Computer crimes in Republic of Serbia

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Abstract

Criminal Legislation of the Republic of Serbia, which started applying as of 1 January 2006, provides for criminal responsibility and punishment for several criminal offences against safety of computer data. Those are computer criminal offences which a perpetrator (who obviously has unique, special knowledge of information, compute technology – IT sector) commits by abuse of computers, computer systems or network, thereby causing material or non-material damage to other natural or legal persons, as well as a whole social community. The basis of those incriminations are European standards established under the Budapest Convention on Cyber Criminal and Additional Protocol to this Convention, as well as many other European documents. The paper analyses basic characteristics of computer criminal offences in Serbia and the degree of their compatibility with European standards.

Keywords: *computer abuse, european standards, crime, responsibility, sanction*

I. Introduction

When adopting the Convention on Cybercime, ETS 188 of 23 November 2001 the Council of Europe[2] tried to set up basis of a unique European system of substantial and procedural criminal law in the field of necessary cooperation of State members in fighting various forms and kidns of cyber crime. The Convention itselft (Articles 2-13) stipulated five such crimes directed against security, entirety and availability of computer data and computer systems. Hereby, basis for some national legislations have been set more precisely in term of determining features and characteristics of individual computer crimes, their basic, minor and more severe forms, and prescribing criminal sanctions for their perpetrators (natural and legal persons)[3].

An additional Protocol on criminalisation of acts of a racist and xenophobic nature committed through computer systems has been adopted with this Convention. In Articles 3-7 this Protocol stipulates criminal responsibility and penalties for abuse of computers in committing crimes out of racial and xenophobic impulses (motives)[4].

By accepting the above mentioned Convention, and amending the Criminal Code of the Republic of Serbia in April 2003, numerous computer crimes have been introduced into the criminal and legal system in Chapter 16a, under title „Crimes against security of computer data"[5]. The same crimes were introduced into the 2003 Criminal Code of Monte Negro in Chapter 28 with the same title[6].

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[2] B.Petrović, D.Jovašević, *International Criminal law*, Sarajevo, 2010, pp. 89-92.

[3] D.Jovašević, *International Criminal law*, Niš, 2011, pp. 109-111.

[4] D.Jovašević, V.Ikanović, *International Criminal law*, Banja Luka, 2015, pp. 97-99.

[5] D.Jovašević, *Commentary of Criminal code of Republic of Serbia*, Neograd, 2003, pp. 389-392.

[6] Lj.Lazarević, B.Vučković, V.Vučković, *Commentary of Criminal code of Montenegro*, Cetinje, 2004, pp. 639-644.

II. General characteristics of criminal and legal protection of computer data

Object of protection of these crimes is security of computer data and systems, that is of computer network. The legislator uses for it the term computer crime. But, aside from this term, the legislation of the Republic of Serbia uses the term of hi-tech crime for crimes being systemized here.

Article 112 of the 2005 Criminal Code of the Republic of Serbia[7] (hereinafter: the Criminal Code) determines the term and characteristics of: computer data, computer network, computer programme, computer virus, computer and computer system in term of object of attack in case of these crimes. The term computer crime understands all various shapes, kinds and forms of expression of illegal behaviors directed against security of computer and information systems as a whole or some of their parts, in different ways and with different means, with intention to gain the benefit for himself or the other person (of material or non-material nature) or to cause damage to other person. Characteristic of a computer crime is huge dynamics and extreme variety of its appearance forms and kinds and manifestation forms.

Perpetrators of these crimes are in a specific category of persons. They are mostly non-delinquents and socially adjustable, non-violent persons. They must have certain special, expert and practical knowledge and skills in the domain of information and computer techniques and technologies.

In practice, there is a greater or lesser time difference between the action taken and the moment when the consequences occur. These crimes are difficult to detect and even harder to prove, they remain practically undiscovered for a long time, until the damaged person suffers harm in the domain of information and computer data or systems.

III. Individual computer crimes

1. Damaging computer data and programmes

Crime under Article 298 understands unauthorized deletion, alteration, damage, concealement or otherwise making unusable a computer data or programme[8].

Object of protection is security of computer data or computer programmes, and object of attack is computer data or programme.

Computer data is every representation of facts, information or concepts in a form suitable for processing in a computer system, including appropriate computer software necessary for the functioning of the computer system. A computer programme is a regulated set of orders serving to control computer operations, as well as solving specific tasks by means of a computer.

Consequence of this crime is violation of protected good – computer data or programme belonging to natural or legal persons in term of its usability or usefulness in general, or for a specific time, at a specific place or for specific purpose.

The perpetrator of the crime may be any person, and the guilt requires intent.

A fine or sentence of imprisonment of up to one year is prescribed for this crime. The court shall obligatory impose on the perpetrator a security measure of seizure of

[7] Official Gazette of Republic of Serbia No. 85/2005, 88/2005, 107/2005, 72/2009, 105/2011, 121/2012, 108/2014, 94/2016 and 35/2019.

[8] D.Jovašević, *Criminal law, Special part*, Beograd, 2017, pp. 232-234.

equipment and devices if the following two conditions are fulfilled: 1) the equipment and devices were used for commission of the crimes and 2) the equipment and devices are the property of the perpetrator.

This crime has two aggravating forms[9].

The first form of this crime exists if the action taken in the execution of the basic crime caused damage amounting to over RSD 450,000. The amount of material damage caused at the time of the commission of the crime in the amount established under the law constitutes a qualifying circumstance. A sentence of three months to three years of imprisonment is prescribed for this crime.

The second form of this offence, for which a sentence of three months to five years of imprisonment is prescribed, exists if the action taken in the execution of the basic crime caused material damage amounting to over RSD 1.500.000.

