mobile phone, 39% over Internet). Among the high-school students, the percent is higher: even two-thirds has experienced some form of online violence at least once (42% over the mobile phones, a 56% via Internet) (Popadić, Kuzmanović, 2016).

Along with the legal and institutional measures directed toward the creation of a successful protective mechanism from the digital crime, the Republic of Serbia has enacted the national Strategy of Information Society Development until 2020.

In addition to the estimates that all aspects of information security would be regulated within the proper institutional framework by 2020, one of the main goals of the Strategy is the development of information security and a simultaneous creation of users' trust in the safe function of the information systems. Citizens' trust in the personal data protection is equally important, as well the awareness of the necessity of implementing the measures that would lead toward the information security, safety of telecommunications systems and electronic transaction. Also, the creation of functional protective mechanisms would increase the safety of new businesses online, along with electronic data exchange (Vilić, 2016).

In the introduction to the Strategy, it is emphasized that the ICTs have managed to revolutionize way of life, studying, work and leisure, within a single human generation. ICTs maintain the decisive influence on further transformation of human interaction, as well as businesses and public institutions. Among the priorities within the information safety area, this strategy envisions the enhancement of its legal and institutional framework, in order to have the entire body of information safety fully regulated in the Republic of Serbia until 2020. At this point, the creation of an institution that would focus on the verification and certification of methods, software applications, devices and systems - as well research and development - is of the essential importance. Such an institution should oversee the implementation of the information safety in the state services. Foundation of the national CSIRT (Computer Security Incident Response Team) is also necessary, with the goal of acting preemptively, and coordinating the solution of security-related online risks.

As a result of the activities prompted by this Strategy, the Republic of Serbia has enacted the Law on Information Security, in January 2016. It regulates the protective measures against the security risks in the information-communication systems, responsibilities of legal entities through the management and use of these systems. Also, the law appoints the competent official bodies to implement the protective measures, coordinate between the protective agents, and supervise the quality of implementation. The governmental body responsible for the safety of the ICT systems is the state ministry competent in the areas of information security. In order to achieve the full cooperation, adjust the functionality and enhance the general information security level - and, also, initiate and follow the relevant preventive activities in this area- the Government of the Republic of Serbia establishes the Body of Coordination on the

Information Security Activities, as a coordinating governmental body, that would include the representatives of various information security-related ministries (Defense, Internal Affairs, Foreign Affairs, Justice, as well as the representatives of the security services, Office of the Council of the National Safety and Secret Data Protection, General Secretariat of the Government, Directorate of the Joint Affairs of the Governmental Bodies, and the National CERT). The National Center for the Security Risk Prevention in the ICT Systems coordinates the national-level activities on prevention and protection of the ICT systems in the Republic Serbia. With the advancement of certain information security areas as a main goal, expert groups are organized within the Body of Coordination, and include the representatives of other public authorities, economic entities, academia and non-government sector. The Regulation Agency for the Electronic Communications and Postal Services is competent for the activities of the National CERT.

In regard to the Law on the Information Security, the Government of the Republic of Serbia has issued the Ordinance on the Safety and Protection of Children During the Use of Information-Communication Technologies, that regulates the preventive measures for the safety and protection of children during the use of information-communication technologies, i.e. on Internet, as well as the procedures in cases of violations of or menaces to their safety online. The aim of this ordinance consists of raising the levels of awareness and knowledge on the advantages and risks of the Internet use, as well as the means of the safe Internet use; advancing the digital literacy among children, i.e. pupils, parents, custodians and teachers; improving the intersectional cooperation in the area of safety and protection of children on Internet. The Ministry of Trade, Tourism and Telecommunications undertakes the preventive measures for the safety and protection of children on Internet - as activities of the public importance - by informing and educating children, parents and teachers, and establishing an integrated location that provides advice and receives concerns related to the children safety on Internet. The topic of interest in informing and educating children, parents and teachers, includes the benefits of the Internet use, risks of Internet use, and means of the safe Internet use. These activities are being employed through the organization of seminars, workshops, and presentations, as well as the information provided through print, electronic and other media, as well as the cooperation with the competent organizations and the civil society representatives. The public media service, in accordance with the laws and other statutes, promotes the children protection, i.e., produces and shows programs in the public interest, related to the children safety and protection on Internet, and in collaboration with the ministry of competence. In order to raise the level of awareness and knowledge on the children safety on Internet, the ministry undertakes the activities related to providing advice to children, parents and teachers over the telephone, about the benefits and risks of the Internet use, and the safe means of the Internet use; this includes the information on the risks of developing addiction to the use of videogames and Internet. The ministry ensures the reception of complaints about the damaging, inappropriate and illegal content and behavior on Internet, and reports of the violations of the rights and interests of children, via the telephone or the electronic form on the website. Based on the report, the ministry undertakes the following activities: it provides the information about the filed report to the administrator of the website **in question**, in case that the report details refer to the inappropriate or damaging content; proceeds the report - if the allegations in the report refer to the existence of the criminal offence - to the competent public prosecutor, and provides the information about the

filed report to the ministry of competence in the internal affairs (Service of cybercrime), in order to inform and with the purpose of fighting the cybercrime; proceeds the report to the competent social service in case that the allegations in the report refer to the violation of rights, health status, well-being and/or the general integrity of a child, as well as the notification to a competent public health center about the filed report, if the allegation in the report refer to the risk of developing an addiction to the Internet use; proceeds the report to the information security inspection, in case that the allegation from the report refer to the violation of safety or an inadequate behavior of the ICT system operator toward the information of the special significance. The ministry informs the report applicant about the activities undertaken. After the report is filed, the social work centers evaluate – within their area of competence – the attitudes of the persons who take care of a child (parents, foster parents), assess the level of influence of the illegal ICT-related content on a child, and provide help in accordance to the law and their competence. After the report is filed, a competent health center, that is capable of providing the professional help, establishes – in case that the patient, their attorney or custodian, agrees – whether there is a risk of developing addiction, or the addiction already exists to the use of Internet; the help is provided in accordance to the law. The employees of the social work centers and health centers become informed of the risks and damaging consequences that may take place for children through the use of ICT, so they receive the training about the means of providing help to children in case that the damaging consequences occur. The ministry of competence in the internal affairs, social work centers and health centers provide the competent ministry the data on responding to the filed reports, related to the children safety on Internet.

In accordance to the aforementioned, the National Contact Center on the Children Safety on Internet has been established in the Republic of Serbia in 2017; therefore, all citizens, including children and juveniles, can call the center for advice regarding the Internet safety, or report the violation of the children safety. Through the establishment of this center, the necessary preventive measures have been undertaken in order to obstruct the spread of the Internet-related child safety problems any further. The existence of such a unique center was needed so the relevant actors could report any problem at one place, in relation to the child safety on Internet. The competent governmental authorities involved in the activities of this center are the Ministry of the Education, Science and Technological Development, Ministry of Health, Ministry of the Internal Affairs, as well as the Office of the Public Prosecutor.

Conclusion

Based on the evidence presented above, digital crime and the abuse of Internet – along with the socially damaging behavior – is reinforced by the high degree of the perpetrators' anonymity, as well as the instant availability of victims, great extent of discrimination possibilities, along with the difficulties experienced by the cybercrime prosecutors while collecting evidence, etc. As the most widespread contemporary means of communication, social networks are challenged with a considerable deficiency: their users, especially children, are exposed to the various forms of abuse.

The existing legislative regulations - international and national alike – are focused mainly on the abuse of computer hardware and software, either as tools or targets of criminal acts, while some other types of exploitation are not being penalized whatsoever.

Prior to 2016 – when the Law on Information Security was enacted along with the legislative additions that have criminalized the very access to the child pornography through ICT – there has not been a single legal act on the national level to define the ICT – related child exploitation as a distinctive form of child abuse. Until then, international and national computer systems have been regulated exclusively as the means of sexual exploitation of children (Protector of Citizens, 2013). By the enactment of this law, as well as the amendment to the aforementioned article of the criminal code, the initial and fundamental steps has been taken toward defining and determining the ICT – related child exploitation as a separate form of violence.

While putting an end to the cyber violence in total may be too difficult, solutions must exceed strictly technological levels. By founding the centers and free telephone lines mentioned above, a significant step in the prevention of digital violence has been taken; nevertheless, prevention needs to be implemented on all levels, starting with individuals and families, educational institutions, telecommunications, service providers, state institutions, and the society as a whole. The necessity of education in this area needs to reach the parents and teachers, and every other societal segment focused on the direct work with children.

Safety of all online users, especially children and juveniles, is an imperative of modern society, primarily because the vast majority of criminal acts against children takes place on Internet. Preventive measures should include the all-encompassing educational strategy (parents, children, schools), as well as the establishment of a system of control and deterrence, through the strict penal policy; its primary achievement would be the successful obstruction of criminal perpetrators, while the whole society would witness the firm determination of the state in protecting its youngest members.

Prevention of the ICT-related child abuse is, in fact, a difficult task. While the process of digital transformation is unstoppable, it is necessary to steer it toward the goal of a large-scale societal progress. So-called digital gap between parents and children is self-evident, but we all belong to the “digital generation” regardless of age. Therefore, it is crucial that all Internet users are timely informed about threats and protection techniques, because the general level of online safety greatly depends on raising awareness in these areas. In order to prevent and deter the child exploitation through ICT, establishing an obligatory form of intersectional cooperation - the institutional, collective and individual participants in the state and civil sector – is necessary.

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Perspectives on the Application of Diversion Program Measures within the Criminal Juvenile System of Serbia

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Abstract:

In this paper, we briefly discuss who is considered a minor in terms of age in Serbia today under the applicable legal provisions, and which regulations apply to minors in conflict with the law. Special attention is focused on the implementation of diversion orders in the application of the provisions of the Law on Juvenile Offenders and Criminal Protection of Minors (hereinafter: LJ) as well as to the current prosecutorial or judicial practice of the existing official data. We have also pointed out some specifics and perspectives in the implementation of diversion orders which are expected to be part of the new draft of the law in this area.

Keywords: *juveniles, criminal legislation, rehabilitation measures, diversion program measures.*

Introduction

The start of implementing the Law on Juvenile Offenders and Criminal Protection of Minors (hereinafter: JL)² in the Republic of Serbia also means that the provisions of this act will incorporate and include the concept of restorative justice. For the first time in Serbia, conditions have been met for the implementation of a new approach in juvenile justice which promotes restorative justice principles, as well as the “application of the principle of subsidiarity of criminal sanctions, giving priority to out-of-court interventions.”³

Prior to this, the basic framework for minors in Serbian law was made back in 1953. This was when Criminal Law adopted as a ‘patronizing – protectionist’ model whose focus was primarily to help the minor offender, get him/her back on track socially, emotionally, and intellectually without considering how to, in the first place, protect society from committed prohibited actions - criminal acts.

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² The Law on Juvenile Offenders and Criminal Legal Protection of Minors, Official Gazette No. 85/05 published October 6, 2005 and passed into force on January 1, 2006.

³ Stevanović, I., Milošević, N. (2006) “Necessary conditions for the implementation of the Law on Juvenile Offenders and Criminal Protection of Minors” and Radovanović, D. (ed.) The new criminal legislation: dilemmas and problems in theory and practice, Belgrade: Institute of Criminological and Sociological research and the College of Internal Affairs, pp. 487-496.

Although the provisions of JL contain many other innovative solutions, some of which specifically mention the introducing of alternative measures, we focused exclusively on rehabilitation measures and the specific obligations within the system of rehabilitation, since the analysis of particular commitments would require much more space than it is available in this study of a limited scope.

General information on juvenile criminal legislation in Serbia

Until the adoption and implementation of JL, neither the Republic of Serbia nor all the legal state predecessors of the present state have ever had a unique law regulating juvenile justice. However, all the previous provisions of criminal legislation involving the juvenile issue,⁴ in the same way as JL, had regulated the issue of minors i.e., children and a certain age group.

For the first time and in a unique way, the new JL regulates the issue of minors – material, physical, procedural and enforcement provisions, and the Serbian legal system for the first time contains specific provisions which regulate the protection of minors as victims in criminal proceedings.

A juvenile or minor is an individual who at the time of committing the offence was 14 years of age, i.e. under 18 years of age. A younger juvenile is someone who at the time of committing the offence was 14 but under 16 years of age and an older juvenile is considered to be an individual who at the time of committing an offence was 16 years old, i.e. under 18. The possibility of imposing criminal sanctions against children has been ruled out, i.e. individuals who at the time of committing an unlawful act are under 14 years of age.

Previous provisions, the herein mentioned regulations of a material legal character prior to the implementation of JL failed to foresee the possibility of applying any diversion measures – i.e. any diversions (avoiding pre-trial procedures) for juveniles in conflict with the law committing crimes. This is reflected in the provisions and the types of rehabilitation measures that can be applied to juvenile criminal offenses under Criminal Law of SRS.⁵

⁴ Criminal Law of SFRY, Official Gazette of the SFRY Nos. 44/76, 36/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90 and 54/90; Official Gazette of FRY Nos. 35/92, 16/93, 31/93, 37/93, 24/94, 61/01; Official Gazette of RS No. 39/03; Criminal Law of Serbia, Official Gazette of SRS Nos. 26/77, 28/77, 43/77, 20/79, 24/84, 39/86, 51/87, 6/89 and 42/89; Official Gazette of RS Nos. 21/90, 16/90, 26/91, 75/91, 9/92, 49/92, 51/92, 23/93, 67/93, 47/94, 17/95, 44/98, 10 / 02, 11/02, 80/02, 39/03 and 67/03; Vojvodina Criminal Law, Official Gazette of Vojvodina No. 17/77 and 24/77; Criminal Law of Kosovo, Official Gazette of Kosovo No. 20/77; The Law of Criminal Procedure, Official Gazette of the SFRY Nos. 4/77, 36/77, 60/77, 14/85, 74/87, 57/89 and 3/90; Official Gazette of FRY Nos. 27/92 and 24/94; The Code of Criminal Procedure, Official Gazette of FRY Nos. 70/01, 68/02; Official Gazette of RS Nos. 58/04, 85/05 and 115/05; Law on Execution of Criminal Sanctions, Official Gazette of SRS Nos. 26/77, and the Law on Execution of Criminal Sanctions, Official Gazette of RS Nos. 16/97 and 34/01.

⁵ Art. 12, Criminal Law of SRS, Official Gazette of SRS Nos. 26/77, 28/77, 43/77, 20/79, 24/84, 39/86, 51/87, 6/89 and 42/89; Official Gazette of RS Nos. 21/90, 16/90, 26/91, 75/91, 9/92, 49/92, 51/92, 23/93, 67/93, 47/94, 17/95, 44/98, 10 / 02, 11/02, 80/02, 39/03 and 67/03.

Possibilities of application of diversion measures within the provisions of juvenile law

The reforms which started in 2005 in the Republic of Serbia and began their implementation from January 1, 2006 regarding juvenile justice⁶ were aimed at improving the situation of children's rights in general. The basis for the existence of rehabilitation measures has its foundation in the provisions of the UN Convention on the Rights of the Child (hereinafter: UNCRC)⁷ wherein Article 40, p. 3, item B provides the obligation of the state to endeavor to promote the establishment of laws, procedures, authorities, and institutions specifically applicable to children and dealing with children alleged as or accused of committing criminal offence, and to adopt measures, whenever possible and desirable, for dealing with such children without resorting to judicial proceedings, and by respecting human rights and legal protection. The Republic of Serbia, in adopting JL, has made an important step in harmonizing national legislation with UNCRC, but also with other relevant European and international standards regarding the protection of Children in Conflict with the Law, as well as children and minors who are victims of criminal acts.

The following selected international documents which have found application in the provisions of JL are the following: the UN Standard Minimum Rules for the administration of the Juvenile Justice system from 1985, and three documents from 1990 – the UN Rules for Juveniles Deprived of Liberty, UN Guidelines for the Prevention of Juvenile Delinquency (The Riyadh guidelines) and the UN Standard minimum rules for Non-custodial measures (The Tokyo Rules).

The introduction of rehabilitation measures as alternative measures for resolving criminal cases where the minor is a perpetrator is a novelty, since rehabilitation is not a penalty, but *sui generis* measures.⁸

Rehabilitation measures can be applied or imposed by the public prosecutor for juveniles and the juvenile judge when two types of conditions are met: objective and subjective. The objective condition is that it is a criminal offence which is punishable by a fine or imprisonment for up to 5 years. The subjective conditions are acknowledgment of the offence by the minor and the attitude of the juvenile offender towards the act and the injured party.

Having in mind the provisions that relate to the objective condition for the implementation of rehabilitation measures, it can be concluded that these measures can be enforced against the juvenile who has committed so-called petty and medium crimes.

⁶ The Criminal Code of RS, Official Gazette No. 85/05 published on October 6, 2005 entered into force on January 1, 2006 (hereinafter: CC); The Law on Juvenile Offenders and Criminal Legal Protection of Minors, Official Gazette No. 85/05 published on October 6, 2005 entered into force on January 1, 2006.

⁷ The Law on Ratification of the UN Convention on the Rights of the Child, Official Gazette of the SFRY - International Treaties, No. 15/90; Official Gazette of the FRY - International Treaties No. 4/96 and 2/97.

⁸ Perić, O. (2005) Commentary on the Law on Juvenile Offenders and Criminal Protection of Juveniles, Belgrade: Official Gazette, pp. 27-28.

The most common crimes within the Criminal Code and the most prevalent in the judicial practice in the Republic of Serbia are the following: theft, minor bodily harm, beatings, bullying, domestic violence, endangering public traffic, and so on. Minors who commit these crimes are usually the primary perpetrators who upon the implementation of the procedure will most likely face one of the following outcomes: warning and guidance as corrective measures – a court reprimand or specific obligations or a suspension of the proceedings against the juvenile.

When it comes to subjective conditions, we believe that the recognition of the crime and the relationship of the minor towards the damaged party i.e. the committed act, which is manifested in real regret, justifies the application of rehabilitation rather than the traditional criminal proceedings, in which the above-mentioned circumstances in the process of pronouncing the sentence could mitigate the minor's circumstances so that more lenient criminal sanctions are imposed, especially one of the rehabilitation measures laid down in the JL. Bearing in mind this kind of juvenile behavior which has met all the subjective conditions, the very process of indicating to the minor the harmful effects of his actions and criticism for the committed act can enable the minor to avoid having a criminal record with the authorized higher courts. In this way, the positive effects of the application of rehabilitation measures come to the fore, particularly in avoiding the court and court proceedings, regardless of the length of the proceedings, whereupon it is up to the court to apply any of the rehabilitation measures in a situation where the minor has committed a number of offences.

The provision of Article 6 of JL defines *the purpose of diversion orders*. On the one hand, there is no act of prosecution; on the other hand, it suspends the proceedings already in progress against a juvenile. In both cases, there is a tendency to use rehabilitation measures to affect the correct development of character and to strengthen the minor's personal responsibility and avoid committing crimes in the future. In this respect, by reducing recidivism and providing support to a minor in the process of reintegrating into the community, the goal of rehabilitation measures is achieved. The application of rehabilitation measures decreases stigmatization and increases the efficiency of the judge and the prosecutor by speeding up the process, while at the same time it reduces the costs of court proceedings, considering the interests and needs of the victim.⁹

In the provisions of Article 7 of JL, the following five rehabilitation measures have been stipulated:

- 1) Settlement with the injured party so that detrimental consequences can be alleviated either in full or partly by damage compensation, an apology, work or otherwise;
- 2) Regular attendance of classes or work;
- 3) Engagement, without remuneration, in the work of humanitarian organizations or community work (welfare, local or environmental);

⁹ Cerović, I., Brašić, K. (2016) "The experience of piloting diversion orders as diversion mechanisms in Serbia in the context of international law", in LVI Counseling Serbian Association for Criminal Theory and Practice, Zlatibor, p. 618.

- 4) Undergoing relevant check-ups and drug and alcohol treatment programs;
- 5) Participation in individual or group therapy at suitable health institutions or counseling centers.

The application of rehabilitation measures is not mandatory, but rather, they represent a procedural option, which is an issue freely assessed by the civil body applying rehabilitation, *i.e.* the competent public prosecutor for minors or the competent court in the appropriate functional form – the juvenile court judge (upon a request for initiating preparatory proceedings), *i.e.* or juvenile court (upon the completion of the preparatory proceedings, whereupon the public prosecutor files for an appropriate proposal for the pronouncement of criminal sanctions, thus initializing the proceedings before the court).¹⁰

This indicates that rehabilitation measures can be imposed before the initiation of preparatory proceedings by the juvenile public prosecutor, so that the minor with his legal representative needs not even come to court. In addition, a rehabilitation measure may be pronounced upon the prosecutor's proposal in preparatory proceedings to the juvenile court judge, with the consent of the minor and the consent of his legal representatives and with respect for the objective conditions, in view that the juvenile has committed a criminal offense which is punishable by a fine or imprisonment of up to five years. The third possibility is that rehabilitation can be imposed even after the completion of the preparatory proceedings in the proceedings before the juvenile justice panel with the meeting of other conditions mentioned herein. In doing so, the competent authority implementing the rehabilitation measures regardless whether it is the juvenile public prosecutor or the competent juvenile court or juvenile judge, takes special care when applying one or more measures so that there is no interference with the schooling or employment of minors. The selection of rehabilitation measures is based, on the one hand, on the overall comprehensive analysis of the personality and the interests of the minors, and on the other hand, on the interests of the damaged party as well.

Rehabilitation measures may not exceed 6 months. The selection and application of these measures is done in collaboration with parents, adoptive parent, or the guardian of the minor and the competent guardianship authority. This legal provision obliges the guardian with the authority to participate in the selection of rehabilitation measures, although the role of this body is not clearly defined in terms of its supervisory and controlling role over the implementation of these measures.

Rehabilitation measures under the provisions of JL may be applied by prosecutors and juvenile court judges. In terms of the application of these rehabilitation measures, Article 62, p. 1 of JL provides the public prosecutor with the possibility of making a decision against initiating the proceedings (under the conditions of Article 58, Paragraph 1, JL) by having the consent of the minor and his parents or adoptive guardians as well as the readiness of the minor to accept and fulfill one or more rehabilitation measures from one of the first three afore mentioned measures as referred to in Article 7. In case the juvenile fully carries out the rehabilitation measure, and a report is submitted by the guardian, the public prosecutor will dismiss all criminal charges, *i.e.* the proposal initiated by the damaged party to institute criminal proceedings (Article 7, p. 4, JL). In addition, the public prosecutor may submit a proposal

¹⁰ Škulić, M. (2011) Juvenile Criminal Justice, Belgrade: Faculty of Law, University of Belgrade & Official Gazette, pp. 281-282.

for the suspension of the proceedings against the minor under the condition that the minor accepts one or more of the three above-mentioned rehabilitation measures which he is able to carry out. Also, the obligation of the guardian is to supervise the implementation of the rehabilitation measures, in a situation where the court accepts the above proposal of the prosecutor. In contrast to the juvenile public prosecutor who can apply only the first three mentioned rehabilitation measures, the juvenile court judge may exercise all five measures.

Official data on application of rehabilitation measures

The first official figures regarding rehabilitation measures applied by judicial authorities in 2009 can be found in the Report from the Statistical Office of the Republic of Serbia,¹¹ a part of Justice Statistics - Juvenile Offenders, for 2005-2009. Previous data on the rehabilitation measures applied by judicial authorities was not presented for 2008 in the Report from the Statistical Office of the Republic of Serbia in the statistics section of the judiciary. However, the Statistical Office of the Republic of Serbia has data on the number of rehabilitation measures applied in 2008, during which “the public prosecutor for juveniles applied rehabilitation measures in 55 cases, and in 14 cases, rehabilitation measures were applied by a juvenile court judge.”¹²

Certain authors from the ranks of public prosecutors have suggested that after a period of six years from the date of application of JL and taking into consideration the entire practice, rehabilitation orders are used in relatively small numbers and have not been implemented in all prosecutorial areas in Serbia, according to the data which is not the official data of the Statistical Office but which has been submitted by the higher public prosecutor to the public prosecutor's Office of the Republic of Serbia as part of its annual reports for 2010 and 2011.¹³ This data has been confirmed in 2011 within the project funded by an NGO, the International Management Group of the Kingdom of Norway and implemented in the 10 biggest cities in Serbia. During the project, an interview was conducted with public prosecutors and juvenile court judges, whereupon it was found that most of the public prosecutors and juvenile court judges, apart from trainings organized by the Judicial Training Center-Judicial Academy, had no other

¹¹ Announcement of the Republic Statistical Office, number 213 dated July 16, 2010 from the Justice Statistics - Juvenile Offenders, 2005-2009. At the end of the statement in the footnote, there is the following Note: “In 2009, the following rehabilitation measures were applied for juvenile offenders: the juvenile public prosecutor stipulated rehabilitation measures in 72 cases and juvenile court judges in 38 cases (Article 7 of the Law on Juvenile and Criminal Protection of Minors). This data relates to Serbia without Kosovo.

¹² Satačić, N. Obradović, D. (2011) “Analysis of practical application of rehabilitation measures and specific obligations in Serbia,” Belgrade, in the following Program: “Improving access to justice in Serbia”; Project: Mapping of resources in local communities for the implementation of corrective orders/special obligations, pp. 7 – 8. European experience shows that rehabilitation measures were applied in the case of 20-30% of juveniles who committed criminal offenses.

¹³ Vučković - Janković, J., (2012) “The application of corrective orders in prosecutorial practice” in Juvenile Justice in Serbia, Proceedings, Belgrade, pp. 155-156. Thus, 77 corrective measures were applied in 2010, and in 2011, some 178 rehabilitation measures. The number of applied corrective measures in 2011 increased by more than twice compared to 2010. When this is compared to the 64 rehabilitation measures applied in 2008 and 69 measures in 2009, according to the Republic Public Prosecutor's Office (KST 9), there appears to be a trend of increasing application, its positive dynamics and adequate representation in certain prosecution occurrences in recent years.

training in the application of rehabilitation measures for minors, in terms of monitoring, record-keeping and reporting.¹⁴ Other authors in other works have suggested that the incidence of rehabilitation measures also varies greatly from city to city and region to region, and that in certain courts and public prosecutor's offices rehabilitation measures have never been applied.^{15,16}

Data from the Republic Bureau of Statistics in 2014¹⁷ show an increase in the application of rehabilitation measures, which had continued during 2015. The last officially published data for 2015¹⁸ by the Statistical Office of the Republic of Serbia shows that a total of 324 rehabilitation measures tasks have been applied.

Some specificities in the application of rehabilitation measures

Among the total number of applied rehabilitation measures, the most frequently used are the following two: settlement with the injured party so that by damage compensation, an apology, work or otherwise, the detrimental consequences are alleviated either in full or in part, and engagement without remuneration in the work of humanitarian organizations or community work (welfare, local or environmental). These measures are usually applied not only by the juvenile public prosecutor but also by the judges and the juvenile panel of higher courts. Therefore, we will point out the specific features of two rehabilitation measures.

What is specific about the *rehabilitation measure regarding settlement with the injured party so that by damage compensation, an apology, work or otherwise, the detrimental consequences are alleviated either in full or in part*, is that these measures are applied with minor criminal offences, i.e. peer bullying, minor bodily harm, bullying among pupils in the category of younger juveniles. As a rule, minors have extreme difficulty in accepting responsibility for offences involving violence, apologizing and reaching out to other minor, the damaged party. This is because at this age, minors are not critical enough, and the very act of apologizing is perceived as humiliation. But in the

¹⁴ Satarić, N., Obradović, D. (2011) *Ibid.*, p. 16.

¹⁵ Cerović, I., Brašić, K. (2016), *Ibid.*, p. 619.

¹⁶ Stevanović, I., (2016) "The reform of juvenile justice in light of the accession of Serbia to the European Union," in LVI Counseling Serbian Association for Criminal Law Theory and Practice, Zlatibor, p. 591: "Diversion orders in 2014 were largely implemented in Novi Sad, Niš, Kragujevac and Belgrade, with the support of the IMG Project. The four centers are currently implementing projects funded by the EU and implemented by UNICEF in partnership with the Ministry of Justice and Ministry of Labor, Veterans and Social Affairs, entitled "Improvement of children's rights through the strengthening of the judicial system in the Republic of Serbia." Improving the quality of implementation of pedagogic and rehabilitation measures outside of detention centers, which is the realization of the aforementioned project, includes primarily the formation and team support to improve the application of corrective measures, to support service providers responsible for the implementation of corrective measures and realize training for judges, prosecutors, experts from centers for social work and service providers."

¹⁷ Announcement of the Republic for Statistics, number 191, LXV, dated July 15, 2015, Judicial Statistics - Juvenile Offenders, 2010-2014. During 2014, 206 corrective measures were applied. Of that number, the juvenile public prosecutor applied 176 rehabilitation measures and juvenile court judges 30.

¹⁸ The Bulletin of the Republic Institute for Statistics, number 618 dated July 15, 2016, juvenile offenders in the Republic of Serbia, 2015 - applications, prosecutions and convictions. Of the total 324 rehabilitation measures, juvenile public prosecutors implemented corrective measures in 246 cases in 2015, and a juvenile court judge in 78 cases.

case that this action reflects their sincere will and not a dishonest deed to avoid criminal proceedings, this kind of sincere behavior indicates that the minor is aware of behavior not in accordance with the law, and that she or he is ready to change and accept responsibility. In this way, a positive message is sent not only to the damaged party but also to the community where he is living, showing that he has accepted the opportunity given to him and that he will make the most of it.

The problem in applying this type of rehabilitation measure was noted in groups for criminal offence against property and in criminal groups against public transport security.

In terms of crimes against property carried out by minors, the outcome is most often material damage to the property of individuals (housing, residential buildings, offices, cottages, etc.). There are very few instances when the victim of such crimes gives consent to implement this measure against the minor, as they have little trust in the effectiveness of the police and judiciary system due to media hype that juvenile crime is increasing, when in fact unambiguous indicators show that in the last few years the trend has been stagnating and a slight decrease in juvenile crime has been reported in the Republic of Serbia, according to official figures of the Ministry of Interior and the Statistical Office of the Republic of Serbia.

When it comes to criminal acts committed against road traffic safety, the outcome is not only material damage to the vehicle, but also non-material damage in the form of light or serious injury. In these situations, the damaged party who has suffered injuries in road accidents, is very suspicious of the minors who caused the accident, and very often blame the parents of these minors for not taking sufficient care of them. For this reason, they only accept legal proceedings against minors and not an apology, not even as a theoretical possibility, nor do they wish to choose from a range of possible rehabilitation measures to apply any form of enforced labor.

Diversional measures, engagement without remuneration in the work of humanitarian organizations or community work (welfare, local or environmental), by its content represents a counterpart to the penalty of labor in the public interest which in the provisions of the Criminal Code is prescribed as one of the possible penalties that may be imposed on adult criminal offenders. We believe that this is a very good and effective measure, considering that its application leads to greater responsibility for committed acts and an incentive for a minor's work habits. Essentially, the minor is primarily developing his working habits through socially useful work, while at the same time also developing responsibility towards his family and the community in which he lives, i.e. his family members.

