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FOR CONTRIBUTORS

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.**

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; zoran.pav@hotmail.com

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Abstract and key words: Times New Roman font type, size 12.

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Headings (chapter titles) shall be in capitals, with a blank line preceding and following them.

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

The future issue of the magazine appears at the end of June 2018. The main issue of the issue is: **THE ROLE OF THE JUDGE OF RIGHTS AND FREEDOMS / JUDGE FOR PRELIMINARY INVESTIGATION**

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Appreciations

Dear Prof. Dr. Viorel Pasca:

Thank you very much for your Journal of Eastern European Criminal Law and kind invitation of papers. This journal is great. My colleagues and I are very interested in publishing our papers on it. We will submit our papers to you or your colleagues as soon as they are fininshed and improved. I hope that we can develop our academic exchange and cooperation further through this journal. I aslo would like to ask you and your colleagues to send us your contributions on criminal law, especially economic criminal law to our journals (one journal is named Political Science and Law, the other journal is named Economic Criminology). In addition, my colleagues are also very interested in translating some papers into Chinese and publish them in Chinese journals. Would you like to grant such authority to my colleagues? Thank you very much!

This Wednesday is Chinese New Year. I wish you happiness and success in the Year of Ram.

Yours Sincerely

Prof. dr. **Ye Qing**
Director Law Institute of SASS, Shanghai

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Dear Professor Pasca,

Dear Professor Gal,

Many thanks for the Journal that you sent me. Unfortunately I got it just a few days ago as well as the letter, although I see that it was sent in early July.

The idea of making the magazine of such a profile is excellent, and the first issue of it looks very promising indeed.

I am very honored by your offer to be a member of the scientific board of the journal. I accept it with pleasure. I'll tell my colleagues about invitation for publishing the articles in the Journal.

I take this opportunity to invite you to publish in our journals in Serbia (Crimen and Journal of Criminology and Criminal Law).

Yours sincerely,

Prof. Dr. Zoran Stojanović
Head of Department of Criminal Science
Faculty of Law, University of Belgrade - profstojanovic@gmail.com

Dear Editors-in-Chief,

On behalf of Professor on Criminal Law, Jaan Sootak and myself I thank you for the copy of the first No. of your journal. We are very interested in publishing an article in your journal, but as we were not able to follow the next deadline (1st of Nov), we were wondering if you have already determined the topic for the journals published in 2015. That way we could make plans for writing an article on a subject determined by you.

Yours sincerely,

Anneli Soo (PhD)
Lecturer on Criminal Law, University of Tartu (Estonia)

Prof Jaan Sootak
Professor on Criminal Law, University of Tartu (Estonia)

Dear Professor Pasca,

Thank You very much for the copy of the journal You sent me. I am honoured and I accept to be the member of the scientific board of the Journal of Eastern European Criminal Law.

Sincerely Yours,

Prof. dr. Vid Jakulin

Dear Professors,

On behalf of Director of Criminal Law and Procedure Institute, Faculty of Law, Mykolas Romeris University (Lituania, Vilnius),

I am pleased to send you the paper for the next issue (No. 2/2014). The Paper is about "Corruption Prevention in Lithuania: moving forward from dark to bright side". This papers was prepared by assoc. professor dr. *Jolanta Zajanckauskiene* (Mrs.) and professor dr. *Raimundas Jurka* (Mr.).

Please, find in the attachment this paper. If any suggestions or notes you have, please do not hesitate and inform us.

By the way, can we expect to receive two copies of the Journal of Eastern-European Criminal Law No. 2/2014?

Thank you very much for collabopration, we believe we can make other common cooperation.

Sincerely,

Prof. dr. Raimundas Jurka (Mr.)

Caro professore,

Spero che Lei stia bene. La ringrazio per l'invio della bellissima nuova rivista Journal of Eastern European Criminal Law. Molti complimenti! Un carissimo saluto, Silvio Riondato

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Freiburg, 20 August 2014

Dear colleague Pasca, dear colleague Gál,

Thank you very much for your kind mail and invitation to become part of the scientific board of the journal of Eastern European Criminal Law. It is a pleasure and honor to accept this invitation.

It would be nice if the new journal could become a focal point for closer scientific cooperation in Central and Eastern Europe. The Max Planck Institute for Foreign and International Criminal Law will do its best to support you.

Sincerely yours,

Prof. Dr. Ulrich Sieber

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MAX-PLANCK-GESELLSCHAFT

The Prosecutor: Magistrate or Government Agent The Romanian Dilemma

1. A brief historical glance

In fact, the dilemma is not a merely specifically Romanian one, since it is related to the very emergence of the prosecutor's institution as a representative of public prosecution; however, recently, alongside the reform of the Romanian judiciary system, the issue has been recalled into question.

Ever since its regulation as a procedural subject in the criminal procedure codes from the beginning of the 19th century, the position of the Public Ministry and, implicitly, that of the prosecutor have sparked controversy: integrated in the executive power, it would subordinate the exercise of criminal action to the political power, whilst as magistrate, it would break the necessary equality between prosecution and defence[1].

In the organization of the Public Ministry, the Romanian legislation followed the Latin model (France, Italy), according to which prosecutors are considered magistrates, just like the judges, but having a different status from that of the judges, enjoying only stability of the position held, but not immutability.

In other European countries, prosecutors are considered to be part of the executive power and may be dismissed by the Minister of Justice, who, in some countries, may intervene in the course of prior investigations[2].

The Constitution of 1886 contains only general provisions regarding the judicial power, but Law No. 982/1865 on the judicial organization recognized the status of magistrates of the members of any rank of the Public Ministry.

The Public Ministry was headed by general prosecutors attached to the Court of Cassation and to each of the Courts of Appeal, appointed by the King, at the proposal of the Minister of Justice, who was also the "supreme head" of justice and the Public Ministry (Art. 74 and Art. 137).

---

[1] For more information, see I. Tanoviceanu, *Tratat de drept și procedura penală,* 2nd Edition, Vol. IV, Curierul Judiciar Publishing House, Bucharest, 1924, pp. 131-146.

[2] Sophie Durbecq, Perrine Lannelongue, Marion Metellus, Des parquets d'Europe à un parquet européen- www.ejtn.eu/.../THEMIS%20written%20paper%20-%20Fran...; Comparative analysis on the appointment of senior prosecutors in Europe, according to a comparative study conducted by the Ministry of Justice in 2004, published on the Ministry of Justice's website at: https://view.officeapps.live.com/op/view.aspx?src=http%3A%2F

The Constitution of 1923, considered by some to be the most liberal constitution of Romania, included a whole chapter devoted to the judiciary (Chapter IV, Title III), but did not refer to the Public Ministry; however, the 1924 Judicial Organization Act assimilated the prosecutors to the magistrates, recognizing their stability on the position held, without recognizing their immutability.

Given that the Minister of Justice subordinated both the courts and the prosecutor's offices, obviously, one cannot speak of independent justice. Regarding the independence of prosecutors in the exercise of their judicial duties, over time, this was somewhat illusory.

The Constitution of 1952 contained, in Chapter 6, regulations on "Courts and Prosecutor's Offices"[3], justice being performed through the Supreme Court and the lower courts, while the Prosecutor's Office exercised the oversight of the law enforcement by the other state bodies, including the courts. Regarding the independence of prosecutors in the exercise of their judicial duties, over time, this was somewhat illusory.

Law no. 6/1952 for the establishment and organization of the Public Prosecutor's Office[4] removed from the legislative texts the phrase "Public Ministry", replacing it with the term "prosecutor", and the Public Prosecutor's Office becomes the Prosecutor's Office or Procuratorate.

The new institution, created following the Soviet model, was a body subordinated to the Grand National Assembly (the Parliament) and, in the interval between its sessions, to the Council of Ministers. The Prosecutor General was appointed by the Grand National Assembly, for a term of 5 years.

In this system, the prosecution exercised wider powers than those related to the judicial activity, supervising and ensuring the observance of the laws by the local bodies of state power, the central and local authorities of the state administration, the state institutions, organizations and enterprises, and the cooperative organizations and enterprises (Art. 1 of Law no. 6/1952 on the establishment and organization of the Prosecutor's Office).

The Constitution of 1965[5] provided a distinct title to the Prosecutor's Office (Title VII), person responsible with overseeing the activity of criminal prosecution bodies and punishment enforcement bodies, "to see, under the law, to the observance of lawfulness, the defence of the socialist order, the legitimate rights and interests of socialist organizations, of other legal entities, as well as of the citizens".

The Prosecutor General, elected by the Grand National Assembly during its first session, for its entire parliamentary term, was liable to the Assembly for the activity of the Prosecutor's Office. Law no. 60/1968 on the organization and functioning of the Prosecutor's Office[6] presented in detail these attributions and competencies.

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[3] *Official Bulletin of the Grand National Assembly of the People's Republic of Romania, no. 1 of 27 September 1952.*

[4] *Official Bulletin, no. 8 of 4 March 1953.*

[5] *Official Bulletin, no. 65 of 29 October 1986.*

[6] *Official Bulletin,* no. 169 of 27 December 1968.

Following the Soviet model, prosecution thus appeared as a fourth category of state bodies, distinct from the executive and judicial powers, and yet subordinate to the legislature. In fact, the independence of the Procuratorate was illusory, with it being a mere instrument of the State-Party[7].

The status of the prosecutors was, in fact, not that of magistrate, but of state agent, the control of their activity, just like in the case of judges, being exercised by the Minister of Justice.

2. The current regulation and the functional competence of the Public Ministry

The Constitution of 1991 brings once again the magistrature within the judiciary, the Public Ministry being enshrined in Chapter 6, Section II of the Constitution.

In its judicial activity, the Public Ministry represents the general interests of society and defends the legal order, as well as the rights and freedoms of citizens.

The Public Ministry shall discharge its powers through Public Prosecutors, constituted into Public Prosecutor's Offices, in accordance with the law (Art. 130 of the Constitution).

If judges are independent and subject only to the law (Art. 123 para. (2) of the Constitution), the Public Prosecutors shall carry their activity in accordance with the principle of legality, impartiality and *hierarchical control, under the authority of the Minister of Justice* (Art. 131 of the Constitution).

The control consists in verifying, through the Judicial Inspection, a body functioning next to the Superior Council of Magistracy, the managerial efficiency, the manner in which prosecutors perform their duties and in which are conducted the relations with the persons seeking justice and with others involved in the activities related to the prosecutor's offices.

The control cannot concern the measures ordered by the prosecutor during the course of the criminal investigation, the Minister of Justice being unable to decide upon the settlement of cases.

The law no. 429/2003 on the revision of the Romanian Constitution does not change the status of prosecutors. Law no. 304/2004 on judicial organization was changed, in the 15 years since its entry into force, 27 times, of which 20 times by means of Government Emergency Ordinances, which illustrates not only legislative instability, but also the excessive intervention of the executive in matters of justice, through Emergency Ordinances, often motivated by a political interest, sometimes with an impact upon the functioning of the Public Ministry.

---

[7] T. Drăganu, *Drept constituțional și instituții politice. Tratat elementar, Vol. II,* Lumina Lex Publishing House, 1998, p. 357.

Law no. 303/2004 on the status of judges and prosecutors defines magistracy as the judicial activity *performed by judges* in view of accomplishing justice and *by prosecutors* in view of protecting the general interests of society, the rule of the law and the rights and freedoms of citizens.

The European Court of Human Rights, in the cases concerning Romania, considered that prosecutors, acting under the authority of the Minister of Justice and being hierarchically subordinated to the General Prosecutor of the Republic, cannot be considered as independent magistrates, and, therefore, that their power to order the preventive arrest (detention) constitutes a violation of Art. 5 para. (3) of the European Convention[8].

As a result, a new actor appeared within the criminal trial: the judge of rights and freedoms.

First, the previous Criminal Procedure Code was amended by means of Law no. 281/2003, and then the new Criminal Procedure Code[9], entered into force on February 1, 2014, stipulated the separation of judicial functions, providing that in the exercise of the prosecution function, the prosecutor and the criminal investigation bodies collect the evidence necessary to establish whether or not there are grounds for referral to the court, and that the judge of rights and freedoms decides on the acts and measures during the criminal investigation which restrict the fundamental rights and freedoms of the person.

The judge magistrates are appointed by the President of Romania and are irremovable, while the prosecutor magistrates are appointed by the President of Romania and enjoy only stability of the position held. The Public Ministry performs its duties under the law and is headed by the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice.

Initially, Law no. 303/2004 on the status of magistrates provided (Art. 50 para. (1)) that the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice, their prime deputy and the latter's deputy, the Prosecutor General of the National Anticorruption Prosecutor's Office, their deputies, the chief prosecutors of these Prosecutor's Offices, as well as the chief prosecutor of the Directorate for the Investigation of Organized Crime and Terrorism and their deputies are appointed by the President of Romania, *at the proposal of the Superior Council of Magistracy*, upon *the recommendation of the Minister of Justice*, from among prosecutors who have a minimum seniority of 18 years in the position of judge or prosecutor, for a period of 5 years, with the possibility of being reinvested only once.

In fact, the leading positions within the Prosecutor's Office attached to the High Court of Cassation were occupied by persons appointed by the President of Romania *at the proposal of the Superior Council of Magistracy*, just like the president, vice-president and the section presidents of the High Court of Cassation and Justice.

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[8] ECHR, judgment from 3/06/2003, case *Pantea v. Romania,* para. (236); ECHR, judgment from 26/04/2007, case *Samoilă și Cionca v. Romania,* para. (45-53).

[9] Published in the *Official Journal, Part* no. 486 of 15 July 2014.

In 2005, by means of Law no. 247/2005, the above mentioned provisions were modified in the sense that, in the foregoing positions, the President of Romania may appoint, *at the proposal of the Minister of Justice and upon the approval of the Superior Council of Magistracy*, prosecutors who have a minimum seniority of 10 years in the position of judge or prosecutor, for a period of 3 years, with the possibility of being reinvested only once.

The President of Romania may refuse only in a reasoned form the appointment into the aforementioned leading positions, notifying to the public the reasons for their refusal.

This provision was not subject to change by means of the new amendments to the laws of justice, although it has been recommended, by the CVM report of 2016, the adoption of transparent and merit-based selection procedures as a way to establish strong leadership, to avoid political interference in the appointments to senior positions and to support the independence of the judiciary. Political interference in senior appointments is recognised as a key risk factor with regard to judicial independence[10].

The involvement of the executive (the Minister of Justice and the President) in the appointments up to the level of section presidents of the two autonomous departments within the Prosecutor's Office attached to the High Court of Cassation and Justice resulted in an excessive politicization of the process of appointing prosecutors in these positions.

Prosecutors working in prosecution offices attached to the other courts perform their functions in accordance with the law, respect and protect human dignity and defend the rights of the individual. Prosecution offices are independent in relations with the courts, as well as with other public authorities.

Within the Prosecutor's Office attached to the High Court of Cassation and Justice was established, by means of Government Emergency Ordinance no. 7/2005, the Directorate for the Investigation of Organized Crime and Terrorism Offenses (DIICOT), as a specialized structure in the fight against organized crime and terrorism.

In 2002, by means of Emergency Ordinance no. 43/2002 of the Government of Romania, the National Anticorruption Directorate (DNA) was established, as an autonomous structure within the Public Ministry, coordinated by the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice, specialized in the fight against corruption, which exercises its attributions throughout the country.

The National Anticorruption Directorate has legal personality and is headed by a chief-prosecutor, assimilated to the prime deputy of the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice, assisted by two

[10] REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on Progress in Romania under the Co-operation and Verification Mechanism, {SWD(2016) 16 final}- https://ec.europa.eu/info/sites/info/files/swd-2017-25_en.pdf

deputies, assimilated to the deputy of the Prosecutor General of the Prosecutor's Office attached to the High Court of Cassation and Justice.

This specialization and autonomy of the Public Ministry, with the consequence of the exclusive material competence to investigate crimes within their jurisdiction under the sanction of the absolute nullity of the procedural acts, dilutes the principle of the uniqueness and indivisibility of the Public Ministry, thus diminishing its effectiveness.

In our opinion, the combat of corruption would be more effective through the unification of the two autonomous directions in one, led by the prime deputy of the Prosecutor General. Such unification would ensure a more efficient use of human resources, thus largely avoiding the necessity to delegate prosecutors from the prosecution offices attached to the courts directly in the structures of the Prosecutor's Office attached to the High Court of Cassation and Justice. Since the delegation is, according to the law, only temporary (for a maximum of 6 months and can be prolonged, with the written consent of the prosecutor, with 6 months at most), it contravenes the principle of stability on the held position and of the specialization of those investigating corruption offenses and/or organized crime. It would also avoid the overlapping of procedural competences, since corruption is, in general, the means by which criminal groups penetrate state structures.

By Law no. 314/2004, the Superior Council of Magistracy was established as a warrant for the independence of the judiciary, an independent body which is subject in its activity only to the law, and its members answer only before the judges and prosecutors who have elected them.

Unfortunately, the Superior Council of Magistracy failed to ensure a real independence of the judiciary, partly due to the division into several professional associations[11] whose opinions do not match, most of the time.

Within the criminal proceeding, the prosecutor is not a party, having the role of a specialized body of the state, that carries out the judicial activity by conducting the criminal investigations or by supervising the criminal investigation carried out by the criminal investigating authorities of the police in order to discover the offenses, identify the criminals and exercise the criminal action with a view to their sanctioning.

The Public Ministry exercises, by means of prosecutors, the following attributions: to carry out criminal prosecution in the cases and under the conditions stipulated by the law; to run and supervise the criminal investigation activity of the criminal police; to notify courts of law for the judgement of criminal cases, according to the law; to exercise civil actions, in the instances stipulated by the law; to participate in court sessions, under the terms of the law; to exercise the legal means against court decisions, under the terms stipulated by the law; to defend the legitimate rights and interests of minors, of persons laid under interdiction, of missing persons and other persons, under the terms of the law; to act in order to prevent and control crime, under the co-ordination of

[11] The Romanian Magistrates Association, the Association of Judges in Romania, the Romanian Judges' Forum, the Romanian Prosecutors' Association

the Minister of Justice, with a view to achieving a global criminal policy of the state; to study the causes that generate or favour crime, to prepare and submit proposals to the Minister of Justice, aimed at eliminating such causes, as well as perfecting the legislation in this field; to check the observance of the law at the places of preventive detention.

The attributions of the Public Ministry are in line with Recommendation (2000) 19 of the Committee of Ministers of the Member States of the Council of Europe on the role of criminal prosecution in the criminal justice system[12].

In solving the cases, the prosecutor is independent, under the conditions stipulated by the law. The prosecutor may appeal to the Superior Council of Magistracy, in the procedure for checking the conduct of judges and prosecutors, the intervention of the hierarchically superior prosecutor, under any form, in carrying out the criminal prosecution or in the adoption of the solution.

The solutions adopted by the prosecutor can be refuted, upon motivation, by the hierarchically superior prosecutor, when they are judged to be illegal, but the order of refusal is subject to the control of the preliminary chamber judge.

3. Reform and political hypocrisy

The modification of Law no. 303/2004 on the status of judges and prosecutors, of Law no. 304/2004 regarding the judicial organization and of Law no. 317/2004 on the Superior Council of Magistracy is a necessity imposed by the evolution of the civil and criminal legislation, which constitutes the main working tool of the judiciary system.

The declaration as unconstitutional of some provisions from these laws and the need to adapt them to the constitutional provisions is felt by the entire judiciary system.

To this end, in 2016, upon the initiative of the Ministry of Justice, a working group was set up, including representatives of the magistrates from the High Court of Cassation and Justice, the Prosecutor's Office attached to the supreme court, and representatives of the magistrates' associations, which tried to find the most effective legislative solutions that could improve the activity and organization of the judiciary.

Proposals to amend the laws of justice were also taken into account in the Technical Report accompanying the Commission's Report to the European Parliament and the Council on the progress made by Romania under the Cooperation and Verification Mechanism and were publicly discussed[13].

The draft for the amendment of the laws of justice was not submitted by the Government to the Parliament, but the parliamentary groups belonging to the ruling coalition took it over as a parliamentary initiative, the draft amendments to these laws

[12] wcd.coe.int/ViewDoc.jsp?Ref=Rec(2000)19.

[13] REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on Progress in Romania under the Co-operation and Verification Mechanism, {SWD(2016) 16 final}- https://ec.europa.eu/info/sites/info/files/swd-2017-25_en.pdf

being subject to parliamentary debate and adopted together with the amendments proposed by the opposition and by bodies pertaining to the judiciary, including magistrates' associations.

The debate was highly politicized, amid a massive misinformation in the media, emerged from civil society groups and a part of the body of magistrates, misinformation that led to street manifestations and claims which were largely not related to the content of the three laws.

A fierce controversy started from the intention to amend Art. 3 of Law no. 303/2004 on the status of magistrates in the sense that: "Prosecutors operate in accordance with the principles of legality, impartiality and hierarchical control, under the authority of the Minister of Justice."

It was argued that this change would result in a subordination of prosecutors towards the Minister of Justice and, hence, towards the political factor.

In fact, this provision is nothing more than the reproduction of Art. 132 of the Romanian Constitution. The objection that this would affect the independence of prosecutors is unfounded as long as the "authority of the Minister of Justice" consists only in the control over the managerial efficiency, the manner in which prosecutors perform their duties and in which are conducted the relations with the persons seeking justice and with other state bodies, without being able to intervene directly in the solving of cases like in other countries, such as Denmark, Finland, France, Belgium or Germany[14].

The hierarchical control, materialized in the fact that the solutions adopted by the prosecutor can be refuted upon motivation by the hierarchically superior prosecutor, which currently exists, is attenuated by the fact that even if the hierarchically superior prosecutor to the one who ordered the solution finds at a later stage that the circumstances that warranted the closing of the case did not exist, rescinds the order and issues a new order to resume the criminal investigation; the order shall be subject to confirmation by the Preliminary Chamber Judge, within no more than 3 days, under sanction of nullity.

Equally fierce was the controversy over the authority that will appoint the persons with leading positions at the top of the Public Ministry: the President, the Minister of Justice or the Superior Council of Magistracy.

Although the amendment of the law does not aim to change the current regulation according to which the President of Romania, at the proposal of the Minister of Justice and with the approval of the Superior Council of Magistracy appoints the prosecutors invested in these leading positions, many people saw in the limitation of the President's

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[14] Sophie DURBECQ, Perrine LANNELONGUE, Marion METELLUS, Des parquets d'Europe à un parquet européen- www.ejtn.eu/.../THEMIS%20written%20paper%20-%20Fran...; Comparative analysis on the appointment of senior prosecutors in Europe, according to a comparative study conducted by the Ministry of Justice in 2004, published on the Ministry of Justice's website at: https://view.officeapps.live.com/op/view.aspx?src=http%3A%2F

right to refuse, upon motivation, the appointment to leading positions as an attack against the independence of the judiciary.

In fact, this amendment is a correlation of the law with the Constitutional Court's judicial practice, which considered this right of the President to refuse the appointment to certain positions, including that of prime minister, as being constitutional, only if the refusal is made only once, thus avoiding situations of uncertainty and political crisis.

The amendments to be made to Law no. 304/2004 are to establish minimum conditions regarding the traineeship and seniority of judges and prosecutors who can present themselves at the annual competition for promotion to the immediately superior courts or prosecutors' offices.

Thus, those who shall be able to participate in the promotion competition for the immediately higher courts or prosecutors' offices are the judges and prosecutors who received a "very good" rating at the last evaluation, have not been disciplinarily sanctioned in the last 3 years, have actually operated for at least 3 years at the court or prosecution office hierarchically inferior to the one to which they wish to promote and meet the minimum conditions of seniority, namely 7 years seniority in the position of judge at the county court or prosecutor at the prosecutor's office attached to the county court, for promotion to the position of judge at the tribunal and prosecutor at the prosecutor's office attached to the tribunal; 10 years seniority in the position of judge or prosecutor for promotion to the positions of judge at a court of appeal and prosecutor in the prosecutor's office attached to such court of appeal and 18 years seniority as a judge or prosecutor, for promotion to the position of prosecutor at the Prosecutor's Office attached to the High Court of Cassation and Justice.

Prosecutors may be delegated, only upon their consent, only to the courts or prosecutors' offices to which they are entitled to operate according to the acquired professional status.

One is intended is the eradication of the practices that circumvent the current provisions through the delegation of some prosecutors from prosecution offices attached to county courts, without fulfilling the conditions of traineeship and with insufficient seniority, directly within the National Anticorruption Directorate within the Prosecutor's Office attached to the High Court of Cassation and Justice.

The Committee of Ministers of the Member States of the Council of Europe recommends (REC(2000)19 on the role of public prosecution in the criminal justice system) to the Member that, if the legal system so permits, states should take measures in order to make it possible for the same person to perform successively the functions of public prosecutor and those of judge or vice versa. Such changes in functions are only possible at the explicit request of the person concerned and respecting the safeguards.

In this respect, the amendments provide that "upon motivated request, the judges may be appointed as prosecutors to the prosecutor's offices attached to county courts, and the prosecutors in the position of judge at county courts, by decree of the President of Romania, at the proposal of the Superior Council of Magistracy, upon observance of

the conditions laid down by the law. The proposal for appointment to the position of judge is formulated by the Section for Judges of the Superior Council of Magistracy, with the advisory opinion of the prosecutor's office from which they originate, as well as of the court in which they want to operate, and the proposal for the appointment of the judges in the position of prosecutor is formulated by the Section for Prosecutors of the Superior Council of Magistracy, with the advisory opinion of the court in which they carry our their activity and of the prosecutor's office in which they want to operate in the future."

What is intended to stop the phenomenon of eluding the law; this practice consists in having prosecutors from the prosecutor's offices attached to county courts delegated without the minimum conditions of traineeship at the National Anticorruption Directorate, following a competition, organized after the delegation, who end up being appointed as judges at the High Court of Cassation and Justice, the Criminal Section, without having a single day of practice as judges.

If the provisions of the law will be modified in the sense indicated, the same person will be able to perform successively the function of public prosecutor and that of the judge or vice versa, only starting from the foundation of the profession in question, respectively from the county court or the prosecutor's office attached to the county court.

In the case of Law no. 304/2004 regarding the judicial organization, the amendment that sparked the spirits was the one regarding the transfer of the current section on the investigation of the corruption offenses committed by magistrates from the National Anticorruption Directorate, where it was established by order of the chief prosecutor of this department, to the Prosecutor's Office attached to the High Court of Cassation and Justice, under the subordination of the General Prosecutor, with the chief prosecutor of this department following to be appointed by the Magistrates' Council.

This transfer was considered to be constitutional, being intended to strengthen the independence of judges, as some practices were found that exerted pressure on the judges involved in hearing cases investigated by the National Anticorruption Directorate, through the opening of unjustified criminal investigations, followed by their quashing after the pronouncement by the judge of the decision in the cases already under consideration.

Even though the laws amending the current regulations on the judiciary and the status of magistrates have been returned by the Constitutional Court in the Parliament, the above-mentioned amendments have been considered constitutional, the return to Parliament referring only to a clearer drafting of other amending texts.

As these laws predict, they will not lead to the subordination of the Public Ministry to the executive power, the prosecutors keeping their quality of magistrates with special status within the judicial authority, distinct from the judges. The above-mentioned amendments cannot affect the fight against corruption, and do not limit the competencies of the National Anticorruption Directorate.

Autonomy of Public Prosecution Service – The Impact of the "Checks and Balances" Principle and International Standards

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Abstract

The specific role and duties of the public prosecution service in representing state interests and defending human rights requires careful balancing its autonomy and/or competences stipulated by constitution and laws. Significant influence with this regard have international standards arising from the Venice Commission practice as well as the Committee of Ministries recommendations. The specific context where this process of balancing become more important and more visible exists within accession negotiations for the membership in the EU but also in the EU itself due to variety of national legal systems among member states and candidate countries and their obligation to adopt EU standards and ensure legal guaranties on prosecutorial autonomy in exercising its competencies. The importance and nature of these competences for the functioning of state but also for the wide range of fundamental rights raising an issue of the role that constitutional provisions should have in regulation of the public prosecution service position and jurisdiction in certain legal system, especially from the angle of its relationship with executive and legislative power as well as with judicial power in light of the checks and balances principle. Abovementioned issues the authors analysing from the angle of recent challenges related to constitutional amendments in Serbia within accession negotiations with EU.

Key words: *public prosecution, autonomy, constitution, EU standards, separation of powers, checks and balances.*

1. The influence of international standards on legislative framework dealing with public prosecution service

When it comes to international standards that should be considered as a milestone in designing national legislative framework that rules position, organization and functioning of the public prosecution service, there are two groups of documents and standards that should be taken into account: The first group of standards could be described as a core, common standards, applicable on judiciary as a whole (judges and public prosecutors) while the second group of standards deals exclusively with the role of public prosecution service.