2. Computer sabotage

This crime set out in Article 299 of the Criminal Code is committed by whoever enters, destroys, deletes, alters, damages, conceals or otherwise makes unusable computer data or programme or damages or destroys a computer or other device for electronic processing and transfer of data, with intent to prevent or considerably disrupt the procedure of electronic processing and transfer of data that are of importance for government authorities, public service, institution, enterprise or other entities[10].

The entry is entering or storing of a new, previously non-existing data or alteration of already existing computer or other data in the computer programme. Destroying is a complete and permanent destruction of a substance or form of a specific object so it cannot not be used for any purpose or previous intention it was used for. Deletion is removing of computer data or programme in its entirety or a part of it, often by use of mecanical or other means.

Alternation[11] is partial change of existing data in term of its substance, place of its whereabouts or nature, or entering of other untrue data into computer system. Damage is temporary, partial or short-term disability of a computer data, programme, computer or other device to serve its regular purpose. Concealment is removing of data or object from the place where it was, the place known to everyone, and its transfer to another, mostly hidden place where other persons cannot be introduced to its content in general or for a certain period of time. Making unusable computer data or programme is any action which, to a greater or lesser extent, affects the usability of computer data or programme.

The perpetrator of the crime may be any person, and the guilt requires a direct intent characterized by mentioned intention. A sentence of imprisonment of six months to five years is prescribed for this offence.

3. Generating and introducting computer viruses

A specific crime set out in Article 300 of the Criminal Code consists of generating computer virus with intention of its introduction or its introduction into somebody else's computer or computer network[12].

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[9] B.Petrović, D.Jovašević, *Criminal law, Special part*, Sarajevo, 2005, pp. 297-299.
[10] M.Simović, D.Jovašević, *Lexicon of Criminal law*, Sarajevo, 2016, pp. 583-585.
[11] D.Jovašević, V.Ikanović, *Criminal law, Special part*, Banja Luka, 2012, pp. 212-214.
[12] B.Petrović, D.Jovašević, A.Ferhatović, *Criminal law 2*, Sarajevo, 2016, pp. 313-315.

Object of protection is security of a computer and computer network from viruses of different kinds and nature, and object of attack is a computer virus. That is a computer programme or some other set of commands introduced into the computer or computer network generated to multiply itself and affect other programmes or data in the computer of computer network by adding of that programme or set of commands to one or more computer programmems or data.

Perpetrator of the crime may be any person, and in practice those are persons having special knowledge in the scope of computers and informatic technologies. As to the guilt a direct intent characterized by mentioned intention is necessary.

A fine or sentence of imprisonment of up to six months are prescribed for this crime. Equipment and devices for commission of this crime are obligatory seized when appying security measure of seizure of object.

Aggravated form of this crime, for which a fine or sentence of imprisonment of up to two years is prescribed, exists if damage is caused by a virus generated in this way and introduced into somebody else's computer or computer network. For the existence of crime it is important that the perpetrator is aware and knows that, during the time of committing a crime – work on a computer, he thereby introduces a computer virus into somebody else's computer or computer network. Damage caused thereby may be of material or non-material character. It is important that a damage caused is a result of commission of a basic crime and that the perpetrator acts with negligence in relation to it.

4. Computer fraud

Computer fraud set out in Article 301 of the Criminal Code consists of entering incorrect data, failure to enter correct data or otherwise concealing or falsely representing data, thereby affecting the results of electronic processing and transfer of data with intent to acquire for himself or another unlawful material gain and thus causing material damage to another person[13].

Object of protection is securing of computer systems from entering incorrect and false data and trust in those systems.

Concealing is failure to enter a data by a person who is obliged to enter it into computer or a computer network. It may involve any data. False representing of computer data exists when false data (be it entirely or partialy false) is represented, published, entered or used in the computer network. Both actions have to be taken in relation to the data which is, by its significance, nature, character and time of entering or use, capable of affecting the result (course and procedure) of electronic processing and transfer of data in computer system.

All the actions in term of commission of this crime have to be taken with certain intent – intent of the perpetrator to acquire for himself or another unlawful material gain. The perpetrator has to have that intent in time of commission of the crime, but does not have to be acquired in the concrete case. A result of this crime is violation causing material damage to another person.

Perpetrator of the crime may be any person, and as to the guilt a direct intent characterized by mentioned intention is necessary.

A fine or sentence of impirsonment of up to three years is prescribed for this crime.

Lighter form of crime exists when a perpetrator committed a crime – hiding or false presentation of data in the computer or computer network in a legally preserbied

[13] D.Jovašević, *Lexicon of Criminal law*, Beograd, 2011, pp. 590-593.

manner with intention to cause damage to another person, that is to cause damage to another natural or legal person. Malicious intention of the perpetrator to cause material or non-material damage to another person is a privileged circumstance for which a fine or sentence of imprisonment of up to six months is prescribed under the law.

This crime has two aggravated forms[14].

The first one, for which a sentence of imprisonment of one to eight years of imprisonment is prescribed, exists when material gain (for perpetrator or another person) is acquired by committed basic crime in the amount of over RSD 450,000. The amount of acquired material gain is a qualifying circumstance. It has to be in cause-and-effect connection with commission of the crime.

The second form of aggravated crime exists if a perpetrator acquired illegal material gain by committing the crime in the amount of over RSD 1,500,000. Sentence of imprisonment of two to ten years is prescribed for this crime.

5. Unauthorised Access to Protected Computers, Computer Networks and Electronic Data Processing

This crime set out in Article 302 of the Criminal Code consists of accesses to a computer or computer network without authorisation, or accesses to electronic data processing without authorisation by breaching of protection measures[15].

Object of protection is security of a computer or computer network, or system of electronic data processing protected by a special technical and other protection measures.