However, in practice, the application of these measures has numerous difficulties, since in the absence of bylaws regulating the implementation and execution of the diversional measure, there is no uniform procedure for the execution of rehabilitation measures, i.e., there is no efficient control of executing the same. Therefore, in the absence of a detailed regulated procedure for implementation, there is objective fear that the positive effects of this measure may be diminished or taken advantage by the minor who has been assigned rehabilitation. In fact, some organizations, associations, or companies where minors carry out this work in the context of executing the

rehabilitation measure have no developed system of accepting these categories of juveniles, or fail to keep records of minors during the implementation of the measure or fail to control their actions during the execution of measures, whereby these diversionary measures and their effectiveness are brought into question.

Perspectives of applying diversionary measures

In the context of legislative reforms in general, and in particular of legislation in the field of criminal law, the Ministry of Justice of the Republic of Serbia has among other things established a working group to amend JL, currently the only law in this area, which from the start till this day has not undergone any changes despite the many amendments in other areas of criminal legislation, and especially in the field of criminal procedural law where the implementation of the new Criminal Procedural Code has changed the concept of investigation and criminal proceedings in general.¹⁹

The Draft of the Law on Juvenile Offenders and the protection of minors in criminal proceedings²⁰ and the provisions relating to rehabilitation measures have undergone a significant improvement compared to currently existing solutions.

Thus, the prescribed penalty limit for criminal offenses for which rehabilitation measures can be applied against minors is raised from 5 years (currently valid) to 8 years. It is an extremely important innovation, given that minors often commit crimes, such as property crimes – such as aggravated theft by breaking into or entering, for which there is a prison sentence of up to 8 years and whose sole aim is obtaining illegal profits for selling for petty amounts but which according to the type of offence is legally qualified as serious theft. Therefore, the possibility of applying rehabilitation measures is also expanding for numerous other criminal offences punishable by imprisonment of up to 8 years.

Also, a greater number of these measures are stipulated, and in addition to the existing five rehabilitation measures, another two are planned, as follows: attending courses or exam preparation and taking exams for testing certain knowledge or participation in certain sports activities, and certain rehabilitation measures that have been to a certain extent modified or amended. In this way, the possibility of expanding opportunism in the application of criminal prosecutions is greater.

An extremely important novelty is the provision which stipulates the obligation of the public prosecutor to try to implement rehabilitation measures in the case when a minor meets the legal requirements prescribed by this new Draft of the Law, and which is aligned with the presently existing solutions of JL provisions. In case the application of rehabilitation measures fails, the novelty in the draft of the new Law stipulates that the public prosecutors will request initiating preparatory proceedings to the competent court by submitting a report stating the failed attempt of applying the rehabilitation measure.

¹⁹ The Code of Criminal Procedure, Official Gazette of RS Nos. 72/11, 101/2011, 121/2012, 32/2013, 45/2013, and 55/2014.

²⁰ The draft Law on Juvenile Offenders and the protection of minors in criminal proceedings of the Criminal Procedure Code, available on the website of the Ministry of Justice of the Republic of Serbia, dated December 11, 2015. <http://www.mpravde.gov.rs/sekcija/53/radne-verzije-propisa.php>

Another novelty is the provision in the Draft of this Law stipulating that the juvenile public prosecutor may exercise all rehabilitation measures, unlike the provisions of JL according to which the public prosecutor can apply only the first 3 of 5 measures in the order listed, and which is envisaged by the valid JL. This solution rectifies the provision of JL where the juvenile public prosecutor, who, like the juvenile court judge has specialized knowledge in the field of child rights and juvenile delinquency, was discriminated against conducting juvenile criminal proceedings. In this way, the provision to respect the principle of urgency in criminal proceedings is also being rectified since the same can be applied in the pre-investigation proceedings by juvenile public prosecutors. This is important in respect to reducing the costs of criminal proceedings, but primarily it is important in terms of avoiding or reducing the negative consequences that the criminal proceedings may leave on minors.

In addition, provisions that relate to appropriate record-keeping and statistics are regulated very differently and more completely with respect to the provisions of the valid JL, representing a novelty, as well as rectifying the lack of appropriate bylaws stipulated by the provisions of JL, the only ones not passed into effect even more than eleven years after the implementation of JL.²¹

Conclusion

A rehabilitation measure is a diversionary measure *sui generis* which, in accordance with the concept of restorative justice, is desirable and necessary to apply towards juvenile offenders, albeit not all, only towards those which show up as primary or secondary perpetrators of petty *i.e.* medium criminal acts.

After more than ten years of applying the provisions of the Law on Juvenile Offenders and criminal protection of juveniles, we can conclude that these diversionary measures in our judicial practice - particularly in the work of juvenile public prosecutors or juvenile court judges, have generally, but not all, in the last three years found their place in the implementation against the juvenile criminal offenders. However, it is not yet applied to the extent of the new rehabilitation measures-special obligations, alternative measures introduced simultaneously with rehabilitations measures, for which we can claim with certainty that they are currently a dominant rehabilitation measure from the group of rehabilitation measures of warning and guidance and very successfully applied independently, as well as with some rehabilitation measures from the group for intensive monitoring.

Whether a lack of bylaws for the implementation of rehabilitation measure is the reason for the delay in the commencement of a wider application of rehabilitation measures, which has for years been an excuse for avoiding the application of these measures by individual prosecutors *i.e.* supervision of the application thereof by individual centers for social work or on the other hand, a lack of staff, deputy public prosecutors in higher public prosecutor's offices and a lack of adequate training in the application of rehabilitation measures until 2014, primarily a lack of competent public

²¹ The by-law on the application of diversion measures specified in Article 7 in conjunction with Article 86 and Article 167, paragraph 1 JL is issued by the Minister of Justice in cooperation with the Ministry of Labor, Employment and Social Policy and the Republic Public Prosecutor.

prosecutors and their extensive workload, especially in the implementation of the new Criminal Procedural Code by public prosecutors who started conducting investigations from October 1, 2013, is at this point less important.

It is necessary in the upcoming period, and upon approval of the National Assembly and the commencement of application of the new Law, which is now in the draft stage and whose provisions regarding rehabilitation measures have been explicated, to begin with their consistent application as soon as possible. In this way, the public prosecutor is aligned with the principle of urgency, as one of the fundamental principles in the treatment of minors in conflict with the law. We believe that there are conditions to make a positive impact, at least with the primary juvenile offenders where perpetrators of crimes after completion of the proceedings do not appear before the public Prosecutor's Office. Acting in accordance with the principle of urgency, the percentage of minors who largely come of age at the time of trial is decreasing, which shows that juvenile proceedings are making less sense. Therefore, we are of the belief that it is necessary to apply rehabilitation measures in all cases that fulfill the statutory requirements.

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(8) The Law on Juvenile Offenders and Criminal Legal Protection of Minors, Official Gazette No. 85/05 published October 6, 2005 and passed into force on January 1, 2006.

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(10) Criminal Law of Serbia, Official Gazette of SRS Nos. 26/77, 28/77, 43/77, 20/79, 24/84, 39/86, 51/87, 6/89 and 42/89; Official Gazette of RS Nos. 21/90, 16/90, 26/91, 75/91, 9/92, 49/92, 51/92, 23/93, 67/93, 47/94, 17/95, 44/98, 10 / 02, 11/02, 80/02, 39/03 and 67/03;

(11) Vojvodina Criminal Law, Official Gazette of Vojvodina No. 17/77 and 24/77;

(12) Criminal Law of Kosovo, Official Gazette of Kosovo No. 20/77;

(13) The Law of Criminal Procedure, Official Gazette of the SFRY Nos. 4/77, 36/77, 60/77, 14/85, 74/87, 57/89 and 3/90; Official Gazette of FRY Nos. 27/92 and 24/94;

(14) The Code of Criminal Procedure, Official Gazette of FRY Nos. 70/01, 68/02; Official Gazette of RS Nos. 58/04, 85/05, 115/05, 49/07, 72/09 and 76/2010;

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(17) The Criminal Code of RS, Official Gazette No. 85/05 published on October 6, 2005 entered into force on January 1, 2006 (hereinafter: CC), 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014;

(18) The Law on Ratification of the UN Convention on the Rights of the Child, Official Gazette of the SFRY - International Treaties, No. 15/90; Official Gazette of the FRY - International Treaties No. 4/96 and 2/97.

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Irregular Migration and Terrorism in the European Union

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Abstract

According to our researches, the relationship between illegal migration and the terrorism shall be emphasized. Terrorist offences proved the vulnerability of the European States, and constitute one of the most serious violations of the human rights and fundamental freedoms on which the EU is founded. In 2014, 276.113 migrants entered the European Union irregularly, which represents an increase of 138% compared to the same period in 2013, and the mentioned data increased in the past year as well. From 2015 to nowadays the European Union experienced a massive number of casualties caused by terrorist attacks. There is no evidence to declare that all of migrants are terrorist, however, the terrorists make use of migratory flows to enter into EU. According to our opinion, the mentioned fact is reinforced by the European statistics as well. It shall be emphasized that the phenomenon of the illegal migration is favourable to the terrorist organizations. The paper deals with mentioned connection between the irregular migration and the terrorism in the European Union, using European statistics of the European Law Enforcement Agency (EUROPOL) and criminal-political viewpoints. Dealing with legal documents and analyzing them are not aim of this paper.

Keywords: *Irregular migration, terrorism, terrorist attacks, EUROPOL TE-SAT, jihadist terrorism, religiously inspired terrorism.*

I. Introduction

The number of migrants tried to enter into EU irregularly was increased in the past few years. The difficulties regarding to the illegal crossing of border are not dominant in the new situation made by the mass migration. Therefore, the terrorist organizations make use of the migratory flows, and the terrorists and the foreign fighters can get in to the target country very easily. It shall be emphasized that the irregular migration means a high challenge for the EU and the Member States as well. This new political and legal atmosphere requires a strong coordinated response and cooperation within and between the Member States. Defining terrorism, and creating an overall statutory definition is a very hard task for the legislator. Many scientific theories – with the aim to respond to the current events - were created by different experts in the past few years, which tried to summarize all essential elements of terrorism¹. All of Member States shall take the necessary measures to create a modern statutory definition of the terrorism,

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¹ Tóth Mihály: Changes of the Practice and Criminal Regulation on the Acts of Terrorism. Hadtudomány, Hungary vol. 1-2, pp. 30-40, 2013.

which meets the international standards and the legal traditions as well². The new EU Directive shows that relating to the illegal migration increased in the past few years and the terrorist offences committed in the territory of the European Union, the attitude of the European legislator has changed in the mentioned question.

The relationship between the illegal crossing of the border and terrorism was recognized by the EU. In 2014, 276.113 migrants entered the European Union irregularly, which represents an increase of 138% compared to the same period in 2013. It shall be underlined that the above-mentioned data increased in the past years. This last period clearly proves that Europe can't cope with the huge herd set out for the Western Europe from various parts of the world. "Through the development of mankind the migration was the phenomenon of changing of the world. Sometimes it was intensive, another time was lower"³. In the past decade the pressure of the migration was strengthened by the global political and economic changings, and it's due to this that the character and the method of the migration has changed as well⁴. For the mentioned reason, the close relationship between the illegal crossing of border and terrorism should be emphasized. In this respect, the irregular migration can be not only a tool but also a catalyst for the terrorist offences as well⁵. In the latter case conflicts and violent affairs are caused by the migration, in the former case the illegal entry and integration of the terrorists are supported by the migratory network. Although the relationship between the irregular migration and terrorism is denied by a lot of experts, the European statistics show an other situation. According to the European Union Terrorism Situation and Trend Report 2016 (hereinafter: TE-SAT 2016) the number of terrorist attacks slightly increased in 2015 and 2016 compared to 2014 and the earlier years. Although there is no concrete evidence to date, the terrorists systematically use the flow of migrants to enter Europe unnoticed, however some incidents have been identified involving terrorists who have made use of migratory flows to enter the EU. "In 2015, a total of 1077 individuals were arrested for terrorism-related offences, which is a significantly higher number than that of 2014 (774)"⁶. Over and above that not only the character of the perpetrators, but also the form of the attacks has been changed as well. The reason of this that the "new type of terrorism does not have clearly tangible goals, the terrorists have an all-out war on the Western civilization"⁷. Therefore, in the near future the Member States will have to take the necessary measures against the new forms of the terrorism as well. It shall be emphasized that the traditional concept of the criminal law is changing "in important areas from being a repressive, punitive instrument to being a primarily preventive toll designed to minimize dangers and risks"⁸. In the area of fight

² For the mentioned aim the Directive on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA was adopted by the European Parliament and the Council on 15 March 2017 (No. 2017/541).

³ Tóthné Demus Mária: New Challenges of the Fight against Illegal Migration in Hungary. *Ügyészek Lapja*, Hungary vol. 3, pp. 53-59, 2005.

⁴ Szűcs János: Human Smugglers: Winners of the Illegal Migration. *Belügyi Szemle*, Hungary vol. 3. pp. 77-79, 1996.

⁵ Hautzinger Zoltán: Stranger in the Criminal Law. *AndAnn Kft*, Pécs, Hungary pp. 35-36, 2016.

⁶ Europol TE-SAT 2016. European Union Terrorism Situation and Trend Report 2016.

⁷ Kóhalmi László: Terrorism and human rights. *Journal of Eastern-European Criminal Law*. vol. 1. p. 162., 2016.

⁸ Prof. Dr. Ulrich Sieber: The paradigm shift in the global risk society: from criminal law to global security law – an analysis of the changing limits of crime control. *Journal of Eastern-European Criminal Law*. vol. 1. p. 15., 2016.

against terrorism, this preventive approach is based on the early criminalization of the terrorist intent which appears in the mentioned new EU Directive as well.

II. Facts and statistics

In order to understand the actual political events in the EU and the European statistics made by the EUROPOL, it's necessary to deal with the migration and its effect on receptive society. As Szilveszer Póczik said, the problem of the migration and the assimilation had been present in the political thinking since the beginning of the 19th Century⁹. After the Second World War the „national mind” came to a crisis, and the idea of the multicultural society strengthened at the same time¹⁰. In the most significant Member States – for example in Austria, in Germany, in France or in Great-Britain - about 10% of the active population are migrants as well. Obviously, the legal and well-educated migrants are received by the majority of the people very easily, therefore they can adapt themselves to the new circumstances. However, the uneducated, or irregular migrants came often of poor families, give a huge problem for the receptive society. These people come into the developed European states with high expectations that often do not come true. Therefore, the integration of these migrants retards, and they will get to the periphery. It shall be emphasized that the mentioned aftermath is the first step to the radicalization and the violence. Subsequently all of the cultural, political and social assets of the given state will be queried by the mentioned persons, and they can easily be the supporters of terrorism.

However, according to the TE-SAT 2016 nearly two-thirds of the arrestees for terrorism-related offences were EU citizens, and the majority (58%) were born in the EU¹¹. The majority of the terrorism-related offences committed in the EU in the past few years were perpetrated by not irregular migrants, but also EU citizens who had migratory ascendants¹². Nevertheless there are in numerous difficulties, which hinder the terrorists to enter into a European state. These are the followings: (1) the Member States allot majority of their budget to their intelligence services, and they have mutual cooperation with those countries, where the terrorists arrive from; (2) the danger of deconspiracy is very high in the target country; (3) the cost of entering into the EU is very high and the illegal crossing of border is very dangerous¹³.

By reason of the mentioned facts the perfect assassin is the citizen of the target country. It should be underlined that this fact is reinforced by the terrorist attacks committed in the past few years, and the attacks frustrated by the authorities in the territory of the EU. As it appears from the tendency, several citizens leave their countries to join a terrorist organization and to make the training programme, then they will return as assassins. These individuals referred to as foreign terrorist fighters travel abroad for the purpose of terrorism. Foreign terrorist fighters have been linked to recent attacks in several Member States.

⁹ Póczik Szilveszter: The Risk of the International Migration. *Ügyészek Lapja*, Hungary vol. 5, pp. 79-87, 2008.

¹⁰ Póczik, *op.cit.* pp. 79-87.

¹¹ Europol TE-SAT 2016. European Union Terrorism Situation and Trend Report 2016.

¹² Böröcz Miklós: The Relationship between the Illegal Migration and Terrorism. (T)error és elhárítás – Journal of the Hungarian Counter Terrorism Center, Hungary. vol. II, pp. 1-20, 2014.

¹³ Böröcz. *op. cit.* pp. 1-20.

Nevertheless, it shall be emphasized that the phenomenon of the illegal migration is favourable to the terrorist organizations. However, the above-mentioned difficulties are not dominant in the new situation made by the mass migration. It's easier to prove the identity with false documents and to evade the vigilance of the frontier-guards. For example the procedure of the several frontier-guards, and the usefulness of the false passports are checked by the agents delegated by the Islamic State, and the experiences are forwarded by this agents to the terrorist organization with the aim of increase of their effectiveness in the near future.

Since the migrants lay a huge charge on the frontier-guards in short time, it's very easy to entry into a European state using the third or the fourth identity. Among other things in County of Csongrad, the migrants committed a crime against closing of border were identified by the authorities with an arm-band contented sequence of numbers to be able to establish the identity of the defendant continuously during the criminal procedure¹⁴. The authorities shall rest on verbal statement of the migrants in the course of establishment the identity, since the migrants had already destroyed their passports, or all of their official documents had already been taken by the human smugglers, when they arrived at the border. At the present time the most popular citizenships used by the migrants are the followings: the Palestinian, the West-Saharan, the Syrian and the Iraqi. The reason for this is that the deficiency of the public administration of mentioned countries. Therefore, it's impossible to control an average Arabian name¹⁵. Over and above it, the procedure of the frontier-guards on establishment the identity is cheated by the migrants as well. For example, they try to sabotage the procedure on taking their finger-prints¹⁶. Therefore, the terrorists and foreign fighters can enter into a target Member State very easily and undetected.

There is no evidence to declare that all of migrants are terrorist, however the terrorists make use of migratory flows to enter into EU. According to our opinion, the above-mentioned fact is reinforced by the European statistics as well. The number of attacks increased in 2015 compared to 2014 and 2013. In 2015 a total of 2011 failed, foiled or completed attacks were reported by the Member States, which is higher number than in 2013 (152). In 2015, a total of 1077 individuals were arrested for terrorism-related offences, which is higher number than that of 2014 (774). The largest proportion of arrests was linked to jihadist terrorism (687). According to the European statistics it shall be underlined that the terrorist intent and attacks classified as religiously inspired terrorism increased between 2010 and 2016. For example the number of suspects arrested for religiously inspired terrorism in 2014 was 395, but in 2010 it was „only” 179¹⁷. These numbers significantly show not only the relationship between the illegal migration and terrorism but also the common obligation of the Member States on strengthen the European security as well.

It shall be underlined that not only the number but also the character of the terrorism-related offences were changed in the past years. Terrorists often apply such

¹⁴ Criminal Questions of the Migration. Round-table Conference, Kecskemét-Hungary, 10th of May 2016., *Ügyészégi Szemle, Hungary* vol. 2, pp. 46-71, 2016.

¹⁵ Emmert Mária: The Character and Problems of the Investigation of the Illegal Migration at the Serbian-Hungarian Border. *Ügyészek Lapja, Hungary* vol. 3, pp. 53-77, 2012.

¹⁶ It often happened at the Serbian-Hungarian border in 2015, that the migrants sharpened their fingers, or smeared them with glue.

¹⁷ Europol TE-SAT 2015. European Union Terrorism Situation and Trend Report 2015 (hereinafter: TE-SAT 2015).

methods of the execution, which have low costs, furthermore it's impossible to clear them up. Compared to the previous years there was a notable increase in arrests of individuals for terrorism-related offences aged under 25. The number of the arrested persons aged under 25 was 87 in 2013, and it increased to 268 in 2015. „The overall number of arrested women nearly doubled from 96 in 2014 to 171 in 2015. An even sharper increase was noted in the number of females arrested for offences related to jihadist terrorism: from 6 (in 2013) to 128 (in 2015)“¹⁸.

The distribution of terrorist attacks and arrests for terrorism-related offences is very interesting as well. According to the statistics it shall be emphasized that the destinations of the irregular migrants are the most closely concerned by the terrorist attacks and arrests for it. The above-mentioned data is much rather significant, if we give attention only to the number of arrests and attacks related to jihadist and religiously inspired terrorism. According to our opinion it's very important to emphasize this data related to jihadist terrorism, namely the starting countries of the irregular migration are areas under the Islam jurisdiction. It shall be underlined that these attacks were committed decisively by the Islamic State. This data clearly shows, that the number of the assassins related to jihadist terrorism are very high in those countries, which are the most popular destination of the illegal migration. It's summarized by the following table based on the TES-SAT 2015 and TE-SAT 2016¹⁹:

Member State	Number of the terrorist attacks 2014/2015	Arrests for terrorism-related offences 2014/2015	Arrests related to jihadist or religiously inspired terrorism 2014/2015
Spain	18/25	145/187	34/75
France	52/73	238/424	188/377
Italy	12/4	39/40	11/40
Great-Britain	109/103	132/134	0/0
Belgium	1/0	72/61	71/60
Netherlands	0/0	1/20	1/20
Germany	0/0	18/40	16/21
Austria	0/0	31/49	30/48

III. Final remarks

According to the mentioned data, the real and close relationship between the terrorism and irregular migration can be underlined by us. The past years clearly prove that Europe can't cope with the irregular migrants, the human smugglers and the

¹⁸ Europol TE-SAT 2016. European Union Terrorism Situation and Trend Report 2016.

¹⁹ Although the new terrorism situation report (TE-SAT 2017) is not published by the Europol yet, it can be emphasized that the trend based on the mentioned data is not changed in the past period. The target Member States of the most serious terrorist attacks were in 2016 and 2017 France /Nizza, on 14 July 2016; Rouen, on 26 July 2016; /, Belgium /Brussels, on 22 March 2016/, Germany /Cologne, on 1 January 2016; Ansbach, 24 July 2016; Berlin, on 18 December 2016/, Great-Britain /London, on 22 March 2017; London on 3 June 2016/.

migratory networks as well. It can be underlined that the illegal migration can be not only a tool but also a catalyst for the terrorist offences. Terrorists make use of migratory flows to enter into the EU. The real danger is the potential for elements of the Syrian migrant diaspora – and the other migrants came from countries, which are area under the Islam jurisdiction – to become vulnerable to radicalisation, and to be specifically targeted by the jihadist terrorist organizations. It was showed by our paper using the data regarding to the religiously inspired terrorism and jihadist terrorism. Europe hasn't got effective answer for the problem mentioned yet, however we hope it will be in the near future. An effective solution is common interest of all of European citizens in order to be able to protect our identity, culture and security of Europe.

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Knowledge Driven Framework for realization of proactive criminalistics investigation in Combating Terrorism and Organized Crime in Montenegro with special focus on interception, collection and recording computer data

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Abstract

The purpose of this work is to articulate a set of interlinked research propositions about knowledge management systems in relation to so-called proactive criminalistics investigations in the field of prevention and combating against serious sort of crime such as organized crime and terrorism. Moreover, this paper addresses missing links in literature between "know-what" and „know-how“ in relationships between knowledge management systems and proactive criminalistics investigations, with special attention to use of information and technology to effectively create, apply, and communicate knowledge in organizations such as the criminalistics police of Republic of Montenegro. In this purpose authors point on organizational use and management of information and technology in proactive criminalistics investigations of organized crime and terrorism by finding that link between knowledge driven framework for fight against this sort of crime, and application of information and technology (specifically Digital Forensics knowledge), represents application of special investigative measure interception, collection and recording of computer data.

In relation with this, authors first describing nature of so-called proactive criminalistics investigation, by comparing it with reactive criminalistics investigation, also apostrophize the importance of implementation of proactive approach in police work by pointing out the benefits that they generate in the fight against severe sort of crime, and

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giving basic models and guidelines for its realizations in case of terrorism and organized crime. After that, authors emphasize the link between knowledge management and proactive criminal investigations, first by analyzing the type of knowledge on which proactive criminalistics investigation should be based on, and then associated use of modern information technology with the scope of effective realization of proactive criminalistics investigations in the case of organized crime and terrorism. As a key link between these two segments authors see application of special investigative measure interception, collection and recording of computer data. Because of that in the second part of the paper, authors analyzed provisions of application of this special investigative measure under the legislation of the Republic of Montenegro. At the end paper concludes with a discussion of various policy recommendations for future research.

This article is based on the application of current practical work of the police, judiciary and prosecution of the Republic of Montenegro through context positivist and deductive paradigm. Propositional methodology in this paper is used to hypothesize about the two interlinked domains of research interest – knowledge management and proactive criminalistics investigations of organized crime and terrorism. The task in this paper is to conceive of and begin to map out an initial set of research propositions that relate knowledge management systems to the proactive criminalistics investigations of organized crime and terrorism selected for their research potential within the larger domain of fight against these types of crime in general. Such a propositional methodology is an inductive–deductive exercise of hypothesis building based on distinct sources of empirical evidence drawn from the two key domains of interest for this paper which are examined below. The first domain is that of proactive criminalistics investigation, with a particular emphasis on knowledge conceptualized as intelligence knowledge as our focal research interest, and the second domain is knowledge management, with a specific focus on the digital forensic in use by police to gathering investigative (intelligence) knowledge in purpose to prevent materialization of criminal intent (committing of criminal offence) an obtaining evidence for punishment perpetrators for preparatory actions regard to criminal offence.

Keywords: *knowledge management, digital forensics, prevention, special investigative measures, interception, collection and recording of computer data, human rights.*

Introduction

In accordance with contemporary trends of crime, in which there is the distinction between proactive and reactive approaches, according to this we can distinguish the criminalistics investigation on proactive and reactive. Reactive criminalistics investigations are the classical approach to the study of crime, which is applied on the basis of knowledge about the manifestation of a particular criminal act, or on the basis of information on the committed criminal offense, in order to clarify it. In other words, they all represent a reaction to specifically manifested criminal event, or already undertaken actions of the committing of criminal offense (which can stay in attempt or be carried out to the end - executed criminal offence). On the other hand, proactive criminalistics investigations are applied in relation to criminal events which are likely to

be committed. And until reactive criminalistics activity is based on more or less visible knowledge such as consequences of criminal offence, traces and objects of the criminal offense, interviews of the victim of criminal offense, interviews of eyewitnesses and etc., organizing and realization of proactive criminalistics investigation is very difficult. Primarily, because it must be based on knowledge in relation to criminal intent and undertaken preparatory actions. The problem is because it is very difficult to come to the knowledge about criminal intent or preparatory actions, for example about terrorist attack or some offence from field of organized crime. Reason for difficulties in sense of gathering this knowledge is primarily due to high level of latency, conspiracy and secrecy of this activities, when terrorism and organized crimes are in question.

It should be noted that reactive criminalistics investigation were proved to be inadequate because the modern forms of crime such as organized crime or terrorism are characterized by far-reaching and mostly unavoidable consequences (death of a large number of people, destruction of property on a large scale, the input of large amounts of drugs on the market, the input of "dirty" money through "money laundering" into the legal economic flows in some country). On the other hand the perpetrators of these acts are mostly professional criminals, and committing of crime is well planned and organized, with use of contemporary information technologies. Because of all of these there is lack of evidence (material and personal) about their involvement in the crime, so reactive criminalistics investigation in many cases are unsuccessful, or have been dismissed due to lack of evidence. In relation with this what is mentioned above, in the late eighties and early nineties of the 20th century, due to the expansion of modern forms of crime that are characterized by a high degree of sophistication, organization, flexibility, mobility, misuse of modern technology and internationalization, pure reactive criminalistics reaction has proven to be insufficient in fight against contemporary forms of criminal manifestations. Because of that, in this period there was a discussion and the development of so-called pro-active criminalistics investigation. It should be noted that this does not mean that the police had not previously dealt with proactively work, but in this period for the first time in developed countries, in the late eighties and early nineties of the twentieth century began to appear new approaches in organization criminalistics activity, with the goal to be efficient on combating contemporary forms of criminal manifestations, such as problem-oriented policing, led-intelligence police work, criminalistics strategic approach and community policing etc. New approaches are basically had a redefinition of the police role in society, setting new strategic goals, organizational forms, and the introduction of new methods of operation with the intention to eliminate the weaknesses of the concept, which was dominant in the greatest period of the twentieth century (reactive or event-driven criminalistics approach). Although there are differences between various models of these relatively new approaches to the organization of criminalistics activity, but they have some common characteristics. First is reflected in a proactive role of police and second is knowledge-based management of police work.

In the Republic of Montenegro, as well as in whole region of Western Balkan, reactive approach in fight against crime, or reactive criminalistics investigations, still dominant in compared of proactive, or preventive approach. With this research we want to influence on the established practice in our country, as well as in whole of the Western Balkans region, in terms of countering serious forms of crime such as organized crime and terrorism, which is more reactive than proactive oriented, and

point on the way how knowledge management system linked with knowledge from the field of Digital Forensics can be used for the successful organization and implementation of proactive criminalistics investigations. In the next part of the paper we will point on the meaning and characteristics of proactive criminalistics investigation, and to describe knowledge driven framework for realization of proactive criminalistics investigation. It should be noted, that in this work we will briefly analyzing basic elements of these modern concepts of organization of criminalistics activities, and that we are not going to deal with operational issues like is, what is that what police or prosecutor's office leads to ground of suspicion that certain people are preparing some serious crimes because intrusion into these details will surpassed frameworks of this work. Instead that we will only focus on the knowledge driven framework for realization of proactive criminalistics investigations in combating of organized crime and terrorism, and within that a special issue we will give to knowledge management system and using of modern information technologies (Digital Forensics) through timely application of special investigative measure interception, collection and recording of computer data, as a core of proactive criminalistics investigations of this types of crime, with special emphasis on legal standards which prescribe the implementation of this measure in the Republic of Montenegro.

Contribution and Findings:

The aim is to take into consideration the features of contemporary forms of crime manifestation, as well as the fact that the implementation only classic reactive criminalistics investigation, and use of conventional operational-tactical and investigative measures and actions are often of limited scope, especially in countering of organized crime and terrorism. The authors emphasize the role and the importance of special investigative measure interception, collection and recording of computer data in fighting these forms of crime, with special emphasis on the criteria and conditions for their implementation according to the regulations of the criminal procedure legislation of the Republic of Montenegro. In this way authors are trying to point out that if the knowledge from the field of Digital Forensics applied in the context of proactive criminalistics investigations may have a preventive effect in terms of prevent a person to realize his criminal intent.

People from practice, so-called decision makers in police, security agencies, or prosecution office can on the base on the findings of this work improve its activity on the field of organization and realization proactive criminalistics investigation against organized crime and terrorism. Also, lawmakers can benefit from the results and make some necessary changes in the regulations of criminal procedural legislation of the Republic of Montenegro which refers to the implementation of special investigative measure interception, collection and recording of computer data, which can enhance activities in the field of fight against organized crime and terrorism. In addition, benefit from the findings of this paper may also have educational institutions that educate police personnel as well as future professionals from the field of Digital Forensics. Namely, the findings of this study can help them to improve curricula and thus increase the competences of students with investigative knowledge's.

Recommendations for Practitioners and Researchers:

Use of purely reactive criminalistics investigations in cases of serious crime, such as organized crime and terrorism is insufficient, and that there is a need for increasing application of so-called proactive criminalistics investigations. And in that actions timely implementation of knowledge from the field of Digital Forensic in form of special investigative measure interception, collection and recording of computer data have important role, because by its implementation we can prevent realization of criminal offence, with one side, and provide evidence for prosecution and condemnation of offenders because of preparation for execution of this type of crime.

Implementing of special investigative measure interception, collection and recording of computer data violate the rights and freedoms of citizens which are guaranteed by a huge number of international and national documents, but it is proved they are necessary and represent one of the most effective mechanisms of state in the fight against organized crime and terrorism. By this work authors want initiate the research and analysis of legal norms that regulate the use of these measures, as well as to explore the feasibility of this only in practice.