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The main sources of international standards on the role of public prosecution service and jurisdiction could be found in the Council of Europe recommendations, consultative opinions of the special advisory body of the Council of Europe – Consultative Council of European Prosecutors and various documents adopted by the UN and ODIHR. The key role in tracing standards in this field has the Venice Commission which addresses various relevant issues through its opinions on (draft) constitutions and judicial laws.

The role and influence of the international standards in drafting national legislation vary in different regions and geo-political frameworks and depend on the internal decision of a certain state to follow its legal tradition or particular comparative model, but could also be determined by external influences and/political pressure coming from international organizations.

The second scenario is typical for transitional post-communist countries that are in focus of the Venice Commission but also for candidate countries in the process of the accession negotiations with the EU. The very nature of the EU could be explained through the idea of unification. This process grasps all the segments of a society, but it has particular importance when we talk about the reform of national legal systems. The degree of unification may vary from the complete – in the areas in which there is the acquis, to a broad one - based on the EU standards. Depending on the concrete area in question, standardization may range from a very wide scale of „desirable and/or permitted ", within which it is sufficient for the state candidate to reach a minimum level in order to meet the requirements for membership in the EU, but a decision may also be taken for the positioning in the middle or close to the top of the scale. In other areas, again, this scale has a particularly narrow range and, therefore, in such cases, the process of harmonization with relevant standards to a great extent is reminiscent of the transposition of the acquis.[3]

The decision of the EU on the level of unification it will request in a certain area (the acquis or standards), depends on several factors, like an *importance of specific area for the functioning of the EU.* If areas of essential importance for the EU are in question, they were mainly regulated by the *acquis* in the early phase of the formation of the EU. The sensitivity of a certain issue in the context of the readiness of the candidate countries to give up their own heritage plays also an important role. The constitutional system, competence, and functioning of the key institutions of the state, particularly the judiciary, is out of any doubt, one of the areas in which the states have difficulties to surrender their heritage.[4] The same tendency is noted in the Rec(2000)19 which says that although the European legal systems are still divided between two cultures – the split being evident both in the organisation of criminal procedure (which is either accusatorial or inquisitorial) and in the initiation of prosecutions (under either "mandatory" or "discretionary" systems), the traditional distinction is tending to blur as the different member states bring their laws and regulations more closely into line with what are now common European principles, in particular those laid down in the

[3] See more in: Kolaković-Bojović, M: Organisation of Judiciary in the Republic of Serbia and Chapter 23, (Organizacija pravosuđa u Republici Srbiji i Poglavlje 23) *European Integrations and Penal Legislations (Chapter 23- law, practice and measures of harmonization)* (ed. S. Bejatović)*:* Zlatibor: Serbian Society for Criminal Law and Practice, 2016, pp. 98-106.

[4] Kolaković-Bojović, M: Constitutional Provisions on Judicial Independence and EU Standards, *Anali Pravnog Fakulteta Univerziteta u Beogradu (Annals of the Faculty of law in Belgrade, Belgrade Law Review*, LXIV, 3, 194.

Convention for the Protection of Human Rights. However, in the same document the Committee of Ministers of CoE (hereinafter: Committee) admitted that it is fair to say that, to date, the status, role and operating methods of authorities responsible for prosecuting alleged offenders have not been scrutinised in detail with a view to their harmonisation at European level.[5] Furthermore, the Committee approaches to the harmonization/unification at European level without ambitions to draw on features of both traditions in order to come up with some type of third option, nor to propose the unification of existing systems, nor to suggest a supranational model, nor did it believe that it should merely seek the lowest common denominator. The idea of the Committee is just to identify the major guiding principles - common to different types of system and to recommend practical objectives to be attained in pursuit of the institutional balance upon which democracy and the rule of law in Europe largely depend.[6]

However, even within circle clearly surrounded by European standards, positioning of particular country is also determined by Venice Commission assessment on belonging the certain country to the cluster of "old democracies" or to the category of "a new or young democracies"[7], where Republic of Serbia has been placed in the second category[8] and criticized due to weak guaranties of judicial independence.[9] This classification criteria is important for the level of tolerance regarding the permitted influence of the legislative and/or executive branch of power on the public prosecution service but also when it comes to place of the guaranties of prosecutorial service autonomy in the legislative framework (constitutional or provisions stipulated by law). That is obvious from the Opinion of the Venice Commission CDL-AD(2007)028 (§ 5-6)[10] from 2007

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[5] Recommendation Rec(2000)19 of the Council of Europe on the role of public prosecution in the criminal justice system, adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies, p. 12.

[6] Recommendation Rec(2000)19 of the Council of Europe on the role of public prosecution in the criminal justice system, adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies, p. 13

[7] Kolaković-Bojović, M: Constitutional Provisions on Judicial Independence and EU Standards, *Anali Pravnog Fakulteta Univerziteta u Beogradu (Annals of the Faculty of law in Belgrade, Belgrade Law Review*, LXIV, 3, 196.

[8] The fact that the Republic of Serbia had been classified in the category of young democracies became obvious after the opinion of the Venice Commission on the 2005 Draft Constitution, in which the Commission insisted on complete elimination of the role of the legislative and the executive power in the management of the judiciary. See more in: European Commission for Democracy through Law (Venice Commission) *Opinion on the Provisions on the Judiciary in the Draft Constitution of the Republic of Serbia*, adopted by the Commission at its 64th plenary session (Venice, 21-22 October 2005) and European Commission for Democracy through Law (Venice Commission), CDL-AD(2007)004, Opinion on the Constitution of Serbia, adopted by the Venice Commission at its 70th Plenary Session (Venice, 17-18 March 2007).

[9] The Commission stated that the proposed solution was not in compliance with the EU standards that proclaim independence of the judiciary, specifically in the part that is related to the role of the National Assembly in the procedure of election of members of the HJC and of the SPC, presidents of courts, and public prosecutors, as well as of judges and deputy public prosecutors who are first time elected to three-year term, but also with respect to the fact that a representative of the authorized parliamentary committee and the minister of justice are members of the HJC and of the SPC *ex officio*. In addition, the existence of the 'probationary' three-year tenure on the occasion of the first election was criticized.

[10] European Commission for Democracy through Law (Venice Commission), CDL-AD(2007)028, *Judicial Appointments Report* adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007).

according to which a differentiation is made between the so-called traditional and young democracies. „In some older democracies, systems exist in which the executive power has a strong influence on judicial appointments. Such systems may work well in practice and allow for an independent judiciary because the executive power is restrained by legal culture and tradition, which have grown over a long time. New democracies, however, did not yet have a chance to develop these traditions, which can prevent abuse. Therefore, at least in new democracies explicit constitutional provisions are needed as a safeguard to prevent political abuse by other state powers in the appointment of judges." (CDL-AD(2007)028, § 45-46). Especially interesting is tendency visible is some recently joint member states that could be described as some kind of reform regression.[11]

Without contesting the *ratio* of such an approach, it remains quite unclear: who, when, and based on what criteria made the decision on the classification of European states into the two qualitative groups? Moreover, although it is clear that there are no „lists" of previously classified states, raising of such a question is still deemed to be some kind of a taboo, and classification is mainly made when formulating individual opinions of the Venice Commission on the draft constitutions and judicial laws of individual states.[12]

Repercussions of putting Serbia in the cluster of young democracies got their concrete shape in the European Commission recommendations[13] contained in the Screening Report for Chapter 23[14] and reflected in the Action Plan[15] for the same Chapter (hereinafter: the AP23).[16]

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[11] See more in: Stanila, L.M: The True Face of the Constitutional Court: SnowWhite or Evil Queen?, *Journal of Eastern-European Criminal Law No*. 1/2017, pp. 199-207.

[12] Kolaković-Bojović, M: Constitutional Provisions on Judicial Independence and EU Standards, *Anali Pravnog Fakulteta Univerziteta u Beogradu (Annals of the Faculty of law in Belgrade, Belgrade Law Review*, LXIV, 3, 196.

[13] The High Judicial Council (hereinafter: HJC), and the State Prosecutorial Council (hereinafter: SPC), should be strengthened in a way that would imply taking over of the leading role in the management of the judiciary. Their composition should be mixed, without participation of the National Assembly (except exclusively in the declaratory role) with minimum half of the members from the judiciary who represent different levels of jurisdiction. The elected members should be elected by their peers, and the legislative or the executive power should not have the authority to control or oversee the work of the judiciary. Additionally, the recommendation calls for the re-examination of the probationary period lasting three years for candidates for judges and deputy prosecutors, precise stipulation of the reasons for termination of office of judges, as well as of the rules related to the termination of tenure of judges of the Constitutional Court. Additionally, the EC insists on the adoption and effective implementation of criteria for election to judicial functions, as well as on striking a balance between the growing powers of the HJC and the SPC, their capacities, as well as on the transparency and accountability in their work.

[14] The Screening Report for the Negotiation Chapter 23, available at: http://seio.gov.rs/upload/documents/eu_dokumenta/Skrining/Screening%20Report%2023_SR.pdf, 25 May 2016.

[15] Action Plan for Chapter 23, http://www.mpravde.gov.rs/files/Action%20plan%20Ch% 2023.pdf, October 16th 2016.

[16] The EC criticized the role of the National Assembly in the election and termination of office of judges as a significant deficiency that creates risks of a political influence on the judiciary. The same is also stated for the relationship with the HJC, bearing in mind that the National Assembly also elects eight out of eleven members of the HJC, while the other three members are elected *ex officio*, including the president of the Supreme Court of Cassation (appointed by the National Assembly), the Minister of Justice, and the chairman of the authorized parliamentary committee. The EC confirmed that the described appointment is not in compliance with the EU standards through the comment that "Serbia

Based on above-mentioned critiques and recommendations, we will analyse several key issues that determine the position and role of public prosecution service in national legislation:

The first of all, there is an issue of public prosecution autonomy, reflected through the level of prescribed guaranties in the national legislation (constitutional of just guaranties stipulated by laws) as well as through institutional mechanism to implement them.

Equally important is issue of balancing powers and relationships between other branches of power but also within judiciary.

Not less important are issues of career which includes mechanisms of selection, appointment, evaluation, promotion, competence, accountability and termination of mandate for public prosecutors.

2. The role of public prosecution service

Understanding the role that public prosecution service has within legal and institutional framework is of the key importance for answering all relevant questions regarding its constitutional and legal position. In that sense, it should be noted that the Recommendation (2000)19 defines that "Public prosecutors" are public authorities who, on behalf of society and in the public interest, ensure the application of the law where the breach of the law carries a criminal sanction, taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system. Operating neither on behalf of any other (political or economic) authority nor on their own behalf, but rather on behalf of society, public prosecutors must be guided in the performance of their duties by the public interest. They must observe two essential requirements concerning, on the one hand, the rights of the individual and, on the other, the necessary effectiveness of the criminal justice system, which the public prosecutor must, to some extent, guarantee.[17]

So, the public interest is the main context shaping the public prosecution role, but systems of criminal justice vary throughout the World and there is no uniform model for all states. The main classifications could be made on systems which are adversarial in nature and those which are inquisitorial, between systems where a judicial officer controls the investigation and those where a non-judicial prosecutor or the police control investigations. In parallel, there are systems where prosecution is mandatory in accordance with the legality principle and others where the prosecutor has discretion

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should ensure that when amending the Constitution … professionalism and integrity become the main drivers in the appointment process, while the nomination procedure should be transparent, and merit based. Serbia should ensure that a new performance evaluation system is based on clear and transparent criteria, excludes any external and particularly political influence, is not perceived as a mechanism of subordination of lower court judges to superior court judges and is overseen by a competent body within the respective Councils." The EC also contests the role of the Ministry of Justice related to its role in the judiciary, as well as in the part of the Report in which the EC says that „The judicial reform process should lead to tasking both Councils with providing leadership and managing the judicial system." Also, the probationary three-year period for candidate judges is contested and described as „very long".

[17] Recommendation Rec(2000)19 of the Council of Europe on the role of public prosecution in the criminal justice system, adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies, p.14.

not to prosecute where the public interest does not demand it (the opportunity principle). Differences exist also between systems which allow private prosecution while others do not do so or limit it. The same goes for position of a victim who, in some systems, has opportunity to take part in criminal proceedings as a "partie civile" while others recognise only a contest between the prosecutor representing the public or the state and the individual accused. (CDL-AD(2010)040-7) However, in spite of differences, it is possible to identify features and values which are common to virtually all modern criminal justice systems and the Venice Commission see it, primarily, in the criminal prosecution as a core function of the state. A crime is a wrong against society, although in many cases the same act will also amount to a private wrong against the individual victim. (CDL-AD(2010)040, par. 10-11)

Having that in mind, the Committee tried to define list of concrete public prosecutor's duties universal for all existing systems but also to identify some additional that could be found in various states. According to the Committee, in all criminal justice systems, public prosecutors: decide whether to initiate or continue prosecutions; conduct prosecutions before the courts; may appeal or conduct appeals of all or some court decisions. In certain criminal justice systems, public prosecutors also: implement national crime policy while adapting it, where appropriate, to regional and local realities; conduct, direct or supervise investigations; see to it that victims are effectively assisted; decide on alternatives to prosecution; supervise the execution of court decisions; etc.[18]

The Venice Commission also tried to connect role of public prosecution service to the question of what powers the prosecution service should have. The Commission challenged any sort of general supervisory powers of public prosecution service commonly found in "prokuratura" type systems, typical for ex -Soviet countries. The Commission also underlined importance of judicial control of prosecutor's actions which affect human rights, that should not function like a quasi-automatic approval of all such requests from the prosecutors. This is a danger not only for the human rights of the persons concerned but for the independence of the Judiciary as a whole. (CDL-AD(2010)040, par. 73-74)

One of the commonly raised issues is role of the prosecution service outside of criminal law and procedure. This issue was in the focus of the Consultative Council of European Prosecutors which stated that "[t]here are no common international legal norms and rules regarding tasks, functions and organisation of prosecution service outside the criminal law field", but also noted that "it is the sovereign right of the state to define its institutional and legal procedures of realisation of its functions on protection of human rights and public interests …"[19] In the same manner concluded the Parliamentary Assembly of the Council of Europe, which points out that the various non-penal law responsibilities of public prosecutors "give rise to concern as to their compatibility with the Council of Europe's basic principles" and that "it is essential … that the powers and responsibilities of prosecutors are limited to the prosecution of criminal offences and a general role in defending public interest through the criminal

[18] Recommendation Rec(2000)19 of the Council of Europe on the role of public prosecution in the criminal justice system, adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies, p. 15.

[19] Opinion no. 3 (2008) on the Role of Prosecution Services outside the Criminal Law Field.

justice system, with separate, appropriately located and effective bodies established to discharge any other function" (paragraph 7).[20]

3. Checks and balances and its influence on the prosection service

The main issue when we are talking about autonomy of prosecution service is "autonomy from whom"? In this regard, it is important to make distinction between external and internal independence/autonomy as well as between judicial independence and prosecutorial autonomy.

An external independence/autonomy are terms connected to relation between separation of power on three branches – legislative, executive and judicial. In that context, the principle of *Checks and balances* is usually understood as the striking a balance in the mutual influence between different branches of power whereby each of them has impact on the others to a certain extent, to allow appropriate process of adoption, application of and supervision over the application of legislation.[21] From the angle of Montesquieu, freedoms are best protected exactly through the separation of powers.[22] That has been confirmed through experiences of many democratic societies so far. The same principle is incorporated in the Article 4 of the Constitution of the Republic of Serbia, which provides that the legal system is unique, and the government system shall be based on the separation of powers into legislative, executive and judiciary. "Relation between three branches of power shall be based on balance and mutual control." The Constitution in the same article also stipulates that the judiciary power shall be independent.

3.1. External independence/autonomy

Interesting and useful view of the external independence could be found in the Rec(2010)12 where independence was reviewed from the angle of the judicial organization as well as from the angle of individual judge. The Committee noted that the independence of the judiciary has both an objective component, as an indispensable quality of the judiciary as such, and a subjective component as the right of an individual to have his/her rights and freedoms determined by an independent judge. Without independent judges there can be no correct and lawful implementation of rights and freedoms. Consequently, the independence of the judiciary is not an end in itself. The external independence of judges is not a prerogative or privilege granted in judges' own interest but in the interest of the rule of law and of persons seeking and expecting impartial justice. The independence of judges should be regarded as a guarantee of freedom, respect for human rights and impartial application of the law. Judges' impartiality and independence are essential to guarantee the equality of parties before the courts".[23]

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[20] Recommendation 1604 (2003) on the Role of the Public Prosecutor's Office in a Democratic Society Governed by the Rule of Law of the Parliamentary Assembly of the Council of Europe.

[21] Kolaković-Bojović, M: Constitutional Provisions on Judicial Independence and EU Standards, *Anali Pravnog Fakulteta Univerziteta u Beogradu (Annals of the Faculty of law in Belgrade, Belgrade Law Review*, LXIV, 3, 193.

[22] Montesquieu, C: The Spirit of Laws: 1748, p. 30.

[23] *Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on independence, efficiency and responsibility of judges,* § 11.

Having this in mind, prescribing guaranties of judicial independence in the constitution is pretty common practice[24] but situation is quite different when it comes to guaranties of prosecutorial independence/autonomy. Reasons for that could be found in long tradition of organizational connections between prosecution service and executive power and consequently, in tradition of political interference. The Committee noted that legal Europe is divided on this key issue between the systems under which the public prosecutor enjoys complete independence from parliament and government and those where it is subordinate to one or other of these authorities while still enjoying some degree of scope for independent action. The Committee also concluded that inasmuch as this is an institutional question – concerned with the fundamental distribution of power in the state – and currently, in many countries, a key factor in internal reforms occasioned either by changes in the historic context or by the existence of problems in the relationship between justice and politics, the very notion of European harmonisation around a single concept seemed premature. Therefore, the committee sought, by analysing the two types of system currently in operation, to identify the elements for achieving the balance that is necessary if excesses in either direction are to be avoided.[25]

According to Serbian Constitution status and jurisdiction of Public Prosecution Service are determined through provisions that regulate rules and procedures for appointment of the Republic Public Prosecutor, public prosecutors and deputy public prosecutors. In addition to this, the Constitution rules composition and jurisdiction of the State Prosecutorial Council as well as sources of law that oblige public prosecutors and deputy public prosecutors in their work. The Article 156 stipulates that "Public Prosecutor's Office shall perform its function on the grounds of the Constitution, Law, ratified international treaty and regulation passed on the grounds of the Law." This provision, unlike similar provisions on the courts, does not mention generally accepted rules of the international law. If the generally accepted rules of the international law remain with regard to the courts, then they should be added with regard to the public prosecutor's offices as well.[26]

Since there is no dispute on the need for mutual influence[27] the situation is quite different regarding political interference on prosecution service. The Venice

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[24] Article 149, paragraph 1 of Serbian Constitution stipulates that a judge in performance of the judicial function shall be independent and responsible only to the Constitution and the law. Further on, in paragraph 2, the same Article prescribes that any influence on a judge while performing his/her judicial function shall be prohibited. Such a formulation seems to be too wide. Namely, although the intention of the legislator to sanction only unpermitted and/or undue influences is clear, the impression is that this should have to be visible from the actual constitutional norm, as well as that, at this place, it is appropriate to refer to the law which would more precisely stipulate what type of influence is prohibited.

[25] Recommendation Rec(2000)19 of the Council of Europe on the role of public prosecution in the criminal justice system, adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies, p. 22.

[26] Analysis of the constitutional framework on the judiciary in the Republic of Serbia, available at: http://www.mpravde.gov.rs/tekst/5847/radna-grupa-za-izradu-analize-izmene-ustavnog-okvira.php, accessed on 23 May 2017, p. 22.

[27] The Venice Commission insists on accountability as a way of mutual influence in order to ensure checks and balances principle and stated that "like any state authority, including judges, the prosecutor's office needs to be accountable to the public. A traditional means to assure accountability is control by the executive, which provides indirect democratic legitimacy through the dependence of the executive on the elected Parliament. Another means is control by a prosecutorial council, which cannot be an

Commission recognized the political interference as literally traditional modus operandi of various monarchs and autocrats to use the public prosecution as a method to fight their political enemies.[28] As the most typical sort of abuses, the Commission identified bringing of prosecutions which ought not to be brought, either because there is no evidence or because a case is based on corrupt or false evidence, and probably commoner, where the prosecutor does not bring a prosecution which ought to be brought. Victims' rights to seek judicial review of cases of non-prosecution may need to be developed to overcome this problem. (CDL-AD(2010)040, par. 20-21) However, it is important to notice that, as it has been noted by the Committee when it analyzed judicial independence, guaranties of judicial independence secure for every person the right to a fair trial and, therefore, is not a privilege for judges, but a guarantee of respect of human rights and fundamental freedoms, allowing every person to have confidence in the justice system.[29] The same goes for guaranties on prosecutorial independence or autonomy (depending on particular model of organization). The purpose of independence, as laid down in Article 6 of the Convention, is to guarantee every person the fundamental right to have their case decided in a fair trial, exclusively on legal grounds only and without any improper influence.[30]

When it comes to external relations of prosecution service with legislative and/or executive powers, comparative legislation provides form various models, but it is important to notice that only small number of European countries have a prosecutor's office forming part of the executive authority and subordinate to the Ministry of Justice (e.g. Austria, Denmark, Germany, the Netherlands). The Venice Commission notes that there is a widespread tendency to allow for a more independent prosecutor's office, rather than one subordinated or linked to the executive. In par. 26 and 27 of the CDL(2010)040 notes that there is a tendency of leaving the model of subordination to executive power. Anyway, position of the public prosecution service/prosecutor's offices are often referred to as 'autonomous' and individual prosecutors would be referred to as 'independent'. However, 'independence' of the prosecutor's office by its very essence differs in scope from that of judges. The main element of such "external" independence of the prosecutor's office, or for that of the Prosecutor General, resides in the impermissibility of the executive to give instructions in individual cases to the Prosecutor General (and of course directly to any other prosecutor). That's not the case if we are talking about general instructions that do not refer to individual cases, having in mind that they could be seen as a measures of a state criminal policy adopted by parliament or government. (CDL(2010)040, par. 29-30)

The useful base for proper shaping relations between public prosecution service and two other branches of power in order to promote a fair, consistent and efficient activity of public prosecutors, the Committee of Ministries see in duty of the states to: give prime consideration to hierarchical methods of organisation, without letting such organisational methods lead to ineffective or obstructive bureaucratic structures; define

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instrument of pure self-government but derives its own democratic legitimacy from the election of at least a part of its members by Parliament. "CDL-AD(2010)40, par. 41.

[28] See more in: Józan, F. & Kőhalmi, L: Rule of Law and Criminal Law Thoughts about the criminal justice of the Millennium Era, Journal of Eastern-European Criminal Law No. 1/2017, 209.

[29] *Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on independence, efficiency and responsibility of judges,* preamble.

[30] *Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on independence, efficiency and responsibility of judges,* § 6.

general guidelines for the implementation of criminal policy; define general principles and criteria to be used by way of references against which decisions in individual cases should be taken, in order to guard against arbitrary decision-making. According to the Committee, three elements should take precedence in the pursuit of consistency: a well-designed hierarchy, with no place for insidious bureaucracy, in which all members of the public prosecution service should feel responsible for their own decisions and capable of taking the initiatives needed to do their particular job; general guidelines on the implementation of crime policy, setting out priorities and the means of pursuing them having account of the discretionary powers recognised to the public prosecutor; a set of criteria to guide decision-making in individual cases, with the aim, for example, of preventing inconsistencies such as that of certain offences systematically attracting prosecution in certain public prosecutors' offices and not in others or being dealt with under different procedures or categorised differently. [31]

3.2. Appointment and dismissal of public prosecutors and the role of prosecutorial councils

Some of concrete points that reflect level of autonomy of prosecution service as well as of the independence of public prosecutors are mechanisms of their appointment, promotion and dismissal, especially (non)existence, composition and role of the prosecutorial councils.

The Committee based on the Venice Commission opinion, a special attention paid on the manner in which the Prosecutor General is appointed and having in mind a significant role in the system guaranteeing the correct functioning of the prosecutor's office. The Venice Commission stated that professional, non-political expertise should be involved in the selection process, but admitted that is reasonable for a Government to wish to have some control over the appointment, because of the importance of the prosecution of crime in the orderly and efficient functioning of the state, and to be unwilling to give some other body, however distinguished, carte blanche in the selection process. It is suggested, therefore, that consideration might be given to the creation of a commission of appointment comprised of persons who would be respected by the public and trusted by the Government." Commission also analysed the role of parliament in the appointment of the prosecutor general and concluded that, in countries where the prosecutor general is elected by Parliament, the obvious danger of a politicisation of the appointment process could also be reduced by providing for the preparation of the election by a parliamentary committee, which should take into account the advice of experts. The Commission suggested the use of a qualified majority for the election of a Prosecutor General as a mechanism to achieve consensus on such appointments but emphasized that there is a need also to provide for an alternative mechanism where the requisite qualified majority cannot be obtained so as to avoid the risk of a deadlock. The Committee also supported principle of appointment just for one, relatively long mandate, to ensure that prosecutor general does not follow inappropriate instructions of executive or legislative power in order to ensure re-appointment. (CDL-AD(2010)040 par. 34-37)

[31] Recommendation Rec(2000)19 of the Council of Europe on the role of public prosecution in the criminal justice system, adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies, pp. 34-35.

The Article 158 of Serbian Constitution stipulates that "the Republic Public Prosecutor shall be elected by the National Assembly, on the Government proposal and upon obtaining the opinion of the competent committee of the National Assembly." (paragraph 2) "The Republic Public Prosecutor shall be elected for the period of six years and may be re-elected." (paragraph 3) Venice Commission has expressed an objection only in part which refers to the possibility of re-election, citing that such a possibility does not exist with regard to the President of the Supreme Court of Cassation. It seems that the election of the Republic Public Prosecutor for a limited term in office (of six years) is debatable. It is unclear why the position of the public prosecutor is not permanent, the way the judge's tenure is.[32]

The paragraph 4 of the same article stipulates that "tenure of office of the Republic Public Prosecutor shall terminate, if he/she is not re-elected, at his/her own request, upon coming into force of legally prescribed conditions or upon relief of duty for reasons stipulated by the Law." Such an provision is in line with the Venice Commission opinion (CDL-AD(2006)029, par. 34) and Committee standpoint (CDL-AD(2010)040 par. 39 that recommend that the grounds for such dismissal would have to be prescribed by law or even more in the Constitution itself. However, there are some opinions in Serbian academic circles that the grounds for the termination of office and for the relief of duty of a public prosecutor should be specified under the Constitution.[33] The same opinions could be found considering termination of office of public prosecutors other than general prosecutor as well as deputy public prosecutors (article 161 of the Constitution). Such opinions are justified in part that ensures legal predictability and disables political influence and frequent legislative amendments. However, it should be noted that Constitution as the main legislative act should include only the key principles and guaranties but not too detailed.

Not less disputable is issue of the authority competent for rendering decision on termination of tenure of office of the Republic Public Prosecutor. According to paragraph 5, article 158 of Serbian Constitution it shall be adopted by the National Assembly, in accordance with the Law, bearing in mind that it shall pass a decision on relief of duty at the Government proposal". The similar as it for decision on appointment, we think that the decision on the termination of tenure of office of the Republic Public Prosecutor should be passed by the National Assembly whereas the role of the Government should be eliminated. Similar disputes exist regarding the role of the National Assembly in appointment of the public prosecutors and deputy public prosecutors for the first (three years) mandate.

This issue brings us to the role of the prosecutorial councils that have been recognized by the Venice Commission as an ideal institutional framework for appointment of prosecutors together with a board of senior prosecutors, whose experience will allow them to propose appropriate candidates for appointment.[34] Opinion of the Commission is that prosecutors should be appointed until retirement to avoid risk that the prosecutor will make his or her decisions not on the basis of the law but with the idea to please those who will re-appoint him or her. (CDL-AD(2010)040,

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[32] Analysis of the constitutional framework on the judiciary in the Republic of Serbia, available at: http://www.mpravde.gov.rs/tekst/5847/radna-grupa-za-izradu-analize-izmene-ustavnog-okvira.php, accessed on 23 May 2017, p. 25.

[33] *Ibidem.*

[34] CDL-AD(2008)019 Opinion on the draft law on the Public Prosecutors' service of Moldova, par. 44.

par. 50) In Serbia, the position of the public prosecutor is no longer permanent as it used to be according to the ex- Constitution of the Republic of Serbia from 1990.[35] On the other hand, the deputy public prosecutors, who are not autonomous holders of powers performing the duties of the public prosecutor's office, are elected to serve first three years and then to a permanent office.