Perpetrator of the crime may be any person having specific knowledge in the field of protection of computers or computer systems. As to the guilt a direct intent is necessary.

A fine or sentence of impirsonment of up to six months is prescribed for this crime.

This crime has two aggravated forms.

The first one exists in case of recording or use of computer data, obtained by accessing somebody else's computer or computer network or system of electronic data processing without authorization, given that it was done by breaching of protection measures. A fine or sentence of imprisonment for up to two years is prescribed for this crime. It has no significance which purpose or intention such obtained (recorded) computer data was used for.

The second aggravated form of this crime, for which a fine or sentence of imprisonment of up to three years is prescribed, exists if computer data (one or more) is obtained by accessing somebody else's computer or computer network or somebody else's system of electronic data processing without authorization by breaching protection measures, and is subsequently used which results in suspensioin or serious malfunction in electronic processing and transfer of data or of the network, or other serious consequences have occurred for another (natural or legal) person.

6. Preventing or Restricting Access to Public Computer Networks

A crime prescribed under Article 303 of the Criminal Code consists of preventing or hindering access to a public computer network without authorization[16].

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[14] D.Jovašević, Lj.Mitrović, V.Ikanović, *Criminal law, Special part*, Banja Luka, 2017, pp. 278-291.

[15] M.Kokolj, D.Jovašević, *Criminal law, General and special part,* Bijeljina, 2011, pp. 389-391.

[16] D. Jovašević, *Criminal code with Commentary*, Beograd, 2007, pp. 67-71.

Object of protection is public computer network and its free access to individually undefined number of persons. Motive of this incrimination is prevention of monopol for using of public computer network.

Prevention is unabling another person to access public computer network completely, permanently or for certain shorter period of time. It may be done by physical prevention, setting of some requirements or obstacles, or requesting fulfillment of certain assumptions. Hindering means partial complication, making difficult or inaccessible, or conditioning another person to access or use public computer network without disturbances and freely, at its own discretion.

Perpetrator of the crime may be any person, and as to the guilt a direct intent is necessary.

A fine or sentence of impirsonment of up to one year is prescribed for this crime.

Heavier form of this crime, for which a sentence of imprisonment for up to three years is prescribed, exists if the crime is committed by an official in discharge of duty.

7. Unauthorised Use of Computer or Computer Networks

A crime prescribed under Article 304 of the Criminal Code consists of use of computer services or computer networks without authorization and with intent to acquire unlawful material gain for himself or another person[17].

Object of protection is legality and conscientiousness in use of computer systems – services or networks, of all forms of abuse and negligence.

There has to be an intent of the perpetrator at a time of comission of the crime, but it does not have to be realized in the concrete case.

A perpetrator of crime may be any person, and as to the guilt a direct intent characterized by mentioned intent is necessary.

A fine or sentence of imprisonment for up to three months is prescribed for this crime.

8. Manufacture, Procurement and Provision to others Means for the Committing Criminal Offences against the Security of Computer Data

This is a new computer crime[18] (Article 304a of the Criminal Code) introduced into the Criminal Code by novelty from 2009. Actually, these are punishable preparation acts for commission of a computer crime. The crime itself consists of possession, manufacture, procurement, sale or giving to another person for his use of computer, computer system, computer data or programme intended for committing of crimes against security of computer data. Prescribed sentence for this crime is imprisonment for six months to three years, while the objects of commission of the crime shall be seized from the perpetrator by use of a special security measure of seizure of object.

Object of protection in this case is also a security of computer systems and data, which is applied in a specific manner – just before the commission of a crime.

IV. Conclusion

When accepting provisions of numerous relevant European documents finally inaugurated by adoption of the Convention on Cyber Criminal, state members of the

[17] D. Jovašević, Lj. Mitrović, V. Ikanović, *Commentary of Criminal code*, Banja Luka, 2018, pp. 699-701.
[18] Official Gazette of Republic of Serbia, No.121/2012.

Council of Europe created in their national legislations legal basis for introduction of a specific kind of „computer" crimes, with the aim to provide performance of various tasks and services by use of a computer with confidence and in an efficient, quality, lawful and secure manner.

Accordingly, in Republic of Serbia many crimes of this kind have been introduced into its criminal and legal system and the legislator, having respect for established European standards, provided criminal sanctions for some forms and kinds of prescribed computer crimes. Thereby, with appropriate process requirements (establishing of special organs for fighting hi-tech crime within the police, public prosecution and the court), basis for efficient fight of our state with this modern forms and kinds of criminality knowing no boundaries between the states have been created.

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3. Jovašević, D., *Criminal law, Special part*, Beograd, 2017.
4. Jovašević, D., Ikanović, V., *Criminal law, Special part*, Banja Luka, 2012.
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Specific aspects on the right to a fair trial in the recent caselaw against Romania

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Abstract

The right to a fair trial provided by art. 6 ECHD is one of the most important elements of the Rule of law. The general content and the specific elements of the right to a fair trial are subject to the constant and contextual teleological interpretation of the European Court of Human Rights. Also, the right to a fair trial received an autonomous interpretation in relation with substantive and procedural provisions of the domestic law. The present study focuses on the recent caselaw of the European Court of Human Right agains Romania regarding the violation of art. 6 ECHD.

Keywords: *right to a fair trial, European Convention of Human Rights, specific guarantees, entrapment, incitement, reasonable duration of the trial,* Al-Khawaja test

I. General aspects on the right to a fair trial as regulated by European Convention of human Rights (ECHD)

The right to a fair trial provided by art. 6 ECHD as a procedural guarantee of the rights and freedoms of a person facing national criminal courts, constitutes one of the premises of ensuring pre-eminence of the Rule of Law in a democratic society. The legal text of the precited article contains a description of the mechanisms of this specific guarantee, the limits of its application and its general and specific content[1].

a) the description of the mechanisms of the guarantee is made by art. 6 § 1 ECHD in determination of *„(...) any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."* The text establishes both the object of the guarantee, and the entitled person, natural or legal, the debtor of the obligation being the State party to the convention under whose jurisdiction the holder of the right is.