Impact on Society

This work should contribute to changing the approach in the fight against serious crime in Montenegro, such as organized crime and terrorism, in which instead of a reactive approach criminalistics, which is dominant in this area, focus should be shifted to the so-called proactive criminalistics approach, which must be knowledge driven and based on application of knowledge form the field of Digital Forensic. Thus, the authors expect that this work will contribute to improving the awareness and critical thinking among the police and prosecutor and sense of planning and implementation of proactive investigations of criminal activities.

1. The meaning and characteristics of proactive criminalistics investigations

Basis for taking proactive criminalistics investigations is suspicion that a particular person's (individually or in the group) engaged in illegal activities. In this regard, proactive criminalistics investigation may be manifested in two ways. The first focuses on a specific crime problem (for example, increased number of addicts' substance in a certain area, which indicates to the increased presence of the sale of narcotics). It is the so-called problem-oriented (proactive) criminalistics investigation. The second form is focused on certain persons or person as a possible carrier of criminal activities. It is a proactive criminalistics investigations aimed at targets. In both form the core of proactive criminalistics investigations makes police intelligence work, which is aimed at gathering knowledge about specific criminal risks and threats.

The essence of proactive criminalistics investigations include the pre-treatment, according to a criminal offense whose execution is expected, *i.e.* proactive steps are aimed at preventing criminal manifestations. Proactive criminalistics investigations were focused on any criminal event or a process that can lead to the commission of the crime, as well as to persons who are potential offenders. The goal of proactive

investigations is to identify potential criminal risks and threats and new forms of crime, in order to prevent the onset and reduce the potential damage, as opposed to reactive, whose goal is reflected in the discovery of the perpetrator and the preservation of evidence in order to initiate criminal proceedings for offenses that are already been made.

With respect to this goals, methodology of proactive criminalistics investigations is significantly different from the methodology and structure of reactive criminalistics investigations. Proactive criminalistics investigations usually start based on the collected intelligence to suggest that a particular individual or group planned to commit the crime, or to a particular area or object may occur commission of a crime. The proactive criminalistics activity in the fight against organized crime and protection of national security is, so to say, the "real" (timely) criminalistics protection from modern forms of crime. Conditionally, the "real" (timely) crime protection realized its function in vestibule of occurrence of adverse effects, *i.e.* before the start of materialization of criminal activity. In this regard, framework for proactive criminalistics activity should be based on certain knowledge, and that knowledge police capturing by giving answers to certain questions, which will then initiate further operational actions in sense of prevention of crime occurrence. Taking into account that this is an *ante delictum*, and not *post delictum* activities, "nine gold criminalistics issues" that are entering in the operational phase of *post delictum* criminalistics activity, here are useless because the criminal event has not yet occurred. So, to preventive criminalistics activity maintained its function must be set on so-called „golden questions" of preventive criminalistics whose answers need to be given in the stage of criminalistics control (Ivanović & Munižaba, 2013).

Table 1: The relationship between reactive and proactive criminal investigations

Description	Reactive criminalistics investigations	Proactive criminalistics investigations
Purpose	Detection, investigation and prosecution of crimes that are already committed.	Detection and prevention of the materialization of criminal intent.
Focus	Criminal offence which has happened in past.	A crime that might happen in the future.
Findings	Obtaining of evidence for judgment and punishment of perpetrator of committed criminal offence.	Discovering preparatory criminal actions and their prevention, obtaining evidence for preparatory criminal actions and also documenting the same in a purpose of prosecution, judgment and punishment its holders.
Framework	<p>"Nine gold criminalistics issues"</p> <ul style="list-style-type: none"> - What sort of crime was happened? - When criminal offence was happened? - Where is criminal offence happened? - How is criminal offence happened? 	<p>„Golden questions" of preventive criminalistics</p> <ul style="list-style-type: none"> - Which circumstance, relationship, process or activity produced the idea of the realization of a criminal activity that is being prepared? - Which criminal activity has been preparing? - In what form and with what intensity will manifest?

Description	Reactive criminalistics investigations	Proactive criminalistics investigations
	<ul style="list-style-type: none"> - Why is criminal offence committed? - With what means criminal offence is committed? - With who is criminal offence committed? - Who is the victim of committed criminal offence? - Who is perpetrator of criminal offence? 	<ul style="list-style-type: none"> - What are the possible modus operandi of offenders? - Which values are threatened and what consequences can be caused? - Who are the holders of the occurrence, or subjects of threat? - In which area criminal activity will manifest?

Answering on the above operational issues is carried out in a timely detection of phenomena that constitute criminal risks and threat to the security in the time of preparing a criminal offense and creates favorable conditions for the prevention of pre materialization, and thus prevent the endangerment and violation of the security situation. Thus, the function of crime proactive action, and action through the implementation of the criminalistics control to protect against modern forms of crime is reflected in the monitoring criminal environment and recognizing and detecting criminal risks and threats and preventing them before they come to the realization of criminal intent.

In connection with the above mentioned we can see that „golden questions” of preventive criminalistics determine and focusing criminalistics activity at the stage of the criminalistics control of crime on certain objectives. To perform its functions of the crime control must be based on the foundations of modern concepts of criminalistics activities, such as problem-oriented policing, intelligence-led police work, criminalistics strategic approach and community policing.

Specifically, the successful realization of proactive criminalistics activity is of great importance in a timely identification of the holders of future criminal activity with the aim prevent materialization of their intentions. A key part of the operational methodology of proactive police work is monitoring criminal milieu and application of methods of recognition phenomena in the environment, or the criminal milieu. The control of criminal and security risks and threats, and overseeing the criminal milieu through criminalistics measures, methods and tools requires a well-developed operational dimension of law enforcement agencies, in which criminalistics activity operating positioned so that its organization, implementation and interpretation of the operative material carried on manner that greatly increases the epistemological value of the material and thus increases the probability of success in the timely recognition, detection and control of criminal-security risks and threats in the stage of their formation, on the one side and gathering evidence of their existence on the other side. So, proactive criminalistics research must be scientifically based, *i.e.* be based on an analysis of data on the status and trends of criminal manifestations that threaten to the security of society. Based on these data, and using the scientific method, it is necessary to define the possible manifestations of criminal acts and security issues, as well as their development tendencies. Defining the possible criminal and security issues determines the focus of proactive criminalistics activity. After the determination of possible criminal and security issues, proactive criminalistics activity in the form of problem-oriented policing is directed toward neutralizing the conditions and causes which favor the occurrence of these problems (Goldstein, 1979).

Taking into account that the criminalistics activity in problem-oriented model of police work only focuses on criminal and security problem, which is not enough, there is a need for a parallel application of other forms of organization of criminalistics activity. In addition to the problem-oriented proactive criminalistics activities is necessary that the application of the concept intelligence-led police work. Specifically, a proactive criminalistics intelligence work is focused on the subjects or potential holders of criminal activity (Dvoršek, 2009). Therefore, it is very important to simultaneously focus criminalistics activity to the criminal and security problems, as well as potential subjects of threats. In addition to these ways of organizing criminalistics activity, for the effective realization of the criminalistics proactive protection is necessary and proactive strategic approach. Criminalistics strategic approach in order to protect society from modern forms of criminal manifestation is primarily reflected in the effective implementation of the objectives of criminal policy (Dvoršek, 2008). Thus, for example, if one of the goals of the criminal policy protection of economic system of counterfeit money, specifically counterfeit euros that criminal organizations inserted in financial flows, then using a strategic approach to shaping a proactive criminalistics strategy, which aims to identify and recognize the indicators that point to the possibility for the occurrence of this type of criminal manifestation of the territory of a country. From this defines criminalistics intelligence strategies derive the following requirements regarding the possible forgery of the euro in a given country: is there an intention of falsifying the euro in that country, whether domestic counterfeiters have the necessary knowledge to produce counterfeits, whether they have the necessary technical facilities and whether they have the necessary contact with other criminals for the establishment of a distribution network on the continent? Indicators by which they could respond to the set requirements are: finding counterfeit euros in the house owned by a famous forger, copying data printing euros and other technical information about making money by known counterfeiters on the territory of the country, try purchasing special copiers. If criminalistics intelligence activities receive a positive reply regarding the above intelligence requirements, then it is a sure sign that the potential danger of forgery euros in the territory of that country real and that it is necessary to develop an operational criminalistics strategy that aims to prevent this type of crime manifestation.

In this example we can see the necessity of coordination of problem-oriented and strategic approach to organized criminalistics activity with criminalistics intelligence activities. Also, for a proactive criminalistics activity is vital and selfless sharing of criminalistics intelligence knowledge between the various security agencies of the state. In fact, in practice, it is represented by a single rule that the security services of one country to a certain extent reserved to other security services of that state in respect of the exchange of criminalistics intelligence information. Thus, for example, after the terrorist attacks of September 11th showed that some security agencies of the United States had specific intelligence knowledge on the persons who are presumed to have committed terrorist attack, but that knowledge is not shared with other security agencies of the state. It is assumed that the situation is any chance was different, *i.e.* that the some of security services of the United States and shared information with other agencies, led to the conclusion mosaic of crime and timely adoption of the conclusion of the criminal intent of the person and the effective takeover measures to thwart the realization of these intentions.

Finally, it should be noted that in addition to the above, the effective implementation of proactive criminalistics activities is necessary practicing the concept of community

policing in order to establish a partnership between the citizens and the local community and members of the security services, especially the police. In this way, it also creates favorable conditions for the timely recognition criminal-security issues in the region, and criminal milieu, before there is a real threat to the values that protect by the national security system of a country.



Figure 1: Conceptual structure of proactive criminalistics investigation

2. Knowledge driven framework of proactive criminalistics investigation of organized crime and terrorism

As we look to the mentioned concepts of criminalistics activity which have proactive approach we can see that all of them are knowledge based. Because our work is focused on combating organized crime and terrorism through proactive criminalistics investigation which must be knowledge driven, in relation to this the following questions are imposed:

- a) Which sort of knowledge is required for effective realization of this activity?
- b) How we can gathering that knowledge?
- c) What is it connection between obtaining of that knowledge and use of information technologies?
- d) How knowledge management should be implemented in scope of proactive criminalistics investigation?

In order to reach the answers to these questions, first we must point out what it mean by knowledge and knowledge management. Knowledge present an important organizational resource. Organizations, in the modern day, are turning to knowledge

management initiatives and technologies to leverage their knowledge resources. Gottschakl (2007) seen knowledge-management as a systematic and organizationally specified process for acquiring, organizing, and communicating knowledge of employees i.e., knowledge workers, so that other employees may make use of it to be more effective and productive in their work. In the knowledge management literature is distinguished tree levels of knowledge: data, information and knowledge. According Awad and Ghaziri (2004) data is defined as unstructured facts, information is defined as structured data and attributes which can be communicated..., while knowledge is seen as information that has meaning ... and can be used to achieve some results. So, by this we can conclude that knowledge is a higher level of information and data. As Nissen (2002) argued that from the knowledge seekers point of view, data is put into context to create information, and actionable information, becomes knowledge (Järvenpää, Kopra & Lanz, 2016).

The American Productivity and Quality Center (APQC) defines knowledge management as an emerging set of strategies and approaches to create, safeguard, and put to use a wide range of knowledge assets, such as people and information. Thus, these assets flow to the right people at the right time so that they can be applied to create more value to the organization. Gupta e al. State that knowledge management is a process by which organizations are able to detect, select, organize, distribute and transmit vital information and experiences which would be used in activities like problem resolution, dynamic learning, strategic programming and decision making (Chang & Chung, 2014).

Criminalistics activities of police in generally have two basic tasks: the generation of police knowledge (which refers primarily to the conclusions and giving answers on questions which relates to what crimes have been committed (repressive) or are likely to be committed (proactive – preventive – by whom, how and why...), and the production of evidence (which refers to the material that may be presented in the court to help establish that whether an alleged criminal offence has been committed or has been undertaken preparatory actions – organized crime and terrorism) (Fasihuddin, 2008). From that point of view knowledge management in police investigations is knowledge intensive and time critical and thus presents a substantial challenge to investigation managers. Successful investigation depends upon knowledge availability (Chen, Schroeder, Hauck, Ridgeway & Atabakhsh, Gupta, 2002). Police officers have to keep up to speed with the current legal and policy directions in relation to their work. Furthermore, they need to know the latest information on crime trends and potential threats to perform their duties effectively and efficiently (Luen & Al-Hawamdeh, 2001). We argue this presents a considerable challenge for knowledge sharing in a police service. Knowledge management is concerned with simplifying and improving the process of sharing, distributing, creating, capturing, and understanding knowledge. Hence, our argument is that knowledge is the most important resource in police investigations. Therefore, we can apply the knowledge-based perspective on organizations, which is derived from the resource-based theory of the firm to policing by stating that knowledge as a “strategic resource” is characterized by being valuable, scarce, non-imitable, nontransferable, non-substitutable, combinable, and exploitable (Dean, Fashing, Glomseth & Gottschalk, 2008).

Police investigation units represent a knowledge-intensive and time-critical environment. Successful police investigations are dependent on efficient and effective

knowledge sharing. Furthermore, Lahneman (2004) argues that successful knowledge management in law enforcement depends on developing an organizational culture that facilitates and rewards knowledge sharing. In this contest, detectives as knowledge workers are using their brains to make sense of information. Knowledge is often defined as information combined with interpretation, reflection and context. This combination takes place in the brains of detectives.

Gathering the knowledge that underpins a criminalistics investigation is a key task for an investigator. In fact, catching criminals cannot happen until an investigator first poses the knowledge provided by forensics, intelligence, and interviewing victims, witnesses, and interrogating suspects (Dean, Fashing, Glomseth & Gottschalk, 2008). Hence, this paper is a hypothesis building exercise into how to best gather the sort of investigative knowledge which is need for successful organization and realization of proactive criminalistics investigations of organized crime and terrorism, in the next part of the work we discuss about this knowledge with correlation of implementing of modern information technologies. Namely, police work seems extremely knowledge intensive and from everything above we can see that it is actually intelligence knowledge, which main purpose is the identification of potential criminals *i.e.*, proactive intelligence or preventive intelligence or threat assessment. Gottschalk quotes Lahneman, that intelligence agencies were the world's first knowledge companies (Gottschalk, 2007).

In order to give answers to the above mentioned issues, and in purpose to fully point to the connection between knowledge management, application of modern information technologies and proactive criminal investigations of organized crime and terrorism, it is crucial to first say something about the knowledge management and activities of terrorist and organized criminal groups. The information and knowledge have long since become key resources of activities of terrorist and organized crime groups. They're in the criminal milieu and the illegal market tend to be more competitive and to strengthen its position by using information and knowledge. The activity of terrorist and organized criminal groups in illegal and legal market is enriched with information or knowledge by specialists from various fields which was hired by terrorist organization or organized criminal groups. They pay particular attention to interaction and exchange knowledge and information with groups from the environment, which enables them to plan and correct their strategies for work. On the other hand, they use rapid and constant technology changes, and development of information technology as a key resources of its development. Thus, terrorist groups and organized criminal groups become users of personnel which criminal activity converted into knowledge driven activity. In this way, their criminal activity takes on characteristics of a business strategy that is based on knowledge management. Accordingly, proactive criminalistics activity should be based on knowledge management in response to the strategic and knowledge driven action of terrorist and organized criminal groups.

Based on this we can conclude that it is a knowledge which has secret character, and which concerning with criminal intentions, plans, identity of group members who are preparing for criminal activity, undertaking preparatory work for the executed criminal activities and etc. Given that this is a knowledge which is based on information which are generally cannot be obtained from the so-called open sources (questioning of

suspects, hearing of witnesses, search of the apartment and seizure of documents, etc.) and on a public way, but only from classified or secret sources, and on way that no one else should know that police work on capturing of that information, we come to the implementation of knowledge from the field of Digital Forensics in proactive criminalistics investigation of organized crime and terrorism.

So in the next part of the work we will describe how knowledge from Digital Forensics can be used in crime prevention. Namely, due to investigation digital forensic is usually viewed as an mostly reactive approach that serves to discovering and obtaining of evidence for the crime which have been already committed, and that its preventive role mostly tantamount to general prevention or deterrent effect. This is corroborated by Srinivasan (2013) which in his work says that Digital Forensics is an important area of study for information security students because, while computer forensic investigation does not prevent the crime from occurring in the first place, it serves as a powerful deterrent for the criminals to know that their acts can be discovered and prosecuted. In connection with this, in the research we strive to point out that if the knowledge of Digital Forensics applied as part of proactive criminal investigations, it may have a very preventive effect in terms of special prevention, *i.e.* preventing a particular person to materialize their criminal intent.

3. Implementation of knowledge from field of digital forensics as the core of proactive criminalistics investigations

The fight against organized crime and terrorism requires a series of actions and measures intended to thwart the perpetrators of criminal acts to commit the criminal activity and avoid punishment. Although there are no generally considered definitions of these forms of crime, we can say with certainty that there is a consensus of most authors in terms of the constituent elements of these socially negative phenomena. Thus, by the majority, organized crime is defined as a permanent and organized criminal enterprise whose intention is to profit from illegal activities and its existence is held permanently by using force, threats, monopoly control, and/or by corrupting public officials. As for terrorism, we thought that the most acceptable definition is an official FBI one, according to which terrorism is the unlawful use of force or violence against persons or property to intimidate or coerce governments, the civilian population, or any segment thereof, in furtherance of political or social objectives (Ivanović & Faladžić, 2011).

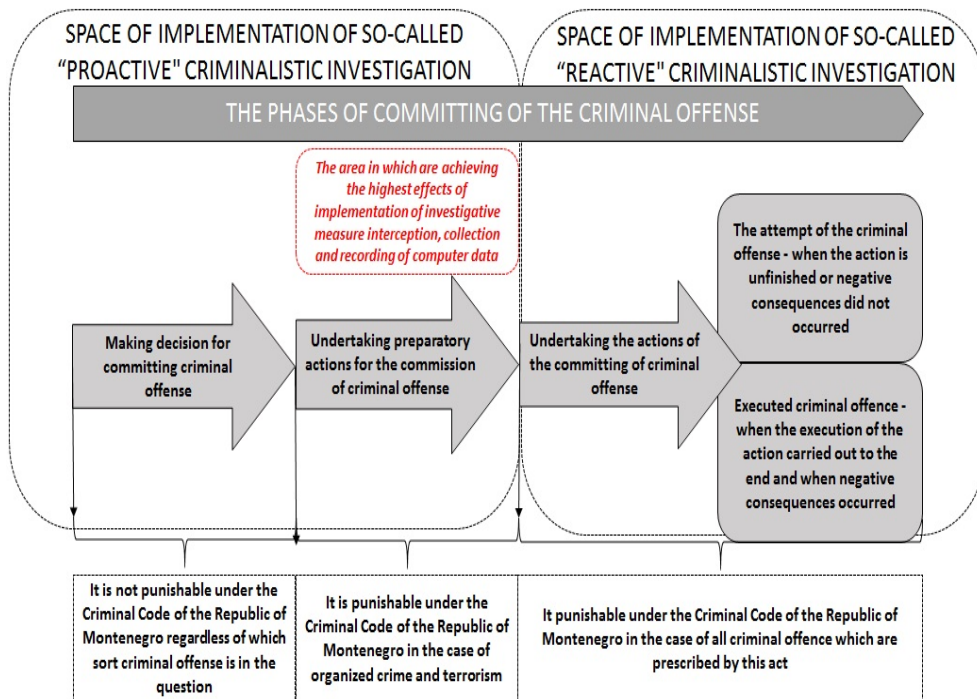
The main characteristics of these forms of criminal manifestation are: high level of organization, internationalization, recidivism, professionalization and specialization, the application of violence, cruelty and ruthlessness, and more frequent abuse of modern technical and technological achievements. For this reason, there is a need to find appropriate measures and resources in their suppression and prevention. The criminal legislation of many countries, the classical tools and methods applied in the prevention and suppression of the most difficult and most complex of modern criminal activities and organized crime, are replaced by new and more effective solutions, tools, methods and techniques. It is unthinkable to prevent and combat terrorism and organized crime without the application of modern tools, methods and techniques. Implementing these measures and actions violate the rights and freedoms of citizens which are guaranteed

by a huge number of international and national documents, but it is proved they are necessary and represent one of the most effective mechanisms of state in the fight against organized crime and terrorism. The introduction of specific procedures aimed at detecting and proving the acts of organized crime and terrorism in a more efficient way, which makes the arranging process to significantly deviate from the principles and traditional institutions of regular criminal proceedings. The focus of the proceedings is transferred to the earliest phase, instead of the investigation, evidence actions are taken in preliminary investigation which is understandable reason because the later would not be effective or are by their nature such that they afterwards can not be taken, for example, secret audio and visual surveillance of a suspect. Status of a suspect is obtained when there are grounds for suspicion that the person is preparing or participating in the preparation of criminal acts of organized crime. It is not required that a criminal offence should be committed, which means that the citizen becomes suspect earlier than in the normal procedure when the offense does not belong to organized crime.

For the effective implementation of these measures, in accordance with the European standards for the protection of human rights, the countries must, in addition to building the basic legal framework to enable implementation of measures and develop the appropriate by-laws and institutional structures and functional mechanisms, and with well-trained officers on the practical implementation of these measures.

The question is which is the best way for timely detection of undertaking preparatory actions and also documenting the same in a purpose of prosecution, judgment and punishment of perpetrators, and what is the common denominator for these activities. The answer to this question lies in the logistics work of criminal activity. Specifically, in order to jointly undertake preparatory criminal actions, there is need for communication between criminals or persons who are involved in criminal activity whose implementation is preparing, for example a terrorist attack. Criminals have long since become aware of the importance of secrecy at this stage of criminal activity, and because of this they avoids direct communication by phone. Instead communications by phone they usually prefer to communicate via encrypted e-mail, social networks such as Facebook, Skype, Viber, WhatsApp etc. For example, in an attempt of the military coup that took place in July 2016 in Turkey, WhatsApp was used as the main mode of communication by the put schists. In November terrorist group, which is suspected to be associated with a terrorist group Islamic State, has been arrested in Kosovo because of preparing terrorist attacks in the Balkans. In discovering and identifying these group were intercepting communications of its members through Skype. This form of communication through computer networks and systems is a common denominator for proactive actions, *i.e.* detection and prevention of criminal activities in the stage of preparatory actions and timely provision of evidence to punish them for the preparation of the crime. So that what some member of organized or terrorist group type through computer, mobile phones, smart phones, tablets or GPS devices can be intercepted, collected and stored and this fact makes it possible for the gathering of forensic computer evidence (Wolfe, 2001).

Figure 2: Review of the relationship between “proactive” and “reactive” criminalistics investigations and their connection with the phases of committing the criminal offense



As Irons and Ophoff (2016) arguing that access to computing and computing technology grows and as the use of computing resources and applications becomes even more widespread, the potential threat of cybercrime also grows. On the same way threat of application of computing resources on filed of organized crime and terrorism is also grows. So as Irons and Ophoff (2016) arguing there is also the need to put in place policy frameworks that will allow for digital investigations to be undertaken. As the initial hypothesis of our work is that proactive criminalistics investigations of organized crime and terrorism must be knowledge driven and based on application of information and technology (specifically Digital Forensics knowledge) and that the core of that activities represent application of special investigative measure interception, collection and recording of computer data, further in the paper we will focus on legal provisions for implementing this measure under criminal procedural law of Republic of Montenegro.

Therefore, the focus of proactive criminalistics investigations should be computer data which are generated by communication between persons who undertake preparatory activities for committing serious crime. Given that these are the data which are protected by right to the inviolability of privacy of correspondence, for their interception, collection and storage there is need for specific legal authorization. This is actually a special investigate measures which prescribing in national legislation is recommended by Convention on Cybercrime adopted in 2001st in Budapest.

4. The application of special investigative measures interception, collection and recording of computer data according to the legislation of the Republic of Montenegro

The application of special investigative measures interception, collection and recording of computer data is provided by articles 157, 158 and 159 of Criminal Procedure Code of the Republic of Montenegro. To this measure could be applied must be cumulatively met the following requirements. First, special investigative measure interception, collection and recording of computer data may be determined if there are grounds for suspicion exist that a person has individually or in complicity with others committed, is committing or is preparing to commit following criminal offences (article 158 CPC MNE):

1) for which a prison sentence of ten years or a more severe penalty may be imposed;

2) having elements of organized crime;

3) causing false bankruptcy, abuse of assessment, passive bribery, active bribery, trading in influence, abuse of an official position, as well as abuse of powers in economy, and fraud in the conduct of an official duty with prescribed imprisonment sentence of eight years or a more severe sentence;

4) abduction, extortion, blackmail, meditation in prostitution, displaying pornographic material, usury, tax and contributions evasion, smuggling, unlawful processing, disposal and storing of dangerous substances, attack on a person acting in an official capacity during performance on an official duty, obstruction of evidences, criminal association, disclosure of confidential information, breach of confidentiality of proceedings, money laundering, counterfeiting of money, forgery of documents, falsification of official documents, making, procuring or providing to others means and materials for forging, participation in foreign armed formations, arranging outcomes of competitions, unlawful keeping of weapons and explosions, illegal crossing of the state border and smuggling in human beings.

5) against the security of computer data (article 158 CPC MNE).

Second condition which must be cumulatively met is fact that evidence cannot be obtained in another manner or their obtaining would require a disproportional risk or endangering the lives of people (Article 157 CPC MNE).

So we can conclude that these measures can be applied against some person if we have grounds of suspicion that some of the offenses set forth in article 157 has committed, is committing or is preparing to commit by these person individually or in complicity with others. And that according to the circumstances of the case evidence cannot be obtained in another manner or their obtaining would require a disproportional risk or endangering the lives of people. This raises the question of the meaning of the term grounds for suspicion, given to that the Criminal Procedure Code of the Republic of Montenegro does not provide a definition of this term (Rakočević, 2014:256). In criminalistics science grounds for suspicion (indications, basic suspicions) are therefore the initial spark for start of criminalistics investigation, *i.e.* involvement of police officers on detecting and clarifying up of all relevant circumstances and facts that are related to a criminal activity. Grounds for suspicion are a form of probability based on the specific facts and circumstances which indicate the possible existence of crime or of some persons as a possible perpetrators. Grounds for suspicion are labeled low differential reach of, based on them to only a preliminary diagnosis in respect of

criminal acts or possible perpetrators. The literature also called sufficient suspicion or basic suspicions. The level of grounds suspicion exists when there are certain indications that indirectly indicate that some persons preparing to commit, are committing, or committed criminal offense. Seen from the point of truth, as much they could be true, at the same level they can also be false. Grounds for suspicion may occur before the crime was committed, during the committing the offense or after the commission of the crime. With respect to the elements of criminal offence grounds for suspicion may relate to: place, time, manner, motive of execution or identity of perpetrator.

So according to law, prosecutor could seek from the court (investigative judge) permission for the application of special investigative measure interception, collection and recording of computer data only if he could convince the investigative judge that there is ground for suspicion that the some person alone or with other persons preparing to commit, is committing or has already committed some of the criminal offenses set forth in article 157 of Criminal Procedural Code of Republic of Montenegro.

The second condition that must be fulfilled for the application of special investigative measure interception, collection and recording of computer data reflected in fact that evidence cannot be obtained in another manner or their obtaining would require a disproportional risk or endangering the lives of people. In the simplest way explained, such legal solution, mean that the implementation of this special investigative measure is not mandatory or primary, but it is optional and supplementary.

Which means that it will apply only if other conventional investigative measures could not achieve goals, or if their application would be risky. If we take in consideration that aim of proactive criminalistics investigation is discovering preparatory actions for the commission of criminal offenses, which criminals undertaking in strict secrecy, we can conclude that the classic measures such as monitoring, surveillance, collecting information will give almost no effect on the field of disclosing their criminal activities as well as providing evidence for the same criminal activities. In this regard, we believe that in most cases proactive criminalistics investigations of organized crime and terrorism there is a need for its implementation, which therefore means the fulfillment of the legal requirements for the application of special investigative measure interception, collection and recording of computer data.

Also measure interception, collection and recording of computer data may be also ordered against persons for whom there are grounds for suspicion that they have been conveying to the perpetrator or from the perpetrator of criminal offences referred to in Article 158 of the Criminal procedural code of Montenegro messages in connection to the criminal offence, or that the perpetrator has been using their telephone lines or other electronic communication devices (Article 175 paragraph 3 CPC MNE). In addition the law provides for the possibility that measure interception, collection and recording of computer data may be ordered against a person for whom an international arrest warrant was issued, or against a third party for whom there are grounds for suspicion that he is in direct contact with the person for whom there is an international arrest warrant (Article 175 paragraph 7 CPC MNE).

Measure interception, collection and recording of computer data shall be ordered via a written order by the investigative judge at the motion of the State Prosecutor containing a statement of reasons for implementation of this measure (Article 179 paragraph 1 CPC MNE). The Criminal procedure code provides an exception of the written procedure for determining the execution of this special investigative measure. So by way of exception, if the written order cannot be issued in time and risk of delay

exists, application of measure interception, collection and recording of computer data may begin on basis of a verbal order of the investigative judge. In that case, a written order must be obtained within 12 hours following the issue of the verbal order (Article 179 paragraph 1 CPC MNE). The motion and the order referred to the application of measure interception, collection and recording of computer data shall contain: data on the person against whom the measure is enforced, grounds for reasonable suspicion, the manner of measure enforcement, its goal, scope and duration (Article 179 paragraph 2 CPC MNE). The motion and the order for ordering measure interception, collection and recording of computer data shall become an integral part of the criminal file and should contain available data on the person against which is ordered, the criminal offence because of which is ordered, facts on basis of which the need to undertake it originates, duration deadline that needs to be suitable to achieving the objective of measure, manner, scope and place for the measure to be implemented (Article 179 paragraph 3 CPC MNE).

Based on the order of the investigating judge, the measure interception, collection and recording of computer data may last up to four months. For justified reasons, this measure may be extended against the same person and for the same criminal offence no longer than 18 months from the adoption of the first order for imposing secret surveillance measures (Article 179 paragraph 5 CPC MNE). It should be noted that such legal solution represents a significant prolongation of the measures bearing in mind that according to the previous law, the duration of secret surveillance measures were provided to a maximum of seven months. Enforcement of the measure shall be terminated by an order when the reasons for its application cease. Measure which enforcement was interrupted may continue for justified reasons against the same person and for the same criminal offence, based on an order. The maximum duration of the measure also includes the time during which the measure was interrupted. After the expiry of the periods referred to in this paragraph, enforcement of a measure may not continue and new measure may not be ordered for the same criminal offence and against the same perpetrator (Article 179 paragraph 5 CPC MNE).

In addition to the order for the application of measure of interception, collection and recording of computer data, the investigative judge shall issue a separate order containing solely the telephone number or e-mail address or the International Mobile Subscriber Identity (IMSI number), International Mobile Station Equipment Identity (IMEI number) and the internet protocol address (IP address) and the duration of the measure in question, and this order shall be delivered to enterprises (Postal agencies, other enterprises and legal entities registered for transmission of information) during the course of the application of the measure by the authorized police officers (Article 179 paragraph 8). Postal agencies, other enterprises and legal entities registered for transmission of information shall enable the authorized police officers to enforce the measure interception, collection and recording of computer data. Persons acting in an official capacity and responsible persons involved in the process of passing the order and enforcement of this measure shall keep as secret all the data they have learned in the course of this procedure (Article 179 paragraph 9).