Very important issue is also question of the composition of prosecutorial councils. The main principle that should guide legislators when deciding on the composition of council should be competence of this body. The Commission took position that where it exists, the composition of a Prosecutorial Council should include prosecutors from all levels but also other actors like lawyers or legal academics. If members of such a council were elected by Parliament, preferably this should be done by qualified majority. (CDL-AD(2010)040, par. 66) Explaining standards on composition of judicial councils, the Venice Commission recognized the need that other members of the council are not a part of the judiciary and that they represent other branches of power or the academic or professional sectors. Such a composition is justified by the fact that "the control of quality and impartiality of justice is a role that reaches beyond the interests of a particular judge. Moreover, an overwhelming supremacy of the judicial component may raise concerns related to the risks of "corporatist management". In a mixed composition of the Council's performance of this control, the Commission perceives the mechanism for strengthening of the confidence of citizens in the judiciary. (CDL-AD(2007)028, par. 46).

Similar argumentation could be found among academics. Paterson deems that, no doubt, separation of powers must play an important role in appointment of judges and performance of their functions but emphasizes unacceptability of absolute validity of that principle when appointment of judges is in question, because then the fact of the matter here is some kind of self-appointment through a body composed exclusively of judges. The same author looks at the appointment through such a body as the opportunity for some sort of *self-replication*, or election, from the aspect of such judges, of suitable candidates, as much as possible like themselves.[36] On the same path is the Venice Commission opinion dealing with judicial councils in which is stated that there is a need to provide a solution that includes democratic legitimacy of the judicial council, as well as to find a balance between judicial independence and self-management on the one hand and accountability of the judiciary on the other, whereby negative effects of corporatization within the judiciary would be avoided. In compliance with the above is actually the recommendation of the Venice Commission that the president of the judicial council should be elected from among non-judicial the members of the council (CDL-AD(2007)028, par. 35). [37]

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[35] Constitution of the Republic of Serbia, "Official Gazette No. 1/1990".

[36] Paterson, A & Paterson, C: Guarding the guardians? Towards an independent, accountable and diverse senior judiciary, CentreForum, 2012 (See also: Le Sueur, A: Developing mechanisms for judicial accountability in the UK, *Legal Studies,* 1-2/2004.), 30.

[37] The Venice Commission also stated that When participation of the executive power, or its representatives (e.g. the minister of justice) is in question, the Venice Commission, taking into consideration the practice of numerous European states, in principle allows for the possibility that a minister is a member of the council but proposes that he/she should not be involved in decisions concerning the transfer of judges or disciplinary measures against judges as this could lead to inappropriate interference by the Government. (CDL-AD(2007)028, par. 34).

When it comes to composition[38] and jurisdiction[39] of the State Prosecutorial Council in Serbia, the jurisdiction of the SPC refers solely to the electoral powers regarding the deputy public prosecutors and the procedure of rendering a decision on the termination of the tenure of office of the deputy public prosecutors. This body performs other duties stipulated by the Law but it is obvious that they may not be related to the public prosecutors, since the Constitution does not mention such duties at all. Therefore, unlike the High Judicial Council for which it may be said that it has a partially adequate scope of constitutional jurisdiction, in view of its position and role as defined by the Constitution, the SPC is a state body whose constitutional jurisdiction is not in accordance with its constitutional definition for the most part. Therefore, its jurisdiction should be completely redefined.[40]

3.3. Relationship between prosecutorial autonomy and judicial independence

Apart from those tendencies, there is an essential difference as to how the concept of independence or autonomy is perceived when applied to judges as opposed to the prosecutor's office. Even when it is part of the judicial system, the prosecutor's office is not a court.[41] The independence of the judiciary and its separation from the executive authority is a cornerstone of the rule of law, from which there can be no exceptions. Judicial independence has two facets, an institutional one where the judiciary as a whole is independent as well as the independence of individual judges in decision making (including their independence from influence by other judges). However, the independence or autonomy of the prosecutor's office is not as categorical in nature as that of the courts. Even where the prosecutor's office as an institution is independent there may be a hierarchical control of the decisions and activities of prosecutors other than the prosecutor general. (CDL-AD(2010)040, par. 28)

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[38] According to article 164 of Serbian Constitution, the State Prosecutors Council is an autonomous body which shall provide for and guarantee the autonomy of Public Prosecutors and Deputy Public Prosecutors, in accordance with the Law. The State Prosecutors Council shall have 11 members. The State Prosecutors Council shall be constituted of the Republic Public Prosecutor, the Minister responsible for justice and the President of the authorized committee of the National Assembly as members *ex officio* and eight electoral members elected by the National Assembly, in accordance with the Law. Electoral members shall include six Public Prosecutors or Deputy Public Prosecutors holding permanent posts, of which one shall be from the territory of autonomous provinces, and two respected and prominent lawyers who have at least 15 years of professional experience, of which one shall be a solicitor, and the other a professor at the law faculty. Tenure of office of the State Prosecutors Council's members shall last five years, except for the members appointed *ex officio*. A member of the State Prosecutors Council shall enjoy immunity as a Public Prosecutor.

[39] According to article 165 of Serbian Constitution, the State Prosecutors Council shall propose to the National Assembly the candidates for the first election of a Deputy Public Prosecutor, elect Deputy Public Prosecutors to permanently perform that function, elect Deputy Public Prosecutors holding permanent posts as Deputy Public Prosecutors in other Public Prosecutor's Office, decide in the proceedings of termination of Deputy Public Prosecutors' tenure of office in the manner stipulated by the Constitution and the Law, and perform other duties specified in the Law.

[40] Analysis of the constitutional framework on the judiciary in the Republic of Serbia, available at: http://www.mpravde.gov.rs/tekst/5847/radna-grupa-za-izradu-analize-izmene-ustavnog-okvira.php, accessed on 23 May 2017, p. 27.

[41] A separate issue is relationship between police and public prosecutor. See more in: Soković, S, Čvorović, D, Turanjanin, V: Cooperation between the Public Prosecutor and Police in Serbia, *Zbornik radova Pravnog fakulteta u Novom Sadu (Proceedings of Novi Sad Faculty of Law)*, L, 3, 843-860.

It is not rare, especially in post-communist, transitional countries, so called "young democracies" that professional public (mostly professional associations of public prosecutors) insist on equal constitutional and legal provisions on judicial and prosecutorial independence. Such an approach ignores differences that exist in very nature and jurisdiction of these to authorities, that also was noted by the Committee. Therefore, the Committee considered it important to state clearly that, although public prosecutors and judges are part of the same legal system and although the status and certain functions of the two professions are similar, public prosecutors are not judges and there can be no equivocation on that point, just as there can be no question of public prosecutors exerting influence on judges. On the contrary, the dealings between the two professions – which inevitably come into frequent contact – must be characterised by mutual respect, objectivity and the observance of procedural requirements.[42] However, it does not mean that there should not be such guaranties at all. Contrary, the Venice Commission stated that the qualities required of a prosecutor are similar to those of a judge, and require that suitable procedures for appointment and promotion are in place. Of necessity, a prosecutor, like a judge, will have on occasion to take unpopular decisions which may be the subject of criticism in the media and may also become the subject of political controversy. For these reasons it is necessary to secure proper tenure and appropriate arrangements for promotion, discipline and dismissal which will ensure that a prosecutor cannot be victimised on account of having taken an unpopular decision. (CDL-AD(2010)040, par. 18)

Differences in nature of judicial and prosecutorial function, the Committee recognized also when it comes to other guaranties of their independence/autonomy, considering tenure, mobility and salary. Unlike judges, public prosecutors must not be guaranteed tenure in a particular position or post, although decisions to transfer them from one post to another must be based on verified needs of the service and not simply on arbitrary decisions by the authorities. However, the mobility should not induce any prioritising temporary recruitments or appointments that may carry damaging effects. The status of public prosecutors and their salaries and pension must take account of the need to maintain a certain balance between members of the judiciary and the prosecution service, as both - despite the different nature of their duties - play a part in the criminal justice system as well as the importance and dignity of the office.[43]

3.4. An internal independence of public prosecutors

As it had been earlier said, the independence or autonomy of the prosecution service as such has to be distinguished from any "internal independence" of individual prosecutors as well as from regime for deputy public prosecutors in systems like Serbian that tittle public prosecutors have only the heads of prosecutors' offices while all other office holders are their deputies. Having in mind hierarchic subordination, prosecutors are bound by the directives, guidelines and instructions issued by their

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[42] Recommendation Rec(2000)19 of the Council of Europe on the role of public prosecution in the criminal justice system, adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies, p. 26.

[43] Recommendation Rec(2000)19 of the Council of Europe on the role of public prosecution in the criminal justice system, adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies, p. 17.

superiors. Independence, in this narrow sense, can be seen as a system where in the exercise of their legislatively mandated activities prosecutors other than the prosecutor general need not obtain the prior approval of their superiors nor have their action confirmed. Prosecutors other than the prosecutor general often rather enjoy guarantees for noninterference from their hierarchical superior. (CDL-AD(2010)040, par. 31) The main issue in this regard is status of instructions to subordinate prosecutors in individual case within prosecutorial hierarchy. The Committee clearly stated that relationship between the different layers of the hierarchy must be governed by clear unambiguous rules so that personal considerations do not play an unwarranted role. Additionally, the Committee see putting instructions in writing as an ideal protective mechanism that should prevent abuse of power and hierarchy that are unacceptable in human terms, and potentially dangerous in terms of civil liberties. The Committee recommend that in case of some prosecutor consider instruction unlawful or have an objection, in addition to right to request it written, it should exist an internal procedure enabling subordinates, at their own request, to be replaced in order to allow the disputed instruction to be carried out.[44] The Venice Commission goes even a further by opinion that any instruction to reverse the view of an inferior prosecutor should be reasoned and in case of an allegation that an instruction is illegal a court or an independent body like a Prosecutorial Council should decide on the legality of the instruction. In opinion of the Commission, the right on appeal should also exist in cases where transfer to another prosecutor's office without contest of prosecutor is used as a mean of influencing a prosecutor. (CDL-AD(2010)040, par 59-60)

Conclusions

From the standards analysed above it is clear that their range is much wider compared to standards relevant for judicial independence. That could be explained by variety of models of public prosecution service organization in comparative law, but also by strong influence of tradition of prosecution service subordination to executive power. Additional reason for that lies in specific role that public prosecution service has when it comes to protection of public interests. Significant deviation from the path that exist in the field of judicial EU standards could be found in lower expectations regarding level of legislative acts that contain provisions on prosecutorial independence/autonomy having in mind that they are mostly placed in laws not in constitution. Finally, introduction of prosecutorial councils as guardians of prosecutorial independence/autonomy are reform tendency supported by the Committee of Ministries and the Venice Commission, especially in states declared as new democracies. From the angle of Serbian accession negotiation process with the EU, abovementioned principles should be applied on currently ongoing process of Constitutional amendments that already opened a wide debate on novelties that could contribute autonomy of public prosecution service as well as to independence of individual public prosecutors and deputy public prosecutors.

[44] Recommendation Rec(2000)19 of the Council of Europe on the role of public prosecution in the criminal justice system, adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies, par. 9-10.

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The Role of the Public Prosecution in the Adversarial System of Criminal Procedure and the Standard of Proof "Beyond a Reasonable Doubt"

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Abstract

The role of the prosecution is one of the features of the new adversarial system of criminal procedure and this role is a particularly changed role. The prosecution is expected to be the managing body during the investigative procedure in relation to other bodies with investigative powers, and during the procedure to be an active party whose main obligation is to prove the guilt. The Prosecutor's Office has a burden of proving guilt and an obligation to find, propose and produce evidence that the defendant's guilt is proven beyond any reasonable doubt. The public prosecutor's office must prove every element of the offense beyond a reasonable doubt to which the defendant charges him. The evidence beyond reasonable doubt does not imply proof beyond a reasonable doubt. Possible suspicions or suspicions based solely on speculation are not reasonable suspicions. Reasonable doubt is based on reason and common sense. This may arise from the evidence, the lack of evidence or the nature of the evidence. From the point of view of the professional ethics of the prosecutors, it is especially important that they present the case in order to help the court to reach a fair verdict, and not to present the case to a conviction.

The domestic Criminal procedure law (Criminal Procedure Code of the Republic of Macedonia-CPL) goes a step further by introducing the standard, in Article 403, that the prosecution shall prove the guilt beyond reasonable doubt, without giving any further definition. Unfortunately, the domestic CPL does not offer different terminologies for these two types of suspicion. The Law uses the term "suspicion" when it refers to the required level of suspicion that a person has committed the crime so that certain investigative measures, restrictions or charges can be undertaken or pressed against him/her, it also refers to the application of the principle of in dubio pro reo and the standard that the guilt shall be proven beyond reasonable doubt.

Keywords: *adversarial, prosecution, reasonable doubt, in dubio pro reo.*

1. Introduction

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

strength of European law towards domestic legal systems and for the consequent harmonizing effect that it can derive, directly or indirectly.

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

The role of the prosecution is one of the characteristics of the new system of criminal procedure and this role is a particularly changed role. The prosecution is expected to be the managing body during the investigative procedure in relation to other bodies with investigative powers, and during the procedure to be an active party whose main obligation is to prove the guilt. The Prosecutor's Office has a burden of proving guilt and an obligation to find, propose and produce evidence that the defendant's guilt is proven beyond any reasonable doubt. The public prosecutor's office must prove every element of the offense beyond reasonable doubt to which the defendant charges him. The evidence beyond reasonable doubt does not imply proof beyond reasonable doubt. Possible suspicions or suspicions based solely on speculation are not reasonable suspicions. Reasonable doubt is reason-based and common-sense suspicion. This may arise from the evidence, the lack of evidence or the nature of the evidence. From the point of view of the professional ethics of the prosecutors, it is especially important that they present the case in order to help the court to reach a fair verdict, and not to present the case to a conviction.

In the function of proving guilt, the prosecution collects material evidence, talks with potential witnesses, undertakes expert examination during the investigative procedure, proposes holding a proof hearing, if it assesses that the conditions prescribed by the CPLare fulfilled, and the evidence is of particular importance for "The thesis of the charge".

The active role expected of the prosecution implies training of prosecutors for examining persons during the main hearing. This is especially important because in the current system, the examination for the needs of the prosecution was largely done by the court.

The new system at the main hearing requires the prosecutor to build the case through the answers received from the witnesses and experts who presume dexterity in formulating the questions and their systematization in a coherent whole, as well as a solid preparation for completing the questions of the previously received answers, and yet, within of the prepared concept of questions to be asked.

The prosecution will also have to successfully perform the role of cross-examination of defense witnesses by exploiting the weaknesses of the "thesis of defense" that the prosecutor perceived during the direct examination of the witness by the defense counsel. The prosecutor must become aware that his failure to prove guilt, that is, the failure to present convincing evidence before the court will lead to the adoption of an acquittal that would mean an absolute failure of the prosecution. So the prosecution can file a charge when it believes that there is "enough evidence." But what would such a standard mean? From federal rules of proof in the United States and from case-law, it is noted that the prosecution must present sufficient evidence in order to convince the court that there is reason to believe that the crime was committed and that

the defendant is the perpetrator. The court must be convinced and there is only such a state of facts that every reasonable person will worship the faith and will consciously lead to a strong suspicion of the guilt of the defendant.

Reasonable doubt is a legal standard of proof in US law that has less significance than a possible cause, a legal standard of arrests and orders, and is applied to justify short arrest during the investigation. But this means more than an undeveloped and non-particleized suspicion or premonition that must be based on concrete and relevant to articulate facts taken into account along with rational conclusions drawn from those facts that a person is or will be engaged in a criminal offense, all depends on the totality of the circumstances and may be the result of a combination of concrete facts, even if each of them is individually harmless. As another standard that is at the expense of proving in the United States, the supremacy of the evidence, that is, the evidence that is being carried out must be clear and convincing, that is, to be highly and substantially more likely to be true than to be untrue. The court should have a firm conviction or belief in their actuality.

The principle of in dubio pro reo was introduced in the national criminal procedure legislation in 1997. The new, party driven, Law on criminal procedure from 2010, (hereinafter: domestic LCP), continues to regulate this principle in Article 4, which reads that "The Court shall decide in favour of the defendant whenever there is doubt regarding the existence or non-existence of facts comprising the elements of crime, or facts which lead to the application of a certain provision of the Criminal Code". The domestic CPL goes a step further by introducing the standard, in Article 403, that the prosecution shall prove the guilt beyond reasonable doubt, without giving any further definition.

Beyond reasonable doubt, it should be defined in the Law as "proven with such certainty that one would lean forward and act in accordance with it without hesitation in its essential actions." This threshold should be mentioned in Article 404 (conviction) of the LCP, as mentioned in Article 403 (acquittal). The threshold cannot be achieved, if there are two possible possible solutions for the particular case.

In order to make a distinction between the suspicion whether a person has committed a crime (suspicion that is detrimental to the defendant and is always in favour of the indictment) and the suspicion whether that person is really the perpetrator of the crime, *i.e.* suspicion which is in favour of the defendant's innocence (positive suspicion which is always in favour of the defendant and is reflected in the principle of in dubio pro reo as well as in the standard that the prosecution has the burden of proof beyond reasonable doubt), the countries in the Anglo-Saxon world, as well as Italy, have been using two different terminologies. Namely, the term suspicion (in Macedonian language: сомневање) is used in a detrimental sense for the defendant and is in favour of the indictment, while the term doubt (in Macedonian language: двојба, двоумење, несигурност) is used to favour the defendant and the definition of the principle of in dubio pro reo, as well as for the standard of the prosecution bearing the burden of proving the guilt beyond reasonable doubt.

Unfortunately, the domestic CPL does not offer different terminologies for these two types of suspicion. The Law uses the term "suspicion" (сомневање) when it refers to the required level of suspicion that a person has committed the crime so that certain investigative measures, restrictions or charges can be undertaken or pressed against him/her., it also refers to the application of the principle of in dubio pro reo and the standard that the guilt shall be proven beyond reasonable doubt.

2. Standard beyond reasonable doubt

So, if the burden of proof is on the prosecution, the logical question is to what degree of certainty this shall be proven. This question leads to the issue of the degree of proof as presented both in the standard of the prosecution having to prove the defendant's guilt beyond reasonable doubt, and the principle of any reasonable doubt favouring the defendantin dubio pro reo. This standard/principle means that the probability of the defendant's guilt is so high that it eliminates all (reasonable) doubt, because, if there is (reasonable) doubt in the defendant's guilt, he/she must be acquitted:

(...) Proof beyond reasonable doubt is the highest standard of proof, which must be reached in any criminal case. Reasonable doubt is defined as the real doubt based on common sense and logical judgment after conscientious, full, and impartial evaluation of all evidence, or the lack thereof, in the case under trial. Consequently, proof beyond reasonable doubt is proof of such a convincing nature that any person can rely on it and act upon it without dilemmas in their most significant personal affairs. It does not, however, mean absolute certainty. (...)

As it was presented before and will be presented further, it can be seen that the reasonable doubt standard of proof has evolved and matured ever since it first came into existence in the common law systems several centuries ago.

The US Supreme Court read this right into the US Constitution in the Winship case, holding the State (prosecuting authorities) to the standard of proof beyond a reasonable doubt. Quoting from Coffin v. United States (1895), the US Supreme Court in Winship noted:

The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual errors. The standard provides concrete substance for the presumption of innocence – that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law."

In the common law systems the trial judge instructs and gives guidance to the jurors throughout the trial. The judge must make it explicitly clear in these instructions that the jurors should give the benefit of the doubt to the accused. If there is any reasonable doubt from the totality of the evidence, the jury must acquit the accused. The process of instructing the jury throughout the trial and how the reasonable doubt instruction at the end of the trial is to be appreciated is cogently described by Richard Uviller:

Jurors are invariably instructed by the judge – usually several times – that they have the exclusive responsibility to find the facts; they are then told at length just how they are to go about finding those facts. Addressing the raw data accumulated during the trial (actually, the evidence is hardly raw, having been refined by evidentiary and constitutional filtration), the judge will enjoin the jury to use their ordinary faculties of judgment and common sense. Jurors are told how to weigh credibility, taking into account the demeanour of witnesses on the stand, tone of voice, eye movements, body language, attitude – all the various sorts of unconscious communications that often betray the liar and confirm the account of the truthful. The jury is told that the credibility of a witness may be attacked ("impeached") by evidence of bias, by contradiction of evidence from another source, or by inconsistency between the

witness's trial testimony and some statement on the same matter previously made by the same witness. They are instructed that the defendant (if he testifies in his own behalf) and, in some instances, co-conspirators are biased as a matter of law because of their inherent stake in the outcome. Jurors are also instructed that other witnesses may be biased in fact for any one of a number of reasons, among them a personal or professional relationship to the defendant or victim or some personal interest in the outcome. At the same time, the jurors are reminded that even a biased witness may tell the truth. In general, they are advised they may either discard the discredited portions of an impeached as the suspect product of an incredible source. Although they are enjoined to use their own "judgment" on these matters, they are warned not to "speculate." They should find the facts on the basis of the supporting evidence, they are instructed, but they are also told that they may consider the lack of evidence along with the evidence on a point.

But the jury is not merely charged at the end of the trial with the reasonable doubt instruction (however defined). The trial judge cautions the jury throughout the trial on how to consider the evidence presented under the appropriate standard. At the end of the trial, the jury is reminded that it has the exclusive responsibility of assessing the evidence. It is for the jury to determine whether, and to what extent, all elements of all charged crimes have been proven to the standard of proof beyond a reasonable doubt – a standard that for all intents and purposes amounts to near certainty (since few things in life can be proved with absolute certainty).

Yet when the jury is told to apply the reasonable doubt standard in evaluating the evidence, they are told nothing about whether they must apply some objective, majoritarian perspective in evaluating doubt or to apply their own individualistic, subjective evaluations. Uviller has insightfully described the tension between the "objective" and "subjective" interpretations of the reasonable doubt standard. He explains that the "objective" and "subjective" are two possible ways of understanding the reasonable doubt standard:

Under the objective understanding, if juror A concedes that juror B has a persistent, good faith doubt based on the evidence, then juror A must vote "not guilty" even though she does not share juror B's doubt. Even if jurors conclude only that some imaginary, conscientious juror might entertain some doubt concerning the defendant's guilt, the objective view would acknowledge a reasonable doubt in the case and require the jury to acquit though none of them actually doubts the defendant's guilt.

Under the subjective interpretation, the question is first whether an individual juror, carefully weighing all the evidence and giving due consideration to the views of fellow jurors, personally doubts the guilt of the defendant. If this step produces a subjective sense of doubt in a juror's mind, the juror must ask himself the next question: whether the doubt is reasonable. Under this subjective reading, if a juror personally has no reasonable doubt, then notwithstanding the imperfections in the proof that might give others reason for doubt, the juror should vote "guilty."

Uviller correctly argues that the subjective understanding is the right one: doubt is an individual matter; jurors must not abandon their personal conclusions or vote against their judgment.

Relying on observations by US Federal Circuit Court Judges, Patricia Wald, and Jerome Frank, Robert C. Power argues: Experience with the reasonable doubt standard, as well as common sense, support the realist criticism that judges and academics overstate the importance of legal doctrine. Our modern and somewhat jaded "realistic"

view is that jurors generally disregard the judge's instructions and just do what they want to do. Judge Wald writes that "the reasonable doubt standard is essentially irrelevant to the everyday workings of the criminal justice system."

This irrelevance results not only from the use of guilty pleas and prosecutorial discretion but also because juries do not apply the standard. For example, "few judges … believe that every jury slavishly and precisely follows the beyond-a-reasonable-doubt standard in deciding guilt or innocence." Judge Wald's connection to the realist view is cemented by her affirmation of Judge Frank's comment that "were the full truth declared [sic] [as to what goes on in the jury room] it is doubtful whether more than one percent of verdicts could stand."

Today, the reasonable doubt standard of proof is widely spread on the Continent as well, in the so called hybrid systems. As such, many criminal justice systems throughout Europe require from the prosecution to prove the guilt of the defendant beyond reasonable doubt or with high certainty, otherwise, the defendant shall be acquitted.

For instance, in Germany the judge's conviction of the defendant's guilt "must be subjective and must be based on persuasive factors, which leave no room for reasonable doubt."

In Italy, when referring to convicting judgment the CPLstates that: "The judge shall convict the defendant only if the defendant is found guilty beyond reasonable doubt of the crime he is charged with".

In the CPLof Serbia, accused individuals may not be convicted unless the prosecution proves their guilt with certainty.

The domestic LCP, when referring to acquitting decision, states that the court shall acquit whenever the prosecution fails to prove beyond reasonable doubt that the defendant is guilty.

An interesting proposition about how the judges/jurors should use the maxim beyond reasonable doubt in order to minimize the possibility of mistakes has been made by the distinguished philosopher of science Larry Laudan, the objective of which is to not only reduce the number of false convictions, but also the number of false acquittals. He claims that there should be just one simple rule that the jurors should use in the context of the required standard of proof, and that rule being: "Figure out whether the facts established by the prosecution rule out every reasonable hypothesis you can think of that would leave the defendant innocent. If they do, convict; otherwise, acquit".

3. The application of the standard beyond reasonable doubt in the anglo-saxon world

The Supreme Court of Massachusetts case Commonwealth v. Webster has endured to this day for the instruction given to the jury by Chief Justice Lemuel Shaw, but it was nonetheless infamous at the time due to the public profile of the victim and the accused. Dr. John Webster, a professor of chemistry at Harvard University, was accused of murdering his colleague, Dr. George Parkman, who was a well-known figure around Boston. Webster discussed the level of certainty necessary to warrant a conviction based on circumstantial evidence and provided a definition of the reasonable doubt standard.

The Court noted that this was a case "to be proved, if proved at all, by circumstantial evidence." It indicated that because "[c]rimes are secret" it becomes

necessary to use "all other modes of evidence besides that of direct testimony, provided such proofs may be relied on as leading to safe and satisfactory conclusions." However, "great care and caution ought to be used in drawing inferences from proved facts," as "[t]he common law appeals to the plain dictates of common experience and sound judgment; and the inference to be drawn from the facts must be a reasonable and natural one, and, to a moral certainty…. It is not sufficient that it is probable only: it must be reasonable and morally certain." The Court then added that "inferences drawn from independent sources, different from each other, but tending to the same conclusion, not only support each other but do so with an increased weight." "[A]ll the facts proved must be consistent with each other, and with the main fact sought to be proved…." Thus, if any fact "necessary to the conclusion is wholly inconsistent with the hypothesis of the guilt of the accused, it breaks the chain of circumstantial evidence upon which the inference depends; and, however, plausible or apparently conclusive the other circumstances may be, the charge must fail." Furthermore, "[i]t is not sufficient that [the circumstances] create a probability, though a strong one; and if, therefore, assuming all the facts to be true which the evidence tends to establish, they may yet be accounted for upon any hypothesis which does not include the guilt of the accused, the proof fails." Chief Justice Shaw went on to define the reasonable doubt standard:

Then, what is reasonable doubt? It is a term often used, probably pretty well understood, but not easily defined. It is not mere possible doubt; because every thing relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. The burden of proof is upon the prosecutor. All the presumptions of law independent of evidence are in favor of innocence, and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. For it is not sufficient to establish a probability, though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary, but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to act conscientiously upon it. This we take to be proof beyond reasonable doubt; because if the law, which mostly depends upon considerations of a moral nature, should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether.

Chief Justice Shaw's definition of reasonable doubt would be widely adopted by other courts. For instance, in *Victor v. Nebraska* (1994), the US Supreme Court noted with approval the Webster definition as "probably the most satisfactory definition given to the words 'reasonable doubt' in any case known to criminal jurisprudence." Some commentators criticized the Webster charge. Judge May, a contemporary of Justice Shaw, noted that although the attempt to define reasonable doubt in Webster was "unsuccessful" and "unfortunate," "the effort to give it a more practical and comprehensible exposition gives promise of a reform which must be hailed with satisfaction."

William Trickett in his article, Preponderance of Evidence, and Reasonable Doubt (1906), criticized Chief Justice Shaw's instruction arguing that "it is impossible to see

how an ordinary juror is to be aided by being told that if he is morally certain of the prisoner's guilt, he is to convict him."

Miles v. United States was the first case in which the US Supreme Court addressed the issue of the definition of the reasonable doubt standard. As one of the grounds of error, the petitioner referred to the jury instruction defining reasonable doubt:

The prisoner's guilt must be established beyond reasonable doubt. Proof beyond a reasonable doubt is such as will produce an abiding conviction in the mind to a moral certainty that the fact exists that is claimed to exist so that you feel certain that it exists. A balance of proof is not sufficient.