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[1] *See* Ovidiu Predescu, Mihail Udroiu, 2007, *Convenția Europeană a drepturilor Omului și dreptul procesual penal român*, Ed. Ch.Beck, București, p. 258-261. According to other scholars, the right to a fair trial is divided now in three pylons: the main pylon refers to the procedural safeguards *stricto sensu,* the equality of arms, the independence and the impartiality of the court, the publicity and celerity of the criminal trial. The second one refers to two other material rights, the right to access a court, the right for the enforcement of decisions; the third refers to the right of every person to access a court. *See* F. Sudre, 2005, *Droit Européen et international*, Ed. Presses Universitaire de Rance, 7e édition refondue, p. 338.

b) the limits of the guarantee application are set by the same art. 6 § 1 ECHD art. 6 § 1 ECHD as the *„determination of civil rights or any criminal charge against one person"*. The right to a fair trial presumes both civil obligations and criminal accuzations.

c) the general content of the guarantee refers to a *„fair and public hearing within a reasonable time by an independent and impartial tribunal established by law"*. The folowing general elements are set by the art. 6 as following: the right to be heard by a legal, independent and impartial tribunal (court), the right to a public trial, the right to be judged within a reasonable time, the principle of equality of arms, the principle of contradictority, the right to remain silent and not to self-incriminate oneself, the obligation of motivating the decision by the court.

d) the specific content of the guarantee is set on paraghaph 2 and 3 of the art. 6 ECHD which regulates the specific elements of the right to a fair trial: the presumtion of innocence[2] and the rights of defence[3].

All the rights regulated by Art. 6 § 3 ECHD are elements of the general notion of *„fair trial"*. The Strassbourg Court has stated in *Colozza v. Italy* that *„the guarantees contained in paragraph 3 of Article 6 are constituent elements, amongst others, of the general notion of a fair trial"*[4]. Also, the Strasbourg Court has constantly shown in its caselaw that the obligations instituted for the states by art. 6 are to be fulfilled by them even if the Court cannot substitute the national courts in their reasoning or national legislators in their regulating activity[5].

Article 6 § 3 ECHR regulates specific guarantees of the fair trial principle in respect of typical procedural situations which arise in criminal cases. These specific elements are not an end in themselves and must be interpreted in the light of the function which they have in the overall context of the proceedings. As stated in Mayzit v. Russia, *„the specific guarantees laid down in Article 6§3 exemplify the notion of fair trial in respect of typical procedural situations which arise in criminal cases, but their intrinsic aim is always to ensure, or contribute to ensuring, the fairness of the criminal proceedings as a whole.*

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[2] Art. 6 § 2 ECHD: *„Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."*

[3] Art. 6 § 3 ECHD: *„3. Everyone charged with a criminal offence has the following minimum rights:*

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

[4] Case *Colozza v. Italy*, paras. 26-27, Application no.9024/80, Judgment 15 february 1985, https://hudoc.echr.coe.int, acessed on 20.06.2019; Same statement in Case *Goddi v. Italy*, Application no. 8966/80, Judgment of 9 April 1984, par. 28, https://hudoc.echr.coe.int, acessed on 20.06.2019

[5] Case *Schenk v. Switzerland*, paras. 45-46, Application no.00010862/84, Judgment 12 July 1988, https://hudoc.echr.coe.int, acessed on 20.06.2018:*"According to Article 19 (art. 19) of the Convention,the Court's duty is to ensure the observance of the engagements undertaken by the Contracting States in the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention.*

While Article 6 (art. 6) of the Convention guarantees the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law."

The guarantees enshrined in Article 6 § 3 are therefore not an end in themselves, and they must accordingly be interpreted in the light of the function which they have in the overall context of the proceedings"[6].

These specific rights/guarantees set by art. 6 § 3 ECHD are:

1. Information on the nature and cause of the accusation - Article 6 § 3 (a) ECHR;
2. Preparation of the defence - Article 6 § 3 (b) ECHR;
3. Right to defend oneself in person or through legal assistance - Article 6 §3(c) ECHR;
4. Examination of witnesses - Article 6 § 3 (d) ECHR;
5. Interpretation -Article 6 § 3 (e) ECHR.

Due to its complexity, art. 6 is approached by the European Court of Human Rights (in the following „the Court") as subject to teleological interpretation[7]. The Court avoids theoretical and illusory approaches, giving a contextual interpretation of art. 6 ECHD in its efforts to give practical effect to the purpose of the provision, establishing the so-called principle of effectiveness.

Another observation regarding art. 6 ECHD refers to the fact that this provision must be interpreted in the light of present-day conditions, in regard with the economic, social, legal frame of the domestic State[8] also taking into account the principles of international law applicable in relations between the State parties[9]. Finally, by analysing the arguments of the Court in cases like *Khan v. the United Kingdom,* the scholars[10] observed that art. 6 „enjoys significant autonomy within the domestic law in its substantive as well as its procedural provisions"[11].

Even if the Court has shown a creative and profound interpretation of the art. 6, the Court cannot act as distinct instance in order to re-examine the alleged breaches of domestic law nor to dictate its content, States remaining free to apply the criminal law to any act and to define the constituent elements of the offence committed.

II. Recent caselaw against Romania

Recent cases agains Romania have shown the same meticulous preoccupation of the Court to observe domestic legislation while seeking to provide real guaratees of a person indicted or convicted in a criminal trial in order for that person benefit of his or her procedural rights.