If, during the enforcement of measures of interception, collection and recording of computer data, registered data and notifications which are referring to some other persons for whom grounds for suspicion exist that s/he had committed the criminal offence for which a measure of secret surveillance was ordered, or some other criminal offence, that part of the material shall be copied and forwarded to the State Prosecutor,

and it may be used as evidence only for criminal offences referred to in Article 158 of the Criminal Procedural Code of Republic of Montenegro (Article 179 paragraph 10 CPC MNE).

The special investigative measures interception, collection and recording of computer data shall be enforced by the authorized police officers in such a manner that the privacy of persons not subject to these measures be disturbed to the least extent possible (Article 160 paragraph 1 CPC MNE). Authorized police officer enforcing the measure shall keep records on each measure undertaken and report periodically to the State Prosecutor, that is, investigative judge on the enforcement of measures. If the State Prosecutor, *i.e.*, investigative judge ascertains that the need for enforcement of the ordered measure does not exist anymore, s/he shall issue and order on its discontinuation (Article 160 paragraph 5 CPC MNE). Upon the enforcement of measure the authorized police officers shall submit to the State Prosecutor a final report and other material obtained by the enforcement of measure (Article 160 paragraph 6 CPC MNE).

Should the State Prosecutor decide not to initiate a criminal procedure or if the data and information collected via this special investigative measure are not necessary for the criminal proceedings, s/he shall forward to the investigative judge the material obtained through the application of measure of interception, collection and recording of computer data, in a closed cover bearing the designation MSS, and the investigative judge shall order that the material be destroyed in the presence of the State Prosecutor and the investigative judge. The investigative judge shall compose a record thereon (Article 160 paragraph 7 CPC MNE). The investigative judge shall proceed in the same manner if the State Prosecutor orders that investigation be conducted against the suspect who was subjected to measure of interception, collection and recording of computer data, when the results obtained or parts of the results are not indispensable for the conduct of the criminal proceedings or when the person for whom there is an international arrest warrant is found (Article 160 paragraph 8 CPC MNE).

In cases where there is no need for further use in criminal procedure of registered data and notifications collected by this special investigative measure as is referred to in paras. 7 and 8 of article 160 of CPC MNE, data shall be considered as classified within the meaning of regulation prescribing data secrecy (Article 160 paragraph 9 CPC MNE).

If the special investigative measure interception, collection and recording of computer data was undertaken in contravention to the provisions of the present Code or in contravention to the order of the investigative judge or the State Prosecutor, the judgment may not be founded on the collected information (Article 161 paragraph 1 CPC MNE).

By prescribing of these procedures legislator has reduced the space for misuse of the special investigative measure interception, collection and recording of computer data in practice and also provide higher degree of protection of privacy and inviolability of communications and personal data in the case of implementation of this special investigative measure.

Before the material obtained through the enforcement of measure interception, collection and recording of computer data is destroyed, the investigative judge shall inform the person against whom the measure was undertaken, and that person shall have the right to examine the collected material (Article 162 paragraph 1 CPC MNE). By prescribing the obligation to inform the person against whom the measure was undertaken in a case where there is no further investigation or indictment against that

person, is also provided greater protection from possible abuse of this special investigation measure. If there is a reasonable concern that rendering information to the person against whom the measure was applied or examination of the collected material by such person could constitute a serious threat to the lives and health of people or could engender any investigation underway or if there are any other justifiable reasons, the investigative judge may, based on an opinion of the State Prosecutor, decide that the person against whom the measure was undertaken not be informed and allowed to examine the collected material (Article 162 paragraph 2 CPC MNE).

The State Prosecutor and the investigative judge shall, in an appropriate way (by copying records or official annotations without personal data, removal of an official annotation from the files and alike), prevent unauthorized persons, the suspects or their defense attorney to establish the identity of persons who have enforced the measure interception, collection and recording of computer data. If such persons are to be heard as witnesses, the court shall apply measures of protection of witnesses from intimidation which are prescribed in article 120-123 of Criminal Procedural Code of Republic of Montenegro (Article 159 paragraph 11 CPC MNE).

Prescribing possibility that from the report, which is made as a result of using special investigative measures, could be erased the names of the persons who have enforced the measure interception, collection and recording of computer data, very important in the sense of protection of their security. Moreover, we think that this should be defined in Criminal Procedural Code as an obligation, not an option. In fact, in practice, there are several cases where the persons who have enforced the measure interception, collection and recording of computer data, later were targeted and intimidated from some organized criminal groups. We are therefore of the opinion that the legislator should change this article in the sense that in the written reports of enforcing of this measure persons who have enforced this operation should be named under the code. And if there is a need to be heard as witnesses in the proceedings, then its identity could be discovered and court shall apply measures of protection of witnesses from intimidation. This solution we propose, because we believe that the identity of the person who have enforced this measure is not relevant for the suspect and his defense attorney, and because in practice there are almost no cases where there was a need to examine the person who conducted investigative measure such is interception, collection and recording of computer data.

Interception of communications is foreseen in the provisions of Article 180 of the Law on Electronic Communications of Republic of Montenegro. By provisions of this article the operator shall at his own expense provide the necessary technical and organizational conditions that enable interception of communications, which is in accordance with the provisions in Article 159 paragraph 9 of Criminal Procedural Code of Republic of Montenegro, according to which postal agencies, other enterprises and legal entities registered for transmission of information shall enable the authorized police officers to enforce the measure interception, collection and recording of computer data. In this article is prescribed that persons acting in an official capacity and responsible persons involved in the process of passing the order and enforcement of this measure shall keep as secret all the data they have learned in the course of this procedure (Article 159 paragraph 9 CPC MNE). Also in the Law on Electronic Communications is stressed the confidentiality of information relating to the content of the communication, the user data, traffic data and location-related communications and unsuccessfully established communication. It is forbidden to listen, eavesdrop or storing

the data content of the communication, or an interception or control by others, without the consent of that communication (Article 172 paragraph 2 LEC MNE). On the other hand, it is allowed technical storage or access to content or data communication without the consent of user of that communication, if the only purpose is to transfer the data over a public electronic communications network or, if necessary, on request of the user to operator provide this service (Article 172 paragraph 3 LEC MNE). Article 172, paragraph 4, prescribes the exceptionally possibility of listening, tapping or storage of content and information about communications, or an interception or control by others, without the consent of the user of that communication, only if this actions are necessary, appropriate and proportional to the measures for protection of national security, defense as well as to prevent the execution of the crime, investigation, detection and prosecution of criminal offenses and unauthorized use of systems for electronic communication, as well as in cases of providing assistance in search and rescue of people and when it is necessary to protect the lives and health of people and property, in accordance with the law. Further, the operator is obliged to provide facilities for the interception of communication in accordance with the conditions laid down in Article 172, paragraph 4, by order of the competent state bodies in accordance with the law. (Article 180 paragraph 2 LEC MNE). The operator shall, together with the relevant state authorities on whose request doing the legal interception of communications, provide a permanent record about this measure and that data which are collected under legal interception of communications shall be kept as an official secret (Article 180 paragraph 3 LEC MNE). Necessary technical and organizational requirements for the interception of communications under Article 180 of the Law on Electronic Communications of Republic of Montenegro prescribed by the Ministry for Information Society and Telecommunications, in agreement with public authorities responsible for internal affairs and security (Article 180 paragraph 4 LEC MNE). Operator which performs technical and program upgrades in its network or implementing new electronic communications services which have an impact on the lawful interception of communications, is obliged to inform about the upgrade or the implementation the competent authorities for the interception of communication at least six months before upgrading its networks or deploy new services (Article 180 paragraph 5 LEC MNE).

This law prescribes the duty of the operator to retain certain traffic data and location data, as well as relevant information necessary for the identification and registration of subscribers – legal entities and individuals, to the extent that these data are generated or processed, for the needs of defense and national security, and to prevent the execution of the crime, investigation, detection and prosecution of perpetrators of criminal acts and to provide assistance in search and rescue of people, protection of life and health of people and property, in accordance with the law (Article 180 paragraph 1 LEC MNE). The obligation to retain data applies to data on unsuccessful calls, the data are generated and processed with the telephone service provider or registered with the Internet service from operators (Article 180 paragraph 2 LEC MNE). The obligation to retain data does not apply to data that reveal the content of electronic communications (Article 180 paragraph 3 LEC MNE). The operator shall provide in its network the necessary technical and organizational conditions that allow authorized state authorities to download the retained traffic data and location data, as well as relevant data necessary for the identification and registration of subscribers. The retention period is limited in the range of six months to two years from the date of performing communication (Article 180 paragraph 4 i 5 LEC MNE).

As regards the categories of data which should keep there are the information necessary to monitor and determination the origin and destination of communication, determination the location of the participants of communications, determination the date, time and duration of a communication, determining the type of communication, the type if communications equipment of user or equipment used for the purpose of communication and determine the location in the case of mobile communication equipment (Article 182 paragraph 1 LEC MNE). In relation to security of retained data operator is obliged to ensure that the retained data be with the same quality and the same degree of safety and protection as well as the corresponding data on the network. It is also required to ensure with appropriate technical and organizational measures that retained data are protected from the illicit or accidental destruction, loss or alteration, unauthorized or unlawful storage, processing, access or disclosure. Retained data can be accessed only by persons authorized by the operator. Operators duty is that retained data, with the exception of data which is accessed and stored, destroy at the end of the specified retention period. Control over the implementation of these measures doing the authority responsible for the protection of personal data. (Article 183 LEC MNE).

In addition to the Code of Criminal Procedure and the Law on Electronic Communications interception of electronic communication is provided for by the Law on the Agency for National Security (ANS) of the Republic of Montenegro. Law on the Agency for National Security provides that the ANS authorized to secretly collect data by surveillance of the electronic communications and postal items (Article 9 paragraph 1 item 4 LANS MNE).

Surveillance of the electronic communications in the purpose of secretly collecting of data, on the base of written proposal from the Director of the ANS, in each case, must be approved by the decision of President of the Supreme Court of Montenegro, and in the case of his absence the decision will given by judge who replaces him in accordance with the law, if there are grounds for suspicion that threatened national security: 1) preparations for an armed attack on Montenegro; 2) covert activities directed against the territorial integrity of Montenegro; 3) covert activities, planning and preparing for the performance of the performance of internal and international terrorist attacks and other violent actions against state authorities and holders of public office in Montenegro or abroad; 4) providing classified information to unauthorized persons; 5) intelligence and subversive activities of individuals, groups and organizations for the benefit of other countries; 6) the organized criminal activity. Decision for application of surveillance of the electronic communications by ANS shall be made within 48 hours of the submission of the proposal (Article 14 LANS MNE).

Proposal for control of electronic communications contain information on the person to whom it applies control; the merits of the reasons for its use; the mode of administration; scope and duration; electronic means of the communication and circumstances that necessitate the need for this type of data collection. Surveillance of electronic communications pursuant to the Law of ANS application of this measure can take for three months, and for important reasons can be extended each time for another three months, or a total of not more than 24 months. Extension of application of this measure approving President of the Supreme Court of Montenegro, in the case of his absence decision will be made by judge who replaces him. Supervision of electronic communications shall be repealed immediately after the cessation of the reasons because it carried out. Director of the Agency, in writing, inform the President of the

Supreme Court of Montenegro, on the cessation of the reasons his inspection. Operators and providers of electronic communications services, as well as the Postal operators are obliged to provide the Agency and guarantee the conditions for supervision of electronic communications, which was approved by the President of the Supreme Court or a judge who replaces him (Article 15 LANS MNE).

5. Conclusion

It is unthinkable to prevent and combat terrorism and organized crime without the application of modern tools, methods and techniques such as special investigative measures, and modern information technologies. The introduction of specific procedures aimed at detecting and proving the acts of organized crime and terrorism in a more efficient way, which makes the arranging process to significantly deviate from the principles and traditional institutions of regular criminal proceedings. The focus of the proceedings is transferred to the earliest phase, instead of the criminal investigation, evidence actions are taken in preliminary investigation which is understandable reason because the later would not be effective or are by their nature such that they afterwards can not be taken, for example., interception, collection and recording of computer data of a suspect. Because of these there is need for implementation so-called proactive criminalistics investigation.

Preventive or proactive criminal investigations includes the undertaking of criminalistics measures, actions and resources in order to prevent the materialization of criminal intent, which tentatively, we can say that it is "real" (timely) criminalistics protection of society from severe forms of crime such as organized crime and terrorism. Thus, the full and effective protection of the desired state and the individual and collective sense of security requires displacement of criminalistics activities from reactive to proactive phase. The primary reactive and event-driven criminalistic investigation in the protection of society from severe forms of crime such as organized crime and terrorism, or the standard model of the organization of criminalistics activity, must be replaced by a proactive approach. The focus of this proactive approach is the timely identification of the potential holders of such criminal activities. This is possible only, by problem-oriented approach of criminalistics activity, which include a deep analysis of the causes, manifestations, dynamics and structure of certain types of crime. However, taking into account fact that a good portion of members of organized criminal or terrorist groups has no criminal record, *i.e.* not previously known to the police and security services, and that their criminal activity carried out in the framework of legitimate activities, problem-oriented approach in such cases can hardly lead to effective results, as a consequence requires a parallel application of criminalistic intelligence work as an effective response to criminal activity. In contrast to the problem-oriented approach in which the focus are the causes of crime problems, the focus of criminalistics intelligence work are the perpetrators. The criminalistics intelligence work mostly involves the monitoring of known and potential criminals, which is not limited to the investigation of specific crimes, but to gain insight into their criminal careers, lifestyle habits, it plans to be based on an analysis of these findings may perform pre-suppositions that could be useful for timely and effective preventative treatment.

From everything above we can conclude how should be proactive criminalistics investigation organized in regarding to knowledge management system. So we will

described it by giving the answers to question that we was nominate in this paper. The first question is which sort of knowledge is required for effective realization of this activity? Regarding to this question police need intelligence knowledge about criminal intentions of members of terrorist and organized criminal groups. Its required police (heuristic) activity and philosophy, which includes the process of collecting, analyzing and evaluating of the security interesting data for efficient crime prevention. It is more than previously gathered and processed by the information provided in the conspiratorial manner. Focus is on the conversion of data and informations into intelligence knowledge. Intelligence knowledge and thus enables decision-makers, to predict its further criminal behavior, and to choose the best solution for prevent it. This means that we need knowledge which giving answers on folows questions: Which criminal activity has been preparing? Which circumstance, relationship, process or activity produced the idea of the realization of a criminal activity that is being prepared? In what form and with what intensity will manifest? What are the possible *modus operandi* of offenders? Which values are threatened and what consequences can be caused? Who are the holders of the occurrence, or subjects of threat? In which area criminal activity will manifest?

Second question is how we can gathering that knowledge? That knowledge should be gathered in the phase of pre-materialization of criminal intent. Which mean in secrecy and by special investigative measures. Thus we come to the third question, what is it connection between obtaining of that knowledge and use of information technologies? The connection is Digital Forensics. With that we means use of knowledge from the field of Digital Forensic in application special investigative measure of interception, collection and recording of computer data, and in analysis of digital evidence which are provided by this special investigative measure. At the end there is question how knowledge management should be implemented in scope of proactive criminalistics investigation? And the answer is that that knowledge which is gather intelligence from criminogenic environment, and then analyze and interpret to determine which criminal activities are currently being implemented and who are the main holders (potential security risks and threats), must then be used to influence on the decision makers, to they promptly activate all available means for impact on all criminal activities that take place or preparing in a given criminogenic environment in order to prevent them. By this way criminalistics proactive investigation achieve both objective, prevention of committing the crime, and obtaining evidence for prosecution and punishment of carriers of preparatory actions or organized crime and terrorism.

In that sense special investigative measure of interception, collection and recording of computer data should have main role in proactive criminalistics investigation. Reason for this conclusion lays in fact that in comparison with the other special investigative measures prescribed by Criminal Procedural Code such as rendering simulated business services and conclusion of simulated legal affairs, enagement of an undercover agent, controlled delivery, examination of cooperating witnesses..., implementation of this measure is almost always possible. Namely, why applications of other special investigative measures is not always possible in every case of organized criminal and terrorism, application of measure of interception, collection and recording of computer data is almost always possible.

By the analysis of all of the above in respect of legislation concerning the application of special investigative measure of interception, collection and recording of computer data, we can conclude that the current legislation of the Republic of

Montenegro in a rather good way achieves a balance between the interests of the criminal proceedings or timely detection and prosecution of offenders of severe crimes such as organized crime and terrorism, on the one hand, and protection of personal rights and freedoms, on the other hand. Current legal provisions in the national legislation of Republic of Montenegro are introduced recommendation of Convention on Cybercrime from 2001st.

We can conclude that the legislation of the Republic of Montenegro makes a distinction between the interception of data that are generated in real time, while the signal passes through a computer network from source to destination communications, and preservation of stored computer data for the prevention and detection of criminal activity. Specifically, in terms of collecting data that are generated in real time, while the signal passes through a computer network from source to destination of communications, legislator is by provisions of the Criminal Procedural Code relating to the special investigative measure interception, collection and recording of computer data and the Law on Electronic Communications and Law on the national Security Agency predicted the possibility of real-time interception of computer data communications traffic and content data communications. Also, the provisions of the mentioned laws provides the obligation of preservation of stored computer data that could be crucial to the success of criminal investigations. The point of these activities is a sort of "freeze data" in order to prevent the loss or modification of existing data that could be of value prevention and detection of criminal activities, and that by order of the competent authorities carry out telecommunications service providers. We can also see that this action was limited duration (not less than six months but not longer than two years), and that this action is intended to preserve certain data and maintain their integrity, and that it can only refer the traffic data but not the content of communications.

At the end from all this we can conclude that is required strategic and planned approach in the application of knowledge of digital forensics in order to realize the knowledge driven proactive criminalistics investigations. In fact, to be able to apply special investigative measure interception, collection and recording of computer data, and to be able to get to the digital data by which analysis would get intelligence knowledge, first it is necessary to get to the grounds for suspicion that terrorist attack or an act of organized crime is preparing. This means that the focus criminalistics activities should be aimed at creating conditions for the implementation of these measure. Then, when it comes to digital data, it is critical to make their analysis in order to come to the knowledge by which we should predict their future behavior in terms of preparatory actions and materialization criminal intentions and also to prove it at the court. So if we implementation of mentioned special investigative measure will begin at the level of grounds for suspicion, then after its application we must reach beyond a reasonable doubt that certain people are preparing a terrorist attack or an act of organized crime, only then we have fulfilled the conditions for their arrest and bring to justice, by which is the goal of proactive criminalistics investigations fulfilled.

In this regard, knowledge management skills from the field of timely and adequately application of Digital Forensics within the proactive criminalistics investigations should be developed at personnel which are in charge for combating of the organized crime and terrorism, in a purpose to prevent it.

Future Research

According to the author it would be desirable in the future to perform research in the sense, in how many cases of detection and prosecution of organized crime and terrorism because of the preparatory activities for the execution of these crimes has been applied special investigative measure interception, collection and recording of computer data and how many of these cases ended with condemning verdict which was based on evidence obtained through this measure. Such research would certainly confirm the author's hypothesis that the timely implementation of these measures is crucial for the effective countering these forms of criminal manifestations.

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Forgery and Credit cards fraud – A Specific Criminal Offense against the Economy in the Criminal Legislation of Serbia

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Abstract

Forgery and credit card fraud is a specific criminal offense against the economy, whose protective object is stability of payment operations in the country. It is prescribed in Article 225 of the Criminal Code of Serbia. The aim of the paper is that, in addition to theoretical and legal definitions, closely analyzes the criminal offense Forgery and credit cards fraud, than through the relationship with the overall crime in Serbia, then with a group of criminal offenses against the economy, and finally, with the other individual crimes against the economy. In this paper was primarily applied normative method, complemented with analytical method, the basic quantitative data analysis and deductive methodological approach. The primary legislative source is consulted in the paper is the Criminal Code of Serbia. The research part of the paper included information on the number of reported adults and enacted convictions for the crime of Forgery and credit card fraud for all crimes on the territory of the Republic of Serbia, for the group of criminal offenses against the economy and for individual crimes against the economy, for the period 2012-2015. After analyzing the work of judicial authorities in Serbia in these areas, this paper provided discussion of the results and about conclusions that were drawn.

Keywords: *Forgery and credit card fraud, crime in economy, crimes against the economy, the Criminal Code.*

Introduction

Economic crime in Serbia is characterized by a complex crimes, especially in finance, accounting, banking, foreign trade, as well as in the privatization process.

Economic crime was, above all, the problem of societies based on socialist system, because of the particular nature of state ownership of the means of production. With the refraction of socialism in terms of establishing a new economic order, a society in transition have faced an increase in crime and new forms of socially harmful behaviors in the economy for which there were no adequate mechanisms to oppose it.¹

¹ Tanjević, N.: Economic crime in Serbia: Suggestions for improving the criminal legislation, *Revija za bezbednost*, Vol. IV, No. 4, 2010, pp. 348–361, p. 349.

In Europe today there is probably no country in which the tendency of crime trends as much interest to criminologists, such as is the case with Serbia.² In addition to ownership transformation, the introduction of multi-party political system and reforms in all public sectors, it is noticeable the global economic stagnation, financial instability of the monetary system, rising unemployment, a certain cultural decadence and erosion of morality.³

Unlike crime at all, which involves the totality of all crimes in a particular time and space, and therefore, is a mass phenomenon, economic crime is a narrower concept in relation to the concept of crime, generally defined. It is the special area of crime and has the aim of acquisition of material or other benefits, regardless of their shape and individual values. Therefore, economic crime consists of all forms of criminal activities that operate against the economic system of the economy of a country.⁴

All offenses in the sphere of economic crime in the Republic of Serbia are penalized by the Criminal Code.⁵ The greatest number of crimes that are an integral part of economic crime, belong to the group of criminal offenses against the economy.

Forgery and credit card fraud is a crime that falls under the category of specific crimes against the economy and is regulated by Article 225 of the Criminal Code. Protective object of this criminal act is the stability of the payment system in the country. Basis for this criminalization is in the Constitution of the Republic of Serbia⁶. Namely, Article 82, paragraphs 1 and 2 of the Constitution of the Republic of Serbia stipulates that economic planning in the Republic of Serbia shall be based on a market economy, open and free market, freedom of entrepreneurship, independence of business entities and equality of private and other forms of property. The Republic of Serbia is a unique economic area with a unique commodity trade, labor, capital and services.

The aim of this paper is that in addition to the theoretical definition of economic crime, its forms, the concept of payment cards, as well as the characteristic manifestational forms of their abuse, closer analyzes the crime of Forgery and credit card fraud, and that through the research part, which will be based primarily on quantitative analysis data, presents its relation with overall crime in Serbia, than with the quantitative data of the group of crimes against the economy, and finally, with the other individual crimes against the economy.

1. Theoretical and legal definitions

In theory there is no unanimity on the concept of economic crime. For example, Ignjatovic believes that the justification for the Identification with of criminality terms "white collar" and "crime corporation", as same is because both criminal activities are

² Ignjatović, Đ.: *Crime in Serbia: analysis of statistical data*. In: Đorđe Ignjatović (ed.), *Crime in Serbia and legal means of action*, Faculty of Law, University in Belgrade, Belgrade, 2007, p. 11.

³ Tanjević, N., *op. cit.*, p. 350.

⁴ Arežina, N., Stefanović, D., Mizdraković, V., Džamić, V. and Alčaković, S.: *Representation of crimes against the economy and economic offenses in the Republic of Serbia*. In: *Economic crime and modern business*, XV International Scientific Conference SINERGIIJA 2014, Bosnia and Herzegovina, Bijeljina, 2014, pp. 1-6, p. 1.

⁵ The Criminal Code, "Official Gazette of the Republic of Serbia" No. 85/2005, 88/2005 - corr., 107/2005 - corr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014.

⁶ Constitution of the Republic of Serbia, "Official Gazette of the Republic of Serbia" No. 98/2006.

carried out in the same areas and in the same way, and victims are either all citizens or organization that employs the offender, or second, competitive company. They are carried out by the same persons, where is the crime, "white collar" understood in the narrow sense, only more pronounced personal selfish motive. With these two terms we have largely exhausts the area that we call economic crime.⁷

Regardless of the different approaches in defining economic crime as a general concept, it is indisputable that there is a considerable number of forms of economic crime, all the more complex in structure and more dangerous in the field of application.

The forms of crime against the economy and economic systems include offenses that are directed against the economic activity and economic system. The forms of crime in this area are known for their ability to be adapted to the specific socio-economic and political conditions so that they experience certain transformation, but there are also new forms of crime. They include those criminal activities that occur in the field of industries and production, construction and urban planning, trade (buying and selling), foreign trade (imports and exports), as well as crimes that are related to the process of ownership transformation.⁸ Banovic classified economic crimes according to the forms that they appear in, classical and contemporary. Classical forms include forms of crime in the production, domestic trade, and in foreign trade. In modern forms of economic crime, that are the result of new tendencies in the social, political and economic relations, are included forms of crime in the area of fiscal liabilities, bank operations, ownership transformation (privatization), cybercrime, money laundering and others.⁹ The content of contemporary forms of economic crime is much more diverse and complex compared to its content in the past, especially during the dominant role of social ownership. Contemporary economic crime is characterized primarily by the conditions in which it is expressed, referring to the commercial and economic conditions the given country, as well as regional and international economic order. Therefore, the content of economic crime is highly variable, which is quite logical, because of its conditionality emerging socio-economic and political relations which inevitably creates the conditions for change and the emergence of new forms.¹⁰

What particularly characterizes contemporary forms of economic crime are its organized forms, or cohabitation of organized crime and modern forms of economic crime. In that context, it is necessary to start from the basic common characteristics of organized crime and economic crime, and that is the pursuit of acquiring illegal material benefits or maximizing profit and power. Also, it is important to specify the key difference between these two forms of crime, and that is a way of acquiring and increasing profits. In fact, economic crime is about the unlawful activities of individuals and institutions that have entered into a business that could gain profit by legitimate business, while organized crime includes illegal activities of entities whose aim from the

⁷ Ignjatović, Đ.: *Criminology*, Belgrade: Nomos, 1998, p. 212.

⁸ Šikman, M., Domuzin, R.: Phenomenological dimension of economic crime, *Bezbednost, policija, građani*, Vol. IX, No. 3-4/2013, pp. 1-20, p. 6-7.

⁹ Banović, B.: *Preservation of evidence in criminalistic process of criminal acts of economic crime*, Belgrade-Zemun: Police College, 2002.

¹⁰ Bošković, M.: *Economic Crime*, Banja Luka: Faculty of Security and Protection, 2009, p. 10.

beginning was the acquisition and maximizing profit by illegitimate means.¹¹ However, it can be concluded that "the transition to the market economy, the free movement of people and capital, the non-transparent privatizations, the dissolution of the authority of the state authority are just some of the factors which favored the amplification of the manifestations of organized crime".¹²

Typical criminal acts of economic crime, which belong to the group of criminal offenses against the economy are: counterfeiting money and stocks, forgery and abuse of credit cards, tax evasion, smuggling, money laundering, abuse in connection with public procurement, causing bankruptcy, causing false bankruptcy, abuse of authority in economy, etc.

Forgery and abuse of credit cards is a specific criminal offense against the economy, whose protective object is stability of payment operations in the country.

Assets, the economy, the financial system, official duty, legal system are just some of the legally protected terms that are affected by long-term effects of actions related to the crimes against the economy.¹³

Generally speaking, crimes against the economy represent those activities that indicate an attack or threat to the economy, as the basis of social relations and to further expanse of society.¹⁴

According to the definition of the Criminal Code (Article 225), forgery and abuse of credit cards makes the person who makes a false payment card or alters a genuine payment card with intent to use it as a real one or by the use of such false card as genuine. The basic form of this offense is punishable by imprisonment of six months to five years and a fine. If the offender obtained unlawful material benefit by using fake credit cards, he will be punished by imprisonment of one to eight years and a fine. If the offender illicitly gained the amount that exceeds one million five hundred thousand dinars, shall be punished by imprisonment of two to twelve years and a fine. Those fines shall be imposed on the offender who comits those illegal activities by using someone else's card or confidential data that uniquely regulate the card in the payment system. Person that obtains a fake bank card in order to use it as genuine, or whoever obtains information with the intention to use them for making false payment cards, shall be punished by a fine or imprisonment up to three years. According to the legal definition the false bank cards will be confiscated.

Payment card is a contemporary and specific non-cash payment, plastic cards issued by banks or other financial institutions that allows the user to pay for goods and services or withdraw cash.¹⁵ According to the application, payment cards are divided into credit, debit, cash and electronic cash cards. Bank card users are clients who have signed a contract with the banks, which together with the general rules include the

¹¹ Petrović, D.: *Organization of a criminal association*, Belgrade: Serbian Association for Criminal Law, 1996, pp. 38-39.

¹² Pašca, I.C.: Evolution of the Legislation on Preventing and Combating Organised Crime, *Journal of Eastern-European Criminal Law*, No. 1, 2014, pp. 128-134, p. 129.

¹³ Pavlović, Z., Bošković, A.: Place of the crime of money laundering within the criminal law of Serbia, *Journal of Eastern-European Criminal Law*, No. 2, 2015, pp. 81-91, p. 83.

¹⁴ Čejović, B., Kulić, M.: *Criminal Law*, Novi Sad: Faculty of Law for Commerce and Judiciary, University Business Academy, 2014, p. 463.

¹⁵ Kresoja, M.: Criminal protection of payment cards in banking business, *Pravo-teorija i praksa*, Vol 27, No. 1-2, 2010, p. 44.

manner and conditions under which the card can be used. Payment card can be used only by the person whose name is on the payment card. To misuse of payment cards in comes when the card is used by the person who is not original owner of the card or either authorized by the user to do so.

There are many ways how to misuse the payment cards, and the forms from day to day changes in the formation of new or improvement of existing forms, and all because of finding new ways to circumvent security measures.

From the definition of the offense it can be seen that there is a clear distinction between counterfeiting payment cards and misuse of payment cards so as specifically prescribed making false payment cards, obtaining false payment cards and data as well as modification, whereas paragraph 4 prescribed unauthorized use of payment cards.

The action of the basic form of the offense was determined by the alternative and consists in creating fake payment cards, alteration of real payment cards with the aim to use them as genuine, and the fraudulent use of payment cards. The action of this crime consists in undertaking any action that is determined by legal forms as being a criminal offense. By creating, means making false payment cards of the items that was not previously a payment card.

Under the remaking of the payment card is considered a change in the nature, appearance and content of the payment card, or restatement of real payment card so that it gets a different look than the one it has, all in order to be used as unmodified payment card.¹⁶

When we say use, we are talking about placing false or modified payment cards in circulation, *i.e.* their use. Therefore the action of this crime represents any use of false or altered payment card as they are real.¹⁷

Forgery and credit card fraud have two qualified forms, considering the height of illegal proceeds generated by criminal act. The Criminal Code stipulates same sanctions for qualified forms as in the case when an offender commits criminal act by unauthorized use of someone else's payment card or confidential data that uniquely regulate the card in the payment system.

And with the privileged forms acts is alternatively determined and consists in obtaining fraudulent payment card in order to be used as a real one, or to obtain information in order to use it to make fake debit cards.