A juror in a criminal case ought not to condemn unless the evidence excludes from his mind all reasonable doubt; unless he be so convinced by the evidence, no matter what the class of the evidence, of the defendant's guilt, that a prudent man would feel safe to act upon that conviction in matters of the highest concern and importance to his own dearest personal interests.

The US Supreme Court found no error in this instruction. The US Supreme Court relied on several state cases, including Webster and Giles, reasoning that: The evidence upon which a jury is justified in returning a verdict of guilty must be sufficient to produce a conviction of guilt, to the exclusion of all reasonable doubt. Attempts to explain the term "reasonable doubt" do not usually result in making it any clearer to the minds of the jury. The language used in this case, however, was certainly very favourable to the accused and is sustained by respectable authority. Portentously, the US Supreme Court observed that attempts to clarify the term "reasonable doubt" would likely result in confusion, rather than clarity. Although the US Supreme Court explicitly recognized the dangers of attempting to define the term "reasonable doubt," it did not suggest any solution to the potential problem. Professor Miller W. Shealy Jr. notes in his analysis of Miles the failure of the Court at this early stage "to firmly settle on a definition marks the origin of the problem."

4. The application of the standard beyond reasonable doubt in the ECtHR case-law

In the Geerings case the Court has found that "if it is not found beyond a reasonable doubt that the suspect has actually committed the crime and if it cannot be established as a fact that any advantage, illegal or otherwise, was actually obtained by the suspect in connection with the crime, a measure like confiscation of goods allegedly connected to the crime cannot be ordered, because it would be based on a presumption of guilt" and therefore incompatible with Article 6 (2).

The case can be summarized as follows: the applicant was arrested and placed in pre-trial detention on suspicion of involvement – together with others – in various thefts of lorries containing merchandise. After the conclusion of the investigation, a first instance national court had established that the applicant had been involved in the theft of 120 laundry dryers from a lorry and in several thefts of lorries. The applicant lodged an appeal with the local Court of Appeal which quashed the first judgment and convicted the applicant of having participated only in some of the thefts and acquitted him of the remainder of the charges.

In the meantime, the prosecutor requested the judge to issue an order for the confiscation of an illegally obtained advantage which, according to the public

prosecutor, amounted to 67,020.16 Euros, including also goods related to the charges the applicant had been acquitted of. The applicant argued that a confiscation order could only be imposed in respect of the offences of which he had been found guilty. The local Court of Appeal granted the request of the prosecutor, thus referring the confiscation also to goods related to the crimes the defendant had been acquitted of.

In the case of Telfner the Court stated that there had been a shift of the burden of proof, since the accused, who refused to give evidence, had been convicted of a road traffic offence on the basis of the fact that he was the driver of the vehicle, despite the fact that no evidence had been found to corroborate the statement. More specifically, the decision of the national court was based on the facts that, although the car was registered under his mother's name, the accused was the main user of the vehicle and that he was not at home the night of the accident - facts which required from him, according to the national court, to present evidence that he was not the driver. The Court recalled that Article 6 (2) "requires, inter alia, that the burden of proof is on the prosecution, and any doubt should benefit the accused … Thus, the presumption of innocence is infringed where the burden of proof is shifted from the prosecution to the defence … In requiring the applicant to provide an explanation although they had not been able to establish a convincing prima facie case against him, the (national) courts shifted the burden of proof from the prosecution to the defense".

5. Conclusion

The context of criminal justice, relationships between European Union member states are viewed as one of the elements in the process of Europeanization, which makes us think of ways to turn this element into an effective and productive tool aimed at strengthening the human rights protection mechanism. The recent dynamic Europeanization of criminal justice became an object of scientific discussions. It is often viewed apologetically and is highly criticized for the efforts to harmonies and simplify the criminal proceedings of the European Union member states by choosing the quickest and most effective way to achieve the goal. Establishment of the European Union (hereinafter – EU) and its further growth reveals the development of its regulated areas and competence. The significance of the legislation adopted by the EU institutions and the significance of the decisions made by the Court of Justice of the European Union (hereinafter – the Court of Justice), which explains this legislation, is undeniable for the Member States. It complements the national legal regulation of the Member States. Consequently, over time the criminal justice got into the range of many areas, which are regulated by EU. On the one hand, the aim of coordinating of the sphere, which exclusively belongs to the national law, has the negative shade, on the other hand, in the absence of regulation of the unified international cooperation, investigations of criminal cases with an international element would stagnate. All these issues are becoming more important as the increasing need to regulate the quite sensitive assessed area of law is observed. Although Member States have provided the EU institutions the right to adopt the legislation, which is binding for Member States and thereby have limited their sovereign rights in certain areas, Member States seek as much as possible to maintain their traditions, culture and national identity.

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Rehabilitation of Persons Convicted for Ideological or Political Reasons and the Role of Public Prosecutor in the Republic of Serbia

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Abstract:

As an expression of an urgent need to break-up with the past, one can distinguish legal violence, which was committed after the end of World War II in Democratic Federal Yugoslavia. The new communist authorities convicted many respectable citizens by conducting numerous court trials, accusing them of supporting the occupier, after which they confiscated their entire property. In order for the totalitarian past to be legally defeated, it was necessary to create a process by which the historical injustice could be corrected, not only through personal rehabilitation, but also through the restitution of the confiscated property.

Fifty years later, when reforms and democratisation of political processes began, Republic of Serbia also faced the consequences of selective and orchestrated justice. The process of rehabilitation and restitution was an attempt, mainly successful, to eliminate the anomalies in the field of final court decisions and their effect. It can be said that the results are significant, but at the same time insufficient. Simple analyses of archived data show that in the period from 1945 to 1952 many more sentences were passed pursuant to the applicable laws in comparison with the number of submitted requests for rehabilitation. The rehabilitation proceedings have shown that those laws were used as a foundation for taking revenge on the previous regimes.

The Public Prosecutor's office in the Republic of Serbia has made a great contribution to establishing legal certainty in this field. To the already wide scope of jurisdictions of the Public Prosecutor's office, the 2011 Rehabilitation Act added a new obligation: to represent the Republic of Serbia in cases related to rehabilitation.

The key question, which is likely to remain unanswered, is whether the proceedings that involved Public Prosecutors rehabilitated those convicted for the most serious criminal acts, who de facto committed those crimes.

***Key words**: rehabilitation, restitution, political and ideological reasons, public prosecutor, court trial, Rehabilitation Act, human and civil rights.*

Introduction

The establishment and reinforcement of the totalitarian regimes in Europe, after the end of World War II were based on the same model, which was a physically and legally violent break-up with the past. The newly established regimes saw the embodiment of the previous regimes in the rich and the successful, believing that their

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wealth originated from the familiarity with the previous regimes. A great number of people were executed without any court's decision.

On the other hand, in addition to physical, one can also distinguish legal violence, which was committed after the end of World War II. This scenario was also present in the Democratic Federal Yugoslavia and the Republic of Serbia as its constitutional part.

The new communist authorities convicted many respectable citizens by conducting numerous court trials, accusing them of supporting the occupier, after which they confiscated their entire property. The authorities used legal ways to deal with both Serbian people and ethnic minorities. We have witnessed dozens of smaller places and villages, with 100% of German or Hungarian population being deleted from statistical reports. Their propriety was confiscated due to the fact that they belonged to one of these two nations, without any further analysis whether they cooperated with the occupation authorities or not.

The second great attack on human rights and citizens' property occurred after the Resolution of Informbiro, when the country's authorities, again using legal ways, dealt with certain citizens who had been sympathizers of the Soviet Union and deprived them of their basic human rights.

In order for the totalitarian past to be legally defeated, it was necessary to create a process by which the historical injustice could be corrected, not only through personal rehabilitation, but also through the restitution of the confiscated property. Following the fall of the communist regimes in Eastern Europe, a democratically elected government gave the process of rehabilitation of convicted persons for political and ideological reasons a top priority, which was later carried out. Furthermore, there was also the return of the property confiscated on the basis of decisions of court or administrative bodies, which had nothing to do with the law and justice, but were based on politics and ideology.[1] Having established the mechanisms for the rule of law, the former communist countries have been trying and mostly succeeded in correcting the historical injustice via processes of moral, political, legal and economic rehabilitation.[2]

When it comes to the Republic of Serbia, the first Rehabilitation Act was not passed until 2006 (hereinafter RA06) which did not leave any deeper mark. Passing of this Act was not followed by passing of the Law on Property Restitution and Compensation, therefore the expectations were not met.

Only with the passing of both the Rehabilitation Act which has been enforced since 2011 (hereinafter RA) and the Law on Property Restitution and Compensation, were the conditions created for the beginning of with moral, political, legal and economic rehabilitation in the Republic of Serbia. Unfortunately, the abovementioned laws were not followed by passing the regulations on access to the secret services' files, which would make the access to the rehabilitation of the large number of citizens convicted after World War II significantly easier.

From the legal point of view, rehabilitation implies the reestablishment of the lost rights, *i.e.* the return into the previous state before the rights were diminished or violated. In theory, there is a great number of definitions by which one has tried to

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[1] Jovica Trkulja, *Rehabilitation of Political Convicts and Writers in Serbia,* Magazine "Hereticus" 1-10, 2011. *Beograd.*

[2] *Ibid.*

define the word rehabilitation in the right way. Regarding the rehabilitation of the persons convicted for political or ideological reasons, it seems that the complete return into the previous state is impossible due to the passing of time or the consequences caused by such decisions. Thus, the most acceptable point of view is that since it is generally not possible to erase the legal consequences, it is insisted on decreasing their effects to minimum.[3]

Although there are certain similarities, it is important to highlight the significant distinctions between the persons who were unreasonably convicted or deprived of liberty in the sense of criminal law from political rehabilitation. In fact, numerous authors have assumed an attitude that the political rehabilitation cannot be considered the matter of law, since it is about the correction of the anomalies from the past by returning the persons who were at one point of social-history considered enemies to public and political life.

The first (unsuccessful) attempt

The first Serbian Rehabilitation Act (hereinafter RA06) was administered from 2006 to the end of 2011 when the new Rehabilitation Act was passed. RA06 was applied to all the requests on rehabilitation submitted according to this Act.

This act regulated the rehabilitation of the persons residing on the territory of the Republic of Serbia who were without any judicial or administrative decision or by a judicial or administrative decision deprived of their lives, liberty or other rights for political or ideological reasons, from 6th April 1941 (the Nazi attack on the Kingdom of Yugoslavia- the author's comment) to the day of the commencement of the Act, *i.e.* 25th April 2006.

Pursuant to the same Act, the right to submit the request for rehabilitation did not have a deadline. The wording of this Act is striking. Namely, the legislator had tried to solve the destinies of a great number of citizens of the Republic of Serbia, whose real number will most likely stay unknown, and who were deprived of their basic human and property rights by passing a micro-Act consisting of 9 articles.

Article 8 of this Act envisaged that the right to compensation and the right to the return of the confiscated property would be regulated by a Lex specialis. Such Lex specialis has never been passed. The legislator has decided on the rehabilitation in a narrow sense, by annulling the decisions made for political or ideological reasons, without more clear elements for the remedy of the legal consequences of the decision or compensation for the damage. [4]

The first crucial problem of this Act is the lack of closer circumstances by which the court or any other decision or the act of exile or violence committed may be qualified to oblige the rehabilitation court to rehabilitate a person whose rehabilitation has been demanded.

The second crucial problem of this Act is strictly declared unilateral holding of the hearing. The person interested demands the rehabilitation from the court without the other side's involvement to protect the interest of the Republic of Serbia and directly control the decision made, all of this with the aim of preventing any abuse. It is assumed

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[3] Bora Čejović, *Criminal Law,* Belgrade, 2006, page 383.

[4] Vladimir Budinović, *Rehabilitation Act:* "A sad story with a possibly happy ending".

by the Act that the only legal remedy is the appeal, which could be issued to the Supreme Court of Serbia and only against the decision in which the request for rehabilitation is denied. The failure of the legislator, at least in the Appellate Court, lies in the fact that they did not introduce the obligation to submit the decision to the Public Prosecutor, who could appeal against the meritum of the first-instance decision.

The most illogical provision is the fact that the Act includes the period from 6th April, 1941, which means that its jurisdiction is expanded to include the decisions of the occupation authorities. It is in the nature of political rehabilitation that the state rehabilitates the persons who were convicted for political or ideological reasons by legitimate and legal predecessors of the state authorities, which certainly cannot include the occupation authorities. War crime victims cannot be rehabilitated in this way.

2011 Rehabilitation act

A small number of authors dealt with the theory of rehabilitating persons sentenced after World War II, because of political or ideological reasons, but there was significant resistance and critique of the legislative solutions in the 2006 Rehabilitation Act. Hence, a new Rehabilitation Act was passed and it came into effect on 13.12.2011.

The Act regulated rehabilitation and legal consequences of the rehabilitation of persons who were executed, deprived of liberty and other rights before the Act came into effect on the territory of the Republic of Serbia, without a verdict or administrative decision of military and other Yugoslav bodies, if they resided or still reside on the territory of the Republic of Serbia or hold the citizenship of the Republic of Serbia.

Unlike the 2006 Act, the 2011 RA envisaged that entitlement to rehabilitation covers the period from the day when a particular settlement was liberated, i.e. from the day when a new administration was established, replacing the occupation authorities, thus being effectively established, without interruption. This provision limited the liability of the Republic of Serbia and it does not include the acts of the occupation authorities from 6th April 1941 until the new administration was established, as it was the case in the 2006 RA.

A specific feature of the Act is the provision that envisages that the right to submit a request for rehabilitation is terminated after 5 years from the day when the Act came into effect.

A single judge decides on the request for rehabilitation, while a complaint against the adjudication in a rehabilitation proceeding can be filed with the competent appellate court.

A decision regarding the request for rehabilitation is made *ex-parte*, pursuant to the rules of extra-judicial proceedings, with an obligation to obtain the opinion of the competent higher public prosecutor. When the public prosecutor disputes the request for rehabilitation, the court decides in a bilateral proceeding, where the other party is the Republic of Serbia, represented by the higher public prosecutor. Hence, a rehabilitation proceeding requires the mandatory presence of the public prosecutor.

As the provisions state, the Act allows for the requests for rehabilitation to be decided on in extra-judicial proceedings, with mandatory participation of the public

prosecutor. There are no other provisions that further regulate the role of the Higher Public Prosecutor. Bearing in mind that the Act issued the rule that the Higher Court decides on the request for rehabilitation, with mandatory involvement of the competent public prosecutor, it is obvious that the competent prosecutor is the Higher Public Prosecutor, who represents the state before the court which decides on rehabilitation. Bearing in mind the fact that there are 25 Higher Public Prosecutor's offices in Serbia, there was a concern that different practices of law in the proceedings would be established, which is why the Republic Public Prosecutor had to intervene.[5]

Mandatory instructions from the Republic Public Prosecutor

Bearing in mind the procedural shortcomings of the 2011 RA and insufficiently applicable provisions of the Law on Extra-judicial Proceedings on the role of the Public Prosecutor in a rehabilitation proceeding, the Republic Public Prosecutor issued the General Binding Instructions [6] to closely regulate the role of Higher Public Prosecutor's offices in the matters related to rehabilitation. Firstly, a register has to be established for registering cases and it is labelled K-Reh. The register has to contain all elements prescribed by the Rehabilitation Act in order to have an adequate record of cases.

In order to create conditions for the work of public prosecutor's offices in the Republic of Serbia to be as uniform as possible, the Instructions stipulate that the Higher Public Prosecutors are obliged, once the Higher Court submits a request for rehabilitation and all the collected documents, to compile a report, in which they would express their opinion, based on the analysed evidence, whether the request for rehabilitation is founded or not. After all, the expressed opinion of the Public Prosecutor influenced the nature of the rehabilitation proceeding, *i.e.* whether it was *ex-parte* or bilateral.

Higher Public Prosecutors were obliged to submit the report to the competent Appellate Public Prosecutor's office prior to submitting their opinion and explanation to the court. The Appellate Public Prosecutor's office would analyse the report and the collected documentation and make a decision, which may or may not be in agreement with the opinion of the Higher Public Prosecutor.

In case of opposing legal stands of the Higher Public Prosecutor and the Appellate Public Prosecutor regarding the merits of the request for rehabilitation, the attitude of the Republic Public Prosecutor was deemed decisive.

Higher Public Prosecutor's offices and Appellant Public Prosecutor's offices were obliged to designate persons who should represent the state in the cases related to rehabilitation.

The aim of issuing the Instructions was a lawful, effective and uniform acting of competent public prosecutors, as representatives of the Republic of Serbia in the proceedings regarding the Rehabilitation Act.

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[5] Zoran Pavlović, *Krivično procesno pravo II,* (Postupci za rehabilitaciju, p.199-202), 2nd ed., Novi Sad, 2015.

[6] General Binding Instructions of RPP, no. A 64/12 of 5.04.2012.

Total number of cases in progress

Bearing in mind the fact that the period during which a request for rehabilitation could be submitted ended on 13.12.2016, since the 2011 Rehabilitation Act stipulated that a request for rehabilitation could be submitted within 5 years from the day when the Act came into effect, the data presented show the total number of cases related to rehabilitation registered at the Public Prosecutor's offices in the Republic of Serbia.

As it has already been mentioned, bearing in mind the provisions of the 2011 RA and the General Binding Instructions issued by the Republic Public Prosecutor, the cases registered at the Appellate Public Prosecutor's offices present the total number of cases in progress in the Republic of Serbia. The Appellate Public Prosecutor's office in Belgrade registered 2,819 cases related to rehabilitation.

The Appellate Public Prosecutor's office in Novi Sad registered 4,182 cases related to rehabilitation during the legally prescribed period.

On the other hand, the Appellate Public Prosecutor's office in Kragujevac registered 887 such cases. Finally, the Appellate Public Prosecutor's office in Niš registered 715 cases related to the same matter.

A data analysis shows that the role of the Higher Public Prosecutor, i.e. Public Prosecutor's offices in Serbia in the matters related to rehabilitation of persons convicted based on political or ideological reasons, generated the total of 8,603 K-pex cases during the period of five years after 13.12.2011.

An overview of cases related to this matter at Public Prosecutor's offices in the Republic of Serbia is presented in this table:

Appellate Public Prosecutor's office	Number of cases	%
Belgrade	2819	32.77
Novi Sad	4,182	48.6
Niš	715	10.31
Kragujevac	887	8.31

Activities of Higher Public Prosecutor's Offices

This paper does not intend to analyse the activities of Higher Public Prosecutor's offices in Serbia regarding the registered 8,603 K-Reh cases. When it comes to the activities of Higher Public Prosecutor's offices in Serbia, only the activities of one Higher Public Prosecutor's office from each of the listed Appellant Prosecutor's offices will be analysed, *i.e.* two Higher Public Prosecutor's offices that are subordinate to the Appellant Public Prosecutor's office in Novi Sad, since the record shows that this Prosecutor's office, *i.e.* its subordinate Higher Public Prosecutor's offices have registered 48.61% of the total number of registered cases.

In order to adequately show the increase in the number of cases from the moment when the new Act came into effect, the analysis will use the data from the Higher Public

Prosecutor's offices in Subotica and Sombor, which, due to geopolitical and historical reasons, registered the highest number of cases related to rehabilitation in relation to the number of citizens and the number of other criminal cases.

When it comes to the Higher Public Prosecutor's office in Kragujevac, in the period during which requests for rehabilitation were submitted, there were 3,453 criminal cases in progress, relating to various matters. Criminal cases fall within the main competence of this Public Prosecutor's office. At the same time, there were 223 cases registered relating to rehabilitation, which means that they comprise 6.46% of all criminal cases being dealt with.

During the same period, the Higher Public Prosecutor's Office in Niš registered 11,891 criminal cases, which are the main competence of the Public Prosecutor's office. When it comes of the subject of rehabilitation, 168 cases were registered, which is 1.41% of the total number of cases being dealt with.

A similar situation is at the Higher Public Prosecutor's office in Užice, where 6,329 criminal cases were registered, with 138 of them related to the subject of rehabilitation, *i.e.* 2.18% of the total number of cases being dealt with.

When it comes to the two Prosecutor's offices on the territory under the jurisdiction of the Appellate Public Prosecutor's office in Novi Sad, the Higher Public Prosecutor's office in Subotica and the Higher Prosecutor's office in Sombor, the analysis shows quite different results and many more cases related to the subject of rehabilitation. Namely, the north of Vojvodina was inhabited with a much higher number of Hungarian nationals than after the World War II. Luckily for the multicultural aspect of the region, a large number of Hungarians continued to inhabit their traditional territories, which cannot be said for the west part of Vojvodina and the Danube region, where a large number of Germans used to live until the end of World War II. Today, their number has been reduced to a symbolic figure.

The Higher Public Prosecutor's office in Sombor registered 6,210 criminal cases, with 981 of them related to the subject of rehabilitation, which means that this subject matter had a share of 15.80% of the total number of cases being dealt with.

The Higher Public Prosecutor's office in Subotica registered 637 cases related to rehabilitation and 6,485 other criminal cases, which means that the subject analysed in this paper was registered in 9.83% of all cases.

Report

The 2011 Rehabilitation Act and the Act on Extra-judicial Proceedings did not envisage a report from the Higher Public Prosecutor on the request for rehabilitation. This was introduced in the General Binding Instructions from the Republic Public Prosecutor among the activities of public prosecutor's offices.

The report was basically an elaboration of the decision of the Public Prosecutor related to the merit of the request for rehabilitation.

Namely, respecting the established procedure, a request for rehabilitation with certain evidence was submitted to the competent Higher Court, which studied the case

and collected additional documentation, if needed, *ex officio*. Only when the court found that the collected evidence represented sufficient factual material for making a decision about the request, regardless of the nature of the final decision, did it submit the materials to the competent Higher Public Prosecutor.

Having received the materials and acting in accordance with the Instructions, the Higher Public Prosecutor was obliged to carefully and meticulously examine the evidence and make a decision.

In practice, the Public Prosecutor had the right to return the case to the court should they found that the factual material was insufficient for making an adequate decision, with an initiative to collect the necessary missing documentation.

Generally speaking, the documentation related to the proceedings that mostly took place between 1945 and 1955 and its availability posed the greatest challenge in the proceedings related to rehabilitation. The documentation was collected from various archives, from local to national, *i.e.* centralised ones, or even in some cases the so-called *divisional courts* (a type of court-martial – author's comment) and the documents related to those cases were almost impossible to find.

On the other hand, even the cases with comprehensive documentation were very difficult to analyse. Namely, due to inadequate conditions in which the documents were kept, the paper would disintegrate when touched and, due to a shortage of paper, after the World War II all documents were typed on both sides using a mechanical typewriter, which has made them illegible over time.

Having compiled the documentation, the Higher Public Prosecutor would write a report, which included the request of the claimant, a list and analysis of submitted and subsequently obtained evidence, as well as their stand on the fact whether the person against whom charges were brought had their human or civil rights deprived.

Taking a legal stand required a detailed elaboration, after which the report and opinion on the merit of the request were submitted to the Appellant Public Prosecutor's office as a superior body, pursuant to the Instructions issued by the Republic Public Prosecutor.

Having reviewed the documents and the legal stand of the Higher Public Prosecutor, the Appellant Public Prosecutor would take the definite stand on the expressed opinion of the Higher Public Prosecutor. If the stands were identical, the case would be returned to the Higher Public Prosecutor, who would in turn return it to the competent court with an elaboration on the opinion.

However, if the Higher and the Appellant Public Prosecutors disagreed, the final decision, with an elaboration on their legal stand, was made by the Republic Public Prosecutor, based on the elaborations on the legal stands of both Prosecutors.

Activities before the Court

1. Court of first instance

The type of proceeding, *i.e.* whether it was an *ex parte* or bilateral, or whether it was a legal or court rehabilitation, depended on the legal stand of the Higher Public Prosecutor, *i.e.* whether they accepted or rejected the request for rehabilitation.

The Higher Public Prosecutor would take an active part in a rehabilitation proceeding before the court of first instance, only in the situations when the Higher Public Prosecutor objected to the request for rehabilitation, so the decision regarding court rehabilitation had to be made in a bilateral proceeding, where one party was the claimant, while the other one was the Republic of Serbia, represented by the Higher Public Prosecutor, as the opposing party. The court would schedule a court hearing, where the evidence was presented and legal stands were expressed by both parties, after which the court would pass a verdict.

A court decision which was different from the legal stand of the Public Prosecutor expressed in their report and at the hearing would lead the parties to an appellate proceeding.

2. Appellate proceedings

The appeals against the decisions of a court of first instance regarding a request for rehabilitation were dealt with by an Appellate Court, with participation of the Appellant Public Prosecutor.

Conclusion

Legal certainty and the rule of law are the postulates that countries from the former communist block are striving to achieve. After World War II, those countries were greatly affected by human rights violations, threats and executions of a large number of people, as well as confiscation of property, with or without a court decision, all with an aim of establishing new, totalitarian regimes.

Fifty years later, when reforms and democratisation of political processes began, the countries from the former communist block faced the consequences of selective and orchestrated justice. The process of rehabilitation and restitution was an attempt, mainly successful, to eliminate the anomalies in the field of final court decisions and their effect.

The Republic of Serbia did not deal with rehabilitation and restitution proceedings seriously until 2011. The deadline for submitting requests for rehabilitation has passed and it can be said that the results are significant, but at the same time insufficient. Simple analyses of archived data show that in the period from 1945 to 1952 many more sentences were passed pursuant to the applicable laws in comparison with the number of submitted requests for rehabilitation. The rehabilitation proceedings have shown that those laws were used as a foundation for taking revenge on the previous regimes.

The Public Prosecutor's office in the Republic of Serbia has made a great contribution to establishing legal certainty in this field. To the already wide scope of

jurisdictions of the Public Prosecutor's office, the 2011 Rehabilitation Act added a new obligation: to represent the Republic of Serbia in cases related to rehabilitation.

The question then arises as to how much factual material the Public Prosecutors had when dealing with the cases related to rehabilitation to take the correct stand in relation to the request for rehabilitation. Especially because all the decisions were made pursuant to then-applicable substantive and procedural regulations. This specific reopening of proceedings and the fact that a modern state took a stand on the relics of the past were in any case deprived of emotional tension typical of the post-war period. The key question, which is likely to remain unanswered, is whether the proceedings that involved Public Prosecutors rehabilitated those convicted for the most serious criminal acts, who *de facto* committed those crimes. The aforementioned problems with the archives, lack of access to all documents related to the cases in question and lack of witnesses are the circumstances that were in favour of the claimants and to the detriment of the principle of the rule of law and legal certainty, as well as the potential victims of the rehabilitated persons.

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Managerial Role of the Public Prosecutor in Serbian Pre-Investigation Proceedings: Myth or Reality?[1]

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Abstract

Managerial role of the public prosecutor in Serbian pre-investigation proceedings is one of the main characteristics of current Criminal Procedure Code. Passing the Criminal Procedure Code from 2011 the investigation has been transferred to the public prosecutor, who is in charge not only for the investigation, but has managerial role in the pre-investigation proceedings. He has become dominus litis of the whole preliminary proceedings. Therefore is important to perceive his powers and relationship with the police in the pre-investigation proceedings. The topic of this paper is to present legal solutions regarding the pre-investigation procedure, main figures of this stage, the police and the public prosecutor, their relationship and essence of the managerial role of the public prosecutor. Also, some practical aspects in execution of leadership role are explained and critically overviewed the problems that limit the realization of the managerial role of the public prosecutor.

Key words: *public prosecutor; managerial role; pre-investigation proceedings; inefficient powers.*

Introductory remarks

Managerial role of the public prosecutor in the preliminary criminal proceedings is one of the most important novelty of the Serbian Criminal Procedure Code from 2011 (hereinafter: CPC).[2] This role is a consequence of the prosecutorial concept of investigation which establishes public prosecutor as a main figure not only for the pre-

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[2] "Official Gazette of the Republic of Serbia", no. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014).

investigation proceedings, but for the whole preliminary proceedings. Basically, conducting preliminary proceedings in general are entrusted with the public prosecutor and the police, with the intention to public prosecutor become a *dominus litis* of entire preliminary proceedings.[3] The basic right and the basic duty of the public prosecutor are to prosecute the perpetrators of criminal offences which are prosecutable *ex officio.* In such cases the public prosecutor is authorised to: manage pre-investigation proceedings; decide on not undertaking or deferring criminal prosecution; conduct investigations; conclude plea agreements and agreements on giving testimony; file and represent an indictment before a competent court; abandon charges; file appeals against court decisions which are not final and submit extraordinary legal remedies against final court decisions and conduct other actions when specified by CPC (Art. 43 of the CPC).