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[6] Case *Mayzit v. Russia*, par. 77, Application no. 63378/00, Judgment 6 July 2005, https://hudoc.echr.coe.int, acessed on 20.06.2019.

[7] Dovydas Vitkauskas, Grigoriy Dikov, 2017, *Protecting the right to a fair trial under the European Convention on Human Rights*, Second edition, Council of Europe, p. 10.

[8] Case *Marckx v. Belgium,* par. 41, Application no.6833/74, Judgment 13 June 1979, http://hudoc.echr.coe.int, acessed on 20.06.2019.

[9] When the Court *„considers the object and purpose of the Convention provisions, it also takes into account the international law background to the legal question before it. Being made up of a set of rules and principles that are accepted by the vast majority of States, the common international or domestic law standards of European States reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty."* Case *Demir and Baykara v. Turkey,* par. 76, Application no. 34503/97, Judgment 12 November 2008, http://hudoc.echr.coe.int, acessed on 20.06.2019.

[10] Dovydas Vitkauskas Grigoriy Dikov, *op. cit.*, p. 12.

[11] Case *Khan v. the United Kingdom*, Application no. 6222/10, Final Judgment 20 March 2012, http://hudoc.echr.coe.int, acessed on 20.06.2019.

II.1. Case Ursu v. Romania 2018

In case *Ursu v. Romania*[12], the Court has emphasized the importance of the principle of equality, establishing the double test standard for incitement oncemore.

The applicant, Mr. Ursu, was convicted in Romania for drug trafficking, in violation of Law no. 143/2000 on the fight against drug trafficking and illegal drug use, as a member of a network of dealers that was trafficking drugs in city Constanța. At the time of committing the acts, the applicant was a student and an acquaintance of another convicted person in the same case, studying at the same university. The applicant was caught bringing drugs to the other convicted and an undercover agent (eighteen ecstasy tablets and 0.46 grams of cannabis resin).

The applicant's first statement to the police (given on 26 June 2005), was given in the absence of a lawyer and interpreter. He maintained his allegations in a statement given in the presence of two lawyers of his choice on 19 July 2005. He added that he had accepted to provide D. with the ecstasy tablets in the hope of having an intimate relationship with her during his stay in Constanța. On the occasion of several hearings held in 2005 before the Constanța County Court, the applicant denied his involvement in drug trafficking and claimed that he had been entrapped by the police.

In 2007 the Constanța County Court convicted the applicant of drug trafficking and sentenced him to one and a half years' imprisonment suspended on probation dismissing his allegations that he had been entrapped. The Constanța County Court did not provide any reasons justifying the fact that, in spite of the applicant's insistence, D. had not been heard. The Constanta County Court convicted the applicant reliyng on his own statements, corroborated by the statements made by the friends who had accompanied him, as well as on reports produced by the undercover agent and the police following the police operation leading to the catch of the applicant in the act of committing a crime.

The Appeal Court dismissed the applicant's appeal and upheld the County Court's findings without providing any additional reasons, reiterating that the evidence obtained by using an undercover agent was in accordance with Law no. 143. It did not refer at all to the applicant's argument that D had not been heard.

The appeal on points of law based on the same arguments – Mr. Ursu had been unduly incited by D to commit the offence of which he had been found guilty and that throughout the proceedings he had not had an opportunity to have her questioned has been dismissed in 2009 by the High Court of Cassation and Justice as ill-founded, the highest Court of Romania upholding the reasoning of the two previous lower courts.

Mainly, the reasoning of the Court in this case is based on the notion of *„entrapment"* which includes the notion of *„incitement"*. The concept of entrapment in breach of art. 6 § 1 of the Convention, is distinguished from the use of legitimate undercover techniques in criminal investigations. While the use of special investigative methods in general and the undercover techniques in particular, cannot in itself infringe the right to a fair trial. The Court explicitly emphasized that the risk of police incitement entailed by such techniques meant that their use must be kept within clear limits. For example, in case Ramanuskas v. Lithuania, the Court stated that the use of special investigative methods, on account of the risk of police incitement entailed by such

[12] Case *Ursu v. Romania* (2018), Application no. 44497/09, Judgment 18 December 2018, http://hudoc.echr.coe.int, acessed on 20.06.2019.

techniques, must be kept within clear limits[13]. Police incitement occurs where the officers involved – whether members of the security forces or persons acting on their instructions – do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed, in order to make it possible to establish the offence, that is, to provide evidence and institute a prosecution[14].

The Court has recognised in general that the rise in organised crime and difficulties encountered by law-enforcement bodies in detecting and investigating offences has warranted appropriate measures being taken and that the police are increasingly required to make use of undercover agents, informants and covert practices, particularly in tackling organised crime and corruption. The use of undercover investigative techniques in combatting crime is accepted by the Court as a necessity of this facts and on several occasions undercover operations *per se* did not interfere with the right to a fair trial. The presence of clear, adequate and sufficient procedural safeguards set permissible police conduct aside from entrapment[15].

The general principles concerning the issue of entrapment were set out in the case of *Ramanauskas* (2008) and reafirmed 10 years later in *Ramanuskas 2* (2018)[16]: the right to a fair trial in regard of the issue of entrapment would be violated where police officers had stepped beyond an essentially passive investigation of a suspect's criminal activities and had exercised an influence such as to incite the commission of an offence that would otherwise not have been committed. The Court has made a step further and considered that the issue of entrapment could be relevant even where the operation in question had been carried out by a private individual acting as an undercover agent, when it had actually been organised and supervised by the police. In *Vanyan v. Russia*, the Court has stated that the use of undercover agents must be restricted and safeguards put in place even in cases concerning the fight against drug trafficking. The requirements of a fair criminal trial under Article 6 entail that the public interest in the fight against drug trafficking cannot justify the use of evidence obtained as a result of police incitement[17]. *„Where the activity of undercover agents appears to have instigated the offence and there is nothing to suggest that it would have been committed without their intervention, it goes beyond that of an undercover agent and may be described as incitement. Such intervention and its use in criminal proceedings may result in the fairness of the trial being irremediably undermined"*[18].