With regard to the type of crime, if it comes to the creation and modification of the payment card, the offender may be any person who has the necessary professional and technical skills and equipment. In the case of using the payment cards, this requirement is not necessary.

In terms of culpability, this offense can only be done with intent, but that is in some form requires the need and intention of the offender (for example, mentioned the creation and modification of payment cards).

The specificity of the offense of Forgery and credit card fraud is, that in its basis is a theft, and that as in the case of misuse of the payment card that need to be illegally, most often through theft, obtained, and when it comes to counterfeiting payment cards, by using specific way of theft from computer systems of commercial banks, data about

¹⁶ Ivanović, R., A.: Forgery and abuse of credit cards, *Perjanik*, Vol. 9, No. 26, 2011, p. 7.

¹⁷ *Ibid.*, p. 8.

existing payment cards is stolen, which can then be used in order to create new payment cards based on the data illegally obtained.¹⁸

Despite the fact that there is a large number of new payment methods, the number of users who use payment cards is growing rapidly and is increasingly shopping activity on the Internet. At the same time, credit cards are the most vulnerable when using the Internet because of the possibility of being compromised and subsequent abuse. Throughout the world the perpetrators of criminal acts that deal with abuse of payment cards in the context of organized criminal groups commit crimes over the Internet, usually in the hope to obtain significant unlawful material benefit.¹⁹

2. Methodology, legal and data sources used

The goal of this this paper, in addition to theoretical and legal definitions, is to closely analyzes the offense Forgery and credit card fraud, and through the relationship with the overall crime in Serbia, followed by the quantitative data for entire group of crimes against the economy, and finally, with the other individual criminal offenses against the economy.

In this paper is primarily applied a normative method, complemented with analytical method for the theoretical analysis of the content and deductive methodological approach when drawing conclusions. The primary legislative source that was consulted in the paper is the Criminal Code of Serbia.

In the section devoted to the results of the work of judicial authorities regarding the initiated and conducted criminal proceedings for the crime of Forgery and credit card fraud, the basic quantitative data analysis shall be concluded.

3. Analysis of the results of the judicial authorities in Serbia in criminal proceedings against adult perpetrators of crimes against the economy and the total number for all crimes on the territory of the Republic of Serbia for the period 2012-2015

In this part of the paper that is going to analyze the results of the judicial authorities in Serbia in criminal proceedings against adult perpetrators of crimes against the economy and the total number for all crimes on the territory of the Republic of Serbia, we will analyze the relationship between the number of reported adults and issued convictions for the crime Forgery and abuse of credit cards, the number of reported adults and enacted convictions for the group of criminal offenses against the economy during the period 2012-2015., then for all crimes on the territory of the Republic of Serbia in this period, and will, in the end to do a comparative review of the number of reported adults and enacted convictions for other individual crimes against the economy.

¹⁸ Janković, S.: Forgery and credit card fraud as a manifestation of the computer crime, *Bezbednost*, Vol. 53, No. 1, 2011, p. 181.

¹⁹ Urošević, V., Uljanov, S.: Impact of carder's forum on the expansion and globalization of misuse of credit cards on the Internet, *NBP – žurnal za kriminalistiku i pravo*, No. 2, pp. 13-24, 2010, p. 15.

Table 1. Number of reported adults for crimes against the economy and the total for all crimes on the territory of the Republic of Serbia in the period 2012-2015.

Criminal offenses	2012. year	2013. year	2014. year	2015. year
TOTAL – ALL CRIMES ON THE TERRITORY OF THE REPUBLIC OF SERBIA	92.879	91.411	92.600	108.759
Crimes against the economy	3221	3397	3347	3526
INDIVIDUAL CRIMES:				
Counterfeit money	167	128	119	178
Counterfeiting of Securities	9	7	9	2
Forgery and credit card fraud	193	264	503	397
Falsifying marks for value	28	19	102	21
Making, procuring or providing other means of forging	1	/	6	/
Issuing check and use of payment cards without coverage	487	296	169	172
Avoidance of Withholding Tax	1132	106	62	63
Tax Evasion	103	1051	712	715
Smuggling	141	106	98	155
Money laundering	21	3	9	14
Abuse of monopolistic position	4	2	7	3
Unauthorized use of another's business name and other special mark of goods or services	38	26	80	111
Dereliction of business operations	59	/	/	/
Abuse in connection with public procurement	/	11	17	32
Abuse of the position of the responsible person	/	542	684	697
Causing bankruptcy	14	16	19	13
Causing false bankruptcy	15	27	3	5
Damage to the creditor	47	61	52	50
Abuse of authority in economy	514	478	396	352
Deterioration of business reputation and credit standing	1	3	2	6
Disclosure of trade secrets	8	7	3	5
Disabling of control	9	9	6	10
Illegal manufacturing	18	20	35	87
Illegal trade	195	191	226	410
Deceiving buyers	8	12	25	15
Forging character, or government stamps for marking goods criteria and articles of precious metals	9	12	3	13

Source: Republican Bureau of Statistics: Press release - Justice Statistics, no. 199, vol. LXIII, 2013, p. 5; Republican Bureau of Statistics: Press release - Justice Statistics, no. 191, vol. LXIV, 2014, p. 5; Republican Bureau of Statistics: Press release - Justice Statistics, no. 192, vol. LXV, 2015, p. 5; Republican Bureau of Statistics: Press release - Justice Statistics, no. 189, vol. LXVI, 2016, p. 5.

Table 2. Number of convicted adults for crimes against the economy and for all crimes on the territory of the Republic of Serbia in the period 2012-2015.

Criminal offenses	2012. year	2013. year	2014. year	2015. year
TOTAL – ALL CRIMES ON THE TERRITORY OF THE REPUBLIC OF SERBIA	31.322	32.241	35.376	33.189
Crimes against the economy	932	1169	1543	1609
INDIVIDUAL CRIMES:				
Counterfeit money	89	82	70	68
Counterfeiting of Securities	9	/	2	3
Forgery and abuse of credit cards	74	111	88	101
Falsifying marks for value	4	3	2	5
Making, procuring or providing other means of forging	2	1	3	3
Issuing check and use of payment cards without coverage	127	143	133	82
Avoidance of Withholding Tax	24	22	44	30
Tax Evasion	246	290	400	449
Smuggling	78	112	72	95
Money laundering	1	3	2	2
Abuse of monopolistic position	1	/	5	/
Unauthorized use of another's business name and other special mark of goods or services	9	10	24	32
Dereliction of business operations	8	/	/	/
Abuse in connection with public procurement	/	/	2	1
Abuse of the position of the responsible person	/	94	337	317
Causing bankruptcy	1	4	5	2
Causing false bankruptcy	/	1	/	1
Damage to the creditor	25	19	22	23
Abuse of authority in economy	135	154	230	183
Deterioration of business reputation and credit standing	/	3	/	1
Disclosure of trade secrets	2	1	1	/
Disabling of control	/	/	/	2
Illegal manufacturing	13	4	5	25
Illegal trade	81	103	90	181
Deceiving buyers	3	7	4	3
Forging character, or government stamps for marking goods criteria and articles of precious metals	/	2	2	/

Source: Republican Bureau of Statistics: Press release - Justice Statistics, no. 199, vol. LXIII, 2013, p. 9; Republican Bureau of Statistics: Press release - Justice Statistics, no. 191, vol. LXIV, 2014, p. 9; Republican Bureau of Statistics: Press release - Justice Statistics, no. 192, vol. LXV, 2015, p. 9; Republican Bureau of Statistics: Press release - Justice Statistics, no. 189, vol. LXVI, 2016, p. 9-10.

4. Discussion of the results of the judicial authorities in Serbia in criminal proceedings against adult perpetrators of crimes against the economy and for all crimes on the territory of the Republic of Serbia

As seen from the analysis results of judicial authorities, had presented the number of reported adults and enacted convictions for all offenses from Chapter XXII of the Criminal Code in the period 2012-2015. The goal was to look at the representation of the offense Forgery and abuse of credit cards in relation to the number of reported adults and enacted convictions for the group of criminal offenses against the economy, compared to the total crime in the territory of the Republic of Serbia, but also make a comparative review of other individual criminal offences that belong to the group of criminal acts against the economy.

From Table 1 it can be seen that the individual crimes against the economy for which is filed the most criminal charges against adults (in relation to the number of criminal charges for the entire group of criminal offenses against the economy, and in relation to the number of criminal charges for all crimes in the Republic of Serbia) is as follows: Avoidance of Withholding Tax (2012.-1132 criminal charges), Issuing check and use of payment cards without coverage (2012.- 487; 2013.- 296 criminal charges), Abuse of authority in economy (2012.- 514; 2013.- 478; 2014.- 396; 2015.- 352 criminal charges), Tax Evasion (2013.- 1051, 2014.- 712; 2015.- 715 criminal charges), Abuse of the position of the responsible person (2013.- 542; 2014.- 684; 2015.- 697 criminal charges), Forgery and abuse of credit cards (2013.- 264; 2014.- 503; 2015.-397 criminal charges), Illegal trade (2014.- 226; 2015.- 410 criminal charges). Of all the individual crimes against the economy, criminal charges that most were filed in 2012 are for the crime Avoidance of Withholding Tax (1132), and in 2013, 2014 and 2015 for the crime Tax Evasion (2013.-1051; 2014.- 712 and 2015.- 715).

Forgery and abuse of credit cards, in relation to the total number of crimes in Serbia, is performed in the following proportions: 2012- 1:482; 2013.- 1:347; 2014.- 1:184; 2015.- 1:274, and we can see that during the four-year period of study there is no constant in the number of crimes, and the number of reported adults, in relation to the total crimes.

Forgery and abuse of credit cards, in relation to all offenses from the group of crimes against the economy, conducted in the following proportions: 2012- 1:17; 2013.- 1:13; 2014.- 1:7; 2015.- 1:9, and we can also see that even in this case there is no continuous progression of the number of reported adults, in comparison to the group of crimes against the economy, but the values obtained vary.

If we do a comparative review of each individual criminal act, it can be seen that Forgery and abuse of credit cards is one of the most represented offense from the group of criminal offenses against the economy.

From Table 2 can be seen that the individual acts against the economy for which enacted the most convictions against adults (in relation to the number of condemnatory judgment for the entire group of crimes against the economy, and in comparison to the number of the same, for all offenses in the Republic of Serbia) is as follows: Forgery and abuse of credit cards (2013.- 111, 2015.- 101 conviction) Issuing check and use of payment cards without coverage (2012.- 127, 2013.- 143, 2014.- 133 convictions), Tax Evasion (2012.- 246; 2013.- 290; 2014.- 400; 2015.- 449 convictions), Smuggling (2013.- 112 convictions), Abuse of the position of the responsible person (2014.- 337; 2015.- 317 convictions), Abuse of authority in economy (2012.- 135; 2013.- 154; 2014.- 230;

2015.-183 convictions), Illegal trade (2013.- 103; 2015.- 181 convictions). Of all the individual crimes against the economy, since 2012.-2015, most of the convictions were issued for the crime of Tax Evasion (2012.- 246, 2013.- 290, 2014.- 400, 2015.- 449).

The scale number of enacted convictions for Forgery and abuse of credit cards, in relation to the total number of crimes in Serbia, is: 2012- 1:423; 2013.- 1:291; 2014.- 1:402; 2015.- 1:329, and we can see that in the case of the number of condemnatory convictions for Forgery and abuse of credit cards in relation to the total number of convictions in Serbia, during the four-year period varies, *i.e.* there is no progressive (or regressive) continuity.

The scale number of enacted convictions for Forgery and abuse of credit cards, in relation to the group of crimes against the economy is: 2012- 1:13; 2013.- 1:11; 2014.- 1:18; 2015.- 1:16, and we can see that in this case, as previously, the results, according to their values, vary by years.

If we do a comparative review to the number of enacted convictions for other individual criminal acts, it is evident that Forgery and abuse of credit cards, according to this criterion, also belongs to the group of highly present crimes against economy.

Conclusion

At the end of the fifties and sixties of the XX century, following the development of financial transactions, give rise to a number of payment cards. Credit card use was spreading quickly, not only for business and tourist travel, but also for carrying out commercial activities, using them from the hotel to the agency rent-a-car and commercial houses. Today, anyone can pay with credit card almost everywhere.²⁰ In contrast to many benefits, the use of credit cards carries certain risks, which relate to various aspects of the abuse and counterfeiting them. Payment cards can be misused in various ways and forms change of the day-to-day bases because of the formation of new or improvement of existing ones.

From the analysis results of judicial authorities in Serbia in criminal proceedings against adult perpetrators, it is evident that there is no proportional increase nor proportional decline in the number of reported adult perpetrators, nor enacted convictions for Forgery and abuse of credit cards in relation to all crimes in Serbia and crimes against the economy, for the reference period from 2012 to 2015. Although, it can be concluded that the Forgery and abuse of credit cards is highly represented criminal offense, from a group of specific crimes against the economy, and we can not deny the fact that the possibilities for abuses in the use of credit cards far outweigh the submitted applications and enacted judgments. This points to the fact that in this area there is a „dark number“ in detecting offenses, which means that a significant number of crimes in this sphere in general are not even detected, or they are covered by some other crime.

“Dark number“ of a misconduct means first of all that there is no reliable information on the volume, structure, dynamics and other important indicators of the importance it represents for the community. Every form of crime is inherent in this

²⁰ Pavlović, Z.: *Protection of payment cards by Criminal Law*. In: Proceedings „New solutions in the criminal legislation and experiences in their implementation“, Association for Criminal Law and Criminology, Zlatibor, 2006, pp. 164-171, p. 164.

characteristic. Practice has shown that it is very difficult to collect reliable and accurate data on the prevalence of the offense Forgery and abuse of credit cards, because of the multitude of ways in which payment cards can be falsified and misused.

The increase in the volume of cash transactions paid by credit cards in recent years in Serbia is following world trends. The use of debit and credit cards has been constantly growing for years. That plastic money is slowly replaces paper, depicted by the fact that during 2008 in Serbia there were registered about 5.8 million credit cards and through them in the first nine months of this year a record turnover of around 250 billion had been achieved.²¹

There are many advantages of using payment cards as cashless payment method. It is clear that the credit card business will constantly develop in the future. Strengthening the system of computer data processing in Serbia, Europe and the world gives impetus for the development of card business. It is evident that the forms of abuse in this segment and in qualitative and in quantitative terms become more complicated and dangerous. Therefore, the treatment of credit cards deserves special attention.

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Crime Control or Due Process? Which are the Tendencies in Romanian Criminal Justice?

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Abstract

A few months ago, Romania celebrated three years since the enforcement of a new criminal legislation. In February 2014, after a long period of maturation, there came into force a new criminal code and a new criminal procedure code. Together, these legal instruments have aimed to transform the context of repression in Romania and to certify that the most modern solutions of criminal legislation are applied. This study focuses on a 3-year-perspective of the criminal procedure code (hereinafter the CPC) and tries to identify what are the tendencies in Romanian criminal justice. Since its enforcement, the CPC has been amended eight times by Government's Acts and five times by Parliament's Acts and refined by more than 40 decisions of the Constitutional Court. It is the time (medium term) and the place (Journal of Eastern European Criminal Law) to expose an insight of one of the most important legislative changes in modern Romania.

Keywords: *crime control – due process – tendencies in criminal justice – Romania – new criminal legislation.*

The title of the study was inspired by the classical distinction made by Stanford University professor Herbert Packer in his famous book of 1968¹. Crime control or due process model is the inquisitorial / adversarial approach revisited. I will briefly present the basic features of this model in order to accommodate the main lines aimed to work with.

Crime Control Model is easily outlined² by the following:

- The repression of crime should be the most important function of criminal justice because order is a necessary condition for a free society.
- Criminal justice should concentrate on vindicating victims' rights rather than on protecting defendants' rights.
- Police / Prosecutor powers should be expanded to make it easier to investigate, to arrest, to search, seize, and convict.
- Legal technicalities that restrain the criminal justice authorities should be eliminated.

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¹ H.L. Packer (1968). *The Limits of the Criminal Sanction*. Stanford, California: Stanford University Press, pp. 149-246.

² <https://www.cliffsnotes.com/study-guides/criminal-justice/the-criminal-justice-system/which-model-crime-control-or-due-process> (accessed on 01.07.2017).

- The criminal justice process should operate like an assembly-line conveyor belt, moving cases swiftly along toward their disposition.
- If the police propose for an arrest and a prosecutor files criminal charges, the accused should be presumed guilty because the fact-finding of police and prosecutors is highly reliable.

Due Process is based on specific requirements:

- The most important function of criminal justice should be to provide fundamental fairness under the law.
- Criminal justice should concentrate on defendants' rights, not victims' rights, because the Constitution expressly provides for the protection of defendants' rights.
- Police / Prosecutor powers should be limited to prevent official oppression of the individual.
- Constitutional rights aren't mere technicalities; criminal justice authorities should be held accountable to rules, procedures, and guidelines to ensure fairness and consistency in the justice process.
- The criminal justice process should look like an obstacle course, consisting of a series of impediments that take the form of procedural safeguards and serve as much to protect the factually innocent as to convict the factually guilty.
- The judicial authority shouldn't hold a person guilty solely on the basis of the facts; a person should be found guilty only if the judicial authority follows legal procedures in its fact-finding.

The work hypothesis of this study is that an ever-increasing tendency has manifested itself in the last three years in the criminal legislation of Romania. The following examples aim to prove that this tendency is a consistent one.

Victim's rights

By means of Extraordinary Government's Act no. 18 of May 2016 (hereinafter EGA) art. 111 (9-10) CPC has been modified as such: *"Judicial authorities shall proceed immediately to the hearing of the victim who has filed a complaint about the commission of an offence [...].The statement of the victim made under the terms provided by art. 111 (9) shall be considered as evidence even if it has been made before initiation of the investigation"*. The amendment could be justified by the interest to increase the protection of the victim, facilitating the immediate hearing of the victim who has filed a complaint. This concern is aimed to give efficiency to what the victim has to say about the loss or suffering caused by the crime he/she has been subject to. The problem arises upon hearing, due to the fact that the statement of the victim shall be considered as evidence even if supplied out of trial. As a matter of principle, the Romanian CPC is definitely against the possibility of using evidence if it was not legally supplied, which includes as a basic rule the duty to obtain evidence only after the investigation was officially started. Making an exception to this principle would be both illegal and futile. It would be illegal because evidence could be valid only if it results out of a procedure where the rights of a defendant are respected. Obviously, this is not the case when the defendant does not have the possibility to react. It would be futile because, as a matter of principle, the statement of the victim does not have the effect of a *proba probatissima*, i.e.

it must be taken into consideration only in the light of all evidence and does not produce a particular outcome *per se*. Abandoning a principle for an insignificant advantage surely does not represent a prudent policy. Still, we have here the embodiment of a special way of thinking, i.e. vindicating victims' rights comes first in relation with the protecting of defendants' rights.

Extended powers

In the first place, the CPC provided that “*when the data and evidence in the case constitute probable cause to believe that a certain person committed the offense that entailed initiation of the criminal investigation, the prosecutor shall order that the criminal investigation continue in relation to that person, and the latter shall acquire the status of suspect*” (art. 305 (3) CPC). The law included a special safeguard for the suspect, stating that only the prosecutor had the power to decide when this particular standing was fulfilled. The same EGA, cited above, has modified this rule, by providing that the judiciary police shall order that the criminal investigation continue in relation to that person, and the latter shall acquire the status of suspect. Shifting the power from the prosecutor (a magistrate by law) to the judiciary police has made the investigation easier and faster. The virtual suspect has lost a superior standard and exposes himself to important risks, such as that he could be subject to a custody order for 24 hours or his asset could be subject to seizure.

These extended powers of the investigation authorities are not accidental. This is illustrative of a peculiar and insidious tendency of crime control model. Other examples successfully sustain this allegation.

For instance, art. 150 (1) CPC deals with the “authorized participation to specific activities under the terms of art. 138 (11) ordered by the prosecutor who supervises or conducts the criminal investigation, for a time period of maximum 60 days [...]”. Art. 138 (11) CPC explains that “authorized participation to specific activities means the commission of acts similar to the *actus reus* of a corruption offense, the conclusion of transactions, operations or any other types of dealings related to an asset or to a person who is presumed missing, a victim of trafficking in human beings or of kidnapping, the performance of operations involving drugs, as well as the providing of services, based on an authorization from the judicial authorities of competent jurisdiction for the purpose of obtaining evidence”. No doubt that the performance of an authorized activity does constitute a civil or a criminal offense. Nonetheless, the law expressly declines any criminal liability in such case (art. 150 (4) CPC³), legally justifying the commission of an offence for the purpose of supplying evidence. Is this necessary? Have the investigators lost any other possibility of supplying evidence since these artificial instruments are legalized? The answer could easily be detected from the perspective of the crime control model.

³ Special provisions exist for the undercover agents. See art. 148 (6) CPC “if the activity of an undercover investigator requires authorized participation to specific activities, the prosecutor shall act in accordance with the provisions of art. 150” or art. 148 (7) CPC “judicial authorities may use or make available to undercover investigators any documents or items necessary for the performance of authorized activities. The activity of a person making available or using such documents or items does not constitute an offense”.

Another example could be found in the amendment of art. 153 (1) CPC by the above cited EGA concerning the legal possibility of having access to data on the financial status of a person. Initially, the prosecutor, based on a *prior approval* of the Liberty and Custody Judge (hereinafter the LCJ), may request a credit institution, or any other institution that retains data on the financial status of a person, to communicate data referring to the existence and content of accounts and of other financial statements of a person if there is probable cause as to the commission of an offense, and there are grounds to believe that the requested data represent evidence. This moment, the prosecutor enjoys extended access to such data since the condition of the prior approval of the LCJ is no longer required.

Furthermore, the EGA has substantially granted access of the prosecutor to prerogatives which, theoretically, are not in his competence. By law, electronic surveillance is in full control of LCJ. A special exception has been provided in art. 141 (1) CPC based on which the prosecutor may authorize, for a time period of maximum 48 hours, electronic surveillance measures when there is an emergency situation, and the obtaining of a electronic surveillance warrant under the terms of art. 140 (by the Liberty and Custody Judge) would lead to a substantial delay of investigations, to the loss, alteration or damaging of evidence, or would jeopardize the safety of the victim, of witnesses or of their family members. This moment, the exception was applied also to other situations previously secured from the intervention of the prosecutor. It is the case of the acquiring of data on the financial transactions performed or to be performed by the perpetrator, suspect, defendant or by any other person in relation with these (art. 146/1 (5) CPC) or the case of measures in respect of letters, postal dispatches or items sent or received by a perpetrator, suspect, defendant or by any person suspected to receive or send, by any means, such goods from/to a perpetrator, suspect or defendant, or goods intended to it (art. 147 (4) CPC). All these situations could be handled by the prosecutor, by reason of emergency, for a period of 48 hours without the control of LCJ. The ratification of the prosecutor's decisions belongs to the LCJ, within a 24 hour- term, but the interference into constitutional rights and freedoms is undoubtedly a reality. Is this the face of a crime control model? It certainly is.

Having this in mind, it is surely no surprise the rule of art. 190 (5) CPC "in cases where a person subject to examination does not give his/her consent in writing or, in emergency cases, when the obtaining of an authorization from the judge (Liberty and Custody Judge) would lead to significant delay in the investigation, to the loss, alteration or damaging of the evidence, the criminal investigation authority may order a physical examination". The LCJ control is totally ridiculed since any judiciary police member has the power to order the physical examination of a person, both external and internal.

Eliminating restraints

As it has been stated above, the crime control model implies that legal technicalities that restrain the criminal justice authorities to be eliminated. This is the case of art. 306 (6) CPC, according to which "banking and professional secrecy, except for the defence counsel's professional secrecy, cannot serve as a basis to dismiss a request by the prosecutor, once the criminal investigation has started". It has been for the first time that a specific provision of the criminal legislation in Romania expressly eliminates the

legal impediments of professional secrecy which barred the investigation, even if the doctrine has stated that this is tendency in the criminal area⁴.

The same logic appears to sustain the amendment of art. 59 CPC related to the extension of territorial jurisdiction: “when particular criminal investigation acts have to be performed outside the territorial jurisdiction in which the investigation is conducted, the prosecutor or, as applicable, the criminal investigation body may perform them or they may order their performance through a letter rogatory or a delegation”. The previous provision, before the enactment of EGA, stated that only the prosecutor had the power to extend the territorial jurisdiction. From now on this prerogative is in the competence of the judiciary police, too. Now it is easier to conduct an investigation which implies more than a jurisdiction. Eliminating territorial barriers despite the legal limits of horizontal jurisdiction means an increasing power of controlling crimes.

Assembly-line conveyor belt

A significant amendment has taken place in the field of dispute resolution of a criminal trial. According to art. 480 (1) CPC, a plea of guilty can only be concluded with regard to offenses for which the law requires a penalty of a fine or of no more than 7 years of imprisonment. The EGA extends the penalty latitude from 7 years to 15 years, which means the existence of a larger possibility to close a criminal case without going to trial. The plea of guilty begins to run as a high-speed instrument for dealing with particular kinds of antisocial behaviours, taking into consideration the fact the 15 years of imprisonment cover the majority of medium and petty crimes and also an important part of serious offences. As the doctrine⁵ has stated, the guilty plea seems to function as an automatic assembly-line conveyor belt similar to other countries (USA as a notable example).

Highly reliable evidence

The CPC is able to offer a surprising statement in art. 1 (2) stipulating that “the criminal procedure rules are intended to provide effective exercise of the judicial bodies’ responsibilities [...]”. What does “effective exercise” mean? No legal provision explains that. Could be effectiveness a virtual principle of the new criminal order in Romania? And what is the intension of this principle? We could put effectiveness in relation with evidence. And again the crime control model comes into place reminding us that the fact-finding of police and prosecutors is reputed as highly reliable. The investigation stage could be pointed to as the evidence-lab and, for this reason, could change the traditional view. It becomes possible to ascertain the investigation conducted by the judiciary police and/or prosecutor as the most important stage in a criminal trial. This view will certainly reduce the duration of the trial, will maximize the efficiency of

⁴ L. Bercea, F. Ciopec (2011). *Secrets Made Public? Limits of the Bank’s Duty of Confidentiality in Criminal Procedures* in C. Fenyvesi, C. Herke (eds.), *Pleadings. Celebration volume of Professor Tremmel Flórián’s 70th Birthday*. Pécs: Studia Iuridica Auctoritate Universitatis Pécs Publicata 148., pp. 15-16.

⁵ M. Roibu (2004). *On a Different Kind of Compromise in the New Code of Criminal Procedure*. Bucharest: C.H. Beck, *Annals of University of Bucharest*, supplement, p. 338.

supplying evidence and facilitate the repressive reaction. The effectiveness of the trial shall increase, shan't it?

Sustained by this doctrine, the meaning of the art. 374 (7) CPC becomes clearer. The law states that "evidence supplied throughout the criminal investigation stage and not challenged by the parties shall not be resupplied during the court investigation. It shall feature in the parties' adversarial debate and taken into account by the court upon deliberation". This is a special case of a *nolo contendere* procedure, based on the reliability of evidence supplied during the investigation phase. The criminal trial seems to leave aside the traditional role of the investigating judge and to promote an arbitration of the duelling parties. The judge no longer investigates, but waits for the parties to contest and challenge the evidence supplied in the preliminary stage. If this is the case, the judge is entitled to proceed to his own investigation. If not, the evidence already supplied by police/prosecutor supersedes the activism of the judge. The ground for such a displacement is the trust associated with the preliminary investigation of the police/prosecutor. Imperceptibly, we feel ready to accept that this kind of evidence is highly-reliable and stands for justice⁶.

The police and/or prosecutor are interested to create the appearance that the evidence obtained in the preliminary stage could be treated as reliable. That is the explanation of the fact that these authorities have built strong investigative teams in order to produce valid and genuine evidence. As part of the team, they have added specialists in various areas able to "flavour" the reliability of the fact-finding. According to art. 172 (10) CPC, such fact finding is conducted by a specialist working with the judicial authorities or by an external one. Following completion of a fact finding report, when judicial authorities deem that an expert opinion is necessary or when the conclusions of the fact finding report are challenged, an expert report shall be ordered. The law expressly provided for an opinion of an expert in case of doubt. The difference between a specialist and an expert resides in the degree of impartiality. The specialist, often part of an investigative team, does not enjoy full guarantees of impartiality. That is reason why the interested parties have the legal possibility to challenge the report of the specialist and obtain the appointment of an impartial expert. Since the enactment of the EGA, that legal right has been transformed into a simple vocation, leaving the protection of the parties at the discretion of the investigative authority. From now on, there are fewer chances to challenge the fact finding report issued by an internal specialist and to apply for an expertise. Surely, the preliminary stage approaches a high level of effectiveness.

This brief insight into the CPC tendencies must be considered as working paper. Firstly, because a solid analysis implies observations during a longer period of time, in order to eliminate the risk of taking an accidental note as a tendency. Secondly, the hypothesis of crime control model prevalence is based on the last legislative amendments, especially on the enactment of EGA of May 2016. It is possible that new amendments of the CPC (announced by the Ministry of Justice) to counter-balance the view in this matter. That's why, on this subject, the study promises to continue.

⁶ K. Mathis (2009). *Efficiency instead of Justice? Searching for the Philosophical Foundations of the Economic Analysis of Law*. Dordrecht: Springer, pag. 187.

The True Face of the Constitutional Court: Snow-White or Evil Queen?

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Abstract

A recent political and juridical crisis in Romanian society has raised up a series of very important questions for both the scholars and the practitioners. The answers to these questions could affect the Rule of Law and throw the Romanian State back in time with at least 20 years. These questions are: could a Criminal or Criminal Procedure Code be amended by political interests? Could the Romanian Constitutional Court influence both the political and legislative decisions? Could a criminal investigation be started in case of legislative decisions if these decisions are proved to be taken for hidden goals, in order to ensure the "whiten" corrupt politicians?

Keywords: *emergency ordinance, criminal code, criminal procedure code, political implication, criminal investigation.*

The title of the study might seem unusual and quite intriguing for anyone, but this is the point of it. By this study we aim to point out some very sensitive issues that the Romanian State and especially the Romanian society has faced with.

The beginning of the story lies in the social context of winning, by the Socialist Democrat Party of the parliamentary elections of December 2016, with 45% of the votes expressed by the Romanian citizens. The main reason for this outstanding result that colored the map of Romania in red, was the promise to adopt a set of socialist measures starting with the increase of salaries and pensions and ending with a decrease of taxation. The new "red" Romanian socialist Government, adopted after only two months, the well known at an European level by now Emergency Ordinance no. 13/2017¹ (GEO 13). By the provisions of this ordinance, both Romanian Criminal Code and Criminal Procedure Code were amended.

In order to understand the background and the implications of these amendments, we are going to briefly enumerate them:

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¹ Published in Official Monitor part I, no. 92/1st of February 2017, now repealed by Government Emergency Ordinance no. 14/5th of February 2017.

a) Amendments of the Romanian Criminal Code

GEO 13 has brought some important amendments of the RCC, which would have entered into force in 10 days after the publication thereof in the Official Monitor. Here are some of the most intriguing:

1. *The offense of aiding and abetting of the offender.* According with the criminalizing norm provided by art. 269 RCC, if someone helps a person to evade trial or execution of a punishment, commits the offense of aiding and abetting of the offender. Nevertheless, the rule provides and impunity cause for those who help their family members (parents or grandparents or great grandparents, children or grandchildren or great-grandchildren, brothers or their grandchildren, husbands or paramours).