Until the introduction of CPC from 2011, Serbian preliminary criminal proceeding was in hands of an investigative judge, who was in charge of the investigation as the first stage of the preliminary criminal proceedings (judicial concept of investigation). Pre-trial proceedings (nowadays: pre-investigation proceedings), as separate stage from criminal proceedings, was conducted by the police with managerial role of the public prosecutor (Art. 46, Para. 2, Item 1 of the CPC/2001).[4] For the purpose of the exercise of these competences, all authorities participating in the pre-trial proceedings were required to notify the competent public prosecutor about all actions undertaken. The Ministry responsible for Internal affairs – the police (hereinafter: internal affairs authority) and all other public authorities responsible for detecting criminal offences were required to act in accordance with every request of the competent public prosecutor. If an internal affairs authority or other public authority didn`t act in accordance with the request of the public prosecutor, the public prosecutor could notify the senior officer in command of the said authority, and if needed could also notify the competent government minister, the government, or the competent parliamentary body (Art. 46, Para. 3-4 of the CPC/2001). Still, the police used to take many actions without prior notifying the public prosecutor. Moreover, the police took all necessary actions and measures and after the completion of the pre-trial proceedings, the police filed criminal complaint to the competent public prosecutor. That`s why the public prosecutor didn`t have an active or managerial role during the pre-trial proceedings that was prescribed by the law.

With introduction of the prosecutorial concept of investigation, public prosecutor has to be seriously engaged during the pre-investigation proceedings and fully take over his/her managerial role. That means he/she can take any necessary action in order to detect a criminal offence and their perpetrator, to collect the evidence needed for criminal prosecution and procedure and to detain for the 48 hours the suspect, or to defer criminal prosecution for less serious offences and dismiss a criminal complaint for reasons prescribed by the law. However, the fight against a crime requires adequate cooperation with all other authorities in criminal justice system, especially the police.

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[3] Bošković, A.: The Relationship Between Public Prosecutor and the Police During Preliminary Proceedings According to the Serbian Code of Criminal Procedure, in: *Archibald Reiss Days (Thematic conference proceedings of international significance), Vol. III* (eds. Milašinović, S., Simović, D., Simeunović-Patić, B.), Academy of Criminalistic and Police Studies and German Foundation for International Legal Cooperation (IRZ), Belgrade and Bonn, 2014, p. 242.

[4] "Official Gazette of the Federal Republic of Yugoslavia", no. 70/2001 and 68/2002 and "Official Gazette of the Republic of Serbia", no. 58/2004, 85/2005, 115/2005, 85/2005 – other law, 49/2007, 20/2009 – other law, 72/2009 and 76/2010).

The public prosecutor has to be informed about all police activities and consulted about all future actions. Because he/she is the main figure who is responsible not only for the pre-investigation and investigation, yet for the indictment and further criminal procedure. For that reason it is very important to establish real mechanisms for the public prosecutor to exercise his/her leadership role.

This is not an easy task, because it depends not only on criminal procedural provisions, but to constitutional position of the public prosecutor and legal position of the police. In the Republic of Serbia, public prosecutor is an autonomous state body which prosecutes perpetrators of criminal offences and other punishable actions and take measures in order to protect constitutionality and legality. Public Prosecutor's Office performs its function on the grounds of the Constitution, law, ratified international treaty and regulation passed on the grounds of the law (Art. 156 of the Constitution of the RS).[5] Almost the same provision contains the Law on the Public Prosecution.[6] Another important issue that reflects the public prosecutor`s position in criminal proceedings is election procedure. Public prosecutors are elected by the National Assembly, on the Government proposal, for the period of six years and may be re-elected. Deputy public prosecutor who stands in for the public prosecutor in performing the function of the Public Prosecutor`s Office and is obliged to act according to his/her instructions, is elected on the proposal of the State Prosecutors Council[7] and the National Assembly elects a deputy public prosecutor to that function for the first time, i.e. for three years. The State Prosecutors Council elects deputy public prosecutors to permanently perform that function (Art. 159, Para. 2-6 of the Constitution of the RS).

On the other hand, the police are not constitutional category. Internal affairs, the organization and jurisdiction of the Ministry of Interior, policing, organization and competences of the police, as well as other issues of importance for the work of the police are regulated by the Law on Police.[8] According to that Law, the police is the central organizational unit of the Ministry of Interior, which in the performance of interior, i.e. police duties, protects and improves the safety of citizens and property, abiding by the constitutionally guaranteed human and minority rights and freedoms and other protected values in a democratic society, with a possibility of using the means of coercion set out in the Constitution and law (Art. 3 of the Law on Police). The Minister of Interior prescribes the manner of performing internal affairs duties and the Government

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[5] "Official Gazette of the Republic of Serbia", no. 98/2006.

[6] "Official Gazette of the Republic of Serbia", no. 116/2008, 104/2009, 101/2010, 78/2011 – other law, 101/2011, 38/2012 – decision of the Constitutional Court, 121/2012, 101/2013, 111/2014 – decision of the Constitutional Court, 117/2014, 106/2015 and 63/2016 – decision of the Constitutional Court.

[7] The State Prosecutors Council is an autonomous body which provides for and guarantees the autonomy of public prosecutors and deputy public prosecutors, in accordance with the law. The State Prosecutors Council have 11 members and is constituted of the Republic Public Prosecutor, the Minister responsible for justice and the President of the authorised committee of the National Assembly as members *ex officio* and eight electoral members elected by the National Assembly. Electoral members include six public prosecutors or deputy public prosecutors holding permanent posts, of which one is from the territory of autonomous provinces, and two respected and prominent lawyers who have at least 15 years of professional experience, of which one is a solicitor, and the other a professor at the law faculty. Tenure of office of the State Prosecutors Council's members lasts five years, except for the members appointed *ex officio*.

[8] "Official Gazette of the Republic of Serbia", no. 6/2016.

prescribes the principles for internal organization of the Ministry, as well as the types of organizational units, the seats and territories for which the organizational units are established. This includes the number of job positions, job classification, type, *i.e.* status and description of job positions, jobs for which special requirements are envisaged, the manner of management, planning and implementation of tasks. The Law on Police stipulates that the police are operationally independent from other state authorities in the performance of police duties and other statutory activities falling under police jurisdiction, but operational independence is not relate to police duties stipulated by the law regulating criminal and misdemeanour proceedings (Art. 12, Para. 1-2 of the Law on Police). It is also stated that during the pre-investigation procedure and investigation, the police shall exercise police powers stipulated by the Criminal Procedure Code and act upon the order and requests of the public prosecutor and the court (Art. 18, Para. 1 the Law on Police).

Bearing in mind these facts, it is questionable to what extent can public prosecutor really performs his/her managerial role. In that context, in the following article will first be presented the basic characteristics of the pre-investigation proceedings and then will be indicated on the managerial role of the public prosecutor and its practical implications.

1. Term determination and basic characteristics of pre-investigation proceedings

According to the Serbian CPC, pre-investigation proceedings are not part of criminal proceedings, because the law stipulates that proceedings are pre-investigation proceedings and criminal proceedings (Art. 2, Para. 1, and. 14 of the CPC) and criminal proceedings can be instituted by the issuance of an order on undertaking an investigation, by the confirmation of an indictment not preceded by an investigation and in other legal cases (Art. 7 of the CPC). Thus, pre-investigation proceedings are the first procedural stage which precedes a formal investigation (as a part of the criminal proceedings) and another name for former pre-trial proceedings.[9] Pre-investigation proceedings can be defined as informal proceedings that begin when there are grounds for suspicion that the criminal offence which is prosecutable *ex officio* has been committed and ends with the issuance of an order to conduct an investigation by the competent public prosecutor. An order to conduct an investigation is issued before or immediately after the first evidentiary action undertaken by the public prosecutor or the police in the pre-investigation proceedings, but not later than 30 days after the public prosecutor was notified about the first evidentiary action undertaken by the police (Art. 296, Para. 2 of the CPC).

Based on presented facts, we can conclude that pre-investigation proceedings end with the start of an investigation, i.e. by undertaking, at least one evidentiary action, or by expressing the tendency to do so. Therefore, key criterion for distinction of these two

[9] Some authors indicate that pre-investigation proceedings are kind of procedural "substitute" for the former pre-trial proceedings. Škulić, M.: Novi Zakonik o krivičnom postupku – očekivanja od primene (New Criminal Procedure Code – Expectations from Application), in: *Nova rešenja u kaznenom zakonodavstvu Srbije i njihova praktična primena (New Solutions in the Serbian Penal Legislation and Their Practical Application),* Srpsko udruženje za krivičnopravnu teoriju i praksu, Zlatibor, 2013, p. 42.

stages of proceedings is character of undertaken actions by competent authorities.[10] Pre-investigative proceedings, dominantly, are reserved for police operative actions which have no probative significance. It is important to emphasize that pre-investigation proceedings can be conducted against unknown or known perpetrator (the suspect), as well as an investigation. Managerial role in this stage of proceeding belongs to the public prosecutor, but most actions are undertaken by the police.

The judge for preliminary proceedings has certain role in this stage of the proceedings, such as protection of human rights and liberties and legally control over police and public prosecutor work.

Having in mind said above, the pre-investigation proceedings essentially represents the type of "investigation", because the purpose of this stage is to investigate a criminal offence through two stages, informal – pre-investigation proceedings and formal – investigation.[11] Hence, there is no real need for existence of these two stages of the proceedings, because the only difference between them is formal decision, called the order to conduct an investigation, everything else is just the same.[12]

2. Managerial role of the public prosecutor in Serbian pre-investigation proceedings

As we have already seen, the public prosecutor is in charge of pre-investigation procedure and for the purpose of exercising this authority the public prosecutor undertakes necessary actions aimed at prosecuting the perpetrators of criminal offences. The public prosecutor may assign to the police undertaking of certain actions aimed at detecting criminal offences and locating suspects. The police are required to execute the order of the public prosecutor and to inform him regularly about actions undertaken (Art. 285, Para. 1-3 of CPC).[13] If the police do not comply with the order, the public prosecutor can notify the head of the police authority and may, if needed, also notify the competent minister, the Government or the competent working body of the

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[10] Kesić, T., Čvorović, D.: Policija kao subjekat tužilačkog koncepta istrage prema Radnoj verziji Zakonika o krivičnom postupku od 2011. godine (The Police as Subject of Prosecutorial Concept of Investigation According to the Working Version of Criminal Procedure Code from 2010), in: *Nova rešenja u krivičnom procesnom zakonodavstvu – teoretski i praktični aspekt (New Solutions in Criminal Procedural Legislation – Theoretical and Practical Aspects),* Srpsko udruženje za krivičnopravnu teoriju i praksu, Zlatibor, 2011, p. 387.

[11] Škulić, M., *op.cit.,* pp. 42-43.

[12] "Bosnia and Herzegovina was the first to move from court-led investigation to prosecution-led investigation and it has practically moved to the adversarial criminal procedure system not only with respect to investigation, but also in terms of trial. Investigation covers not only such actions which, in the court-led investigation were undertaken as investigative actions, but also those that were undertaken previously in the pre-trial (pre-investigation) procedure. In that respect, in order to undertake an investigation it is sufficient that there exists reasonable suspicion that a criminal offence has been committed". Radulović, D.: The Concept of Investigation in Criminal Proceedings in the Light of the New Criminal Procedure Legislation, in: *New Trends in Serbian Criminal Procedure Law and Regional Perspectives (normative and practical aspects),* (eds. Petrović, A. and Jovanović, I.), OSCE, Mission to Serbia, Belgrade, 2012, p. 14.

[13] All authorities participating in the pre-investigation proceedings are required to notify the competent public prosecutor of all actions taken with the aim of detecting a criminal offence and locating a suspect. The police and other public authorities responsible for discovering criminal offences are required to comply with every request of the competent public prosecutor (Art. 44, para. 1 of CPC).

National Assembly. If within 24 hours of time when the notification was received the police or other public authority fails to comply with the request, the public prosecutor may request the institution of disciplinary proceedings against the person who he believes is responsible for not complying with his request (Art. 44, Para. 2-3 of the CPC). Also, during the pre-investigation proceedings the public prosecutor is authorised to assume from the police the performance of an action which the police had undertaken on its own pursuant to the law (Art. 285, Para. 5 of the CPC).

The police may conduct operative and some evidentiary actions, arrest the perpetrator and file the criminal complaint during the pre-investigation procedure. Whatever the activity, the police are required to inform the public prosecutor about undertaken operative and evidentiary actions on regular basis as soon as possible, i.e. immediately and without delay, note that in case of operative actions that deadline may be to a maximum of 24 hours from the moment of their undertaking. Since the police may arrest a person if exists a reason for ordering custody, it is required to take such a person without delay, maximum of 8 hours, to the competent public prosecutor. The similar relationship between the police and the public prosecutor exists when it comes to criminal complaint. Namely, if the police filed the criminal complaint and the public prosecutor cannot assess if its assertions are probable, or if the data in the complaint do not provide sufficient grounds to decide whether to conduct an investigation, or if he finds out in some other way that a criminal offence has been committed, the public prosecutor may: collect the necessary data himself, request citizens to provide information, or to submit a request to public and other authorities and legal persons to provide necessary information. A responsible person may be fined up to 150,000 dinars for failing to comply with this request of the public prosecutor, and if after being fined he still refuses to provide the necessary information, another fine in the same amount may be imposed on him once again. The decision on imposing the fine is issued by the public prosecutor. An appeal against the ruling imposing the fine is decided by the judge for the preliminary proceedings.

If the public prosecutor is not able to undertake the mentioned actions, he will request the police to collect the necessary information and to undertake other measures and actions with the aim of uncovering the criminal offence and the perpetrator. The police are required to act in accordance with the request of the public prosecutor and to notify him about the measures and actions it had undertaken not later than 30 days from the date of receiving the request. In the case of a failure to act in accordance with the request, the public prosecutor can exercise his powers towards the police.

On the other hand, the public prosecutor is able to undertake any action aimed at detection of the criminal offence and finding the perpetrator. This power fully enables managerial role of the public prosecutor. Managing of the pre-investigation proceedings implies a set of activities which are undertaken by the public prosecutor directing various activities of state authorities engaged in detection of a criminal offence and a perpetrator.[14] It is necessary to point out that the managerial role primarily involves active rather than reactive approach of public prosecutor who is expected to

[14] Ilić, P.G., Majić, M., Beljanski, S. i Trešnjev, A.: *Komentar Zakonika o krivičnom postupku. Prema Zakoniku iz 2011. godine sa izmenama i dopunama od 22. maja 2013. godine (Commentary of the Criminal Procedure Code. According to Code from 2011 with the amendments from 22. May 2013),* treće izmenjeno i dopunjeno izdanje, Službeni glasnik RS, Beograd, 2013, p. 657.

strategically plan this and the next phase of the proceedings.[15] Prof. Bošković points out that the intention of the legislator is to really have in practice, the leadership role of the public prosecutor in the preliminary inquiry, primarily in his relation to the police considering that the public prosecutor was formally head of former pre-trial proceeding, but such role of his was rarely carried out in full capacity in practice. In fact, the public prosecutor should be the authority which makes decisions that are of strategic importance for the outcome of the preliminary inquiry, not only that but also to directly manage, *i.e.* make operational decisions about actions to be taken in this stage in cooperation with the police.[16]

3. Critical overview of managerial role of the public prosecutor in Serbian pre-investigation proceedings

After brief presentation of the legal solutions about managerial role of the public prosecutor in the pre-investigation proceedings, we would like to express our critical overview on this topic. It is necessary because there is a big difference between legal and practical aspects of implementation of the managerial role of the public prosecutor. In the following presentation we will present some of the most important obstacles in achieving real managerial role of the public prosecutor.

Although it is stated that public prosecutor is able to undertake any action aimed at detection of the criminal offence and finding the perpetrator[17] (*e.g.* public prosecutor may enter a dwelling and other premises and without the presence of witnesses and the court order, undertake a search of the dwelling, or other premises, or persons found there in accordance with the law), the practice shows lack of such powers. The main reason for that is absence of human and technical resources on the public prosecutor`s side. During the years, public prosecutors were only a party in the proceedings, who were responsible for indictment, while the police traditionally were in charge for detecting a criminal offence and collecting the evidence. Thus, the public prosecutor is not operational enough and depends on the police activities, which diminishes his/her leadership role in pre-investigation proceedings.

Also, the public prosecutor should have more criminalistic knowledge to adequately perform his/her duties as prescribed by the law. This is especially important today in the light of increased need for specialization to prosecute different types of criminal offences and to cooperate with specialized police units.[18] It is hard to imagine

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[15] *Ibid.* Traditional division of work among the state authorities in the criminal proceeding, according to which the public prosecutor is engaged in prosecution and the police in detection of a criminal offence, with the new concept should lose its significance. Ilić, P.G., Banović, B.: Policija i nova rešenja u Zakoniku o krivičnom postupku (Police and the New Solutions in the Criminal Procedure Code), in: *Nova rešenja u kaznenom zakonodavstvu Srbije i njihova praktična primena (New Solutions in the Serbian Penal Legislation and Their Practical Application),* Srpsko udruženje za krivičnopravnu teoriju i praksu, Zlatibor, 2013, p. 107.

[16] Bošković, A., *op.cit.,* p. 247.

[17] During the pre-investigation proceedings the public prosecutor is authorised to assume from the police the performance of an action which the police had undertaken on its own pursuant to the law (Art. 285, para. 4 of the CPC).

[18] Specialization of the public prosecution is common standard today. Such specialization exists in the Serbian law in the field of organized crime, war crimes, high-tech crimes, domestic violence and etc. This is also the case in other countries. Italy, for example, has National Anti-mafia Prosecutor who runs a

real managerial role of the public prosecutor who misses criminalistic and special knowledge for prosecution of certain types of crimes.

Further, public prosecutors are covered with the work due to increased competencies, but haven`t got enough employees. According to one prosecutor, he has about 15 minutes for one case, which is not enough for adequate cooperation with the police or other authorities. It also means that he/she will leave all activities to the police and that cooperation will be exhausted in sharing of information. Even if the public prosecutor would like to really engage in certain case, he won`t have the time, therefore, he/she will have a passive instead of active managerial role. Also, absence of an active role often is a consequence of the fact that the public prosecutor who is on duty does not receive that case for further prosecution, so the prosecutor won't be fully interested in its solution.

As we have seen, the police are obliged to act on any request of the public prosecutor. If the police do not act upon the request the public prosecutor and do not undertake ordered action, the public prosecutor shall immediately inform the officer in charge of the authority, and if necessary, may inform the Minister of Interior, the Government or the authority in charge of the National Assembly. If within 24 hours from the moment of received information from the public prosecutor the police do not act on his/her request, the prosecutor may request the initiation of disciplinary proceeding against a police officer who is considered to be responsible for the failure of his request. Hence, the public prosecutor can only initiate disciplinary proceeding but he/she does not initiate it directly.

According to the Law on Police, police officers and other employees of the Ministry of Interior shall be responsible for violation of official duty if they fail to perform their duties and tasks in a conscientious and professional manner and within the prescribed time periods, if they do not abide by the Constitution, laws, other regulations and rules of behaviour while on duty, as well as for off-duty violations that may endanger the interests and damage the reputation of the Ministry of Interior. Police officers and other employees of the Ministry shall be responsible for violations of official duty (Art. 203, Para. 1-2 of the Law on Police). The disciplinary procedure, *i.e.* first-instance procedure shall be initiated by a manager or a person authorized by him who shall authorize a police officer – senior disciplinary officer to conduct the disciplinary procedure and decide on the disciplinary responsibility of police officers and other employees. The senior disciplinary officer must have a university degree in law, a master's degree or a bachelor's degree, or it may be another employee with university-level education and the minimum of ten years of experience in the profession (Art. 210, Para. 1-3 of the Law on Police). The person who is subjected to the disciplinary procedure and the person who initiated the procedure shall be entitled to complain to the Disciplinary Commission within eight days from the date of receiving the decision. The Disciplinary Commission shall be a peer review body deciding on complaints against the first-instance decisions of senior disciplinary officers. The Disciplinary Commission shall

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specific office (*Direzione nazionale antimafia)* established within the Office of the General Prosecutor at the Court of Cassation. Vigna, P.L.: *Fighting Organized Crime, with Particular Reference to Mafia Crimes in Italy,* Journal of International Criminal Justice, no. 4/2006, p. 524. Similar specialization exists in the Republic of Romania, where the Prosecutor's Office Attached to High Court of Cassation and Justice received a new department, called the Directorate for Investigating Organized Crime and Terrorism (DIICOT). More on activities of DIICOT: Stănilă, L.: *Organized Crime in Action: Trafficking on Human Cells, Tissues and Embryos in Romania,* Journal of Eastern-European Criminal Law, no. 1/2015, pp.62-65.

decide in a three-member panel, where the chairperson and one member come from the Ministry of Interior, and one member is a representative of the general public. The chairperson, members and secretaries of the Disciplinary Commission shall be appointed by the Minister of Interior by a separate act (Art. 210, Para. 5-8 of the Law on Police).

Based on these facts, we can conclude that the public prosecutor`s right to initiate disciplinary proceeding fully depends on the police authority who is in charge to initiate that proceeding. If the authority does not initiate disciplinary proceedings, the public prosecutor would have possibility to notify about it direct superior of a police officer, Minister of Interior, the Government or the authority in charge of the National Assembly.[19] Besides that, the public prosecutor cannot participate in the disciplinary proceedings or even be informed about its outcome. Further, declaratively commanded prosecutor`s authority over the police are not accompanied by any hierarchical-organizational solutions in the prosecution-police system. These two are essentially separate state authorities with essentially separate command structure and completely separate organization.[20] During the drafting of the CPC there was proposal to put Criminalistic Police Unit under the Ministry of Justice, but this has never become a part of any law.

Above all, one of the problems in the relationship between the police and the public prosecutor and his/her managerial role in the pre-investigation proceedings is lack of the special protocol which would regulate mutual relations and responsibilities of these two authorities.

Conclusion

Regulation of the managerial role of the public prosecutor in the CPC of the Republic of Serbia clearly indicates the intention of the legislator that the public prosecutor should take leading role in collecting the evidence and all other activities that may be of significance for future criminal proceedings. The scope of rights and duties of a public prosecutor in pre-investigation proceedings clearly indicates his/her managerial role which should affect the greater efficiency of the whole preliminary proceedings. Despite such provisions, there are obvious problems in execution of the managerial or leadership role of the public prosecutor in practice.

We addressed some of the most important issues, such as: inefficient means for police control by the public prosecutor, *i.e.* limited possibilities in initiating disciplinary responsibility of the police officers, lack of adequate criminalistic knowledge and specialization of public prosecutors, a huge amount of cases followed with the insufficient number of employees and lack of technical resources. All mentioned leads to conclusion that the public prosecutor during pre-investigation proceedings is passive, without real mechanisms to execute his/her dominant role. On the other hand, the police activities stay "under the radar" and responsibility for inefficiency of pre-investigation proceedings cannot be established, but will often be switched from the police to the public prosecutor and *vice versa*.

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[19] Škulić, M.: *Komentar Zakonika o krivičnom postupku (Commentary of the Criminal Procedure Code),* Službeni glasnik RS, Beograd, 2007, p. 203.

[20] Nenadić, B., Majić, M. i Ilić, G.: *Analiza ustavnog položaja javnog tužilaštva u Republici Srbiji sa preporukama za njegovo unapređenje (Constitutional Position of Prosecution Service – Analysis and Proposals for Amendments),* Beogradski centar za ljudska prava, Beograd, 2016, p. 52.

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The Secret Service Tools in the New Hungarian Criminal Procedure Code

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Abstract

The main source for criminal procedure is now the Act XIX of 1998 on Criminal Proceedings (CPC) which due to numerous modifications could take place on 1st July, 2003. The new Code on Criminal Proceedings is the Act XC of 2017 (new CPC), which will be enter into force on 1st July 2018.

In this new Criminal Procedure Code in the sixth part will be included the rules of secret evidences under the name of "Unveiled devices". The part sixth contains eight chapters (chapters number XXXV-XLII.) and 37 sections (sections number 214-260).

Key-words: *Hungarian Criminal Procedure Code, Criminal Proceedings, secret services.*

1. Covert gathering of data in the current code

The CPC provides the rules of covert data gathering subjected to judicial permit in a very detailed form (sections 200 to 206). Thus in particular its:

a) conditions,
b) the motion of the prosecutor and the permission of the judge therefore,
c) the performance thereof,
d) the use and disclosure of its results.

Besides,

e) the covert information-gathering completed prior to the commencement of criminal proceedings shall be broached briefly as well.

ad a) In order to establish the identity of the offender, locate or arrest him/her or to find means of evidence which all are subjected to judicial permit, from the time the investigation is ordered until the documents thereof are presented, the prosecutor and the investigating authority may, without informing the person concerned:

- keep under surveillance and record the events in a private home with a technical device,
- open and check and record with a technical device the contents of pieces of mail, closed postal matters of a person who can be identified, as well as learn and record with a technical device the communications made by electronic means of communication,
- learn, record and use data transmitted and stored by way of a computer or computer system (section 200 (1)).

The CPC allows only in cases specified in section 201:

When the investigation is conducted by any investigating authority	When only the prosecutor investigates
• the crime was committed intentionally and punishable with imprisonment of 5 years or more • the crime was committed in a businesslike manner or as a part of a criminal association and punishable with imprisonment of up to 3 years • the following crimes were committed: violation of freedom of conscience and religion and abuse of authority • the crime committed is punishable with imprisonment of up to 3years regarding the following crimes: Trafficking in Human Beings, Misuse of Illegal Pornographic Material, Pandering, People Smuggling, Abuse of Authority, Harbouring a Criminal, Bribery, Bribery regarding International Relations, Damaging the Environment, Damaging, Violation of the rules of Waste Management • the crime of misuse of classified data was committed • an attempt of or preparations – if preparation is penalized by the law - for the above written crimes	• if violence against official persons was committed against a person enjoying immunity due to public office or due to international law, furthermore threatening an internationally protected person with violence • if violence against official persons was committed against the judge, the prosecutor, the secretary of the court or the prosecutors' office, the independent and the County Court- bailiff and the deputy-bailiff, the notary public and the deputy-notary public sworn member of the police, as well as if a crime against the purity of public life, which is punishable by at least 3 years of imprisonment was committed regarding the above-mentioned and sworn member of National Tax and Customs Office, furthermore the non-sworn financial investigator • if failure to report bribery or trafficking in influence was committed against persons written above • if crimes against the administration of justice have been committed (except of misleading of authority) • if crimes against foreign officials was committed and crimes against the propriety of international affairs have been committed • if the above written crimes fall under military criminal procedure

Covert data gathering may be conducted against:

- the suspect (or a person presumably is going to be a suspect),
- a person having culpable relations with him,
- if there is reasonable ground to suspect that the person has committed a criminal offence related to the case in progress against the defendant:
  - defence counsel, (including the attorney-client interview room)
  - priest (clergyman) or witnesses who may refuse to testify.

Covert data gathering may only be conducted if obtaining evidence by other means reasonably appear to be unlikely to succeed if tried or would involve unreasonable difficulties, and there is probable cause to believe that evidence can be obtained by covert data gathering (section 202).

ad b) Covert surveillance data gathering shall be permitted by the court at the motion of the prosecutor for a maximum period of 90 day (may be extended for a further 90 days on one occasion). If the permission procedure caused a delay that would jeopardise the success of covert data gathering, the prosecutor may order for maximum period of seventy-two hours, but simultaneously with the order, the motion for the permit shall also be submitted.

ad c) Covert data gathering is performed by the organisation specified in separate laws. According to the CPC, such organizations are:

- local, district and central police organs,
- National Protection Service of the Police,
- Affected national security service (concerning crimes committed by a sworn officer of national security services).

ad d) The fact of performing covert data gathering, as well as the data produced and recorded in the course thereof may be disclosed only to the judge having issued the permit, the prosecutor and the investigating authority, further, by superior (senior officer) of the prosecutor and the investigating authority. Court documents related to the permission of covert data gathering may also be disclosed to the administrative superior of the judge having issued the permit (section 205 (2)).

If the prosecutor intends to use the result of covert data gathering as evidence in the criminal proceedings, the motion for the permit of the covert data gathering, the court's decision and the report on the performance of covert data gathering shall be attached to the files of the investigation (section 206 (1)).

The result of the covert data gathering may be used for the proof such crime which was the basis for and against such person who was the subject of the permission of gathering secret intelligence issued by the court (section 206 (3)).

ad e) The CPC has only framework regulations regarding the admissibility of the results of covert information-gathering conducted prior to the criminal proceedings upon a judicial permit (section 206/A). The detailed rules of covert information-gathering are provided by separate laws.