The Court had also established a set of criteria to distinguish entrapment breaching Article 6 § 1 of the Convention from permissible conduct in the use of legitimate undercover techniques in criminal investigations. The Court's examination of complaints of entrapment has developed on the basis of two tests: the substantive and the procedural test of incitement.

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[13] Case *Ramanauskas v. Lithuania*, par. 51, Application no. 74420/01, Judgment 5 February 2008, http://hudoc.echr.coe.int, acessed on 20.06.2019.

[14] Ramanuskas v. Lithuania, par. 55.

[15] Case *Ramanauskas v. Lithuania (2),* par. 52, Application no. 55146/14, Judgment 20 February 2018, http://hudoc.echr.coe.int, acessed on 20.06.2019.

[16] See *supra* note 12.

[17] Case *Vanyan v. Russia*, par. 46, Application no. 53203/99, Judgment 15 March 2006, http://hudoc.echr.coe.int, acessed on 20.06.2019.

[18] Case *Vanyan v. Russia*, par. 47.

The criteria for the substantive test were set up in case Ramanuskas cited above[19] and reiterated in the courts further judgments, such as Case of *Matanović v. Croatia*[20]:

- whether the offence would have been committed without the authorities' intervention, that is to say whether the investigation was *„essentially passive"*;

- was the execution of the simulated purchases performed by an undercover officer or informant particularly well justified, was it subject to a stringent authorisation procedure, and was it documented in a way that allowed a subsequent independent scrutiny of the actors' conduct.

If the results of the substantive test are inconclusive or positive, the court steps to the procedural test. The Court applies the procedural test of incitement in order to determine whether the necessary steps to uncover the circumstances of an arguable plea of incitement were taken by the domestic courts and whether in the case of a finding that there has been incitement or in a case in which the prosecution failed to prove that there was no incitement, the relevant inferences were drawn in accordance with the Convention[21].

In Case *Ursu v. Romania* the Court's examination of complaints of entrapment has meticulously developed on the basis of the substantive and the procedural test of incitement as follows:

As a preliminary step, the Court had to establish whether the situation under examination falls prima facie within the category of *„entrapment cases".* In case of a positive answer, the Court had to proceed with the substantive test, followed by the procedural test.

a. Substantive test of incitement

The Romanian authorities' statement differed from the applicant's as to D's role in the applicant's acting as an intermediary for the drug sale and the existence of objective suspicions that the applicant had been regularly trafficking drugs prior to the setting up of the undercover operation. Romanian authorities have produced no evidence to substantiate their claim that before the intervention by D., the police had reason to suspect that the applicant was a drug dealer due to the fact that the police report did not offer any more details in respect of the information the authorities had about the applicant's alleged involvement in drug trafficking and how that information had been acquired by the police. The mere claim by the police to the effect that they possessed information concerning the applicant's involvement in drug dealing does not provide a sufficiently solid basis to conclude that the applicant's criminal activities were already ongoing prior to him being contacted by D[22]. In addition, the applicant's behaviour was not indicative of any pre-existing criminal activity while D. had played a significant role in arranging the deal. In its constant rulling, the Court had insisted on the passivity on the State agent's in committing the crimkinal act by the perpetrator. In this case, D. initiated the whole criminal activity under the direct supervision of the investigation bodies and although she was not a State agent and she had not been authorised to act as an undercover agent, the incriminating evidence obtained because of her intervention led to the prosecution and conviction of the applicant[23].

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[19] See *supra* note 12.

[20] Case *Matanović v. Croatia*, paras. 131-134, Application no. 2742/12, Judgment 4 July 2017, http://hudoc.echr.coe.int, acessed on 20.06.2019.

[21] Case *Matanović v. Croatia*, par. 135.

[22] Case *Ursu v. Romania*, par. 36.

[23] *Idem*, par. 37.

b. Procedural test of incitement

On the second part of the reasoning, the Court had to determine whether the applicant was able to raise the issue of incitement effectively in the domestic proceedings, and to assess the manner in which the domestic courts dealt with his plea

The Court observed the domestic trial courts had failed to properly answer to the allegation raised by the applicant regarding a plea of incitement rejecting it in a summary manner and had failed to verify all the aspects regarding the undercover operation.

Secondly, the Court observed also that the applicant did not, at any stage of the proceedings, have an opportunity to have D. questioned being thus deprived of the possibility of clarifying to what extent D.'s actions had influenced and determined his behaviour[24].

The Court concluded that the applicant was convicted on the basis of evidence obtained by way of police incitement and that the courts which examined the case did not carry out a careful examination of his assertion that he had been incited to commit the offence imputed to him, art. 6 § 1 ECHD being thus violated.

II.2. Case Cernea v. Romania 2018

The applicant, Mr. Cernea was initially (2006) convicted for bribe taking and his assets were seizured, the criminal investigation starting in 2000. As a matter of fact the applicant was initially sent to trial for bribe taking an abbuse in office and the State Agency for Capitalisation of Banking Assets (*Autoritate Pentru Valorificarea Activelor Bancare*– „AVAB") joined the criminal proceedings against the applicant as a civil party soughting the recovery of 27,863,805,105 Romanian lei (ROL) (approximately 1,758,753 US dollars (USD)), the damage that it had allegedly incurred as a result of the applicant's abuse of office. On 16 August 2002 the prosecutor's office ordered the seizure of the applicant's movable and immovable assets up to the value of the damage allegedly incurred by AVAB. The order was enforced by the Bihor Police Department on 19 December 2002 by seizing part of the immovable properties owned jointly by the applicant and his wife, in particular four plots of *intra muros* agricultural land, a home and annexes.