- GEO has added a new category of people who will not be punished for this offense: in-laws up to second degree (husband's parents and grandparents, husband's children and grandchildren, husband's brothers). This meant that, according to the decriminalizing law principle, the trials opened so far for these latter categories of persons should have been closed;

- GEO also provided a very interesting rule: shall not be punished those who favor the perpetrators *by issuing, approving or adopting legislation.*

2. *Abuse of office.* The criminalizing norm provided by art. 297 RCC, before CCR decision no. 405/2016 was the following: "The action of the public servant who, while exercising their professional responsibilities, fails to implement an act or implements it faultily, thus causing damage or violating the legitimate rights or interests of a natural or a legal entity, shall be punishable by no less than 2 and no more than 7 years of imprisonment and the ban from exercising the right to hold a public office." By decision no. 405/2016, CCR has declared the provisions unconstitutional pointing that this act constitutes an offense, only if, by failing to implement an act or implementing it faultily, the public servant breaches *a law.*

The regulation provided by art. 297 was changed almost entirely, exceeding the requirements of CCR decision (which drew attention to a single issue). According to the amendments, a conduct should be criminalized only if it had been violated the provisions of a law, GO or GEO and it led to a material damage exceeding 200,000 lei or harmed the rights or interests of a person. That means that on the February 11th 2017 acts of abuse that caused a damage not exceeding 200,000 lei would not be criminalized anymore. Consequences of this amendment: criminal cases pending will be closed, and the damage can be recovered only by a civil lawsuit (plaintiff must pay stamp duty etc, which was not the case during the criminal trial). Convicts for the offense should have to be set free immediately. There was no legal, logic or social ground for setting a limit of 200,000 lei, meaning that that amount has been chosen arbitrarily;

- the penalty limits of 2-7 years in prison were set to six months – to 3 years in jail or fine. So, the new law sets up lesser penalties. The effect is to decrease the terms of limitation for criminal liability, which affects also cases in progress, according to the limitation of the criminal liability principle.

-if convicted, the judge had to apply an ancillary punishment of banning the right to exercise a public function for 1-5 years. According to GEO 13, the ancillary penalty is no longer mandatory.

3. *Negligent breach of duty of a public servant (art. 298 RCC).* Until GEO 13, the culpable breach by a public official of a professional duty by failing to carrying it out or by faultily carrying it out, if it resulted in damage or violation of the legitimate rights or

interests of a natural or legal entity, should have been punished by no less than 3 months and no more than 3 years of imprisonment, or by a fine. After GEO 13, this offense does no longer exist! This means that pending criminal cases will be closed, and the damage can be recovered only by those interested in a civil lawsuit.

4. *Conflict of interests.* According to art. 301 RCC, "The conduct of the public servant who, while carrying out their professional duties, committed an act or participated in making a decision that resulted, directly or indirectly, in a material gain for themselves, their spouses, for a relative or an affiliate, including those twice removed, or for another person with whom they were in business or labour relations for the past 5 years or from whom they had or have benefits of any nature, shall be punishable by no less than 1 and no more than 5 years of imprisonment and the ban from exercising the right to hold a public office.

(2) Par. (1) shall not apply to issuing, endorsing or adopting regulatory documents."

- CCR warned by the decision no 603/2015 that the legal text uses the phrase "business relations" is not clarified, but instead clarifying this expression, GEO13 had completely removed any reference to it. Furthermore, references to "labour relationships, gifts and donations" have been removed also! Therefore, if someone makes a decision as a public servant by which favours his/her former chief, former business partner or someone who paid for his/her summer holidays, he/she will no longer commit any crime!

b) Amendments of the Romanian Criminal Procedure Code

GEO 13 has brought some interesting amendments of the RCPC, which had entered into force right after the publication thereof in the Official Monitor, that is immediately after adopting GEO 13.

1. *Aquittal in case of statute of limitation:* Before GEO 13, if limitation for criminal liability occurred, the defendant should have been acquitted and the civil action remained unsettled. For now, even in this case, the judge will have to settle the question of injury (amendment consistent with CCR 586/2016), which is in favor of the victim.

2. *Judicial control extension:* To rally to CCR decision 614/2016, GEO 13 provides that in case of extension of judicial control the defendant *must be heard, in the presence of a retained or court appointed counsel.*

3. *Report.* Before GEO 13, the report could be submitted at any time, with respect of the statute of limitation for criminal liability, sometimes years from the date of the criminal act. GEO 13 provides that from 1st of February 2017, report must be filed within 6 months from the date of the offense. Two consequences are highlighted:

- this provision does not cover cases initiated until January 31st, 2017 because rules of criminal procedure do not produce retroactive effects as happens in the field of criminal law;

- GEO 13 does not provide any legal consequence in case of breaching this 6 months term. Basically, even if an report is filed to the police or prosecutor after six months, the prosecuting authority may act *ex officio*.

The main problem with the GEO 13 was that, according to art. 115 par. 4 of Romanian Constitution, the Government can only adopt emergency ordinances *in exceptional cases*, when the regulation of which can not be postponed, and the motivation of emergency is mandatory required. GEO 13 failed to motivate the

emergency while the entry into force of the amendments to the Criminal Code was postponed by its provisions for 10 days. So much for emergency in this case!

The social consequences of adopting this act were dramatic. There were unprecedented street movements involving up to 500.000 people, dissatisfied citizens who accused the Romanian Socialist Government that intended to regulate corruption of the high public officers and to help important members of the governing Party – Democrat Socialist Party – to escape criminal convictions. The most common names were of the president of the Socialist democrat Party, Liviu Dragnea, head of the Romanian Deputy Chamber of the Romanian Parliament and Călin Popescu Tăriceanu – head of the Senate. The population demanded the repealing of GEO 13 and the resignation of members of the “red” government. The most chanted slogans were. “During the night, like thieves” and “I resist”.

And the street won! Or, they thought they won! The GEO 13 was repealed by GEO 14/ 5th of February 2017. But a new event occurred.

A criminal investigation was started in relation with the adoption of GEO 13 by the National Anticorruption Directorate (NAD). The prosecutors' investigations into the adoption of the GEO 13 were in compliance with the legal provisions and the case law of the High Court of Cassation and Justice (ICCJ), the NAD said.

“The criminal case envisaged the investigation of deeds covered by criminal law and which are described in the denunciation to the criminal prosecution bodies. Prosecutors proceeded to investigating in accordance with the legal provisions and the constant case law of the High Court of Cassation and Justice which provide that the prosecutor is required to carry out an effective investigation in order to find out the truth, including in the situations where the notification is about the adoption of acts published in the Official Journal”. To support its arguments NAD invokes a criminal case sentence handed down by ICCJ on June 4, 2014 which shows that “if the claims of the petitioner rely on known facts, any flaw of the investigation which reduces its ability to determine the circumstances of the case or the persons responsible risks leading to the conclusion that it does not meet the requirements of a fair trial”. In the same sentence, the Supreme Court mentions that “the requirement for promptness and reasonable diligence is implicit” and in situations where the complaint refers to aspects arising from an act published in the Official Journal “higher rigor is expected from the authorities performing the investigation.”²

Initially, the case was registered to NAD, where prosecutors (...) ordered on 24th of February, 2017 the closure of the case concerning the offenses provided by art. 13 of Law no. 78/2000 on corruption and declined the case to the Prosecutors Office attached to High Court of Cassation and Justice for competent settlement.

NAD has shown, in a public statement that, during the investigation for GEO 13, resulted evidence and indications that acts were destroyed or stolen, and other documents were 'forged'. According to NAD, the first notice sent by fax from the Ministry for Relations with Parliament (MRP) to the Ministry of Justice on 31st of January had been destroyed, and the original of this document was handed over to representatives of Ministry of Justice and then stolen.

Also mentions of false data in the content of the Register of the Ministry of Justice Cabinet were found.

² <https://www.agerpres.ro/english/2017/03/13/dna-says-investigation-into-oug-13-complies-with-law-supreme-court-case-law-14-41-08>.

Prosecutors also say that during the investigation found clues that several offenses were committed, such as: aiding and abetting of the offender, presentation maliciously inaccurate data to the Parliament or the Romanian President (provided and sanctioned by Law no. 115/1999), stealing or destroying documents (art. 259 para 1 and 2 RCC), stealing or destroying evidence or documents (art. 275 RCC) and forgery.

Since these offenses do not fall within the competence of the National Anticorruption Directorate, nor meet the specific requirements of the Law no. 78/2000 republished or GEO no. 43/2002, the cause is declined to the Prosecutor's Office attached to High Court of Cassation and Justice.³

But the story does not stop here. The Romanian Constitutional Court was called to state if there is any conflict between the Executive authority – the Government of Romania, on the one hand, and the Legislative authority – the Parliament of Romania, on the other hand, as well as between the Executive authority – the Government of Romania, on the one hand, and the Judicial authority – the Superior Council of Magistracy, on the other hand.

So, on 8th of February 2017, CCR adopted the **Decision no. 63/2017**⁴ on applications submitted by the President of the Superior Council of Magistracy and the President of Romania stating that Art. 1 (4) of the Constitution has established the principle of separation and balance of powers in the framework of a constitutional democracy, which requires, on the one hand, that none of these three powers may interfere in the activities of another power and, on the other hand, requires checks as provided by law in respect of the acts issued by each of them.

The Constitution has also established, in Article 108 (3) and in Article 115 (1) to (3), a task enabling the Government to issue ordinances, which is a legislative competence derived from a law adopted by Parliament, whereby the sole legislative authority of Romania has delegated, for a limited time, the power of legislation in areas strictly delineated by the Constitution and the enabling law. The exercise of such powers is likewise included in the sphere of the executive, because the Government, by issuing ordinances, accomplishes the enabling law, and the specific aspects involved by such a law in respect of the assessment of limitations on the powers thus granted. Despite the fact that the Government, as the effect of empowerment, issues an act which, by content, is of legislative character, on account of a legislative delegation, the ordinance remains an administrative act by the executive authority.

Furthermore, as regards the law-making competence, the Court holds that the relationship between the legislative and the executive power is completed by the competence conferred to the Government to adopt emergency ordinances under the conditions provided by Article 115 (4) to (6) of the Constitution. An emergency ordinance, as a normative act that allows the Government to deal, under control by Parliament, with an extraordinary situation is justified by the necessity and urgency to lay down regulations in a situation which, because of its circumstances, calls for an immediate solution in order to avoid severe harm to the public interest.

The Court finds that ***the Government's decision to adopt Emergency Ordinance no. 13/2017*** cannot be regarded as an action of assuming powers, tasks or competencies which the Constitution has vested in Parliament. ***It is obvious that the Government has discharged its own competence, expressly provided for in Article 115 of the Basic Law.***

³ <http://www.pna.ro/comunicat.xhtml?id=8044>.

⁴ Published in the Official Gazette of Romania, Part I, no. 145 of 27 February 2017

Court holds that **the assessment of the appropriateness of the adoption of an emergency ordinance in terms of the decision to enact such legislation constitutes an exclusive task for the delegated legislator, which may be censored only under the conditions provided by the Constitution, i.e. only through parliamentary control exercised according to Article 115 (5) of the Constitution.** So, it is only for Parliament to decide the fate of the Government's enactment by adopting a law for its approval or rejection, as the case may be. During parliamentary debate, the highest legislative body has full control over the emergency ordinance concerned, in terms of both legality and *appropriateness*, whereas according to provisions of Article 115 (8) of the Constitution, the law approving or rejecting an ordinance shall regulate, if such is the case, the necessary steps concerning the legal effects caused while the ordinance was applicable.

In conclusion, ***the Court found there has been no legal conflict of a constitutional nature between the Executive authority - the Romanian Government, on the one hand, and the Legislative authority - the Romanian Parliament, on the other hand.***

On examination of the requests as to a legal conflict of a constitutional nature between the Executive authority - the Romanian Government, on the one hand, and the Judicial authority - the Supreme Council of Magistracy, on the other hand, concerning the competence of the Superior Council of Magistracy in matters relating to legislative procedures, The Constitutional Court holds that ***the Government has no constitutional or legal obligation to seek the opinion of the Superior Council of Magistracy on other questions than those which concern the activity of the judicial authority, and that the Superior Council of Magistracy has no legal empowerment to issue such an opinion.***

In view of all these considerations, the Court found that the adoption of Government Emergency Ordinance no. 13/2017 **has not generated a legal conflict of a constitutional nature between the Executive authority - the Romanian Government, on the one hand, and the Judicial authority - the Supreme Council of Magistracy, on the other hand,** whereas the Government did not prevent the judicial authority, represented by the Superior Council of Magistracy, to accomplish one of its constitutional tasks, but acted *intra vires*, in exercising its own competence bestowed under the provisions of Article 115 of the Basic Law.

But, in this case, a dissenting opinion was resented and signed by Judge Livia Doina Stanciu, in disagreement with the decision rendered in the majority. According with this dissenting point of view, **the Constitutional Court should have** declared that a legal conflict of a constitutional nature exists between:

- the executive authority - the Romanian Government, on the one hand, and the legislative authority - the Romanian Parliament, on the other hand, which is caused by the Government's having overstepped the limits of legislative delegation;

- the executive authority - the Romanian Government, on the one hand, and the judicial authority the executive authority - the Romanian Government, on the one hand, and the judicial authority - the Supreme Council of Magistracy, on the other hand, which is caused by a breach of the principle of loyal co-operation between authorities.

Another Decision was adopted by the CCR on 27th of February - Decision no. 68/2017⁵, CCR being called to state if there was a conflict of constitutional nature

⁵ Published in the Official Gazette of Romania, Part I, no. 181 of 14 March 2017.

between the Government of Romania and the Public Ministry – The Prosecutor’s Office attached to the High Court of Cassation and Justice – the National Anticorruption Directorate, as submitted by the President of the Senate. By this decision our CCR overcame its powers to analyze the existence of a conflict of constitutional nature between two Authorities of the State and created its own conflict by analyzing the content of the offenses investigated by the Prosecutor’s Office attached to the High Court of Cassation and Justice.

By this decision the Court found that ***no other public authority except for the legislative can control the normative acts adopted by the Government in terms of the appropriateness of such enactment.*** In the context of its analysis, the Court deems it relevant, for the resolution of this case, to appeal to the reasoning stated in the ***Report on "The relationship between political and criminal ministerial responsibility"***, adopted by the European Commission for Democracy through Law (***Venice Commission***) at its 94th Plenary Session, held in Venice, 8 - 9 March 2013. Thus, "on a general level, the Venice Commission considers that the basic standard should be that *criminal procedures should not be used to sanction political disagreement.* Government ministers are politically responsible for their political actions, and this is the democratically correct way to ensure accountability within the political system. Criminal procedures should be reserved for criminal acts. Ministerial actions and decisions are often politically controversial, and may later turn out to have been very unwise and detrimental to national interests. But this is for the political system to sort out. Procedures of impeachment or other criminal charges should not be used against political opponents for political reasons, but should be invoked only in those few and extraordinary cases in which a minister is suspected of a clear breach of law."

Furthermore, it is affirmed that "when drawing the line between criminal and political responsibility, one should also take into account the special characteristics of the political decision-making procedures and the "political game". It is important for democracy that government ministers have room for maneuver to pursue the policies that they are elected to do, with a wide margin of error, without the threat of criminal sanctions hanging over them. In a well-functioning democracy, ministers are held responsible for their policies by political means, not by resorting to criminal law. [...]"

Finally, "the Venice Commission considers that the ability of a national constitutional system to separate and distinguish political and criminal responsibility for government ministers (former and in office) is a sign of the level of democratic well-functioning and maturity as well as the respect for the rule of law. Criminal proceedings should not be used to amend political mistakes and disagreements. Political actions by ministers should be subject to procedures for political responsibility. Criminal procedures should be reserved for criminal acts".

But in paragraph 110 of the Decision no. 68/2017, The Court states that, in view of the alleged facts and of those being retained by the prosecutor charged with the case, ***all that has been presented as material constitutive elements of the imputed offences is nothing more than a personal judgment or criticism by the authors of the denunciation with regard to the legality and appropriateness of the measure adopted by the Government.*** Thus, the circumstances of the adoption of the normative act, the contradictory public stance taken by Justice Minister and Prime Minister, followed by the adoption of GEO 13, "without having consulted with the Legislative Council, without waiting for the opinion from the Superior Council of Magistracy, without being included on the agenda of the Cabinet meeting on 31 January 2017" are

certainly issues which concern the legality and appropriateness of the adoption of the act impugned, but that cannot fall into the prosecutors' scope of competence, or be subjected to criminal investigations. Moreover, the claim that "legislative changes are not justified, since the arguments [...] about prison overcrowding and a possible conviction under a «pilot judgment» against Romania rendered by the ECHR, are not true" appears to be targeted against the failure to give reasons for the urgency and the extraordinary situation at the origin of those regulations, therefore a *question of constitutionality* of the normative act concerned, which is clearly outside the jurisdiction of criminal investigation bodies. Also, suspicion that a certain person might directly benefit from these new regulations, which allegedly confers an *intuitu personae* character to the emergency ordinance, appears to be without a legal basis. It is obvious that a normative act, being intended for an indeterminate number of addressees, as e.g. Government Emergency Ordinance no. 13/2017, will cover all individuals who are in a position to satisfy the hypothesis of such new law.

The Court continues with the argument stating that *it is unacceptable that the primary or delegated legislative authority (MPs or government ministers) should come under the criminal law by the mere fact of having adopted, or participated in the decision-making in regard of the adoption of a normative act, whilst fulfilling its constitutional tasks*. By virtue of the immunity attached to the act of decision-making in the legislative area, which is, as the Court previously held, applicable *mutatis mutandis* to the members of the Government, no MP or minister can be held accountable for their political opinions or actions carried out with a view to the preparation of adoption of a normative act with the force of law. To admit the contrary is, indirectly, to allow for the intrusion into the legislative process of another power, whose direct consequence is a violation of the separation of powers. Exemption from legal responsibility for the legislative activity is a guarantee in the exercise of the office, against pressure or abuse that a person who holds a position as MP or government minister may be faced with, whereas immunity will ensure his independence, freedom and security in the exercise of rights and obligations under the Constitution and laws.

There has been and there is a legal conflict of a constitutional nature between the Public Ministry – The Prosecutor's Office attached to the High Court of Cassation and Justice – the National Anticorruption Directorate and the Government of Romania, generated by the action of the Prosecutor's Office attached to the High Court of Cassation and Justice – the National Anticorruption Directorate having arrogated tasks to check into the legality and appropriateness of a normative act, that is Government Emergency Ordinance no.13/2017, in violation of the constitutional powers of the Government and Parliament provided by Article 115 (4) and (5) of the Constitution, and of the Constitutional Court, as provided by Article 146 lit. d) of the Constitution.

Also in this case, the same Judge Livia Doina Stanciu presented a dissenting opinion showing that, anyhow, the special, and specialized, review competence of the Constitutional Court with respect to constitutionality of legislation cannot and should not be opposed to jurisdiction of the Public Ministry to investigate possible criminal offences committed in connection with the adoption of such normative acts, which means that the powers vested in the Constitutional Court cannot remove that of the Public Ministry.

In the dissenting opinion it is stated that **the Constitutional Court should have found there has been no legal conflict of a constitutional nature between the Public Ministry – The Prosecutor's Office attached to the High Court of Cassation**

and Justice - the National Anticorruption Directorate and the Romanian Government, because it is impossible at this stage of the criminal investigation to establish an interference by the Public Ministry in the Government's exercise of competencies to initiate and adopt its Emergency Ordinance no. 13/2017.

In other words, the Constitutional Court has committed an independent act of interference with the powers of the Public Ministry by analyzing the content of the offenses mentioned above in order to state that there was a conflict between Public and the Romanian Government. In fact, the Court succeeded to create its own conflict of constitutional nature between it and the Public Ministry.

So, is CCR Snow-White in our story? Or has a hidden face because it created a poisonous apple by mixing politics, constitutional provisions and criminal law provisions with a deadly effect for the Rule of Law?

Of course that one can interpret as he wishes the arguments of CCR but lets put the problem this way: If one of the members of the Government, having hidden interests comes with an idea and convinces other members that an Emergency Ordinance is needed in order to cover some illegal acts of people he is in relation with, and that GEO is adopted, no one could impose criminal liability of that member of the government, even if it is obvious, because CCR stated that such act should be considered a political error and at no point a criminal act. This is why we truly believe that CCR, by these two decisions, became the Evil Queen in our story, having a pretty face with the make up of constitutional provisions, but combining the poisoned ingredient of politics. In fact, we also have a Snow White character in our story who is in fact the Public Ministry. Unfortunately, at this point, we cannot end our story with "and they lived happily ever after...".

Rule of Law and Criminal Law

Thoughts about the criminal justice of the Millennium Era

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Abstract

The constitutionality of the legal system also includes the constitutionality of criminal law. Criminal law must also be constitutional. The changes that have taken place in the world and which are currently underway have implications for crime as well. Difficulties in tackling criminality could begin with the exact determination of crime dimensions and specificities.

Keywords: *rule of law, constitutionality, criminal law, terrorism, corruption.*

The rule of law is a frequently quoted expression of the media organs of our age. There are countless attempts to define the rule of law as the opposite of the **police state**, which we would not discuss in detail here, but we want to point out that the idea of the rule of law has impacted on almost all segments of social life, including criminal justice.¹

Undoubtedly, if we look at the **archaic status** of criminal law, we can immediately see a – mostly positive – change, but we are far from being able to know the realities of the rule of law in criminal law behind ourselves.

In this study, – within the limits of the content and scope – we briefly glimpse some of the **legal anomalies**, which **overshadows** the imaginary rainbow of the criminal law of the rule of law. The selection of topics to be discussed below has been subject to **subjective** considerations, namely that we have tried to collect the problems that have arisen in our practice and what are the common actors of the legal-literary publicity.

1. Revolution of a Rule of Law

The Hungarian Constitutional Court granted the Constitutional Court's interpretation of the political system change in its decision No. 11/1992 (III.4.), and „**ars poety**” of the

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¹ Antal Visegrády, *Jog-és állambölcsélet* [Law-and State Philisophy], Dialóg Campus Kiadó, Budapest-Pécs, 2003, p. 327.

body still valid for the relation of political power and the Constitutional Court, legality and the most general context of the rule of law.² "Definition of rule of law in Hungary is a fact and a program at the same time. The rule of law is realized by the fact that the Constitution is indeed and definitely in effect. For the law, the change of regime means that a change in the legal system is possible only in the sense that it must be brought into line with the constitution of the rule of law, or – in case of new legislation – the whole legal system must be consistent ... The realization of rule of law is a process. It is a constitutional obligation for the state organs to do so." [Decree 11/1992 (III.4.) AB]

In this decision, it stated that the law on persecution (approved but not announced) between 1944 and 1990 on the persecution of a serious offense committed in the **communist dictatorship**, but not prosecuted due to political reasons (treason, intentional homicide and death) was unconstitutional.

The Constitutional Court has found that making already annulled crimes punishable again, extending the length of time limitation of non-annulled offenses by interrupting law is unconstitutional.

According to András Szabó, the most well-known Hungarian expert in the topic, the rule of law can not be realized in the name of truth or politically motivated truth with if using methods in line with rule of law.³

The constitutional rule of law means that the provisions of the Constitution are binding on the entire legal system.

The constitutionality of the legal system also includes **the constitutionality of criminal law**. Criminal law must also be constitutional.⁴ The constitutional rule of law can only react to violations of the law by means of the rule of law, so that no one can be denied of any legal guarantees. Failure to enforce legal guarantees means even justice can not be enforced within the framework of rule of law.⁵

Contrary to the Constitutional Court, German law enforcers have used the retroactive effect of criminal law in the so – **wall snipers** (Mauerschusser) lawsuits – though following a long theoretical search. For this, they called for the **radbruch's formula**.⁶

The question may arise why did the Hungarian Constitutional Judges not apply Gustav Radbruch's thesis?⁷

According to András Szabó, the radbruch's formula⁸ is merely a question of whether some scholars of criminal law overestimate the significance of their theoretical elements.

² András Holló, *Az Alkotmánybíróság ...* [The Constitutional Court ...], Változó Világ Könyvtár 15, Útmutató Kiadó, Budapest, 1997, p. 65.

³ András Szabó, *Jogállami forradalom és a büntetőjog alkotmányos legitimitása* [Counter-revolution of rule of law and the constitutional legitimacy of criminal law], *Belügyi Szemle* 1999/10, p. 6.

⁴ Béla Blaskó, *Jogállam - Büntetőjog - Bűnösség* [Rule of Law – Criminal Law – Culpability], *Magyar Jog* 1995/4, p. 209

⁵ Szabó, *op. cit.*, p. 7.

⁶ Katalin Ligeti – Imre A. Wiener, *A radbruchi-formula* [The Radbruch's Formula], In: Károly Bárd – Balázs Gellér – Katalin Ligeti – Imre A. Wiener: *Büntetőjog – Általános Rész* [Criminal Law – General Part], KJK-Kerszöv Jogi és Üzleti Kiadó Kft, Budapest, 2002.

⁷ Bix H. Brian, *Radbruch's Formula, Conceptual Analysis and the Rule of Law*, In: Imer B. Flores – Kenneth E. Himma (eds.): *Law, Liberty and the Rule of Law*, *Ius Gentium: Comparative Perspectives on Law and Justice*, Volume 18, Springer Science+Business Media Dordrecht, Heidelberg/New York/London, 2013, pp. 65-67.

⁸ See, Marijan Pavčnik, *The Symbolic Meaning of Radbruch's Formula - Statutory (Non-) Law and the Argument of Non-Law*, *Rechtstheorie* 46 (2015), pp. 139-142.

In the law, the law has positive normative binding force. However, the theoretical theorem has neither normative power nor normative function. Despite the fact that the criminal law theory says abortion is punishable by unbearably unjust means, fetal deportation will still be punished if it is stated punishable by the Criminal Code.

In a study by András Csúri, in the case of crimes committed under communist dictatorships („Mauerschützer”⁹), only the blatant cases would be punished, where the unlawful act was objectively clear and obvious to the perpetrator.¹⁰

The rule of law revolution – says László Majtényi correctly – is a paradox, because the rule of law and the revolution can not coexist. For us – this is part of the paradox – it was not the commonplace of history that is fulfilled; It is not the rule of the law that devours her children, but her children of excellent appetites devour her. The rule of law revolution – we must understand – is a reality. In contrast, the historical constitution of the revolutionary state is present, part of our life, defines its framework; This time it is still stronger than those who regard them as their toy.¹¹

In addition to the rule of law revolution, there are countless phenomena in the Hungarian legal system, including in the broad sense of criminal law that are against the fulfillment of the rule of law. That is why we can rightly call these misadministration, lawless law enforcement as **counter-revolution of rule of law**. In 2006 for example, peaceful demonstrators in Hungary were raided, people on the ground were beaten by police, but then the existing ruling political power did not initiate criminal proceedings, and the new government, in 2011, relinquished responsibility for the 5-year term of delinquency.

2. Challenges of the Globalized Society and Crime

The changes that have taken place¹² in the world and which are currently underway have implications for crime as well. The globalization of society functions as a **power economy** and as a **power society**.

Contrary to the rapid change in natural and social phenomena, methods of dealing with crime are characterized by relative stability. The security of law enforcement requires a high degree of stability, the system of law enforcement skills education, the use of law enforcement methods over a longer period of time can lead to considerable familiarity, possibly even harmful innervation.

All this suggests that a relatively rapidly changing crime is facing a **conservative** law enforcement. Géza Katona raises the question: With the development of science and technology, does the contemporary theory and practice of fight against crime in Hungary meet the needs of society?¹³

⁹ Wall sniper.

¹⁰ András Csúri, *Múltrendezés, avagy a berlini falnál leadott lövések büntetőjog megítélése*, Belügyi Szemle, 2004/9, p. 185.

¹¹ László Majtényi, *A jogállami forradalom történeti alkotmánya* [Historical Constituion of the Rule of Law Revolution], Jogi Fórum 19 November, 2003. (<http://www.jogiforum.hu/publikaciok/122.2.0>)

¹² Ulrich Kiss, *Globalizáció vagy párbeszéd?* [Globalization or Dialogue?], *Távlatok* 2005/1, pp. 4-5.

¹³ Géza Katona G, *A kriminalisztika és a bűnügyi tudományok* [Criminalistics and the Criminal Science's], BM Kiadó, Budapest, 2002, p.7.

2.1. Increasing crime rate and criminal statistics

Statistical data indicate an increase in crime rate and in severity. The increase of crime rate is a global phenomenon. Difficulties in tackling criminality could begin with the exact determination of crime dimensions and specificities.

Analysis can only be made based on crimes that are known to the authorities, although it is known from **latency** research that the actual size of the crime exceeds the figures found in the criminal statistics.¹⁴

2.2. Violent crime and detection rates

Practical criminologists have known – although this is not necessarily supported by official statistics – that the number of violent crimes increases, and that crime is exposed to violence beyond the rational level.

The number of crimes on the subject's side, the number of criminal offenses, indicates that the number of detected crimes is not followed by an increase in the number of detected perpetrators, ie the number of **uncharted crimes** is clearly on the increase.

The **lack of discovery** is accompanied by a decline¹⁵ in the public's willingness to report (e.g., "the police does nothing anyway") and the increase in their **fears of crime**,¹⁶ which further increases the number of latent crimes. However, we can not go without saying the deterioration of the public's sense of security, although the press has undoubtedly had a negative impact on this trend.¹⁷

The negative outlook of criminality is indicated by the fact that rate of **juvenile** and even pediatric participation is constantly on the increase. It is also a worrying sign that foreign nationals¹⁸ are increasingly becoming perpetrators or victims of crime in Hungary, and there is still no clear evidence of any links between **migration**¹⁹ and potential criminality.

A drastic increase in crime has now led to a rise in the workload of the investigating authority. In the case of crimes against property, that affecting and most irritating an average citizen, the feasibility of substantive investigative work is already questioned. Developments are most visible in the higher ranking law enforcement officers' offices and company cars, rather than in "trenches", that is, in small local police units.

2.3. Responsibility of criminal policy and science

In the last fifteen years, the struggle against the crime has not remained free from current policy impacts. Law enforcement on the slogans level can be considered as no

¹⁴ See László Korinek, *Látencia és prognózis* [Latency and Prognosis], *Belügyi Szemle* 1987/4, pp. 78-80.

¹⁵ Pál Déri, *A bűnözési statisztika és a valóság* [Criminal statistics and the Reality], BM Kiadó, Budapest, 2000, p. 155.

¹⁶ László Korinek, *Félelem a bűnözéstől* [Fear of Crime], *Közgazdasági és Jogi Könyvkiadó*, Budapest, 1995, p. 57.

¹⁷ Valér Dános, *Kriminológiai ismeretek* [Basic Criminology], Rejtjel Kiadó, Budapest, 2000, p. 85.

¹⁸ Katona, op.cit. p.9.

¹⁹ Róbert Bartkó, *The new Europe Challenge- The relationship between the illegal crossing of border and the terrorism*. In: SGEM International Multidisciplinary Scientific Conference on Social Sciences.

more than **virtual law enforcement**. We simply have to note that no result can be achieved against crime without financial support.

One has to forget once and for all the era of **improvised policing** actions that draw media attention. It should be noted that a single swallow does not make summer.