2. The unveiled devices in the new Code

The conditions of the use of unveiled devices in the new CPC are the following:

- it can reasonably be assumed that the information (evidence) to be obtained is indispensable and can not be otherwise obtained,
- its application does not involve a disproportionate restriction of the fundamental right (it is proportional to law enforcement)
- the information (evidence) can be obtained by using it.

In criminal proceedings the following unveiled devices can be used: which is

- not bound by a judicial or prosecutorial authorization,
- bound to a prosecutor 's authorization,
- bound to a judicial authorization

2.1. Unveiled devices without bounded by a judicial or prosecutorial authorization

The unveiled devices without bounded by a judicial or prosecutorial authorization are the following:

a) secretly cooperating person,
b) collect and verify information,
c) use a trap,
d) replace the victim or other persons,
e) hidden surveillance,
f) disclose inaccurate or deceptive information.

In this paper we would like to focus on these tools with the hidden surveillance and the disclose the inaccurate or deceptive information.

During the hidden surveillance the body authorized to use unveiled devices can observe secretly, collect information about what's happening, and record the perceived ones by a technical means from

- a person, apartment, other premises, enclosed space or vehicle (with the exception of a place open to the public or publich vehichle), or
- the thing that constitutes material evidence

can be connected to a criminal offense

For the purpose of hidden surveillance, a body authorized to use unveiled devices may also use a secretly cooperating person.

Finally, it should be noted, that the inaccurate or deceptive information

- shall not be applicable to interrogation of an accused or witness,
- can not contain promise incompatible with the law,
- can not be threatened or incited nor may it render the person concerned subject to a more serious offense than was originally planned.

2.2. Unveiled devices bounded by prosecutorial authorization

The prosecution decides on the authorization of the unveiled devices within the seventy-two hours from the receipt of the petition of the head of the body authorized to apply the unveiled devices (standard application).

Perriculum in mora the authorized head of the body authorized to use the unveiled devices may start deploying the unveiled devices until the prosecution is taken but shall submit a motion to the prosecution for the post authorization of the application within seventy-two hours after the decision to commence the application. The prosecutor decides on the motion within a hundred and twenty hours. If the prosecution refuses the request for ex-post authorization:

- the result of the use of the unveiled devices shall not be used as evidence and
- the obtained data shall be immediately deleted.

The unveiled devices bounded by prosecutorial authorization in the bill are:

a) observing payment transactions,
b) prospect of avoiding criminal liability,

c) observation with approval,
d) phony purchase,
e) applying undercover agent,
f) it is a member of a body authorized to use discarded tools and a secretly cooperating person to a phony purchase,
g) use of cover charter, institution and data.

ad a) The observing (monitoring) of payment transactions is the recording or transmitting relevant data in particular of

- all payment transactions relating to the payment account,
- payment transactions in accordance with specified conditions.

The prosecutor may require the service provider to suspend payment transactions in accordance with specified payment transactions or transactions between persons or a specific condition

- in the case of a domestic payment transaction up to two business days,
- in the case of a non-domestic payment transaction up to four business days.

The observation of payment transactions may be made up to three months, which may be extended by a maximum of three months with the authorization of the prosecutor.

If the prosecutor determines that the terms and conditions for the attachment of the account or electronic money concerned with the payment transaction are in force, he shall ordering the sequestration.

ad b) A body authorized to use unveiled devices with a prosecution authorizing entitled to establish an arrangement with the accused. During this arrangement the body can intend for the completion of denunciation or termination of the investigation. The so-called "investigatory bargain" can be made with a person who may be reasonably suspected of having committed the criminal offence co-operates to such an extent that the interests of national security or law enforcement takes priority over the interest to enforce the claim of the state to punish this person.

An agreement shall not be concluded if the accudes is to be prosecuted for an offense that

- has deliberately extinguished somebody's life,
- intentionally causes permanent disability or
- serious deterioration of health.

If the accused fulfills the agreement, no criminal proceedings may be instituted against him or the ongoing criminal proceedings shall be terminated.

ad c) The body authorized to use unveiled devices may use observation with the permission of the prosecution and with the written consent of the victim up to forty-five days

- for offense related violence or bullying, or
- for an offense that is threatened.

During the observation the body

- can observe and record the acts by means of a technical means in apartment, other premises, enclosed location or vehicle (exception of a place open to the public or public transport vehicle);
- may know the communication in the electronic communications service.

ad d) With the permission of the prosecution an implied agreement can be made and fulfilled (so-called phony purchase)

The goal of the phony purchase can be

- the acquisition or use of a service likely to be related to a criminal offense,
- the purpose of strengthening the trust of the seller,
- the purpose of arresting the accused or providing a material means of proof.

ad e) The body authorized to use unveiled devices may to use with the permission of the prosecution an undercover agent in the criminal proceedings for a period of up to six months (may be repeatedly extended for up to six months).

The undercover agent can be used in the following cases:

- integration into a criminal organization,
- incorporation into a terrorist group,
- phony purchase,
- hidden surveillance,
- the transmission of information,
- obtaining information and evidence relating to a crime.

The undercover agent must not be punished for the commission of an offense if

- the law enforcement objective to be achieved with the application,
- it needed to ensure the security of the undercover agent, or
- it is necessary to prevent or interrupt the commission of another crime,

and the interest of law is greater than the interest in the criminal prosecution of the undercover agent

An undercover agent shall not commit a deliberate abolition of somebody's life or intentionally causing a permanent disability or serious deterioration of somebody's health.

An undercover agent may not commit to another a criminal offense and shall not mislead the person concerned to commit a more serious offense than was originally planned.

ad f) For a phony purchase a member of a body authorized to use unveiled devices may also be used or this body may also use a secretly cooperating person but the body may use a secretly cooperating person to acquire a repurchase if the aim sought by the buy-in is not achieved with an undercover agent or a body authorized to use the unveiled devices.

ad g) The body authorized to use unveiled devices with the permission of the prosecution

- may produce or use a document or authentic instrument ("cover charter") containing an incorrect data, fact or declaration,

- establish and maintain an organization,
- authentic data ("cover data") may be reconciled in the public records

for the purpose of detecting or proving the crime.

The “cover charter” shall be destroyed and the “cover data” deleted from the public records if it is no longer necessary for the purpose of criminal proceedings.

2.3. Unveiled devices bounded by Judicial authorization

The following unveiled devices may be used in the criminal proceedings bounded by Judicial authorization:

a) secret surveillance of the information system,
b) secret research,
c) secret observation of a place,
d) secret knowledge of the consignment,
e) interception.

ad a) During the secret surveillance of an information system, information obtained by an authorized body for the use of unveiled devices can be secretly known to the information system managed by a judicial authorization and can record the perceived ones by a technical means.

ad b) In the course of a secret research, with a judicial authorization the body authorized to use unveiled devices can securely scan and record the detected ones with a technical tool. The body can search

- a room,
- a fenced area,
- a vehicle or
- a subject (with the exception of a place open to the public or publich vehichle).

ad c) In the secret observation of a site, with a judicial authorization the body authorized to use unveiled devices able to observe secretly by means of a technical device and record the things happened in the above places.

ad d) In the case of secret information of a consignment with a judicial authorization the body authorized to use unveiled devices may open secretly the sent mail or other similar items, and the body can know, check and record its contents.

ad e) During hearing with a judicial authorization the body authorized to use unveiled devices able to secretly know and record the content of the communication through the electronic communications network or information system.

Unveiled devices bounded by a judicial authorization may be used for intentional offenses

- punishable by imprisonment of up to five years or more;
- punishable by imprisonment of up to three years by some crimes (*e. g.* sexual abuse, damage to the environment, corruption offenses etc.);
- regardless of the threat of imprisonment by some crimes (*e. g.* abuse of office, abuse of an official person, unauthorized financial activity etc.)

The court shall decide on the basis of a motion of the prosecution within seventy two hours of the submission of the petition.

Perriculum in mora the prosecution may order the use of an unveiled device up to a maximum of one hundred and twenty hours. In this case the prosecution shall submit a motion to the court in seventy-two hours following the order for ex-post authorization. The court decides on the motion of the prosecutor within one hundred and twenty hours.

The use of unveiled devices bounded by a judicial authorization may be authorized up to a maximum of 90 days, which may be extended up to 90 days per occasion. The use of unveiled devices bounded by a judicial authorization may be authorized for a total of three hundred and sixty days.

European Public Prosecutor's Office: To be or not to be?

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Abstract

The European Union for year's struggles with the low percentage of the verdict in fraud cases. The fraudsters are usually not convicted due to different problems in the procedures on both national and central level. The agencies such as Europol, Eurojust, and OLAF are coping with this problem but cannot directly get involved in solving it. Due to the obvious reasons, the European Commission is pushing towards the creation of a new body the European Public Prosecutor's Office that will be able directly to prosecute the fraud cases without the consent of the national legislative authorities. This, of course, raises many cons especially in the issue of subsidiarity.

Key words: *European Public Prosecutor Office, subsidiarity, Eurojust, OLAF.*

1. Introduction

The European Union is still coping with the side effects of the economic crisis, its financial interests are still vulnerable due to fraud, corruption and other kinds of deceptions towards the EU budget. On the Commission's political agenda priority is to give assurance that taxpayer's money is being used correctly. The Lisbon treaty has reinforced Article 85, 86, 325 of TFEU to deal with this hurdles. The EU budget consists of taxpayer's money that should be used for implementing the EU policies. But despite the legislation and tools in 2009 Member States reported 279.8 million euros worth of suspected fraud cases. The protection of EU financial interests across the Union varies from state to state. Investigations into fraud and other financial crimes have an uneven legal and procedural framework. [1] The Member States judicial authorities use their national criminal law tools to fight crime against the EU budget. There is insufficient cooperation between authorities, limitations in the legal assistance, unused evidence, restriction in the prosecution to domestic cases, insufficient investigation power. [2] All

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[1] "COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS On the protection of the financial interests of the European Union by criminal law and by administrative investigations". An integrated policy to safeguard taxpayers' money. Brussels, 26.5.2011 European Commission. Online. Available: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:52011 DC0293 pg. 2-3.

[2] "COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS On the protection of the financial interests of the European Union by criminal law and by administrative investigations". An integrated policy to safeguard taxpayers' money. Brussels, 26.5.2011 European Commission. Online. Available: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:52011 DC0293 pg. 6-8.

these weaknesses lead to the rising numbers of not convicted frauds, which gives the opportunity to the criminals to straighten their power and still even more because the chance of being caught, or convicted is minimal.

There are administrative investigations, controls and audits, legislative actions, but they are not enough so the Commission believes there is a need for a new directive on fraud through criminal law, also there is the need for a new or reformed OLAF, and the need of specific investigation and prosecution measures.[3] With the passing of the Commissions idea and establishing a European Public Prosecutor's Office, it is expected improvement in the protection of the financial interests of the citizens and creation of a steady prosecution policy. The independence of such body will ensure that investigations and prosecutions will be dealt with and taken to national courts, without the influence and delay of national authorities. [4]

2. Why create an EPPO when existing actors already work on fighting EU financial fraud?

There are actors at a European and national level that are involved in the fight against EU financial fraud. Eurojust is such an agency that deals with crossbred judicial cooperation in criminal matters, but it does not have the power to start a criminal investigation or prosecution in the Member States. Eurojust may ask the authorities to:

- To investigate or prosecute specific acts;
- To accept that one country is better placed to prosecute than another;
- To set up a joint investigation team;
- To improve Eurojust with information necessary to carry out its tasks.[5]

Article 85 and 86 of the Treaty of the functioning of the European Union (TFEU) discuss Eurojust revision. Article 85(1) TFEU establishes the horizontal role of Eurojust: "its job is to support and strengthen coordination and cooperation between national authorities when member states are affected or require a prosecution of operations conducted and information supplied by the States and by Europol". Article 85(2) specifies that in the prosecution process, the judicial procedure will be done by national officials. It does not specify the relationship between the initiator of criminal investigations and prosecutions and the national authorities. To initiate criminal investigation Eurojust will need criminal investigation resources.[6] And this resources Eurojust does not acquire.

Eurojust was established by the Council, it helps national investigators and prosecutors to cooperate and coordinate around 1500 cross-border cases a year. Each Member State must appoint a national member of Eurojust: a prosecutor, judge or police officer. Eurojust may help in the administrating of the requests and decisions relating to judicial cooperation. On 17 July 2013, the Commission presented a proposal to reform

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[3] "Impact Assessment Accompanying the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office". Commission Staff Working Document. Brussels, 17.7.2013 Online. Available: http://ec.europa.eu/justice/criminal/files/eppo_impact_assessment_en.pdf pg. 4.

[4] *Ibid,* pg. 4.

[5] *Ibid,* pg. 8.

[6] White, Simone and Dorn Nicholas. "Towards a decentralized European Public Prosecutor's Office". Amicus Curiae Issue 89, spring 2012 Online. Available: http://sas-space.sas.ac.uk/4676/1/1673-2136-1-SM.pdf pg. 2.

Eurojust together with a proposal to establish an EPPO. [7] Article 86 states that the Council may establish a European Public Prosecutor's Office from Eurojust. Also, the Council will act collectively after receiving the consent of the European Parliament. This makes the creation of EPPO uncertain but article 86 further states that if there is no joint agreement in the Council a group of at least nine Member States can request that the draft regulation is presented to the European Council. [8] Which gives the opportunity for such a body to be created even though all the member states do not agree.

Besides Eurojust, EUROPOL (EU Agency for Law Enforcement Cooperation) is another agency that exists since 1997 and it supports investigations into EU financial crimes through analysis and information exchange networks. It has no operational powers and it cannot conduct criminal investigations. [9] To continue with, in 1988 the Commission established the Fraud Coordination Unit which transformed its structure in 1999 in Anti-Fraud Office (OLAF). OLAF functions as an independent administrative control body with the department within each EU country. OLAF together with Europol, Eurojust, the European Union Agency for Fundamental Rights and Frontex form the institutional structure in preventing and fighting crimes, together with the national law enforcement agencies and the rule of law.[10] OLAF is responsible for protecting the financial interests of the Union by fighting fraud, corruption, and other illegal activities. Its mission is to conduct administrative anti-fraud investigations and support the Commission to apply fraud prevention and detection policies. But it cannot conduct criminal investigations.[11] There are many limits of the existing bodies, they lack enforcement structure and common European prosecution policy. The institutional and legal frameworks are week with a crumbled prosecution and are based on national feedback and depend on the resources and prioritization of the national investigations, prosecution, and judicial authorities.[12] OLAF, between 2010-2016:

- Concluded over 1600 investigations;
- Recommended the recovery of over € 3.6 billion to the EU budget;
- Issued over 2000 recommendations for judicial, financial, disciplinary and administrative action to be taken by the competent authorities of the Member States and the EU. [13]

But of all these investigations will be in vain because they all depend on the national authorities' prioritization. Is there any positive effect of the work of OLAF?

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[7] "EUROJUST". Online. Available: http://ec.europa.eu/justice/criminal/judicial-cooperation/eurojust/index_en.htm .

[8] White, Simone and Dorn Nicholas. "Towards a decentralized European Public Prosecutor's Office". Amicus Curiae Issue 89, spring 2012 Online. Available: http://sas-space.sas.ac.uk/4676/1/1673-2136-1-SM.pdf pg. 4.

[9] "Impact Assessment Accompanying the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office". Commission Staff Working Document. Brussels, 17.7.2013 Online. Available: http://ec.europa.eu/justice/criminal/files/eppo_impact_assessment_en.pdf pg. 8.

[10] Bocănială, Tache. "The Need of the European Public Prosecutor's Office in the Context of Strengthening the Integration". Legal Sciences in the New Millennium. The 9th EDITION OF THE INTERNATIONAL CONFERENCE EUROPEAN INTEGRATION REALITIES AND PERSPECTIVES. Online. Available: http://proceedings.univ-danubius.ro/index.php/eirp/article/view/1504/1672 pg. 71.

[11] "Impact Assessment Accompanying the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office". Commission Staff Working Document. Brussels, 17.7.2013 Online. Available: http://ec.europa.eu/justice/criminal/files/eppo_impact_assessment_en.pdf pg. 9.

[12] *Ibid,* pg. 12.

[13] "European Anti-Fraud Office. OLAF in figures". Online. Available: https://ec.europa.eu/anti-frud/investigations/fraud-figures_en pg. 1.

Obviously the work OLAF does it is purely to inform and present the cases to the national authorities but it is up to them whether they will go on with the investigation and prosecution in the courts.

3. Pursuing towards the idea for a European Public Prosecutor's Office

The idea for a European Public Prosecutor (EPP) can be found in the Corpus Juris. The idea was created based on the French prosecuting model. It was envisioned that the EPP will function with European Public Prosecutors responsible for the investigation and prosecution of fraud in the member states. They would wear two hats because they would apply national law in national cases but would also apply another set of EU rules for EU budget crimes. The EPP would be independent from the Member States and would have the authority to act on its own initiative. The procedure for creating an EPP would be nomination by the Commission and Council decision with qualified majority. The Commission proposed the idea of an EPP in 2000. In 2001 was proposed a "Green Paper on the criminal law protection of the financial interests of the Community and the establishment of the European Prosecutor". The proposal for some member states was controversial because they thought it would sabotage national sovereignty in justice. Others believed that there were problems of accountability and fair trial. [14] Only national authorities can investigate and prosecute EU fraud if EPPO does not exist. While the existing EU bodies focus on coordination, exchange of information and administrative investigations.[15]

4. The European Public Prosecutor's Office (EPPO)

The Treaty of Lisbon offered the legal basis for the establishment of the European Public Prosecutor's Office (EPPO) and it re opened the debate on the EPPO that started with the presentation in 2000 of 'Corpus Juris'. According to Article 86 of TFUE, EPPO is responsible for investigating, prosecuting and bringing to judgment criminal cases of course in accordance with Europol. It will have the functions of prosecutor in the courts of the members combining European and national law in a unified approach. The EPPO will have jurisdiction in transnational crimes, for all offences against the financial interest of the EU. It will have competence in cross border and is meant to go beyond the cooperation and its power will not be limited to the coordination of authorities in the investigating of certain crimes.[16] The European Public Prosecutor office will be decentralized and independent prosecution office with the authority to investigate,

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[14] White, Simone and Dorn Nicholas. "Towards a decentralized European Public Prosecutor's Office". Amicus Curiae Issue 89, spring 2012 Online. Available: http://sas-space.sas.ac.uk/4676/1/1673-2136-1-SM.pdf pg.5

[15] VEROUX, Giovanna Maria. "(EPPO) European Public Prosecutor: are the EU Member States slowly stifling an European project…?" April, 11 2015 European Area of Freedom Security & Justice Online. Available: https://free-group.eu/2015/04/11/eppo-european-public-prosecuto-ar-the-eu-member-states-slowely-stifling-an-european-project/ pg. 1

[16] Santalo Pol. "The EU Internal Security after the Treaty of Lisbon: innovations, benefits and drawbacks". December 18, 2016. Online. Available: http://www.polsantalo.com/the-eu-internal-security-after-the-trety-of-lisbon-innovations-benefits-and-drawbacks/ pg. 2

prosecute and bring to justice crimes like fraud, corruption or cross-border VAT fraud (Value added tax). There will be a single office across participating member states.[17]

The need for a public prosecutor is alarming because the existing EU bodies like the OLAF (European Anti-Fraud Office), Eurojust (European agency for criminal justice cooperation) and the Europol (European Police Office) cannot conduct criminal investigations or prosecute fraud cases. National law enforcement efforts are divided across Member States, they do not care to deal with crimes against the EU budget. Only around 50% of the judicial recommendations presented by OLAF to the national prosecution authorities lead to a verdict. And the low number of prosecutions leads to low recovery of amounts lost to fraud.[18] This is a low percentage of verdicts leading to the questioning of the OLAF competences, although the main problem is not in OLAF's work but it is in its jurisdictions and second it is due to the unwillingness of the national authorities to work on such cases and to make them their priorities.

This points at another susceptive idea that maybe some national authorities are connected with networks and specific groups and they have benefit of such low verdicts and low interest in prosecuting this kinds of fraud. "The network model activities of the organized criminal groups makes it more difficult to detect and combat it by the gov't and judicial authorities, this element adding to the lack of adequate legislation".[19] Therefore there is always a possibility of such cases even do the suspicions towards authorities to be part of such networks are low.

For the above reasons EPPO will have a joint European investigation and prosecution strategy where prosecutors will carry their investigations, they will be coordinated, there will be fast exchange of information and joint investigations, fast freezing of assets, and requests for arrests of the suspects. EPPO will use member states capacities and will use expertise in areas such as crime analysis, tax, accounting, or IT. It will be managed on two levels central and decentralized: the central level will consist of the European Chief Prosecutor, 20 European Prosecutors (one per participating member state) two of whom as deputies for the European Chief prosecutor, administrative director, technical and investigative staff. The decentralized level will consist of European Delegated Prosecutors located in the participating member states. The central level will supervise the investigations and prosecutions at the national level.[20] The EPPO will have homogenous investigation powers integrated into the national law system. The rights of the persons involved in the investigation will be guaranteed based on national law, Union law and the Charter of fundamental rights. The EPPO will enable Member States and the Union to work together for the protection of the European Taxpayers money. The value of the EPPO will be:

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[17] "Frequently Asked Questions on the European Public Prosecutor's Office" European Commission-Fact Sheet. Brussels 8 June 2017 Online. Available: http://europa.eu/rapid/press-release_MEMO-17-1551_en.htm pg. 1.

[18] *Ibid,* pg. 1.

[19] Stănilă, Laura. "New Field of action for organized crime: Trafficking in human cells, tissues and embryos. New challenges for Romania". НАУЧНО-СТРУЧНИ СКУП СА МЕЂУНАРОДНИМ УЧЕШЋЕМ Тара, 26 – 29. мај 2015. СУПРОТСТАВЉАЊЕ САВРЕМЕНИМ ОБЛИЦИМА КРИМИНАЛИТЕТА – АНАЛИЗА СТАЊА, ЕВРОПСКИ СТАНДАРДИ И МЕРЕ ЗА УНАПРЕЂЕЊЕ Том 2 ЗБОРНИК РАДОВА Online. Available: http://www.nst.org.rs/sites/default/files/docs/Tara_2015_Tom_2.pdf Pg. 308.

[20] "Frequently Asked Questions on the European Public Prosecutor's Office" European Commission-Fact Sheet. Brussels 8 June 2017 Online. Available: http://europa.eu/rapid/press-release_MEMO-17-1551_en.htm pg. 2.

- Genuine European prosecution policy;
- Uniform, consistent and systematic approach while linking in with MS' judicial systems;
- Investigates and prosecutes all EU fraud cases;
- Continuity in complex and cross border cases;
- Stronger deference and prevention effect.[21]

The EPPO will rely on national rules of investigation and procedure which will apply if the regulation does not provide for specific provisions.[22]

On 8 June 2017 20 EU members reached agreement for the establishment of the EPPO and they are: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Spain and Slovenia. The other EU member states can join whenever they will fill comfortable in doing so. [23]

5. Pros and Cons for the EPPO

Pros for EPPO are that it will reduce problems with different legal systems. Up till now the Member States were responsible for themselves for such investigations and prosecutions supported by Eurojust and EUROPOL but in practice this is not efficient enough.[24] Establishing EPPO will bring benefits with the increase in the number of prosecutions in national courts. Also the decentralized and centralized options bring benefits. With the decentralized options, doubling the number of convictions will lead to a reduction of damage of around 10%. This option will provide the most benefits over 20 years and assumed total of 3200 million euros. The central option is with benefit of about 2900 million euros in the period of 20 years. [25]

Bocănială states many cons for the EPPO. There should be clear goals and rules on the functioning of the EPPO, because it would be assigned "excessive freedom" in terms of jurisdiction, there is a need to define the entire area of the EU jurisdiction under the competence of the EPPO investigation. The investigating instruments and measures of the EPPO should be homogenous, clearly identified and consistent with the laws of the member states, it is also believed that the proposed regulation is not according to the principle of subsidiarity.[26]

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[21] "European Public Prosecutor's Office". European Commission. Online. Available: http://ec.europa.eu/justice/criminal/judicial-cooperation/public-prosecutor/index_en.htm pg. 2.

[22] *Ibid,* pg. 2.

[23] "Frequently Asked Questions on the European Public Prosecutor's Office" European Commission-Fact Sheet. Brussels 8 June 2017 Online. Available: http://europa.eu/rapid/press-release_MEMO-17-1551_en.htm pg. 2.

[24] "Impact Assessment Accompanying the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office". Commission Staff Working Document. Brussels, 17.7.2013 Online. Available: http://ec.europa.eu/justice/criminal/files/eppo_impact_assessment_en.pdf pg. 4.

[25] *Ibid,* pg. 5.

[26] Bocănială, Tache. "The Need of the European Public Prosecutor's Office in the Context of Strengthening the Integration". Legal Sciences in the New Millennium. The 9th EDITION OF THE INTERNATIONAL CONFERENCE EUROPEAN INTEGRATION REALITIES AND PERSPECTIVES. Online. Available: http://proceedings.univ-danubius.ro/index.php/eirp/article/view/1504/1672 pg. 74-75.

6. Cons with a subsidiarity arguments

Under Protocol 2 of the Lisbon Treaty on the principles of proportionality and subsidiarity the proposal of EPPO was sent to national parliaments within the umbrella of the Early Warning Mechanisms (EWM). The Lisbon treaty introduced the EWM as a form of political control. The procedure gives the Member States the chance to express their opinion of the draft legislative texts if there are more Member States that do have any remarks than the draft is analyzed again. In the case of the EPPO the Commission dismissed all the National Parliament's arguments for subsidiarity and it did not revise the original text. [27] Article 86 of TFEU provides a legal basis for the establishment of EPPO. The first paragraph of the provision states that the Council, may establish an EPPO from Eurojust. If there is no consensus, Article 86 allows the regulation to be approved if at least nine Member States agree on a proposal. [28] Therefore EPPO was created with all legal and legislative measures even though all the Member States did not agree on the draft text.

The House of Representatives in UK believes that investigation, prosecution and trial are a national ability. Transferring this competences to another body (in regards to EPPO) would decrease the sovereignty of the national state. In order to fix the breach of sovereignty it is crucial that the competences are laid out. The democratic legitimacy of the investigators and prosecutors is essential.[29]

Defining the Subsidiarity principles in regards to EPPO:

- Investigation and prosecution regarding fraud is (primarily) the responsibility of national authorities;
- The power to investigate and prosecute offences which damage the financial interests of the Union are insufficiently defined, making it impossible to determine the scale of a breach of sovereignty(legality principle);
- Democratic control of the investigative and prosecution authorities must be possible. The proposed assessment by the European parliament on the basis of an annual report is inadequate;
- As the actual investigation and prosecution actions (and trail) are carried out in the Member States itself, these actions should be democratically controlled by bodies in the relevant Member States;
- With the aid of Eurojust and OLAF the investigation and prosecution fraud affecting EU funds can also be organized without an EPPO;
- The intended objective the effective combat of fraud with EU funds- can also be realized without a breach of sovereignty of the Member States by the foundation of an EPPO as formulated below. [30]

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[27] Wieczorek, Irene. "The EPPO draft Regulation Passes the First Subsidiarity Test: An Analysis and Interpretation of the European Commission's Hasty Approach to National Parliament's Subsidiarity Arguments". German Law Journal Vol.16 No.05 2015 Online. Available: https://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/56c0598401dbaed289e1412d/1455446406130/8.16.5_European+Public+Prosecutor_Wieczorek_FINAL.pdf pg. 1248.

[28] *Ibid,* pg. 1250.

[29] "House of Representatives of the State General position paper with regard to the establishment of a European Public Prosecutor's Office (EPPO). Tweede Kamer Der Staten-Generaal Online. Available: www.tweedekamer.nl/.../document?...Position%20paper%20European%20Public%20.. Pg. 1.

[30] *Ibid,* pg. 2.

The House of Representative does not agree with the creation of the EPPO since it is obvious that it believes that it is breaching the subsidiarity.