In 2006 the Bihor County Court acquitted the applicant of abuse of office but convicted the applicant of bribe taking and sentenced him to three years' imprisonment, suspended, maintaining the measure imposed on the applicant's assets. Further, as the applicand had appeald the decision, in 2006 the Court of Appeal quashed the judgment of the County Court and referred the case back to the first-instance court for re-examination on procedural grounds. In 2010 when the County Court examined the applicant's case on the merits, acquitted him of abuse of office, dismissed AVAB's civil claim consequently lifting the seizure measure from his assets, but convicted the applicant, however, of receiving bribes and gave him a suspended sentence of three years' imprisonment. The applicand appealed the decision and, by the final judgment of 2011, the Court of Cassation allowed the applicant's appeal on points of fact and law in part helding that he was guilty of bribe taking, but his criminal liability for that offence had become time-barred.

It was only in 2012 the Bihor Land and Immovable Property Register removed the annotation concerning the seizure measure imposed on applicant's immovable property which had prevented him from freely disposing of it.

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[24] *Idem*, par. 42.

In this case, there were two main complaints made by the applicant against national authorities: the breach of the principle of celerity under art. 6 § 1 ECHD and breach of the principle of peaceful enjoyment of one' property under Article 1 of Protocol No. 1 to the Convention. In the present study we refere solely to the first complaint.

In its rulling, the Court reafirmed the principles set out in its case-law concerning the assessment of the reasonableness of the length of proceedings. But it is worth to mention that the Court stated before that even if *„it is for the Contracting States to organise their judicial systems in such a way that their courts are able to guarantee the right of everyone to obtain a final decision on disputes concerning civil rights and obligations within a reasonable time"*[25], the reasonableness of the length of proceedings must be assessed *„in the light of the circumstances of the case"*: the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute[26].

In case Cernea the criminal proceedings against the applicant had lasted ten years, five months and ten days over three levels of jurisdiction, neither the complexity of the case, nor the applicant's conduct justifying the overall length of the proceedings. Thus the Court stated that the length of the proceedings in the case did not satisfy the *„reasonable time"* requirement and that there has accordingly been a violation of art. 6 § 1 ECHD.

II.3. Case Tău v. Romania 2019

This case is one of the most recent cases against Romania putting into debate the violation of art. 6 § 1 and § 3 (c) and (d) ECHR.The applicant complained of breaches of the guarantees of fair trial: the applicand had been assisted by an officially appointed lawyer who had also been assisting co-accused persons in spite of the fact that he had requested to be assisted by a lawyer of his own choosing and that he had not been given the opportunity to confront in open court a witness whose statements had been relied upon in convicting him[27].

The applicant was arrested in 2003 and investigated for one of the biggest drug-trafficking cases investigated by the Romanian authorities at the time based on the testimony of two other co-accused, F.D. and P.A. who reached an agreement whereby they would give statements about others involved in drug-trafficking in exchange for a reduced sentence. The first applicant's statement was given in the presence of an officially appointed lawyer, who had also been assisting the other two co-accused, denying any involvement in drug-trafficking. During the hearings before the High Court of Cassation and Justice for the examination of the prosecutor's request concerning applicant's pre-trial detention, the applicant was assisted by the same officially appointed lawyer despite the fact that he insisted to be assisted by a lawyer of his own choosing.

The applicant managed to engage a lawyer only a week later.The applicant's pre-trial detention was repeatedly extended by the Bucharest County Court by interlocutory decisions.

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[25] Case *Lupeni Greek Catholic Parish and Others v. Romania,* par. 142, Application no. 76943/11, Grand Chamber Judgment 29 November 2016, http://hudoc.echr.coe.int, acessed on 20.06.2019.

[26] Idem, par. 143.

[27] Case *Tău v. Romania,* Application no.56280/07, Judgment 23 July 2019, http://hudoc.echr.coe.int, acessed on 30.07.2019.

The prosecutor issued an indictment concerning twenty-six accused persons, including the applicant, but F.D. had not been indicted although he had recognized his involvement in drug-trafficking.

The co-accused, P.A. stated that the applicant had been his friend since 1994 and had helped him in packing drugs. An under-cover agent, in her statement before the court did not mention anything about the applicant envolvment, although in her initial statement given before the prosecutor had stated that many drug transports had left from the applicant's home. In 2005 the Bucharest County Court found the applicant guilty of taking part in international drug trafficking by facilitating the transport of drugs and convicted him to sixteen years' imprisonment.

His conviction was based on statements given by undercover agent, co-accused P.A. and witness F.D. Following the appeal, the Bucharest Court of Appeal reversed the judgment in respect of the applicant and his sentence was reduced to eight years' imprisonment on the grounds that he was an accomplice, had no criminal record and he was more than sixty years old, but had made no reference to the applicant's complaints that he could not confront in open court the witness F.D. The High Court of Cassation and Justice dismissed in 2007 the appeal on points of law by the applicant. It concluded by stating that the applicant's allegations that he had not committed any offence related to drug-trafficking had been contradicted by the statements of witness, co-accused and the undercover agent.

In this case the Court noted that he right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be (art. 6 § 3 (c) ECHD) does not secure an autonomous right but must be read and interpreted in the light of the broader requirement of fairness of criminal proceedings, considered as a whole, as guaranteed by art. 6 § 1 ECHD[28]. At the same time, the Court recalled that *„the compliance with the requirements of a fair trial must be examined in each case with regard to the development of the proceedings as a whole and not on the basis of an isolated consideration of one particular aspect or one particular incident"*[29] *and* that a person charged with a criminal offence should already be given the opportunity at the stage for the preparation of the criminal proceedings to have recourse to legal assistance of his or her own choosing[30].