The inadequate effectiveness of the fight against crime, alongside negative social and economic factors, also raises the issue of the **lack of scientific background**.²⁰

It is true that criminology has developed countless exceptionally excellent theories of criminality (becoming a criminal), but it seems difficult to go beyond the theses of the classic school, F. von Liszt: "Best Criminal Policy is a Good Social Policy".²¹

Therefore, if we need more than **first-aid type** symptomatic treatment against crime, we can achieve results only by address social policy, labor management, family policy, housing policy, moral education etc. – in a complex way.

3. New features of crime

3.1. Organized crime

The emergence and spread of organized crime was a new decisive factor in the development of Hungarian crime history in the 1990s. Despite the fact that it can not reasonably be reflected in the indicators of crime statistics, organized crime has developed a model of criminality tools and methods that significantly influence the theory and practice of law enforcement.²²

Organized crime is difficult to be defined on the material side, because almost all crimes, in case of committed with others, are organized. It is more appropriate to approach from the subject point of view, which requires the existence and functionality of a "criminal organization" for the purpose of establishing organized crime.

The definition of a criminal organization was established by the Hungarian legislation in accordance with European legal norms and criminological principles and its foundation and operation were properly sanctioned. Nevertheless, criminal organizations and organized crime remained in the field of **scientific debates** and press reports, they were not converted into court judgments. But this is not just a Hungarian specialty. The criminological theses on the fundamental characteristics of the activities of the criminal organizations also explain the causes of frequent failings of law enforcement.²³ Combating organized crime with new (or partly new) law enforcement tools – witness protection, undercover investigator, secret information gathering, etc. – soon after the initial **euphoric mood** came the disillusionment. We can only rejoice over the fact that in the usual Hungarian legislature exaggerations there has been no legalization of the **"reversal of the burden of proof"**, which exists in the tax law. We do not consider the abolition of classical criminal prosecution principles to be a positive process on the altar of combating organized crime.

²⁰ Katona, op.cit. p.9.

²¹ József Földvári, *Magyar Büntetőjog - Általános Rész* [Hungarian Criminal Law – General Part]. Osiris Kiadó, Budapest, 2002, p. 47.

²² Katona, op. cit. p.10.

²³ Katona, op. cit. pp.113-115.

3.2. Terrorism

The fight against terrorism can be observed both in our material criminal law²⁴ and international conventions ratified in the subject.²⁵

In the field of typology of terrorism, many outstanding studies have been published in both domestic²⁶ and foreign literature, but we would not address them all in this place. The essence of terrorism – according to Samuel Huntington – conflicts between different civilizations, most often as cultural or ethnic conflicts.²⁷ With regard to terrorism, it must be stated that the commitment of the modern state to operate society as a **pacified society**, characterized by inner peace, is seen as failing gradually.

Terrorism appears as "a new terrorism" in these days, as the main export product of those are on **the losing end of globalization**.²⁸ The fight against terrorism raises serious questions. What is terrorism? Which state or institution is entitled to determine who are the terrorists?

Following the attacks on 11 September 2001, the US administration is the only one who considers itself having an exclusive right to answer these questions, and the international community does not raise serious objections to this policy. In our view, the failure of this US doctrine that interprets terrorism is now gradually becoming visible. The main question is that whether terrorism is a **war** or a **crime**. The United States facing terrorism with military measures, but this is not an appropriate way of approach, as terrorism is in fact a crime and law enforcement measures are significantly more effective against it compared to military measures.

3.3. Economic and financial crime

The consequence of the operation of organized criminal groups (criminal organizations), which appear as a player in the economy leads to **the blurring of the boundary** between organized crime and economic crime.²⁹

Determining the concept of economic crime is a rather complicated task, since it is all about whether we intend to define it based on legal or criminological considerations. Mihály Tóth, a prominent Hungarian expert in the topic, considers it important to emphasize in conceptualization that economic criminality, in addition to and beyond the

²⁴ Róbert Bartkó, *A terrorcselekmény dogmatikája a nemzetközi büntetőjogban* [Dogmatics of the Acts of Terrorism in the international Criminal Law], *Jog - Állam - Politika* 2011. Különszám pp. 155-159.

²⁵ Balázs Elek, *From poaching to financing terrorism.: Thoughts on poaching endangering society*, *Journal of Eastern European Criminal Law* 1, 2016, pp. 190-193

²⁶ László Korinek, *A terrorizmus* [The Terrorism], In: Csaba Fenyvesi – Csongor Herke (eds.), *Emlékkönyv Vargha László egyetemi tanár születésének 90. évfordulójára*, *Studia Iuridica Auctoritate Universitatis Pécs Publicata* 132, PTE ÁJK, Pécs, 2003, pp. 169-181.

²⁷ Samuel P. Huntington, *The Clash of Civilizations?*, *Foreign Affairs*, Summer 1993, p. 22. „Nation states will remain the most powerful actors in world affairs, but the principal conflicts of global politics will occur between nations and groups of different civilizations. The clash of civilizations will dominate global politics. The fault lines between civilizations will be the lines of the future.”

²⁸ László J. Kiss, *Az „új terrorizmus”, avagy a háború metamorfózisa: a „régí háború”-tól az „új háború”-ig* [The new Terrorism, other the Metamorphosis of the War: from the “old War” to the “new War”], *Valóság*, 2002/7, p.15.

²⁹ Katona, op. cit. p. 13. See László István Gál, *Economic crimes in Hungary after the change of the political system in 1989*, In: Ye Qing (ed.), *International Symposium on Sino-European Economic Criminal Law: Conference Papers*, Institute of Law of Shanghai Academy of Social Sciences, Shanghai, 2015. pp. 17-19.

individual interest criterion, is typically damages or threatens the order of economic activity, the management obligations, the fair and legitimate management framework.³⁰

Evidence of the relationship between financial crimes³¹ and organized crime does not require any further discussion. Foreign experience has shown that financial crimes, including evasion of tax, excise and social insurances, are a kind of "**banana shell**" for organized crime, because it is not unlikely that the perpetrators persecuted for serious violent crimes could be judged based of these delinquents, but they are actually judged by the court based on financial offense.

3.4. *Cyber crime*

Technological globalization has brought about the emergence of new forms of crime. As a result of globalization, financial operations have become increasingly **computer based**, bringing with it the appearance of cyber crime.

Cybercrime shows a varied form of realization. One of the most dangerous form is the illegal intrusion into computer systems that violate data protection provisions. In the economic sphere, the computer can be used to inflict enormous damage by obtaining information in an unlawful way. Everyday people are particularly irritated by the so-called "**e-banking**" (bank card/credit card counterfeiting) crime.³² However, it should be noted that all these require a high degree of IT knowledge.

The spread of internet trading further increases the risk of becoming victims of this kind of crime. The security of electronic signatures or the IT security of the so-called "**wireless**" services does not seem completely convincing either.

In addition to its many advantages, the Internet **carries risks**, with a target group of young people (*e.g.* "pedophile industry"). In connection with computer crime, we have to mention copyright abuse, as these crimes are often committed by computer (*e.g.* copying a music CD/DVD). With regard to copyright and copyright infringement, its **decriminalization** should be considered. The fact is that law enforcement is characterized by selectivity and casualty. Illegal copiers are randomly picked up by the authorities, since if we went through a college dormitory we would most probably encounter several illegal cases. It would be more appropriate to apply a one-off royalty of copyright works, and then allow them to be copied free of charge.

3.5. *Corruption*

Corruption slowly and slowly becomes a criminological topos in the characterization of Hungarian public sphere. The issue of police corruption³³ is a popular area for corruption research. Unfortunately, however, there are still spheres where corruption has serious social consequences. Two of the old and new types of corruption in corruption will be described below: judicial corruption and corruption in public procurement.

³⁰ Mihály Tóth, *Gazdasági bűnözés és bűncselekmények* [Economic criminality and crime], KJK-Kerszöv Jogi és Üzleti Kiadó Kft., Budapest, 2002, p. 22.

³¹ See László István Gál, *Broker Scandals in 2015 in Hungary*, *Pravna Rijec* 13/ 2016. pp. 347-349.

³² Heine, G.: *E-Banking, Die einzelnen Rechtsgeschäfte* [E-Banking, The private legal transactions], Berner Bankrechtstag, BBT Band 9, Institut für Bankrecht an der Universität Bern, Hrsg.: Wolfgang Wiegand, Stämpfli Verlag AG, Bern, 2003, pp.109-131.

³³ István Szikinger, *Rendőrség és korrupció* [Police and Corruption], In: Mariann Kránitz (ed.): *Korrupció Magyarországon I.* [Corruption in Hungary], Transparency International Magyarországi Tagozata Egyesület, East-West Management Institute, Budapest, 2003, p. 129.

The questioning of the intractability of the judiciary is undoubtedly one of the "delicate" themes in democracies. The issue of judicial corruption is a rather underdeveloped area both in foreign³⁴ and Hungarian³⁵ literature. This is due to the low number of cases occurring, but the latency is not negligible.

The old Roman saying, "Quis custodiet custodes?" is especially true for this case. Who is guarding the shepherds? Who is entitled to check for justice? The existing legal system does not essentially provide answer for this.

Corruption cases in international comparison show high rates in Latin-speaking countries. In our country, such a figure has been so small - since only a few cases have emerged since the regime change - that it might not be worth considering the phenomenon by adopting official criminal statistics. However, corruption and attempted intrusion into the independent and impartial functioning of the judiciary can not be excluded by one hundred percent. Such experiments can be assumed and perceived by executive power, as well as the private sector.

The executive power in our country does not have the right to appoint the judges. The only disturbing factor is that the current government has the decisive power in determining the court budget and the remuneration of judges.

Another important area of the fight against corruption is the public administration sector. Unfortunately, the personal connection based system in the public sector has basically not changed much since the change of regime. In order to exclude or reduce corruption in the public sector, public procurement procedure was introduced.

Corruption risk is the most commonplace in sectors where decisions have a significant economic impact, and there is not enough (legal and other) assurance that they will be provided on a professional basis. Corruption professionals refer to four main areas where corruption risk deserves particular attention: privatization, party financing, state subsidies and public procurement.³⁶

In the case of public procurement³⁷, corruption factors³⁸ can be as below: outsider organizations; distribution of funds allocated to support persons; Disposition of property or their right of use; Transfer of exclusive licenses (concessions); Public procurement.³⁹

³⁴ Sergio Moccia: Das korrumpierte Strafrechtssystem (eine nur italienische Geschichte?) [The Corrupt Criminal Law System (one not just italianStory?)], In: Bernd Schünemann, Wilfried Bottke, Hans Achenbach, Bernhard Haffke, Hans-Joachim Rudolphi (eds.): Festschrift für Claus Roxin zum 70. Geburtstag am 15. mai 2001, Walter de Gruyter, Berlin-New York, 2001. pp 1487-1504.

³⁵ László Kőhalmi, *Korrupció és hatalom* [Corruption and Authority], In: Ferenc Csefkó/Csaba Horváth (eds.): *Korrupció Magyarországon* [Corruption in Hungary], Pécs - Baranyai Értelmiségi Egyesület, PTE Állam - és Jogtudományi Kar, Pécs, 2001.p. 146.

³⁶ Lajos Berény, *A korrupció kérdése a közbeszerzésekben* [The Question of the Corruption in the public procurement], In: *Korrupció Magyarországon III.* In Transparency International Magyarországi Tagozata Egyesület, Budapest, 2003, p.25.

³⁷ Csaba Szilovics, *About the Causes of Corruption in the Hungarian Public Procurement System*, *Journal of Eastern European Criminal Law* 2, 2016, pp.106-108.

³⁸ Csaba Szilovics, *Korrupció és közbeszerzés* [Corruption and public procurement], *Közjogi Szemle* 2010/1. pp. 46-48.

³⁹ Anna Dessewffy, *A közbeszerzés és a korrupció összefüggései* [Relationships of the public procurement and corruption], In: *Korrupció Magyarországon III.*, Transparency International Magyarországi Tagozata Egyesület, Budapest, 2003, p.71.

4. Other Challenges

4.1. Criminal legality of legal persons

The legal institution in Hungarian criminal law since 1 May 2004 is the criminal liability of legal persons, but only in a few cases criminal proceedings have been initiated against companies.⁴⁰ Law enforcement agencies are reluctant to initiate criminal proceedings against legal persons, simply said, this legal institution has not obtained "civil rights" in law enforcement practice.

4.2. Privatization in the fight against crime

Western tendencies start to appear in Hungary, and – although with a slight delay – we can witness **the privatization of criminal law**. Privatization has created a specific "security market" and it is felt that the state gradually returns – part of the crime prevention and regulatory power – to citizens and the society. It is now clear that modern states, which call themselves welfare states, are unable to guarantee the security of citizens, and instead encourage them to "buy" security for themselves, for example: alarms, special locks, video cameras, etc.

In essence, it induces a kind of "**positive ghettoization**" process, *i.e.* those having a sufficient financial base can create "security" in a limited area (such as a residential park).

This privatization process, however, raises its head in the full range of criminal justice, including in the execution of sentences. Nils Christie correctly notes that criminal justice is in an exceptional situation, as there is no risk of raw material shortage, the supply is infinite. It is an industry that is comparable to Australian rabbits or Norway wildlife; It has hardly any natural enemies.⁴¹

In these days – with a slight exaggeration – the "**punishment**" industry – within the United States in particular – has been set up with the classical characteristics of major industries – criminal justice has features that can lead to creation of Western type Gulag (concentration camps), according to Nils Christie.⁴²

There are also some authors who call the privatization process in criminal law as **reprivatization**, referring to the fact that we are essentially returning to the early period of criminal proceedings, when the victim had the judgement over the case, and he could freely decide regarding any retaliation.

The wave of privatization slams through the reality of the whole criminal proceeding. Just to mention one example, the privatization of public law and investigation in the criminal process.

5. Closing remarks

In our study, we have not get into details of several criminal-law issues that are currently unanswered (*e.g.* the future of a single European criminal law/criminal procedural/enforcement law). We have tried to flare up trends that, in the long term, can not be left without a substantive response to criminal law making and law enforcement.

⁴⁰ See, Ferenc Sántha, *Criminal responsibility of legal Persons in Hungary*, Sectio Juridica et Politica, Miskolc, Tomus XXIII/1, 2005, pp. 232-235.

⁴¹ Christie Nils, *Büntetésipar* [Punishment industry], Osiris Kiadó, Budapest, 2004, pp. 13-14.

⁴² Christie, *op. cit.* p. 15.

Observations on the *ne bis in idem* principle in light of the European Court of Human Rights' Judgment: *Milenković v. Serbia*

Goran P. Ilić*

Abstract

This paper dealt with problems of the ne bis in idem principle as one of the basic human rights in criminal proceedings. First, the author analyzed the practice of the European Court of Human Rights in correlation to the concepts of bis and idem. Special attention was devoted to different approaches taken in the interpretation of the concept of the identity of offence (idem), whereby the judgments of the Grand Chamber in the cases Sergey Zolotukhin v. Russia and A. and B. v. Norway were studied thoroughly. After that, the jurisprudence of the Serbian Supreme Court of Cassation and Constitutional Court was portrayed. Then ensued a critical analysis of the Milenković v. Serbia judgment. Based on it, the conclusion was drawn that the guarantees anticipated in Article 4 of the Protocol No. 7 and the states' obligations based on Article 2 and 3 of the European Convention on Human Rights (ECHR) must be considered as parts of a whole and interpreted so as to promote inner compliance between different provisions of the ECHR. The author deems that in the case Milenković v. Serbia apart from the in substance connection, existed a sufficient temporal connection. Namely, in the concrete case there was no res iudicata at the moment of raising the indictment, so the applicant was not in suspense that the criminal charge would be disputed in front of the competent court, while the length of the proceedings itself did not surpass the criteria of a reasonable duration. In the end, the author raised the question to what extent it will be possible to limit digressing from the criterion established in the case Zolotukhin on tax sanctions, especially if having in mind that the criterion adopted in the judgement A. and B. v. Norway was to a large extent discretionary, thus, appropriate to create further uncertainties in the area belonging to the „core” of human rights.

Keywords: *ne bis in idem, a criminal proceedings, the European Court of Human Rights, the European Convention on Human Rights, the Supreme Court of Cassation, the Constitutional Court.*

Introductory notes

The rule *ne bis in idem* dates from institutions of the Roman law, which discuss the legal validity and the ruled matter. *Orificius' senatus consultum* states that ruled affairs are considered effective (*quae iudicata... rata meneant*), while one of Ulpian's maxims goes even beyond that, because it establishes that the ruled matter is found to be the

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truth (*res iudicata pro veritate accipitur*).¹ The maxim *not twice about the same*² in criminal matter represents the principle of the criminal procedural law, and is frequently raised to the level of basic human right in constitutional and provisions of international documents. *Ratio* of the *ne bis in idem* principle lies in the fact that it prevents the state to apply the *ius puniendi* on the defendant who was prosecuted in the same criminal case or who was sentenced. Apart from that, the principle is an expression of the public interest that the criminal proceedings should end with an effective judgement which is considered to be true (*res iudicata pro veritate habetur*). Given that the effective judgements as a rule cannot be contested by filing legal remedies, the *ne bis in idem* principle contributes to the legal certainty.³

When it comes to international documents on human rights which contain the *ne bis in idem* principle, the International Covenant on Civil and Political Rights⁴ and the Protocol No. 7 (November 22, 1984) along with the European Convention for the Protection of Human Rights and Fundamental Freedoms⁵ should be mentioned. Given that the detailed analysis of the *ne bis in idem* principle seeks answers to questions about the extent of the protection that could include the prohibition on re-trial or only the impossibility of re-punished, with the types of "final" decisions and their makers and the criterion by which the identity of the offences is established, that kind of approach would surpass the scope of this paper. That is why the analysis in the following lines will primarily be oriented towards the problems that relate to determination whether there is a identity of the offence.

1. Conditions for the *ne bis in idem* principle application

Two major questions, related to the concepts of *bis* and *idem*, must be answered when it comes to fulfilling conditions for the *ne bis in idem* principle application.

1.1. The concept of *bis*

The concept of *bis* as a condition for law application from Article 4, Paragraph 1 of the Protocol No. 7 refers to the type, the maker and quality of the decision with which

¹ G. P. Ilić, M. Majić, S. Beljanski, A. Trešnjević, *Komentar Zakonika o krivičnom postupku*, The eighth amended edition, Službeni glasnik, Beograd 2015, 78.

² The attitude of the Supreme Court of United States is that the *Double Jeopardy Clause* includes three separate constitutional guarantees: the protection against re-prosecution for the same crime after charges are dropped, the protection against re-prosecution for the same crime after receiving a sentence and the protection against receiving multiple sentences for the same crime. C. Byrne Hessic, F. Andrew Hessic, „Double Jeopardy as a Limit on Punishment“, *Cornell Law Review* Vol. 97 1/2011, 49. However, in accordance to the doctrine of „the double sovereignty“, the prohibition on the double punishment does not represent a hindrance for that same person to be on trial for the same offences in front of the federal and court of the federal unit. V. Bajović, „Načelo ne bis in idem“, *Kaznena reakcija u Srbiji IV deo* (Ed. Đ. Ignjatović), Pravni fakultet Univerziteta u Beogradu, Beograd 2014, 240, 241.

³ D. S. Rudstein, „Prosecution Appeals of Court-Ordered Midtrial Acquittals: Permissible Under the Double Jeopardy Clause?“, *Catholic University Law Review* Vol. 62 1/2012, 103, 104; J. A. E. Vervaele, „Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?“, *Utrecht Law Review*, n^o 4/2013, 212.

⁴ Ratification Law on the International Covenant on Civil and Political Rights, *Official Gazette of SFRJ*, n^o 7/71.

⁵ Ratification Law on the Convention for the Protection of Human Rights and Fundamental Freedoms with additional Protocols and Amendments – ECHR, *Official Gazette of SCG – International Contracts* n^{os} 9/03, 5/05 and 7/05-corr. and *Official Gazette of RS – International Contracts*, 12/ 10 and 10/15.

the proceedings ended. When it comes to the type of the decision, a release or a conviction are mentioned, which can be understood as an acquittal or an conviction judgment. Since it is about the meritorious decisions which resolve the criminal case, the withdrawing of the public prosecutor from the prosecution cannot be equal to them, hence there is no place for the application of Article 4, Paragraph 1 of the Protocol No. 7.⁶ The question of how should one act in case the public prosecutor withdraws from the prosecution after the defendant fulfills all the obligations set by the prosecutor should also be asked.⁷ Considering that it is a situation where there is no conviction, it is questionable whether the evaluation on a penal character of a certain measure or obligation would be enough to draw a conclusion about the impossibility of prosecution for the same offence.⁸

The acquittal or the conviction judgment must be „final“, i.e. *res iudicata*. In the procedural doctrine the „finality“ of court decisions is related to the possibility of filing the remedies, or more accurately for stating ordinary remedies. The trait of the „finality“ of a judgment is gained when it cannot be refuted with a ordinary remedy or when no further ordinary remedies were available. Similar to that, it was cited in some explanations of certain provisions of the Protocol No. 7 that the „finality“ of a judgment indicates that no further ordinary remedies are available—cannot refute it or when the parties have exhausted such remedies or have missed the deadline for their submission.⁹

1.2. The concept of *idem*

The next legal aspect from Article 4, Paragraph 1 of the Protocol No. 7 refers to the interpretation of the concept of the identity of offences (*idem*). The disorganization of

⁶ *Smirnova and Smirnova v. Russia*, 46133/99 and 48183/99, 2. 10. 2002; *Harutyunyan v. Armenia*, 34334/04, 7. 12. 2006. Related to that, see the case *Marguš v. Croatia* (4455/10, 27. 5. 2014, §§ 120, 123, 126, 140, 141) in which the European Court of Human Rights considered the possibility of conducting a new criminal proceedings after a „final“ judgment was reached and the indictment was rejected due to amnesty. J. Omejec, *Konvencija za zaštitu ljudskih prava i temeljnih sloboda u praksi Europskog suda za ljudska prava strazburški acquis*, Novi informator d.o.o., Zagreb 2013, 1234.

⁷ Unlike the European Court of Human Rights that did not give any statements on that matter, the Court of Justice of the European Union gave a positive answer to this question. One of the key arguments in the case *Gözütok and Brügge (Hüsein Gözütok and Klaus Brügge)*, Judgement of the Court, 11 February 2003, Joint Cases C-187/01 and C-385/01, §§ 28-30) was that it is about the decision of a public authority which is according to provisions of the national law a part of the criminal law system. By making the mentioned decision, the public prosecutor meritoriously examined the circumstances of the concrete case, thus the *argumentum a contrario* withdrawal of the public prosecutor from the prosecution in which that examination is absent cannot be perceived as „an final ending to a proceedings“ (*Filomeno Mario Miraglia*, Judgement of the Court, 10. March 2005, C-469/03, §§ 28-36). On the decisions of the Court of Justice of the European Union related to the *ne bis in idem* principle see Z. Burić, „Načelo ne bis in idem u europskom kaznenom pravu – pravni izvori i sudska praksa Europskog suda“, *Zbornik Pravnog fakulteta u Zagrebu*, 3-4/2010, 824-842; T. Bravo, „Ne Bis In Idem as a Defence Right and Procedural Safeguard in the EU“, *New Journal of European Criminal Law*, Vol. 2 4/2011, 398, 399.

⁸ It is worth mentioning that in the cases *Gradinger v. Austria*, 15963/90, 23. 10. 1995, §§ 9, 55) and *Oliveira (Oliveira v. Switzerland)*, 84/1997/868/1080, 30. 7. 1998, § 11) the European Court of Human Rights evaluated the fulfillment of conditions for the application of Article 4, Paragraph 1 of the Protocol No. 7 in light of the proceedings which ended with the decisions made by non-judicial bodies. In both cases the penal character of the sentenced sanction was a decisive condition for the application of Article 4, Paragraph 1 of the Protocol No. 7.

⁹ Rapport explicatif au Protocole n° 7 à la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales, § 22.

the legal regulation, the extension of court decisions dispositive on the elements that are not included in the legal norm¹⁰ and the autonomous character of the „criminal charge“ concept in the jurisprudence of the European Court of Human Rights¹¹ are undoubtedly reasons that can lead towards the conclusion that a certain offence can simultaneously consist of characteristics typical of two identical or two different types of „criminal“ offences.¹² That can have, for consequence, a parallel conduction of the proceedings in front of the same or different courts, as well as a later initiation of the proceedings for a „criminal“ offence that „matches“ with the previously finally judged offence. Although certain authors when considering the concept of *idem* take into account the existence of the identity of the protected property, the perpetrator and the victim of the „criminal“ offence,¹³ the key issue that should be addressed is whether the identity of the offence should be evaluated with the help of factual or legal criteria.

The jurisprudence of the European Court of Human Rights so far testifies that there has been some wandering related to the evaluation whether it is the same offence. First, in the *Gradinger*¹⁴ case the emphasis is put on the „same behavior“ (*idem factum*) no matter how it was legally qualified in the national law. A change in the attitude occurred in the *Oliveira*¹⁵ case, and the new approach consisted of the apprehension that one punishable behavior can include two different „criminal offences. So as to justify the new point of view from which the existence of the identity of a offence would be analyzed, the European Court of Human Rights pointed out that in the *Gradinger* case, unlike in the *Oliveira* case, the degree of alcohol abuse of the applicant was judged in a contradictory manner by the two different jurisdictions.

Despite the shifted point of view, it remained unclear which criteria helped to determine whether one punishable behavior contains two or more „criminal“ offences. That is why the European Court of Human Rights in the case *Franc Fischer v. Austria*,¹⁶ after bringing to mind that Article 4 of the Protocol No. 7 does not exclude the possibility of multiple prosecutions in case of when same conduct constitute several offences (*concoure idéal d'infractions*), highlighted that it was necessary to consider „essential elements“ of the offence so as to determine whether the *ne bis in idem* principle was violated. The criterion on „essential elements“ is basically the evaluation whether the two offences matches in the essential factual elements. Considering the uneven treatment of the European Court of Human Rights in cases that ensued with the problems of the „same offence“,¹⁷ there was a legal uncertainty that was incompatible with the basic right in Article 4, Paragraph 1 of the Protocol No. 7.

¹⁰ E. Ivičević Karas, D. Kos, „Primjena načela ne bis in idem u hrvatskom kaznenom postupku“, *Hrvatski ljetopis za kazneno pravo i praksu* 2/2012, 559, 560.

¹¹ About the meaning of the „criminal charge“ concept see David Harris (*et al.*), *Law of the European Convention on Human Rights*, Second edition, Oxford University Press, Oxford 2009, 205-210.

¹² In this paper the notion of „criminal“ offence is used in accordance with the autonomous meaning which has in jurisprudence of European Court of Human Rights.

¹³ S. Trechsel (*With the assistance of S. J. Summers*), *Human Rights in Criminal Proceedings*, Academy of European Law European University Institute, Oxford University Press, Oxford 2005, 391-394.

¹⁴ *Gradinger v. Austria*, §§ 54, 55.

¹⁵ *Oliveira v. Switzerland*, §§ 26-29.

¹⁶ *Franc Fischer v. Austria*, 37950/97, 29. 5. 2001, § 29.

¹⁷ At hand are, among others, cases: *Göktan v. France*, 33402/96, 2. 7. 2002, *Hauser-Sporn v. Austria*, 37301/03, 7. 12. 2006, *Schutte v. Austria*, 18015/03, 26. 7. 2007 and *Garretta v. France*, 2529/04, 4. 3. 2008.

Due to that, the European Court of Human Rights tried to secure an even interpretation of the „same offence“ concept, and the opportunity for that came along with the case *Sergey Zolotukhin v. Russia*.¹⁸ Since the approach which underlines the legal qualification of the offence was too restricted for the rights of an individual, the Court took a stand that Article 4 of the Protocol No. 7 must be understood as a prohibition on prosecution or trial to one person for the second offence to the extent that it arises from *identical facts* or *facts which are substantially the same*. The examination must be directed towards facts that make up a set of concrete situational circumstances that refer to the same defendant and inextricably linked together in time and space, and whose existence must be determined in order to secure a conviction or institute criminal proceedings. The new approach basically corresponds to the manner in which the Court of Justice of the European Union interprets the concept of *idem* in Article 54 of the Schengen Agreement.¹⁹ Namely, the same facts implies the identity of the material acts, understood as a part of the existence of the set of concrete (facts) that are inextricably linked together in time, space and content.²⁰

It was mentioned that the violation of the *ne bis in idem* principle occurs not only due to the overlapping of legal classification of different types of „criminal“ offences, but also because the factual description of the offence in a „final“ decision is fraught with facts unimportant for its existence. A problem appears if the mentioned facts represent a being of a severe „criminal“ offence, because the *res iudicata* for a minor „criminal“ offence can be a prohibition against double jeopardy (*et vice versa*). This situation is especially problematic in case of a concurrently conduction of an administrative and criminal proceedings against the defendant, because an administrative proceedings is usually completed swiftly, which can affects the possibility for a criminal prosecution.

A typical example of it is the *Maresti*²¹ case in which the applicant was firstly found guilty in the administrative proceedings for disturbing public order and peace, and then convicted in a criminal proceedings for a crime of aggravated assault, because while he was under the influence of alcohol he insulted the victim and inflicted severe bodily injuries to his head and body. Although the legal description of the administrative offence for which he was convicted did not mention aggravated assault, the Court of administrative offence determined the defendant guilty for aggravated assault as well. Given that the conviction for aggravated assault ensued in the criminal proceedings as well, the European Court of Human Rights came to a administrative and criminal conviction referred to the same offence and that Article 4 of the Protocol No. 7 was violated.

Given that in the *Zolotukhine* judgment those cases of procedures, connected in such a way so that they make a whole, were not reviewed, the European Court of Human Rights addressed this issue in the case *A. and B. v. Norway*.²² When considering the fulfillment of conditions for Article 4 of the Protocol No. 7 application it is necessary to examine whether the dual proceedings in question have been *sufficiently closely*

¹⁸ *Sergey Zolotukhin v. Russia*, 14939/03, 10. 2. 2009, §§ 81, 82, 84.

¹⁹ European Union, *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 („Schengen Implementation Agreement“)*, 19 June 1990.

²⁰ *Leopold Henri Van Esbroeck*, Judgement of the Court, 9 March 2006, C-436/04, §§ 36, 38.

²¹ *Maresti v. Croatia*, 55759/07, 25. 6. 2009, §§ 63, 64, 68, 69.

²² *A. and B. v. Norway*, 24130/11 and 29758/11, 15. 11. 2016, §§ 111, 130.

connected in substance and in time. In other words, it is necessary to show that they have been combined in an integrated manner so as to form a coherent whole. This implies not only that the purposes pursued and the means used to achieve it should in essence be complementary and linked in time, but also that the possible consequences of organizing the legal treatment of the conduct concerned in such a manner should be proportionate and foreseeable for the injured persons.

2. Serbian jurisprudence

Although, not until recently, the Republic of Serbia did not find itself under „attack“ by the ECHR due to the violation of rights in Article 4, Paragraph 1 of the Protocol No. 7, the point of view of Strasbourg’s Court on this matter is present in the domestic jurisprudence. Before some of the more important decisions dealing with these problems are portrayed, it should be highlighted that through a provision of Article 34, Paragraph 4 of the Constitution²³ a wider range of the *ne bis in idem* principle was guaranteed, because it includes, apart from the acquittal or the final conviction judgment, those cases which are impossible to be conducted due to the existence of permanent procedural obstacles. It was in this sense prescribed that no person can be prosecuted or punished for a criminal offence for which he was either acquitted or convicted by final judgment or for which the charge was finally rejected or the procedure finally dismissed. Besides, it was underscored that the same prohibition is subjected to the conduction of a procedure for a different „criminal“ offence.