To continue with, the Member States do not share the Commission's vision of a European Public Prosecutor and the impact that the EPPO may have on their national criminal justice systems and sovereignty. It remains to be seen whether OLAF will be incorporated within the EPPO and how the relationship between EPPO and Eurojust will develop. [31] In any rule of law based criminal justice system it is of crucial importance that sate power to investigate, prosecute, and punish are granted by law, but also controlled and commanded. This control is the essence of the rule of law, as the nation state has to guarantee both the liberty and the security of the citizens. This has not only consequences for the way criminal law is executed but also giving the power to investigative and prosecutorial judicial authorities such as prosecutors. [32]

EPPO is still doubted because of the vague picture it gives in the aims at tackling financial crimes, and because the agencies like Eurojust, Europol and OLAF are competent to carry out administrative investigations on fraud crimes and their legal instruments have been expanded. Instead of creating a new body with an unclear value without the compliance of all the member states it could be more appropriate to complement the current instrument and bodies. The functioning of the EPPO will be characterized by a degree of networking between EU law and national law. The bottom line of the matter is self-evident: "the more national law is brought to the fore to regulate the functioning of the EPPO the more the supra national nature of the Office is watered down." [33]

7. Conclusion

The European Union in order to protect its financial interests and to safeguard the taxpayer's money created Eurojust which tackles cross border judicial cooperation, but it cannot conduct a criminal investigation or prosecution. EUROPOL is another agency that supports investigations of financial crimes through analysis and information exchange. It has no operational powers and as Eurojust it cannot conduct criminal investigations. OLAF is a body that can conduct administrative anti-fraud investigations but it cannot conduct criminal investigations. Therefore the European Commission created EPPO in order to be able to investigate, prosecute and judge criminal cases in accordance with Europol. It will function as a prosecutor in the courts of the member states combining European and national law. Despite many states disapproval of the EPPO due to the belief of weakening the sovereignty in the legal system of the member states and the power to reflect in national legislation, the need for a European Public

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[31] Ligeti, Katalin and Marletta Angelo. "THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE: WHAT ROLE FOR OLAF IN THE FUTURE?" Online. Available: https://www.pravo.unizg.hr/_download/repository/4_-_The_European_Public_Prosecutor%27s_Office--_what_role_for_OLAF_in_the_future.pdf pg. 62.

[32] VARVAELE, A.E. JOHN. "THE MATERIAL SCOPE OF COMPETENCE OF THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE: A HARMONISED NATIONAL PATCHWORK?" INSTITUTE FOR RESEARCH INTO EUROPEAN CRIMINAL LAW CENTROSTUDI DI DIRITTO PENALE EUROPEO. Online. Available: www.dirittopenaleeuropeo.it pg. 1.

[33] Giuffrida, Fabio. "The European Public Prosecutor's Office: King without kingdom?" Research report No 2017/03, February 2017 Online. Available: http://aei.pitt.edu/84218/1/RR2017-03_EPPO.pdf pg. 37-38.

Prosecutor is necessary because it will lead to creation of steady prosecution policy and lower the cases of financial fraud.

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https://www.pravo.unizg.hr/_download/repository/4_-The_European_Public_Prosecutor%27s_Office--_what_role_for_OLAF_in_the_future.pdf

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Prosecutor of State Authority or Party in Criminal Procedure

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Abstract

This educational work is the essay of authors from various fields of theory and practice in Bosnia and Herzegovina, trying to provide users with a theoretical practical institute regarding the role of the Prosecutor as a state body and a party in criminal proceedings that could help legal practitioners and practitioners in their everyday work. The work that you will have in front of you is part of a series of works that have already been elaborated thanks to generous theoreticians and practitioners who support "Journal" of Eastern-European Criminal Law Timisoara. Within this scientific project, the themes covering the key topics of criminal substantive and procedural law, with emphasis on procedural law, were taken into account. The proposal for this topic was given by the Journal Committee for the Education of Judges and Prosecutors of the Republic of Romania, as now most important, given the implementation problems that have emerged with recent legal reforms in these fields.

Users of this work and other works of the same and similar topics are invited to contribute to the improvement of this Module through constructive critical feedback, since it is the author's intention to continuously update and improve this educational material.

Key words: *prosecutor, state body, party in criminal procedure.*

1. Introduction

The introductory part of the article will include facts related to the Law and Criminal Procedure, (general provisions, investigation), prosecutor, authorized official, suspect, defense counsel, court, basis of investigation, opening of investigation, planning of investigation, management and supervision of the investigation, then the Criminal Procedure Code, in terms of the course of the investigation, the actions of proofing, the investigation procedure, the gathering of evidence, the reporting of the criminal offense, the order to carry out the investigation, the order to suspend, the completion of the investigation, the judicial provision of evidence, the search, the witness, the expert witness, the suspect, the prosecutor , a preliminary procedure judge, that is, a bit of the above-mentioned parts relating to the prosecutor in the role of a state authority and a party in the proceedings in the sense of his duties and rights.[1]

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[1] Law on Criminal Procedure of Bosnia and Herzegovina - ZKPBiH, ("Official Gazette of Bosnia and Herzegovina", br. 3/03, 32/03, 36/03, 26/o4, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 93/09, 72/13.....

With the entry into force of the new Criminal Procedure Code in BiH[2], the biggest changes in relation to the previous criminal procedure are precisely in the changed role of the subjects of the criminal procedure in the investigative procedure. Namely, by the entry into force of the new Code of Criminal Procedure in BiH, in accordance with the strongly accusatory criminal procedure, the jurisdiction to carry out the investigative procedure was fully disclosed to the prosecutor, who can again delegate certain powers in the investigative procedure to authorized officials who must act under his supervision or control.

Also, the new criminal proceedings sublimated the previous pre-trial procedure and the previous criminal proceedings into a single and unified investigation, conducted by, administered or supervised by the prosecutor, as the original holder of investigative powers. This sublimation has an exceptional significance because it enables the prosecutor to direct the investigative procedure from the very discovery of the criminal offense in a direction that will enable him to effectively bring the case before the court, or to raise and represent the indictment at the main trial. In this regard, this sublimation of the earlier pre-criminal and preliminary criminal proceedings allows the plaintiff to ensure, from the very beginning of the investigation, the legality of obtaining evidence or the formal correctness of the evidence obtained.

In addition, this sublimation enables the plaintiff to form multidisciplinary investigative teams composed of various law enforcement and law enforcement agencies (police, miscellaneous inspections, cuts, tax administrations etc.) and enables him to have a complete picture of the investigation and its results through proper division of labor and coordination in both segments and the results of the investigation as a whole.

In addition to the changed role of the prosecutor, which, by the entry into force of the new Criminal Procedure Code, became a kind of "investigation manager", the powers of authorized officials in the investigation procedure were changed, and the evidence obtained by authorized officials in the investigative procedure gave valid verifiable character provided that the evidence was obtained in a lawful manner, which significantly strengthened the position of authorized officials in the investigative procedure.

The position of the suspect and his defense attorney in the investigative procedure has also been amended, and since the new Criminal Procedure Code, the suspect has been guaranteed his rights in the sense of procedural guarantees that were earlier only from the previous criminal proceedings since the very beginning of the investigation, while such guarantees were not in the earlier pre-trial procedure. Now the suspect has been informed about his rights from the first appearance before the prosecutor or authorized officials, and during the examination, he has been provided with all rights, from the right to a defense counsel, to the right to defend his / her silence.

In this way, the suspect has been guaranteed all his rights from the very beginning of the investigative procedure. True, since the prosecutor is in the role of the state authority in the molluscy to practically conduct an investigation into secrecy, and at the very end to hear the suspect who can only then find out that an investigation has been conducted against him, in that sense, the strategic position at that stage of the proceedings has weakened the position of the suspect in relation to the previous criminal procedure law, but this is a logical consequence of the previously mentioned

[2] *Ibid.*

sublimation of the previous pre-criminal and previous criminal proceedings into a single and unique investigation, since even in the previous pre-trial procedure the suspect had not had to know that the same one was running against him.

Regarding the role of the defense counsel in the investigative procedure, the same has also undergone certain changes that essentially represent the consequence of the already mentioned sublimation of the previous pre-trial and previous criminal proceedings into a single and unique investigation, and on the one hand allows the defense counsel to take all the facts from the moment of the knowledge for the investigation actions aimed at identifying all the facts and obtaining evidence in favor of the suspect, that from the first appearance of the suspect before the prosecutor or to authorized officials, he develops a defense strategy and gives active defense to the suspect with certain limitations that relate mainly to the secrecy of the investigation and the evidence that goes at the detriment of the suspect.

The role of the court in the investigation also has undergone a major change in relation to the former Criminal Procedure Code[3], in which the investigating judge was the investigator, so that judicial intervention in the investigative procedure is now limited to those situations, that is, those investigative actions and measures to a certain extent they undermine the human rights and freedoms of citizens.

2. The role of the prosecutor in the investigation

The role of prosecutors in the new system of criminal proceedings is one of the most important novelties of the new Criminal Procedure Code in BiH. This new role of the prosecutor in the criminal proceedings stems predominantly from the adversarial system of criminal procedure that gives a strong impetus to the new Criminal Procedure Code and greatly approaches the role of the prosecutor in the role of the prosecutor in the system of criminal procedure that exists in the Anglo-Saxon countries.

What gives an "adversarial seal" to the whole new system of criminal proceedings is the setting of criminal proceedings as a kind of "criminal lawsuit" with a strong accusatory character of each phase of the criminal proceedings, in which the prosecutor is a body and one of the parties in the proceedings, with the authority to prosecute perpetrators of criminal acts, whereby the legislator leaves jurisdiction and gives responsibility for the entire process of detection and illumination, proving criminal offenses in such a way that the investigative procedure fully enters into the authority and duties of the plaintiff, limiting the judicial intervention in the investigation procedure only to cases in which the investigation, that is, certain acts and measures that are being carried out in the investigative procedure are produced or can produce such consequences that some of the basic human rights and freedoms of citizens may be violated or limited.

In accordance with this basic intention of the new criminal procedure law, the legislator provides all the evidence obtained by the prosecutor or authorized officials working under his order or authority during the investigative procedure, giving valid evidence in terms of dominance-dominus litis, provided that that such evidence was

[3] The Criminal Procedure Code of 1976, which came into force on July 1, 1977, and the amendment was amended in 1985, which remained in force until the independence of BiH, which in 2003 brings its completely new-reformed Criminal Procedure Code.

obtained in a lawful manner, that is, in accordance with the provisions of the Criminal Procedure Code.

The role, that is, the rights, duties and powers of the prosecutor in the investigative procedure are determined primarily by Articles 35 of the ZKP BiH and the ZKPDB, and 43 of the Criminal Procedure Code of the Republika Srpska, or Article 45 of the ZKP BiH, which clearly states that the main role of the prosecutor in the criminal proceedings is the detection of criminal offenses and the detection and prosecution of perpetrators of criminal offenses.

When considering this basic role of the prosecutor in the criminal procedure, it can be seen that it is realized in several different stages of the criminal offense, which arise from Article 35 of the ZKP BiH and the ZKP SR, and 43 of the Criminal Procedure Code of the Republika Srpska, or Article 45 of the ZKP BH, which provisions precisely indicate the manner, powers and scope of the rights and duties of the prosecutor in the entire criminal case, from the knowledge that there are grounds for suspecting that a criminal offense has been committed and until the procedure for legal remedies.

It is precisely from the above articles that the basic phase and field of activity of the prosecutor in the criminal procedure, which also represents the initial activity of the prosecutor, and hence the "condicio sine qua non" of all other stages of the criminal procedure, is the investigative procedure. The role of the prosecutor in the investigative procedure is especially determined by Article 216 of the ZKP BiH, RS, BD and Article 231 of the FBiH FBiH, which clearly shows that the prosecutor is the subject who decides the existence of the basis for suspicion as the basis on which the investigative procedure is conducted, 217 of the Constitutional Court of Bosnia and Herzegovina, RS and BD and Article 232 of the FBiH FBiH, it is determined that during the investigation, the prosecutor can take all the investigative actions.

3. When the criminal proceedings begin

Unlike the previous Code of Criminal Procedure, in which this issue was resolved in a precise manner, and the criminal proceedings started with the adoption of a decision on the implementation of the investigation, the new Criminal Procedure Code in Bosnia and Herzegovina did not solve this issue precisely, so the answer must be to seek indirectly.

Namely, regarding this issue there are two key different points of view.

1. Criminal proceedings begin with the issuance of an order to carry out an investigation, or taking measures from the collapse of authorized officials in accordance with Article 218 of the ZKP of BiH, or analogous to the articles of the ZKP BD; RS and FBIH., With I am connected after the notification, the prosecutor agrees.

2. The criminal proceedings shall begin with the confirmation of the indictment. The basis of the dilemma when the criminal proceedings begin is the provision of Article 18 of the Law on the criminal procedure of the BIH, or analogous members of the ZKP BD; RS and FBiH, which are identical and they read:

"*When it is stipulated that the initiation of a criminal proceeding results in a restriction of certain rights, these consequences, unless otherwise provided by this law, arise from the confirmation of the indictment. In the case of criminal offenses with a prescribed imprisonment sentence of up to five years or a fine as the main punishment, these consequences shall arise from the date on which the conviction was rendered, irrespective of whether it has become final. "*

The first point is that the criminal proceedings begin with the confirmation of the indictment, the argumentation is precisely in this legal provision according to which the moment of occurrence of these consequences is considered the beginning of criminal proceedings.

Representatives of this view emphasize that according to the new system, the precondition for investigation is the existence of the basis for suspicion that a criminal offense has been committed. So there are no reasonable doubts and there is no specific person for whom this basis exists and there is no court body that by its decision confirms such suspicion of the prosecutor. It follows that the order to carry out the investigation referred to in Article 216 does not have the character of the prosecution against the suspect or in a wider sense: a formal criminal proceeding has not been initiated.

Therefore, there is not actually legal consequences of the criminal proceedings, which is, after all, explicitly stated in 18, according to which the legal consequences of initiating criminal proceedings the indictment is confirmed.[4]

However, the second point is that criminal proceedings exist even when there are no above-mentioned consequences, then it is considered that criminal proceedings exist even when they do not produce such consequences, considering that the moment of initiation of criminal proceedings can not be linked to the moment of occurrence of these consequences, instead of criminal proceedings, they treat all activities of prosecutors and authorized officials since the establishment of grounds for suspicion that a criminal offense has been committed.

In addition to these two key ones, one of the opinions is that the criminal proceedings begin as of the moment when the Accused opposes the guilt. The lack of this opinion consists in the fact that, in this case, any procedure in which the accused pleads guilty, either under a plea agreement, deprived the character of the criminal proceedings without agreement, which is not acceptable.

When thoroughly perceive both the point of view one can draw several conclusions:

1. The aforementioned legal provision does not regulate the moment of the start of the criminal proceedings, but the moment from which the restrictions of certain rights occur, and accordingly, from the abovementioned legal provision, the conclusion on the moment of commencement of the criminal proceedings can not be drawn.
2. If the binding of the commencement of the criminal proceedings with the abovementioned legal provision would be strictly accepted, in that sense, it would be concluded that for criminal offenses for which the law impose a sentence of imprisonment for up to five years, a fine is the main punishment, criminal proceedings it covers only the treatment of legal remedies, while the first-instance court proceedings leading to a conviction would be regarded as some other than criminal proceedings.
3. In this respect, the investigative procedure would, if it produced restrictions on the suspects' rights, also be treated by some other, not criminal proceedings, although it was regulated by the "Criminal Procedure Code".

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[4] Prof. Dr. Miodrag Simović, *Practical Commentary on the Code of Criminal Procedure of the Republika* Srpska, 2005 edition edition, p. 375 and 376.

Therefore, by continuously linking the interpretation of the initiation of the criminal proceedings to Article 18 of the ZKP of BiH, there are at least analogue members of the ZKP BD; RS and the FBI, there would be a clumsy absurdity.

4. The etymological significance of the criminal proceedings

The Code of Criminal Procedure is a systemic law that regulates the activities of the subjects of the criminal procedure, and hence the activities that the prosecutor and the authorized official persons file in the investigative procedure.

Conducting a criminal investigation, the etymologically has the meaning of a criminal procedure, because it can only be carried out under the Criminal Law rather than in another, (for example, the Administrative Procedure).

The fact that the legislator has lowered the standard of proof required to initiate the investigation procedure from a grounded suspicion on the basis of suspicion does not mean that the investigative procedure took away the character of criminal proceedings, but only that by criminal proceedings it included the early stage of knowledge of the criminal offense and its perpetrator, prosecutor and authorized officials to apply the standards applicable to criminal proceedings from that stage.

Finally, the evidence obtained in the investigative procedure by the prosecutor and the authorized official persons provided valid evidence in the first instance court proceedings, provided that they were obtained in accordance with the Criminal Procedure Code, which does not do with the evidence obtained in some other (*e.g.* an administrative procedure) for which the other lower standards apply than for criminal proceedings.

It should be said that by lowering the standards for conducting an investigative procedure from a reasonable suspicion on the basis of suspicion, that is, with the introduction of standards of criminal procedure in this early stage of finding out about the criminal offense and the perpetrator, the position of the suspect is substantially strengthened because, precisely with the introduction of these standards of criminal procedure, the rights of the suspect increased.

However, in addition to this, as a possible solution to this dilemma, one opinion should also be taken into account, which essentially means that the criminal proceedings begin with the moment of establishing the parties' contradictions before the court.

Thus, our earlier legal theory treated the beginning of the criminal proceedings as a three-pronged procedural relationship that was established between the court, the prosecutor and then the accused, and that the criminal proceedings could not have started if there were no three main procedural subjects, but also a certain court decision.

In that regard, it was considered that the regular criminal proceedings, the first stage of the investigation, began with the issuance of a decision on the conduct of an investigation by an investigative judge or an interlocutory council. Furthermore, when it came to the direct indictment, it was considered that the criminal proceedings began with the granting of the consent of the investigating judge to the indictment for the criminal offense for which a punishment of over five years or more severe punishment was envisaged, ie the imposition of a direct indictment on the legal force for the criminal offense for which a sentence of imprisonment of three to five years is envisaged. Then, for the criminal offense for which a private lawsuit was raised in a regular criminal

procedure, (when it relates to so-called related criminal offenses), it was considered that the criminal proceedings began with its entry into force, and so on.

Therefore, the criminal procedure was considered to be a three-pronged procedural relationship between the main procedural entities and that it always begins with some decision-making by the court, (for example, by issuing a decision to conduct an investigation). If such a prior understanding of such a legal theory follows, then according to the new procedural laws, criminal proceedings can begin with any decision of the court establishing the basis for suspicion or suspected suspicion, and apply, order or approve certain investigative measures and actions (*e.g.* Detention, special investigation, search etc.)

After this, of course, the issue of the ongoing investigation conducted by the prosecutor and who takes actions according to the prescribed rules of procedure, of course, opens up (or when these actions are undertaken by persons under the law pursuant to the law in accordance with Article 36 of the FBiH Criminal Procedure Code to act upon his request in criminal proceedings). This must have its own name, and in the Criminal Procedure Code there is no obstacle to initiating criminal proceedings under procedural rules, because the legislator in connection with the principle of accusation (Article 16 of the FBiH ZKP) binds the initiation of criminal proceedings for prosecuting the prosecutor. Therefore, the syntagm of initiating criminal proceedings is not something new, since it has already been entered into the text of the law.

5. What does the legislator mean by the term investigation?

The definition of the investigation is given in Article 20, paragraph j) of the ZKP of BiH, the ZKP BD, and Article 21, paragraph j) of the FBiH Criminal Code, or Article 20, paragraph i) of the ZKP RS, which are essentially identical: "The investigation includes activities undertaken by the plaintiff or authorized Officials in accordance with this law, including the collection and keeping of statements and evidence."

However, in Article 43, paragraph 2, item a) of the KZRS and Articles 35, paragraph 2, subparagraph a) of the ZKP BIH and ZKPBD, Article 45, paragraph 2, item a) of the FBiH ZKP stipulates that the prosecutor has the right and duty " after knowing that the criminal act has been committed, take the necessary measures for the purpose of detecting and conducting an investigation, finding suspected leadership and supervision of the investigation, as well as for the purpose of managing the activities authorized officials in connection with finding a suspect and collecting statements and evidence ".

While in the article in paragraph 2, item b) of the same legal members, it provides that "the prosecutor has the right to conduct an investigation in accordance with this law". Such legal norms may result in certain inconsistencies and ambiguities, and then the question arises what does the legislator mean in general under investigation?

The first kind of ambiguity that may arise from such a provision exists in the very content of Article 35, paragraph 2, subparagraph a) of the ZKP BIH and ZKPBD, respectively Article 43, paragraph 2, item a) of the CCI, and Article 45, paragraph 2, item a) of the CCBH; where it is said that the prosecutor has the right and the duty immediately to know that the committed criminal act has taken the necessary measures in order to detect and carry out the investigation. Accordingly, the legislator makes a distinction between "discovering a criminal offense" and "investigating the investigation" by such a provision, although it is unclear what kind of character other

than the investigative could have measures that are being carried out in order to "discover the criminal offense"?

Namely, measures taken in order to "detect a criminal offense" pursuant to the Criminal Procedure Code can not be undertaken in any other procedure, except in accordance with the Criminal Procedure Code, and in Articles 20, paragraph j) of the ZKP BIH, ZKP BD, and Article 21 j) FBiH ZKP and Article 20, paragraph i) of the ZKP of the RS, which are essentially identical and as already stated: "The investigation includes activities undertaken by a prosecutor or an authorized official in accordance with this law, including the collection and safeguarding of statements and evidence ".

Accordingly, it is completely clear that these are activities of prosecutors and authorized officials aimed at detecting a criminal offense, which are undertaken in accordance with the Criminal Procedure Code.

Furthermore, from the moment of knowing that there are grounds for suspecting that a criminal offense has been committed, the prosecutor is obliged to open an investigation in which all actions and measures of detection of the criminal offense and his perpetrator are undertaken, and hence the law on criminal procedure in that part does not separate the disclosure procedure the criminal offense and the conduct of the investigation.

Furthermore, the disclosure of a criminal offense involves the collection and provision of evidence, which can be obtained solely in accordance with the provisions of the Criminal Procedure Code.

Accordingly, the detection of a criminal offense is not covered by any lengthy special procedure but is an integral part of the investigative procedure that it manages and which is supervised by the prosecutor.

6. Detection and clarification of criminal offenses

In view of the aforementioned authority of the prosecutor in relation to the detection of criminal offenses, the question arises as to what the terms disclosure and clarification of crimes relate to the authority of the prosecutor, and bearing in mind that the basis of any activity of the prosecutor is the basis for suspicion that a criminal offense has been committed. Therefore, when this is taken into account, the existence of the basis for suspicion implies that a criminal offense has already been discovered in a certain way, and then the question arises as to what the prosecutor discovers if there is already a basis for suspicion that a criminal offense has been committed.

Furthermore, the question arises, which then shows the difference between investigating criminal offenses by the prosecutor and revealing criminal offenses by authorized officials from law enforcement agencies, primarily all police.

It is necessary to distinguish the police treatment of the detection of criminal offenses in accordance with the law prescribing the basic work of the police, from the prosecutor's role in the detection of criminal offenses. The Prosecutor shall take the necessary measures to detect the criminal offense solely on the basis of the existence of grounds for suspicion that the offense has been committed. The collection and the discovery of evidence and evidence that constitute the basis of suspicion that the offense has been committed is solely the competence of the police authorities within its jurisdiction.

This means that the detection and clarification of the criminal offense committed by the prosecutor represents an eventually directed detection of a criminal offense, or an

additional disclosure of a criminal offense on the basis of an already acquired knowledge that there is an event that raises the suspicion that a criminal offense has been committed, unlike the police detection of a criminal offense is to discover the basis for the suspicion that the offense was committed as an essential consequence of regular activities that were not directed at an event that undermines the suspicion of a criminal offense.

From the foregoing, it follows directly that the plaintiff has no function in relation to the conduct of the police and other law enforcement agencies on detecting criminal offenses and preventing and combating crime until the moment of establishing the basis for suspicion that a criminal offense has been committed. This is supported by the fact that the basic regulations governing the treatment of police services, such as laws on internal affairs, the Law on the State Investigation and Protection Agency, the State Border Service Act etc., as one of the basic functions of these services and the obligation to detect, clarify and prevent criminal offenses.

7. Investigate and open an investigation

Considering the existing provisions of the Criminal Procedure Code, the role of prosecutor in the investigative procedure was conceived as the role of a kind of "investigative manager" who, in cooperation with authorized officials, on the knowledge that there is a suspicion that the crime is a criminal offense, undertakes measures that consist in the planning of the investigation, the management of the investigation and the supervision of the investigation, over the work of authorized officials in the investigative procedure, and possibly directly undertakes certain investigative actions, and the purpose of discovering all relevant facts and circumstances of the criminal offense and its perpetrators.

Implementation the investigation involves several stages:

1. Decisions on conducting the investigation, (Decree on conducting the investigation).
2. Planning the investigation,
3. Management and supervision of the investigation,

The initial stage of every investigation, represents a decision on conducting the investigation by the prosecutor brings in the form of commands.

The basic and only condition that the legislator foresees for making such an order

constitutes the "basis of suspicion" that a criminal offense has been committed, and accordingly the basis of doubt is the initial standard of conducting an investigation by the prosecutor, at the very core of the investigation procedure.

8. The legal character of an order to carry out an investigation

Passing orders of about conducting the investigation has extremely great importance.This command with one hand is a decision of the Prosecutor of the existence of reasonable doubt on the other hand represents a sort of planning of the investigation in its initial stages, and developing investigative strategies and tactics that will provide efkasno prosecution.

In response to the question of the legal character, order to conduct investigation, should go up by 216, paragraph 2 of the ZKP of BiH, RS and BD respectively by 231, paragraph 2 of the ZKP of FBiH, which provides:

"An order is issued on the conduct of the investigation, which contains: information on the perpetrator of the criminal offense, if known, a description of the offense arising from the legal characteristics of the criminal offense, the legal name of the criminal offense, the circumstances that confirm the basis for the suspicion of the investigation and the existing evidence. In the order, the prosecutor will state what circumstances to investigate and what investigative actions should be taken. "

The first question raised in connection with the investigation of the investigation is the question of its legal character, that is whether it is a mandatory formal procedural document that produces certain legal consequences for the suspect or is an internal act of a prosecutor directed to the planning and management of the investigation.

In answering this question, it is primarily necessary to start from Article 18 of the ZKP RS and analogous to the articles of the ZKP of BiH; BD and FBIH which foresee:

"When it is stipulated that the initiation of criminal proceedings results in a restriction

certain rights, these consequences, unless otherwise stipulated by this law, arise with the confirmation of the indictment, and for the criminal offenses for which the main punishment is a fine or imprisonment of up to five years – from the day when the conviction was rendered, regardless of whether has become lawful ".

Pursuant to the aforementioned legal provision, it is clear that only the passing of an order to carry out an investigation does not produce any consequences for the suspect in terms of limiting certain of his rights.

Of course, in the course of the investigation there may be restrictions on certain rights of the suspect, (measures to secure presence, special investigative actions), but then the basis of such restrictions is not an order to carry out an investigation but a court decision based on a higher standard of proof, (basic suspicion) of the standard of proof necessary for issuing an order to carry out an investigation.

Furthermore, in answering the question about the legal character of the order to carry out the investigation, the content of the already quoted article 216, paragraph 2 of the ZKPBIH; RS and BD, respectively, Article 231 of the ZKP FBiH, should also begin, which determines the content of an order to carry out an investigation from which it is clearly visible that the order for the conduct of an investigation is directed to the successful and efficient conduct of the investigation, whereby this order actually contains two parts.

The first part of the contents of an order to carry out the investigation relates to the basis and subject of the investigation, expressed as:

"Information on the perpetrator of a criminal offense if known, a description of the offense arising from the legal characteristics of the criminal offense, the legal name of the criminal offense, the circumstances that confirm the grounds for the investigation and the present evidence ..." while the other part of the content focuses on the planning and management of the investigation expressed as:

„In the order the prosecutor will state what circumstances to investigate and what investigative actions should be taken."

Accordingly, the content of the order for the conduct of the investigation indicates that by that order the prosecutor, as a state body, decided on the basis of the investigation at the same time, decided on the subject of the investigation, and decided on the method of conducting the investigation, (investigative strategy and tactics).

However, considering the order to carry out the investigation as a whole, and especially considering that there is no obligation to deliver it, it does not foresee

procedural sanctions in the event of non-issuing such an order, and the fact that in relation to the suspect he does not produce any legal effect in terms of limiting his rights, as well as the fact that in Article 218, paragraph 4 of the ZKP BIH, the ZKPRS and the ZKPBD, Article 233 of the ZKPFBH, the prosecutor was given a free disposition regarding the issuance of an order to carry out the investigation, it follows that the order on the communication of the investigation, the internal act of the plaintiff, the procedure by which the prosecutor decides on the existence of the basis for suspicion that a criminal offense has been committed, the subject of the investigation, and which manages the investigation.

Accordingly, the order on the conduct of the investigation can not be considered as a strictly formal act, deciding on the legal validity of the undertaken actions in the investigation procedure.

9. Completion of the investigation

By the provision of Article 225 of the Criminal Procedure Code of BiH, by analogy with the provisions of the Criminal Procedure Code of RS, FBiH and BD, the issue of termination of the investigation is regulated, and so it is determined:

"(1) The plaintiff completes an investigation when he finds that the state of affairs is sufficiently clarified to be he can pick up the indictment. The completion of the investigation will be recorded in the file.