But since there was no evidence in the file to corroborate the applicant's allegations that he had requested to be assisted by a lawyer of his choosing and that his request had been ignored by the domestic authorities, the Court dismissed the applicant's complaint that he was prevented from being represented by a lawyer of his own choosing at any of the first two hearings. Further, the Court tryed to establish whether the particular circumstance that the *ex* officio lawyer assigned to him for the first two hearings had been already representing two other suspects who incriminated him, affected the effectiveness of legal assistance provided to the applicant. The conclusions of the Court were against the applicant*: „the overall fairness of the criminal proceedings against the applicant had not been irretrievably prejudiced"* by this fact, since in the first two statements given in the absence of a lawyer of his own choosing, the applicant had not confessed the commission of any offence and the lawyer of his own choice actively participated at all stages in the criminal proceedings (with the except of those two first

[28] *Idem*, paras 38-30.
[29] *Idem*, par. 39.
[30] *Idem*, par. 40.

hearings). Also, the Court emphasized that the applicant had not, at any stage in the criminal proceedings before the domestic courts, raised any complaint concerning the efficacy of the legal assistance ensured by the officially appointed lawyer on the ground that the latter had assisted co-defendants with whom he had conflict of interests[31].

The Court concluded that there had been no violation of art. 6 § 1 in connection with art. 6 § 3 (c) ECHR.

As regards the second complaint, the Court had noted that the guarantees in art. 6 § 3 (d) ECHR represent specific aspects of the right to a fair hearing set forth in § 1 which must be taken into account in any assessment of the fairness of proceedings and had followed specific steps in order to determine if there had been a violation of in art. 6 § 3 (d) ECHR. The Court had found out that there had been indeed such a breach applying the *Al-Khawaja* test[32]:

1. Observed the principle that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to adversarial argument.

2. Determined whether there was a good reason for the non-attendance of a witness

3. Examined the sole or decisive rule.

4. Identify eventually sufficient „counterbalancing factors" to compensate for the handicaps under which the defence labored.

Due to the fact that domestic courts admitted the pre-trial statement of witness F.D. in evidence without having him questioned at the applicant's trial, the Court noticed that they had not made all reasonable efforts to secure the witness's presence in spite of the applicant's repeated requests to be confronted with F.D., and did not provid any reasons for the witness' non-attendance[33].

In the following the Court observed that the judgments of the domestic courts listed the witness F.D. statement at the pre-trial stage of the investigation in the evidence substantiating the applicant's guilt and considered that, while the statement of witness F.D. may not have been the sole or decisive evidence on which the applicant's conviction was based, it clearly carried significant weight in the establishment of his guilt.

The last step in the rulling of the Court was to establish whether there were sufficient „counterbalancing factors" to compensate for the handicaps under which the defence labored by analysing relevant elements in the context:

a) whether the trial court approached the untested evidence of an absent witness with caution;

b) whether the domestic courts provided detailed reasoning;

c) whether there was corroborative evidence supporting the untested witness statement;

d) whether the applicant or his defence counsel had been given an opportunity to question the witness during the investigation stage;

e) whether the defence was offered the possibility to put its own questions to the witness indirectly in the course of the trial; *and*

f) whether the defendant was afforded the opportunity to give his own version of the events and to cast doubt on the credibility of the absent witness[34].

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[31] *Idem*, par. 47.

[32] *Al-Khawaja and Tahery v. the United Kingdom,* Applications nos. 26766/05 and 22228/06, Grand Chamber Judgment 15 December 2011, http://hudoc.echr.coe.int, acessed on 30.07.2019.

[33] Case *Tău v. Romania,* paras. 55-56.

[34] *Idem*, par. 61.

The conclusions of this analisys was that the Court could not identiy a good reason for the non-attendance of the absent witness and that the additional incriminating evidence and procedural safeguards capable of counterbalancing the absence of witness F.D. at the applicant's trial were inssuficient. Thus the criminal proceedings, looked at as a whole, were rendered unfair by the admission in evidence of the pre-trial statement of absent witness[35].

III. Conclusion

The right to a fair trial occupies an important place in democratic society. As stated in the doctrine, the fair trial is a fundamental right, as it represents an ideal of a real justice that respects human rights, its influence being very strong both in the domestic and international legal order[36].

In the interpretation of art. 6, the Court examines the correctness of the procedures as a whole, meticulously verifying all the stages of the trial as well as all the actual possibilities offered to a person to defend himself/herself, avoiding the analysis of a simple isolated procedural defect.The right to a fair trial was explicitly enshrined, in the content of art. 21 paragraph (3) of the Romanian Constitution, when it was revised in 2003. The Criminal Procedure Code of Romania also provides in severall article the general and special guarantees of the riaght to a fair trial as follows: art. 4 – presumtion of innocence, art. 8 – the equitabl character and the reasonable duration of the criminal trial, art. 10 – the right to defense, art. 12 par. 3 – the right to an interpreter.

In spite the proper regulation of the the right to a fair trial by the Romanian law, the Romanian State continues to be condemned by the Strasbourg Court for violating art. 6 of ECHR. In our opinion, this is due to the complexity of the cases in their vast majority, as well as to the logistical difficulties faced by the Romanian judicial bodies in the investigation of the criminal cases.

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[35] *Idem*, par. 67.

[36] D. Gomien, 1996, *Introducere în Convenţia Europeană a Drepturilor Omului***,** Editura All, Bucureşti, p. 40.

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