2.1. The Jurisprudence of the Supreme Court of Cassation

It should be highlighted, to begin with, that the case in which the Supreme Court of Cassation established that the conditions for dismissing the administrative procedure were not fulfilled after the public prosecutor for the same event dropped the criminal offence report upon the suspect’s accepting and completing a certain obligation.²⁴ It is the case in which the person in state of total alcohol abuse drove a vehicle through traffic. Thus, it was the groundwork for initiating the administrative proceedings and simultaneously submission of criminal offence report to the public prosecutor. Since the public prosecutor rejected the criminal offence report because the suspect completed the obligations laid down by the agreement on the delay of prosecuting, the Higher Court of administrative offences changed the first-instance conviction judgment for a traffic administrative offence and dismissed the procedure upon reminding that not even the injured person has rights to take on himself the prosecution of the person who completed the obligations. The key argument was that the re-prosecution of the same person for the same offence would, in some other „penal procedure“, violate the right to a citizen’s legal certainty as an integral part of the right to a fair trial guaranteed by the Constitution, through provisions on human and minority rights, which are directly applied. The Supreme Court of Cassation did not accept the exposed interpretation. It explained its standpoint through the argument that in case the criminal offence report are dropped the criminal proceedings has not even been initiated, nor has the defendant been finally convicted in the criminal proceedings for the offence that has the marks of a administrative offence. If the decisions of the Higher Court of administrative offences

²³ The Constitution of the Republic of Serbia – Constitution, *Official Gazette of RS* n° 98/06.

²⁴ The Supreme Court of Cassation, Przz. br. 12/12, 23. 11. 2012.

and the Supreme Court of Cassation are considered in the light of the problems *ne bis in idem* so far, it can be said that the first judgement reflects the core meaning of the prohibition of double jeopardy.²⁵

In the next case,²⁶ the Supreme Court of Cassation highlighted that, even though in a both administrative and criminal proceedings the defendant is the same and the life event took place within the same temporal and spatial frame, factual descriptions of „criminal“ offences are crucially distinguished. Namely, the factual description of the administrative offence does not contain all facts and actions of the defendant related to inflicting light bodily injuries to the injured person's head and right arm, and does not include the event that ensued after the initial conflict, described as the administrative offence. With the nature of the defendant's committed actions in mind that are not mentioned in administrative offence judgment and the severity of unknown consequences at the time of the administrative procedure initiation, which were revealed after the expertise and examination of the injured person, the Supreme Court of Cassation decided that the description of administrative offence, related to the procedure which was finally dismissed, did not refer to an identical event and completely same facts and actions of the defendant. It did not refer to the consequence of inflicting severe bodily injuries, as well, which is generally a mark of an offence that was the subject of the charge in a criminal procedure.

2.2. The Jurisprudence of the Constitutional Court

The Constitutional Court dealt with the question of the *ne bis in idem* principle application as well, thereby setting the measures with which it could be determined whether it is the same offence.²⁷ After reminding that a clear line between criminal and administrative offences in our legislation does not exist, the Constitutional Court underlined that that does not mean that the *res iudicata* in the administrative procedure, when it is the same event, always represents an obstacle to prosecute the offender for the criminal offence as well. The gist of the criminal protection, and above all the life and body integrity protection, is questioned when the Court of administrative offences in judgment dispositive unnecessarily broadens the factual description of the administrative offence so that it includes the factual substrate of a criminal offence. In that type of a case the prohibition *ne bis in idem* is activated. When it is absent, this principle does not have to be applied, because one socially unacceptable behavior can simultaneously jeopardize various protected properties and realize characteristics of two or more „criminal“ offences that can be under the competence of the same or different prosecution authorities of the same state.

This question is especially important for those cases in which the consequences of a too broad interpretation of the *ne bis in idem* principle would be harmful to the protection of basic social values and could violate the predominant obligations of any state. Those are, above all, the victim's right to have their life protected and the right to the inviolability of the physical and mental integrity from Articles 2 and 3 of the ECHR. The Constitutional Court's attitude is that when applying the *ne bis in idem* principle, with the aim of protecting the predominant interest, it is necessary to bear in mind basic

²⁵ This understanding was also accepted in the doctrine of I. Vuković, *Prekršajno pravo*, Pravni fakultet Univerziteta u Beogradu, Dosije studio, Beograd 2015, 146.

²⁶ The sentence was passed in a session of the Criminal Department of the Supreme Court of Cassation, 23. 12. 2013.

²⁷ The Constitutional Court, UŽ-1285/12, 26. 3. 2014.

and corrective criteria. The basic criteria implies: 1) that both procedures, conducted against the person making the constitutional appeal, were related to a „criminal“ offence, i.e. that the first penalty was in its nature a criminal one; 2) that the offences, for which the applicant was prosecuted, were the same (*idem*); 3) that there was a duplication of proceedings (*bis*). Apart from these, additional so called corrective criteria should be considered in each concrete case: a) the identity of the protected property and the gravity of the consequence of the offence, and b) the identity of the sanction.

By applying the abovementioned corrective criteria, the Constitutional Court took the stand that the right to legal certainty was in criminal law not violated when for the same life event a warning was issued in the administrative procedure, while in the criminal proceedings it got a conditional sentence.²⁸ Besides, in the dispositive of the administrative offence decision, what was marked was the official position done by the injured person in the crucial moment, however, it was not specially highlighted that that position gave him the characteristics of the public official person. Since in the dispositive of the administrative offence decision the description of the administrative offence was not broadened to the characteristics of the injured person as a public official, it ensued that the substrate of a criminal offence was not included in that decision. Thus, there was neither the identity of protected property nor the gravity of those consequences. Apart from that, the attitude of the Constitutional Court is that there is not even a identity in the sanctions. A warning in the administrative procedure has also a preventive and an „executive“ character, and it is the mix of a „penalty“ in the material sense and a measure that serves the purpose to execute „penalty“. However, a conditional sentence can possess, apart from a preventive character, a repressive character as well.

The case²⁹ in which the constitutional appeal referred to one life event was also interesting. Within it, it was possible to make a clear distinction between two different „criminal“ offences – a traffic administrative offence and the criminal offence of endangering of public transport. While the administrative procedure was conducted against the person making the constitutional appeal due to them driving vehicle under the influence of alcohol, a charge was disputed in the criminal proceedings, because the defendant as the participant in the traffic endangered the victim’s body and inflicted light bodily injuries. Hence, it was about „criminal“ offences that were not determined on identical facts or facts which are substantially the same, and were besides that different to the protected property and consequence. On the basis of that, the Constitutional Court determined that a criminal offence of endangering of public transport, in the concrete case, was not consumed by the mentioned administrative offence, thus making the offences due to which the person making the constitutional appeals was twice found guilty, not the same.

3. The *Milenković v. Serbia* Case

In the *Milenković v. Serbia*³⁰ case, the applicant hit and hurt the injured who cursed his children, more than once, so he was ordered to pay a fine in the amount of 4000 dinars in the administrative procedure since he disturbed public order with violence.³¹

²⁸ The Constitutional Court, UŽ-1207/11, 12. 6. 2014.

²⁹ The Constitutional Court, UŽ-6835/2012, 12. 11. 2014.

³⁰ *Milenković v. Serbia*, 50124/13, 1. 3. 2016.

³¹ The Municipal authority for administrative offences of Leskovac, Up. 7444/06-7, 6. 11. 2007.

A criminal charge was raised against him for the same event. Within it, he was found guilty on the grounds of aggravated assault and was sentenced to three months in prison.³² The Appellate Court of Niš dismissed his appeal as ill-founded³³ and the Constitutional Court dismissed the constitutional appeal as clearly ill-founded.³⁴ The main argument of the Constitutional Court was that the description of the administrative offence from Article 6, Paragraph 3 of the Public Order Act³⁵ did not identical as the description of the criminal offence of aggravated assault execution from Article 121, Paragraph 2 of the Criminal Code³⁶ contained in the dispositive of judgment, thus the fact that the person making the constitutional appeal was sentenced two times for the same „criminal” offence cannot be discussed.

In the dispositive of decision of the administrative offence authority states that the defendant Milenković was responsible for the administrative offence of disturbing public order from Article 6, Paragraph 3 of the POA by having hit the first defendant, several times, by fist to his head and having hurt him after the other one cursed his children.³⁷ On the other hand, in the dispositive of the first-instance criminal judgment it was stated that the defendant Milenković endangered the victim and his life through the aggravated assault. He could have understood the importance of his offence and he could have managed his own behavior, in such a way that he hit the victim in the left side of his face. Due to that, the victim fell to the ground, with his back facing it. The defendant kept hitting him in the face and head, inflicting heavy bodily injuries that threatened his life: a hematoma in the part of both of his eyelids, a hematoma on the left conjunctiva, abrasions on the nose, crushed head and body parts and blood coagulations under the hard meninges on the left side of the head, forming in the medium rate. So although he was aware of his offence, he carried it out. He was aware that it was forbidden, and thus committed a criminal offence of aggravated assault from Article 121, Paragraph 2 of the CC.³⁸

In a judgment that established that Article 4 of Protocol No. 7 was violated in a concrete case, the European Court of Human Rights determined, in the first place, along with the „Engel criteria” that the administrative offence against public order can be subjected under the notion of „criminal charge”, leaving enough room to determine whether the *ne bis in idem* principle was violated.³⁹ After that, it considered the issue whether the same offence can be mentioned in relation to the principles stated in the *Zolotukhin* case, *i.e.* whether are the identical facts or facts which are substantially the

³² The Basic Court of Leskovac, K. 101/10, 13. 4. 2011.

³³ The Appellation Court of Niš, Kž.1. 2313/11, 20. 3. 2012.

³⁴ The Constitutional Court, Už-4267/2012, 20. 5. 2103.

³⁵ The Public Order Act – POA, *Official Gazette of RS* n^{os} 51/92, 53/93, 67/93, 48/94, 85/05 and 101/0.

³⁶ The Criminal Code – CC, *Official Gazette of RS* n^{os} 85/05, 88/05 – modification, 107/05 – modification, 72/09, 111/09, 121/12 and 104/13.

³⁷ In Article 6, Paragraph 3 of the POA, it was stated that whoever insults or abuses another person, bullies someone else, causes a fight or participates in one, jeopardizes citizens’ peace or disturbs public order – will be charged with a 30,000 dinars fine or with a jail sentence in the duration of 60 days.

³⁸ By the provision of Article 121, Paragraph 2 of the CC it is stated that whoever injures another person or disturbs their health so much that they are in a life-threatening situation or ruined or permanently and significantly damaged or if an important part of their body or vital organs are damaged or if they are permanently incapable of work or their health is permanently and seriously damaged or deformed, will be sentenced to prison in the duration of one to eight years.

³⁹ *Milenković v. Serbia*, §§ 33-37.

same and whether those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space.⁴⁰

The European Court of Human Rights did not accept the attitude of the Serbian representatives that provisions of Article 6, Paragraph 3 of the POA do not include aggravated assault, while this element is of key importance to the existence of the criminal act of aggravated assault from Article 121, Paragraph 2 of the CC. In the concrete case it was crucial that in the decision of the administrative offence was clearly state that the applicant was guilty, *inter alia*, for hitting and hurting the injured, so that *the physical attack*, no matter the legal qualification of the offence, represents one of the administrative offence elements.⁴¹ Since after the final decision for the administrative offence the applicant was found guilty in the criminal proceedings for the offence related to the same behavior for which he was punished in the administrative procedure, and the facts were substantially the same, the European Court of Human Rights established that Article 4 of the Protocol No. 7 was violated.⁴²

First of all, it should be noted that the European Court of Human Rights did not accept the allegations that Article 6, Paragraph 3 of the POA did not prescribed the aggravated assault. It put in the front the dispositive of the administrative offence decision by which the applicant was found guilty for disturbing public order, referring thereby towards the stand it took in the *Maresti*⁴³ case. One of the shortcomings of this approach was that Article 6 of the Croatian AAOAPO⁴⁴ connects the existence of an administrative offence with especially insolent and rude behavior in public that insults citizens or disturbs their peace, so, it *does not prescribe aggravated assault*. Contrary to that, the provision of Article 6, Paragraph 3 of the POA has a broader scope. Disturbing citizens' peace or disturbing public order is, among other matters, connected to *exercising violent behavior towards* another person. In the Serbian doctrine and in domestic jurisprudence under the notion of exercising violent behavior towards another person it is implied to use physical force to hurt the body of the other person, to deprive the other person of the freedom to move freely or to freely make decisions about their actions.⁴⁵ Because of that the statement given by the Serbian representative does not exist, yet the European Court of Human Rights taciturnly accepted that Article 6, Paragraph 3 of the POA does not have any common points with aggravated assault. Therefore, the tables have turned in this situation, because the administrative authority in the decision by which the applicant was found guilty for disturbing public order by hitting the injured party in the head and by hurting him as was described along the lines of the framework of the provision of Article 6, Paragraph 3 of the POA.

This treatment of the administrative authority does not have to mean that the *ne bis in idem* principle violation was absent, because descriptions of certain administrative offences can completely coincide with the legal description of a criminal offence. That is how endangering another person's security with a life threat or a threat to hurt him or someone close to him would present an administrative offence against public order

⁴⁰ *Sergey Zolotukhin v. Russia*, §§ 82, 84.

⁴¹ *Milenković v. Serbia*, §§ 41, 42.

⁴² *Ibid.*, §§ 48, 49.

⁴³ *Maresti v. Croatia*, § 63.

⁴⁴ Act on administrative offences against public order – AAOAPO, *National Paper* nos 5/90, 47/90 and 29/94.

⁴⁵ Z. Stojanović, N. DeliĆ, *Krivično pravo Posebni deo*, Pravni fakultet Univerziteta u Beogradu, Pravna knjiga, Beograd 2013, 297.

according to Article 6, Paragraph 2 of the POA. Identical legal description relates to the criminal offence of jeopardizing security from Article 138, Paragraph 1 of the CC.⁴⁶ Therefore, in this case it is about the *identical* facts. Situations from which the conclusion is drawn on the (non)existence of facts which are substantially the same represent a far more serious problem, since the *criterion of substantiality* is to a large degree vague. Connecting those facts which constitute a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space⁴⁷ is not of much value when determining whether it is dealing with *in concreto* substantially the same facts. In truth, the Grand Chamber of the European Court of Human Rights followed mentioned measures in the *Zolotukhin*⁴⁸ case. However, it should not be discarded that in the concrete case a factual coincidence was examined between the administrative offence against public order and criminal offence against public order. Therefore, „criminal“ offences that have the identical protected property. Considering that *the only difference* between „criminal“ offences was *the violent threat oriented towards the police officer*, which represented an element of a criminal offence, but not of an administrative offence, a conclusion was drawn on the existence of facts that are substantially the same.

Problems of „substantially same facts“ are complicated slightly in cases where there is no coinciding of „criminal“ offences' protected properties. The case *Milenković* is the right example of that. Within it, a factual coincidence between an administrative offence against public order and a criminal offence, whose protected property is the life and body of a human being, were compared. Unlike the *Zolotukhin* case in which the emphasis was put on the *insufficiency of one element* to make the base for two „criminal“ offences with the same protected property substantially different, in the *Milenković* case *the existence of one element* – the physical assault, was *enough* to draw the conclusion on the substantially factual identity of two „criminal“ offences that have *different* protected properties. In other words, hitting and hurting the injured party whose fate was determined in the administrative offence decision is basically equal to committing an aggravated assault due to which the victim's life is threatened, which was established in the criminal proceedings.

The showcased approach could be accepted if a charge was raised against the defendant during the administrative procedure or after the conviction for administrative offence from Article 6, Paragraph 3 of the POA, because of the criminal offence of violent behavior from Article 344, Paragraph 1 of the CC.⁴⁹ It is in that sense that participating in a fight mentioned by the provision from Article 6, Paragraph 1 of the POA, or insolent or rude behavior as an alternative action to a criminal offence from Article 344, Paragraph 1 of the CC, could be judged as the difference that does not question the substantially factual identity of two „criminal“ offences. However, the practice which

⁴⁶ Whoever jeopardizes the security of any person by a life threat directed to them or to a person close to them, will be sentenced to prison in the duration of one year (Article 138, Paragraph 1 of the CC).

⁴⁷ *Sergey Zolotukhin v. Russia*, § 84.

⁴⁸ *Ibid.*, § 97.

⁴⁹ The basic form of the criminal offence of violent behavior is committed by someone who jeopardizes another citizen's peace or significantly disturbs public order in a more serious manner through insolently insulting or molesting another person, through executing violent behavior on another person, or through causing a fight or through insolent or rude behavior (Article 344, Paragraph 1 of the CC).

emerges on the threshold of understanding the substantially same facts expressed in the *Zolotukhin* case leads towards a direction for which an excuse cannot be always found.

That is especially expressed in cases in which the question of protecting the „core“ of human rights emerges. Included among those rights, among all else, are the Right to Life (Article 2 of the ECHR) and the Prohibition of Torture (Article 3 of the ECHR) and the *Ne bis in idem* principle (Article 4 of the Protocol No. 7).⁵⁰ That is justified with the fact that in the area of certain rights' application same circumstances must have same consequences regardless of the existence of special circumstances in a certain state.⁵¹ Lately, it is noticeable that the Strasbourg jurisprudence is headed towards the direction of accepting the margins of appreciation even in regards to the Right to life and the Prohibition of Torture, especially when the European Court comes to a decision that there was a positive obligation of the state.⁵² Under this notion, the liability of the state to create suitable conditions for effective execution of guaranteed human rights is implied. Provided that here, above all, it is referred to securing and respecting the Right to Life (Article 2 of the ECHR), the Prohibition of Torture (Article 3 of the ECHR) and the Right to respect for private and family life (Article 8 of the ECHR).⁵³

That is why the Grand Chamber of the European Court of Human Rights tried to justify the digression from the *ne bis in idem* prohibition in the judgment *A. and B. v. Norway* along with the criterion of *sufficiently closely connection in substance and in time*. However, it seems that this time as well no gratifying answer was given. Namely, in the mentioned judgment the attitude that the existence of a sufficiently close connection assumes, among other matters, that different proceedings are directed towards complementary aims and that they *in concreto* refer to different aspects of socially harmful behavior. Thereby, it is extremely significant that imposed sanctions in an administrative procedure do not represent a part of „the core of criminal law“, because then there would be the risk of repetition (*bis*) in different actions instead of completion of the punishment for the forbidden behavior.⁵⁴

However, it is debatable whether it is possible to evaluate if it is the case of repetition or completion of punishment in different procedures, solely based on the imposed sanction. Namely, in the *Milenković* case, the sanction imposed in a administrative procedure with the aim of protecting public order, while in the criminal proceedings protected properties were the life and human body. Essentially, this is about the *concurrency of „criminal“ offences*, administrative offence of public order violations, on one hand, and the criminal offence of aggravated assault, on the other. The distinctness of the mentioned situation is reflected in the fact that the decision on two „criminal“ offences, which were substantially the same, conducted before two

⁵⁰ Apart from these, untouchable rights that are applied on everyone, in all circumstances and places, which cannot be subjected to limitations or derogation, there are also conditioned rights, which enjoy relative protection, and indirect rights that can be highlighted only in the correlation to some other rights. More on that:

F. Sudre, *La dimension internationale et européenne des libertés et droits fondamentaux*, in: R. Cabrillac, M.-A. Frison-Roche, Th. Revet (sous la direction de), *Libertés et droits fondamentaux*, 9^e édition revue et augmentée, Dalloz, Paris, 2003, 38, 39, 40.

⁵¹ F. Tulkens, L. Donnay, „L'usage de la marge d'appréciation par la Cour européenne des droits de l'homme Paravent juridique superflu ou mécanisme indispensable par nature?“, *Revue de science criminelle et de droit pénal comparé* 1/2006, 11.

⁵² *Ibid.*, 12.

⁵³ S. Trechsel, 37.

⁵⁴ *A. and B. v. Norway*, §§ 132, 133.

competent public authorities, was being made in two separate proceedings. Had it been the case of criminal offences, i.e. had the other person got a heavy bodily injury due to the aggravated assault, the unanimous attitude of the jurisprudence and doctrine would be that the *concurrency of criminal offences* exists.⁵⁵ It can be said, for this approach, that it is synchronized with the attitude of the European Court of Human Rights expressed in the *Marguš*⁵⁶ case that the guarantees predicted in Article 4 of the Protocol No. 7 and the states' obligations based on Article 2 and 3 of the ECHR must be considered as parts of a coherent whole and interpreted so as to promote inner compliance between different provisions of the European Convention.

The *Milenković v. Serbia* judgment can be questioned in light of the attitude expressed in the *A. and B. v. Norway*⁵⁷ case that a sufficiently closely temporal connection between different procedures must exist. In the *Milenković* case the administrative procedure was initiated on October 27th 2006. It was finally over when the deadline for making the appeal against the first-instance decision passed, by which the applicant was pronounced responsible from November 6th 2007. On the other hand, the indictment was raised in the criminal proceedings against the applicant on April 4th 2007 and the conviction judgment became final on March 20th 2012. Given that the criminal proceedings was in the phase of disputing the foundation of the indictment at the moment when the administrative procedure was finally over, it can be said that the two penal procedures had a sufficiently closely temporal connection. In this concrete case there was no *res iudicata* in the moment of raising the indictment, so the applicant was not in suspense that the criminal charge would be disputed in front of the competent court, while the length of the proceedings itself did not surpass the criteria of a reasonable duration.

Concluding notes

Despite the newest attitudes of the European Court of Human Rights expressed in the judgment *A. and B. v. Norway*, the scope of provision application from Article 1 of the Protocol No. 7 remains to large extent debatable. That the matter at hand is the one in which it is difficult to find a common denominator, testifies the fact that the Protocol No. 7, which introduced the *ne bis in idem* principle to the European system of human rights protection, was adopted in 1984 and came into force in 1988. Besides, Germany, Netherlands, United Kingdom, and Turkey did not ratify the Protocol No. 7. Germany, same as Austria, France, Italy and Portugal (who ratified the aforementioned Protocol), gave reserved or interpretative statements in which they specified that the word „criminal“ is to be interpreted according to the meaning given to it within the national law.

The main question presented in practice to the European Court of Human Rights so far, referred to the identity of offences and the criterion by which they were judged – through legal or factual criteria. Although the *Sergey Zolotukhin v. Russia* judgment expresses the attitude that Article 4 of the Protocol No. 7 must be understood as a prohibition on prosecuting or holding a trial to the same person for another „offence“ to

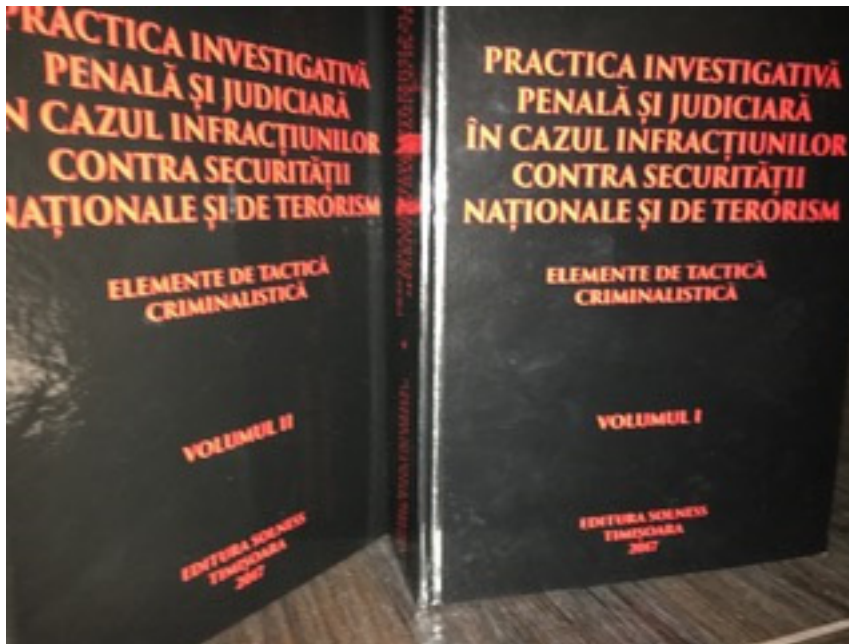
⁵⁵ The District Court of Belgrade, Kž. 3003/95; 194/05, in: Z. Stojanović, N. Delić, 299.

⁵⁶ *Marguš v. Croatia*, 4455/10, 27. 5. 2014, § 128.

⁵⁷ This request is justified with the argument that the person on trial is protected from being exposed to uncertainty and delay and from proceedings becoming protracted over time. *A. and B. v. Norway*, § 134.

the extent where it stems from identical facts or facts which are substantially the same, the application of the *ne bis in idem* principle still causes certain doubts. Considering that the aforementioned judgment did not answer the question of concurrently conduction of penal proceedings, the Grand Chamber of the European Court of Human Rights reached a judgment *A. and B. v. Norway* towards the end of the last year. On that occasion, an attempt was made to keep the approach expressed in the *Zolotukhin* case, but also to allow digressions from it by using the criterion of sufficiently closely connected in substance and in time. Having in mind the cases that changed the attitude of the European Court of Human Rights, it can be said that the financial interests of the Member States of the Council of Europe, and the European Union as well, expressed in the possibility of imposing sanctions in terms of raising the tax rate in case of unreported taxable income, had a decisive significance. However, the question is to what extent will it be able to limit the digression from the criterion established in the *Zolotukhin* case to tax sanctions. Especially if we bear in mind that the criterion adopted in the *A. and B. v. Norway* judgment is to a large degree discrete and thus appropriate for creating additional uncertainty in the field that is considered to be „the core“ of human rights.⁵⁸ Some of the open questions related to the application of the *ne bis in idem* principle were underlined in this paper.

⁵⁸ On that note, as one of the solutions in the part of the doctrine is proposed: a test „*Blockburger*“. The Supreme Court of USA applies it when evaluating whether coinciding acts are at hand (*Blockburger v. United States*, 284 U.S. 299 (1932)). It is a rule used when the same act represents a violation of two different legal provisions and it ought to be used to establish whether each provision requires the carrying out of evidence on the additional fact that the other provision does not require, when judging whether two or only one offence was committed if S. Trechsel, 398, 399; B. M. Zupančič, „*Ne bis in idem* (zabrana ponovnog suđenja za isto delo) la belle dame sans merci“, *Crimen* 2/2011, 175, 176.



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Investigative and judicial practice in the matter of crimes against national security and terrorism Ed. Editura Solness, Timisoara, 2017, ISBN 978-973-729-495-1

The authors book, php Doru Ioan Cristescu and attorney Victor Cătălin Enescu is a *vademecum* work which describes **elements of criminalistics tactics**, in instances specific to crimes against national security, and terrorism.

The *theoretical part*, entitled "*Elements of criminalistics tactics specific to the investigation of crimes against national security, and terrorism*", deals with matters concerning the role, place and the importance of *informative-operative investigations* undertaken for the discovery and documentation of any illicit activities subsumed to threats against national security, in relation to *the criminal investigations of crimes against national security, and terrorism* and, where applicable, of the strong similarities between the two investigative activities, with a consistent difference determined by their prior development and, respectively, subsequent to the time of commencement of criminal prosecution towards the deed or the individual.

Arguments have been brought forth for the consideration for which the performance of national security activities, undertaken by the bodies responsible for enforcing the law, **bears a component which is set up under an operative-**

informational investigative process, with characteristic features and own rules, and whose development, from the time of being triggered and up to the moment of completion, is under jurisdictional control, exerted by the Attorney General of the Public Prosecutor's Office attached to the High Court of Cassation and Justice or the attorney designated by the Attorney General, on the one hand, and, on the other, by the judge designated by the President of the High Court of Cassation and Justice, who is compliant with the requirements of the fundamental human rights stated by the ECHR and in the constitution, with guarantees built under the framework law on national security in Romania and under the organic laws for the organization and operation of the intelligence services, whose breaches are susceptible to be sanctioned, for a criminal perspective, being thus protected.

The constituted part in a collection of "*investigative and judicial practice in the matter of crimes against national security, and terrorism*" is accompanied by brief comments from the perspective of the theoretical aspects mentioned in the first part, and is performed by gathering, under a *corpus*, of some of the acts of completion of the criminal investigation, either indictments, or *nolle prosequi* (*removal from criminal investigation, under the provisions of the old Criminal Procedure Code*), of several criminal cases settled during 2005-2016, whose object were the *crimes against national security or acts of terrorism*, irrespective of whether at the end of the criminal trial, such legal classification was or was not maintained, a circumstance which may also be due to the legislative changes occurred as a consequence of the enforcement of the New Criminal Code, on 01.02.2014, or that, following submission of the evidence, it was assessed that there is no subsistence of any composing elements of such crimes, as well as the decisions of trial courts, where final.

The criminal investigation activities is also illustrated with a few **Technical and scientific reports of findings** as a result of using the scientific evidence procedure consisting in the arrangement and performance of technical and scientific findings, from an incredulous consideration: on the one hand, for the purpose of detecting the need for arrangement, the objectives brought forth by the criminal prosecution bodies and the materials made available to the expert designated for the execution of the work, whilst, on the other hand, for highlighting the scientific content of the expert work and the possibilities of being capitalized under the criminal proceedings.

It is worth mentioning that all the cases illustrated in this collection *were largely brought to the attention of the media* in Romania, which makes it useful to present the exclusively judicial manner for approaching such criminal cases, whilst it is well-known that journalistic investigations are *intuitive* and judicial investigations are *reenacting*, with the evidential support offered by submission of evidence as the main *modus operandi* and argument.

The work represents a documentation material for the *experts within the bodies liable for law enforcement in the field of national security*, who may perform assessments of the way the *national security intelligence activity* was capitalized on, under the criminal trial, activity that is/was undertaken, which are the elements in fact, resulting from the clues, data and information obtained by the information collection activity, that shall or may turn into evidence relevant to a criminal trial and, in essence, which are the fundamentally necessary evidence and that may prove the criminal activity targeting national security.

The documentation material may, in itself, represent a *guide for the development of the criminal investigation in the matter of crimes against national security and acts of*

terrorism, from the time of the first intimation and up to the completion of the criminal investigation, since the evidence submission mechanism bears such an object, under criminal cases, the tactical method for using the evidential means, methods and procedures, the development of the evidence submission activity based on an unprejudiced planning, in compliance with a unitary research methodology, the cooperation, fundamentally necessary, with the bodies liable for enforcing the national security law, the criminalistics tactics for performing different activities, which may be useful for practitioners in the sector – national security law enforcement bodies, as well as attorney magistrates and criminal investigation bodies.

This work may also be beneficial to *judge magistrates*, in order to be able to assess the need to establish, under any criminal case, a *factual basis* which features the specifics of crimes against national security and acts of terrorism, which features a certain discretion, occult conditions (*for instance, espionage or treason*) or, on the contrary, with an extremely powerful social impact and echo (*for instance, acts of terrorism*) but that are all subjected to a special behavior in relation to the possibilities and the effective submission of the evidence, in order to be able to make a correct, judicious and complete decision on the facts submitted to them for trial.

Not least, the documentary collection may be useful to *lawyers, PhD students or any party interested* in the criminal science field, in general, and criminalistics tactics and methodology, in particular.

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