(2) Before the investigation is concluded, the prosecutor will hear the suspect, if he has not previously been examined in terms of the principle of contradiction, immediacy, orality and others.

(3) If the investigation is not completed within six months from the issuance of an order to carry out the investigation, the necessary measures to complete the investigation shall be taken by the college of the Prosecutor's Office. "

Regarding this provision, it regulates the completion of the investigation that results in the indictment.

As stated in the provision itself, paragraph 1, the prosecutor terminates the investigation when it finds that the state of affairs is sufficiently clarified that the indictment can be raised.

If you are in contact with the standard of evidence necessary for raising and establishing the charges, it can be concluded that the prosecutor suspends the investigation when he determines that this status has been sufficiently resolved under the conditions of a gap from a reasonable suspicion that the suspect committed the criminal offense, and in view of the clarification the state of affairs affecting the pronouncement of a sentence, the establishment of security measures, or, respectively, related to the facts that are important for seizing the proceeds of the criminal and property claims.

Therefore, the basic condition for the completion of the investigation is to establish a reasonable suspicion, that is, the spread of the suspicion of suspicion in the established suspicion, while the preconditions for determining the above mentioned other facts.

The prosecutor is the one who makes the assessment, however, his assessment is subject to review by the preliminary hearing judge when deciding on the confirmation of the indictment, which in the case of a preliminary hearing judge can assess that the state of affairs is not sufficiently clarified in the investigation, hence the evidence

proposed with the indictment do not indicate the existence of a reasonable suspicion that the suspect committed the criminal offense that is the subject of the charge.

In this case, if optužnioce not be confirmed, the Prosecutor may continue the investigation in order to further clarification of the situation, the person respectively in order to gather evidence that will lead to the confirmation of the indictment.

When it comes to the completion of the investigation, the legislator foresees the obligation to hear the suspect if he had not been examined before in the investigation, and hence it follows that the investigation can not be completed before the suspect in the criminal proceedings does not hear the investigation.

Furthermore, it should be stated that this provision establishes the Criminal Procedure Code that the optimum time for conducting the investigation is six months, and if the investigation is not completed within that period, it is stipulated that the College of the Prosecutor's Office will take the necessary measures.

It should be emphasized here that this six-month deadline does not have any limiting character, but it is more about a kind of declaratory deadline, which has no formal or substantive effect on the investigative procedure, nor is there any criminal procedural effector the sanction of breaking that deadline, except that in order to accelerate and end the abusive proceedings of the college of the Prosecutor's Office, the necessary measures (the law does not determine what measures can be taken by the College of the Prosecution), it could be said that these measures are moving in a very broad from the engagement of additional prosecutors to the release of the prosecuting prosecutor with a number of other indebted files, etc.

Namely, the purpose of this provision and the establishment of this deadline after which the necessary measures should be taken by the College of the Prosecutor's Office is to emphasize the need to respect the rights of the suspect to be brought to trial in the shortest possible time and to be tried without delay as a right guaranteed by Article 6 of the European Convention on human rights and fundamental freedoms, and not the restriction of the prosecutor regarding the possible duration of the investigation.

Final considerations

Prosecutor in criminal proceedings participates in a double role: first as a state authority as parties in criminal proceedings equal to suspected or accused as the other party in criminal proceedings.

Therefore, it also appears in the role of the state body in charge of representing state interests in the criminal procedure, that is, social-public interests aimed at proving the truth, *i.e.* constitutional and legal principles, "that no one will be convicted of innocence, and that the perpetrator of the criminal offense deserved criminal sanction.

In every criminal case, he, as a state body, must also take into account the interests of the other party in the proceedings, which is not the case with the civil proceedings, and the purpose of his procedural legal activity is not to reach a court decision that will at any cost go to the detriment of the other party in the process, already in making a valid and lawful court decision.

Having in mind his state function and representation of the victim in the proceedings, he is authorized to declare the appeal both in favor and at the expense of the accused or the convicted person. The reason is that more, which not only concerns the state interest, but also the public interest.

Through the work, it was noted that the Prosecutor is an independent state body that is subject to the Constitution and the law by its work. And the court is an independent state body, and according to that characteristic these two bodies are similar, with different rights and duties. It is important to emphasize that, apart from the function of independence, the court also relates to the function of independence, which the state prosecutor does not have, despite the fact that in the literary sense, the state prosecutor is independent in his work even though this does not expire in the law.

It is important to emphasize that the Prosecutor is, by its very nature, a special state judicial and administrative body, established to cooperate with the court, performs an administrative and judicial function, equally separated from both the court and the administration.

The basic function of the state prosecutor is to prosecute perpetrators of criminal offenses, in accordance with the principle of officiality, legality and prosecution of criminal prosecution.

In addition to his basic duty, he is authorized to invest legal remedies for the protection of constitutionality and legality, if the issues of constitutionality and legality arise within his job description.

Functionally, the position of the prosecutor in the criminal procedure is determined by the rights and duties he/she has as a party in the criminal procedure and as a state body.

Some of the actions undertaken in accordance with the Criminal Procedure Code are at the same time their right and duty. The basic right and basic duty of the state prosecutor is the prosecution of perpetrators of criminal offenses.

In order to implement the law established rights and duties of the state prosecutor, the established function is carried out not only in the criminal procedure, the initiator of which should be, but also before the criminal proceedings.

This activity before the criminal proceedings takes place before the criminal proceedings, that is, in the investigation, and it is precisely dominated by the investigation, that is, the manager is in front of the criminal procedure, whose task is to collect the evidence and data on the basis of which the necessary level of knowledge and probability of the criminal offense and the perpetrator, which would be sufficient to initiate criminal proceedings, which is a grounded suspicion.

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4. *Bulletin of the case law,* Supreme Court of Republika Srpska, Banja Luka;

5. *Bulletin of the case law,* Supreme Court of Serbia, Official Gazette, Belgrade;

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19. Pavlović Z., *Public Prosecutor as a Crime Prevention Authority,* Institute for Criminological and Sociologicalin monograph Criminal Legislation and Crime Prevention, Belgrade, 2008, p. 170 -186;

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24. Simović, Miodrag, *Criminal Proceedings in Bosnia and Herzegovina, Collection of Laws Criminal Proceedings, with an introductory commentary and a register of terms, "Privredna štampa",* Sarajevo, 2004;

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Liability of Legal Entities for Environmental Criminal Offences in Serbia. Public Prosecutor's Role in Proving

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Abstract:

Environmental criminal offences include illegal behaviours against the environment and its integral parts: soil, air, water, flora and fauna. Their consequences are devastating and long-lasting, especially if committed by legal entities, particularly by powerful multinational corporations. This type of crime, referred to as corporate environmental crime or green-collar crime results in criminal liability of corporations. However, its organised and often trans-national character, its link with corruption and other types of crime as well as high costs of expert findings often cause numerous issues and challenges regarding its discovering and proving. Having in mind the important role of the public prosecutor in collecting evidence according to current Criminal Procedure Code of the Republic of Serbia, the author analyses the characteristics of environmental corporate crime and the difficulties related to its discovering and proving. Finally, the author suggests that all subjects involved with criminal proceedings, including the public prosecutor, should be more environmentally conscious and take a more active part in the prosecution of the perpetrators of corporate environmental crime.

Key-words: *environmental crime, corporate crime, criminal proceedings, evidence, Public Prosecutor.*

1. Environmental criminal offences: definition and types

The term "environmental delicts" encompasses a variety of illegal human activities by which the perpetrators harm or endanger the social values that are aimed to provide the conservation, improvement and protection of the environment.[1] The legislation of the Republic of Serbia is familiar with three groups of environmental delicts: 1) environmental criminal offences, 2) environmental economic offences and 3) environmental administrative offences[2] (also referred to as environmental infractions or contraventions[3]).

Environmental criminal offences comprise the most serious violations of legal provisions regulating environmental protection. According to *Đurđić* and *Jovašević*, they include various unlawful activities, committed either by individuals or by legal entities,

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[1] Jovašević, D.: *Sistem ekoloških delikata-ekološko kazneno pravo*, Niš: Pravni fakultet Univerziteta u Nišu, 2009, p. 130.

[2] Jovašević, D.: Environmental Crime in the Republic of Serbia: Theory, Practice and Legislation, *Facta Universitatis Series: Law and Politics*, 9(2), 2011, p. 116.

[3] Al-Kawadri, L.D.: The Distinctive Features of European Criminal Law, *Lex et Scientia International Journal*, 1(21), 2014, p.123.

directed against the environment for which criminal sanctions are imposed.[4] *Situ* and *Emmons*, define environmental crimes as unauthorized acts or omissions that violate the law and that are therefore subject to criminal prosecution and criminal sanctions.[5] They further explain that these offences harm or endanger people's physical safety or health as well as the environment itself and serve the interests of individuals or organizations, such as corporations.[6]

Serbian criminal law is familiar with three types of environmental criminal offences: 1) genuine, 2) counterfeit and 3) subsidiary. Genuine environmental criminal offences are systematised within chapter 24 of the Criminal Code of the Republic of Serbia[7], entitled as "Criminal Offences against the Environment" and they directly protect the environment and its elements such as: air, soil, water, flora and fauna from various negative anthropogenic impacts.[8] These criminal offences include: 1) Environmental Pollution (Article 260), 2) Failure to Apply Environmental Protection Measures (Article 261), 3) Illegal Construction and Operation of Facilities and Installations Polluting the Environment (Article 262), 4) Damaging Environmental Protection Facilities and Installations (Article 263), 5) Damaging the Environment (Article 264), 6) Destruction, Damage, Transfer Into a Foreign Country or Into Serbia of Protected Natural Asset (Article 265), 7) Bringing Dangerous Substances into Serbia and Unlawful Processing, Depositing and Stockpiling of Dangerous Substances (Article 266), 8) Illegal Construction of Nuclear Plants (Article 267), 9) Violation of the Right to be Informed on the State of the Environment (Article 268), 10) Killing and Abuse of Animals (Article 269), 11) Transmitting Contagious Animal and Plant Diseases (Article 270), 12) Malpractice in Veterinary Services (Article 271), 13) Producing Harmful Products for Treatment of Animals (Article 272), 14) Pollution of Livestock Fodder and Water (Article 273), 15) Devastation of Forests (Article 274), 16) Forest Theft (Article 275), 17) Illegal Hunting (Article 276) and 18) Illegal Fishing (Article 277).

The so-called "counterfeit" environmental criminal offences are also systematised within the Criminal Code, but in its other chapters, dedicated to the protection of other social values such as human health and public safety. Finally, subsidiary environmental criminal offences are not incriminated by the Criminal Code, but can be found in some other laws regulating various aspects of environmental protection, such as Law on Plant Health[9], Law on the Appliances for Plant Health Protection[10] and Law on Veterinary Medicine[11].

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[4] Đurđić, V. & Jovašević, D.: *Krivično pravo: Posebni deo*, Niš: Pravni fakultet Univerziteta u Nišu, Centar za publikacije, 2013, pp. 214-221.

[5] Situ, Y. & Emmons, D.: *Environmental Crime: The Criminal Justice System's Role in Protecting the Environment*, London: Sage, 2000, p. 3.

[6] *Ibid.*

[7] Criminal Code of the Republic of Serbia, Official Gazette of the Republic of Serbia, No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014 and 94/2016.

[8] Jovašević, D.: Environmental Crime in the Republic of Serbia: Theory, Practice and Legislation, *Facta Universitatis Series: Law and Politics,* 9(2), 2011, p. 116. 109-134.

[9] Law on Plant Health, *Official Gazette of the Republic of Serbia*, No. 41/2009.

[10] Law on the Appliances for Plant Health Protection, *Official Gazette of the Republic of Serbia*, No. 41/2009.

[11] Law on Veterinary Medicine, *Official Gazette of the Republic of Serbia*, No. 91/2005, 30/2010 and 93/2012.

There is a close connection between administrative and criminal law in many countries[12], including the Republic of Serbia. Administrative provisions often determine, for example, the extent of permissible pollution and acceptable risks in certain areas, whereas criminal law links criminal liability to aggravated forms of violations of environmental regulations.[13] But, while an administrative offence (*i.e.* infraction or contravention) [14] is considered a morally neutral act against public administration (an "anti-administrative" act), the criminal offence[15] represents a materially unlawful behaviour that violates or endangers common public values.[16] In the Republic of Serbia, both-individuals as well as legal entities can be responsible for the aforementioned types of delicts. However, when it comes to economic offences[17], the situation is a bit specific since only legal entities and responsible individuals within legal entities can be liable for them. Economic offences represent a particular type of delicts that Serbian legislation has been familiar with since the period of socialism[18]. Some of these offences can also be directed against the environment, but they generally include less serious violations of environmental provisions than environmental criminal offences.

2. Legal entities as perpetrators of environmental criminal offences

Since the last decade of the 20th century, there has been an increase in the number of environmental crimes, antitrust crimes, fraud, pharmaceutical crimes and offences, labour law offences, corruption, economic and fiscal policies crimes committed by legal entities in the United States and Europe[19]. The effects of these criminal offences are long-term and particularly affect the environment and human health, causing huge economic and human life losses.[20] There is no doubt that some of the most destructive and costly environmental crimes have been committed by large corporations[21]. Hence, the corporations have been traditionally viewed as perpetrators of environmental crime, in large part because of their involvement in pollution and contamination cases[22].

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[12] Pereira, R.: *Environmental Criminal Liability and Enforcement in European and International Law*, Leiden: Brill, 2015, p. 221.

[13] *Ibid.*

[14] Administrative Offences Act, Official Gazette of the Republic of Serbia, No. 65/2013, 13/2016 and 98/2016.

[15] Criminal Code of the Republic of Serbia, Official Gazette of the Republic of Serbia, No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014 and 94/2016.

[16] Al-Kawadri, L.D.: The Distinctive Features of European Criminal Law, *Lex et Scientia International Journal*, 1(21), 2014, p. 123.

[17] Economic Offences Act, Official Gazette of the Socialist Federative Republic of Yugoslavia, No. 4/1977, 36/1977, 14/1985, 10/1986, 74/1987, 57/1989 and 3/1990, Official Gazette of the Federative Republic of Yugoslavia, No. 27/1992, 16/1993, 31/1993, 41/1993, 50/1993, 24/1994, 28/1996 and 64/2001 and Official Gazette of the Republic of Serbia, No. 101/2005.

[18] Economic Offences Act defines an economic offence as a socially harmful violation of regulations on economic or financial operations, which has caused or may have caused graver consequences and which is defined as an economic offence under the competent authority's relevant regulation (Article 2, Paragraph 1).

[19] Stănilă, L.M.: Criminal Liability of Legal Persons. History, Evolution and Trends in Romanian Criminal Law, *Journal of Eastern European Criminal Law*, 1(1), 2014, p. 109.

[20] *Ibid.*

[21] Shover, N. & Routhe, A.: Environmental Crime, *Crime and Justice,* 32(1), 2005, p. 326.

[22] Bricknell, S.: *Environmental Crime in Australia*, Canberra: Australian Institute of Criminology, 2010, p. 6.

Criminal offences against the environment committed by legal entities are usually referred to as corporate environmental crime, and constitute a major variety of corporate crime[23]. Corporate crime represents a subtype of white-collar crime that typically involves illegal behaviour by firms and their agents (executives and managers) in the pursuit of corporate benefit.[24] The behaviours of corporations that break laws protecting the environment were first referred to as "green crime"[25]. But, as the similarity between the motives and characteristics of environmental criminal offences committed by individuals working in corporations and the white-collar crime was noticed, they were more often referred to as "green-collar crime".[26]

Corporate environmental crime comprises a wide variety of unlawful behaviours committed by legal entities (i.e. corporations), including: environmental pollution due to excessive emission of certain chemicals or spill of waste-waters, degradation of the environment by illegal construction, illegal waste disposal etc[27]. The use of so-called "dirty technologies" that pollute the environment and the transfer of these technologies from developed to undeveloped countries[28] as well as failing to apply appropriate environmental protection measures with the intention to minimise production costs is also considered environmental crime[29].

Transnational corporations are responsible for the production and emission of a massive amount of carcinogenic pollutants resulting from the manufacture and processing of numerous industrial commodities including plastics, chemicals as well as a series of natural resource extraction processes. Not only do these activities have negative environmental impacts, but they also cause serious health risks.[30] The consequences of corporate environmental crime are long-lasting and devastating and may include the destruction of entire ecosystems, which is often referred to as "ecocide"[31]. Apart from causing immense financial losses, environmental corporate crimes frequently affect various, mostly poor and marginalised social groups whose incomes depend on natural resources, exposing them to so-called "environmental discrimination" and "environmental racism"[32]. That is the reason why it is extremely

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[23] Situ, Y. & Emmons, D.: *Environmental Crime: The Criminal Justice System's Role in Protecting the Environment*, London: Sage, 2000, p. 45.

[24] Simpson, S., Gibbs, C., Rorie, M., Slocum, L.A., Cohen, M. & Vandenbergh M.: An Empirical Assessment of Corporate Environmental Crime Control Strategies, *The Journal of Criminal Law & Criminology*, 103(1), 2013, p. 232.

[25] Frank, N. & Lynch, M.: *Corporate Crime, Corporate Violence*, Albany, NY: Harrow and Heston, 1992.

[26] Wolf, B: "Green-Collar Crime": Environmental Crime and Justice in the Sociological Perspective, *Sociology Compass,* 5(7), 2011, p. 500. and O'Hear, M.: Sentencing the Green Collar Offender: Punishment, Culpability and Environmental Crime, *Journal of Criminal Law and Criminology,* 95(1), 2004, p. 201.

[27] House of Commons-Environmental Audit Committee: *Corporate Environmental Crime-Second Report of Session 2004-5*, London: The Stationery Office Limited, 2005, p. 9.

[28] Ikanović, V.: *Odgovornost pravnih lica za krivična djela*, Banja Luka: Međunarodno udruženje naučnih radnika-AIS, 2012, p. 298.

[29] Ignjatović, Đ.: *Kriminologija,* Beograd: Pravni fakultet Univerziteta u Beogradu, Centar za publikacije, 2008, p. 152.

[30] Katz, R.: Environmental pollution: corporate crime and cancer mortality, *Contemporary Justice Review*, 15(1), 2012, p. 98.

[31] Kramer, R.C.: Climate Change: A State-Corporate Crime Perspective, *https://www.peacepalacelibrary.nl/ebooks/files/352205474.pdf*, 01.11.2017.

[32] Bullard, R.: Environmental Justice in the 21st Century: Race Still Matters, *Phylon*, 49(3-4), 2001, pp. 160-161.

important to establish an appropriate mechanism of state reaction to corporate environmental crime that would include the liability of both - legal entities as well as responsible individuals within them in accordance with the provisions of criminal law.

3. Criminal liability of legal entities for environmental criminal offences

The Republic of Serbia adopted its first Law on the Liability of Legal Entities for Criminal Offences in 2008.[33] According to this law, a legal entity may be liable for criminal offences constituted under a special part of the Criminal Code (including criminal offences against the environment, systematised within its Chapter 24) and under other laws if the conditions governing the liability of legal entities provided for by that Law are satisfied (Article 2). However, the Republic of Serbia, the autonomous province and the local-self government unit, that is, government authorities and authorities of the autonomous province and local self government unit cannot be liable for criminal offences.

Other legal entities that have been given public authorisations by the law also cannot be liable for criminal offences they committed when exercising these public authorisations (Article 3).

The law is applied on both - national as well as foreign legal persons that are held accountable for a criminal offence committed in the Republic of Serbia (Article 4, Paragraph 1). Furthermore, the law is applied to foreign legal entities held accountable for criminal offences committed abroad to the detriment of the Republic of Serbia, nationals thereof or national legal entities (Article 4, Paragraph 2) as well as to national legal entities held accountable for criminal offences committed abroad (Article 4, Paragraph 3).

According to the law, the term legal entity (also referred to as legal person) includes a national or a foreign entity that is considered a legal entity under positive legislation of the Republic of Serbia. The Law defines a liable person as a natural person that is legally or *de facto* entrusted with certain duties within a legal entity, as well as a person authorised, i.e. a person who may reasonably be considered authorised to act on the behalf of a legal entity (Article 5).

Criminal liability of a legal entity is based upon the culpability of the responsible person within that legal entity. However, a legal person can also be held accountable for criminal offences committed by the responsible person even though criminal proceedings against the responsible person has been discontinued or if the act of indictment has been refused (Article 7).

The following types of sanctions can be imposed on legal entities liable for criminal offences: punishment, conditional sentence and security measures (Article 12). Punishments for legal entities may include: fine and termination of the status of a legal entity. Both of them can be imposed only as principal punishments (Article 13).

When it comes to conditional sentence, it is worth mentioning that this type of sanction has some specific characteristics in cases of environmental criminal offences. Namely, for some criminal offences against the environment systematised within Chapter 24 of Criminal Code of the Republic of Serbia, the legislator has provided a

[33] Law on the Liability of Legal Entities for Criminal Offences, *Official Gazette of the Republic of Serbia*, No. 97/2008.

possibility for the perpetrator to be sentenced conditionally if he fulfils certain obligations related to protection, conservation and improvement of the environment or to the elimination of negative environmental impacts caused by his offence. This type of conditional sentence is prescribed for the following criminal offences: 1) Environmental Pollution (Article 260), 2) Failure to Apply Environmental Protection Measures (Article 261), 3) Illegal Construction and Operation of Facilities and Installations Polluting the Environment (Article 262), 4) Damaging Environmental Protection Facilities and Installations (Article 263), 5) Damaging the Environment (Article 264).

Although it has been rarely applied since its introduction to criminal legislation of the Republic of Serbia in 1977, this specific modality of conditional sentence designed especially for environmental criminal offences seems quite rational from the aspect of criminal policy[34]. This type of conditional sentence has particular importance in the cases of corporate environmental crime, since corporations generally have sufficient financial resources and capacities to undertake adequate measures designed to repair environmental damage. Hence, it seems that this type of conditional sentence is more suitable to be imposed on legal entities than on individuals as perpetrators of environmental criminal offences.

4. Criminal proceedings in cases of environmental criminal offences committed by legal entities

If legal entities appear as the perpetrators of criminal offences, the provisions of the Law on the Liability of Legal Entities for Criminal Offences and the Criminal Procedure Code are applied. This refers to environmental criminal offences as well. The Law on Liability of Legal Persons for Criminal Offences contains basic provisions regulating criminal proceedings against legal entities and explains how the provisions of Criminal Procedure Code should be applied in such cases.

The Law on Liability of Legal Entities for Criminal Offences prescribes that the criminal proceedings shall be, as a rule, instituted and conducted jointly against a legal entity and the responsible person and that a single judgment shall be passed (Article 35, Paragraph 1). However, if it is not possible to initiate and conduct criminal proceedings against the responsible person, due to the reasons specified by law, the proceedings may be initiated and conducted against the legal entity alone (Article 35, Paragraph 2). In case that a legal entity ceases to exist before the criminal proceedings has been initiated, the proceedings may be initiated and conducted against the responsible person alone (Article 35, Paragraph 3).

According to the Law on Liability of Legal Entities for Criminal Offences, the court in the territory of which a criminal offence has been committed or the commission attempted has the territorial jurisdiction in cases of criminal offences committed by legal entities (Article 36, Paragraph 1). But, if the proceedings are instituted against an accused legal entity alone, the court is competent in the territory of which: 1) a national legal entity is seated; 2) a foreign legal entity has a representative office or a branch thereof (Article 36, Paragraph 2).

The accused legal entity is represented by a proxy in criminal proceedings (Article 37, Paragraph 1). A proxy is a person who is authorised to represent a legal entity by the

[34] Stojanović, Z.: *Komentar Krivičnog zakonika*, Beograd: Službeni glasnik, 2017, p. 797.

law, other regulation or a decision of a competent authority (Article 37, Paragraph 2). A proxy is authorised to undertake any on behalf of an accused legal entity that could be undertaken by the defendant concerned (Article 37, Paragraph 3). An accused legal entity may have only one proxy (Article 37, Paragraph 4). A proxy of an accused foreign legal entity is a person managing a representative office thereof (i.e. a branch of a foreign legal entity operating in the Republic of Serbia) (Article 37, Paragraph 5).

For criminal offences punishable by fine imprisonment of up to three years, the public prosecutor may repudiate a criminal charge filed against a legal entity if he assesses that the initiation of criminal proceedings would not be viable (Article 45, Paragraph 1). When making such decision, the public prosecutor has to take into consideration one or several of the following circumstances: 1) that the legal entity has reported a criminal offence before finding out that prosecuting authorities have detected the commission of a criminal offence; 2) that the legal entity has prevented or compensated the damage and eliminated other detrimental consequences of the criminal offence; 3) that the legal entity has returned voluntarily the proceeds from crime; 4) that the legal entity has no assets or a bankruptcy proceedings has been instituted against such legal entity (Article 45, Paragraph 2). This provision is similar to Paragraph 3 of Article 284 of the Criminal Procedure Code, regulating the repudiation of criminal charge filed against a natural person due to the reasons of viability.

In addition to the elements laid down by the Criminal Procedural Code, the indictment and the proposal for an official charge made to a legal entity contain the name, seat and activities of the legal entity concerned, registration and personal numbers of the legal entity, first name and family name of the proxy thereof, citizenship and number of the passport if the proxy is a foreign national, and the grounds for liability of the legal entity concerned (Article 46).

At the main trial the first person to be heard is the accused responsible person, followed by the proxy of the accused legal entity (Article 47, Paragraph 1). The proxy of the accused legal entity who has not been heard yet may not attend the hearing of the accused responsible person (Article 47, Paragraph 2). The court may order the confrontation of the accused responsible person and the proxy of the accused legal entity be confronted if their respective statements do not match as to significant facts (Article 47, Paragraph 3). Upon the completion of the evidence-related proceeding, following the statements given by the prosecutor and the victim, the defence counsel of the accused legal entity, and the proxy of the accused legal entity may proceed, followed by the defence counsel of the accused responsible person, and the accused responsible person (Article 48).

It is important to note that in the majority of cases of environmental criminal offences, including those committed by legal entities, an abbreviated or summary criminal proceedings is conducted. Namely, according to Article 495 of Criminal Procedure Code, abbreviated proceedings is conducted in cases of criminal offences for which a fine or imprisonment of up to eight years can be imposed. The punishments that Criminal Code of the Republic of Serbia prescribes for criminal offences against the environment, suggest that abbreviated proceedings will be conducted in all cases of environmental criminal offences except from one: an aggravated form of Bringing Dangerous Substances into Serbia and Unlawful Processing, Depositing and Stockpiling of Dangerous Substances (Article 266, Paragraph 3). Namely, for aggravated form of this

criminal offence imprisonment from two to ten years and fine can be imposed, which makes it suitable for regular criminal proceedings[35].

Abbreviated criminal proceedings is generally designed for less complicated criminal cases that are considered less hazardous for the society.[36] It does not include investigation and is initiated on the basis of a motion to indict submitted by the public prosecutor or on the basis of a private prosecution, when there is justified suspicion that a certain person has committed a criminal offence. (Article 499, Paragraph 1). In such proceedings, before deciding whether to file a motion to indict or to dismiss a criminal charge, the public prosecutor may in the shortest possible period of time conduct certain evidentiary actions (Article 499, Paragraph 2).

The punishments that may be imposed on the perpetrators of criminal offences against the environment suggest that two specific institutions prescribed by Criminal Procedure Code can be applied in such cases: 1) Delay of Criminal Proceedings (Article 283) and 2) Hearing for the Imposition of a Criminal Sanction (Article 512).

The public prosecutor may delay criminal prosecution for criminal offences punishable by a fine imprisonment of up to five years if the suspect accepts one or more of the following obligations: 1) to repair the detrimental consequence caused by the commission of the criminal offence or compensate the damage caused; 2) to pay a certain amount of money to the benefit of a humanitarian organisation, fund or public institution; 3) to perform certain community service or humanitarian work; 4) to fulfil maintenance obligations which have fallen due; 5) to submit to an alcohol or drug treatment programme;

6) to submit to psycho-social treatment for the purpose of eliminating the causes of violent conduct; 7) to fulfil an obligation determined by a final court decision, or comply with a restriction determined by a final court decision (Article 283, Paragraph 1). The public prosecutor determines a time frame (that may not exceed one year) during which the suspect must fulfil the imposed obligations. Supervision of the fulfilment of obligations is performed by an officer of the authority in charge of the execution of criminal sanctions, in accordance with a regulation issued by the minister responsible for the judiciary (Article 283, Paragraph 2). If the suspect fulfils the imposed obligation within the prescribed time limit, the public prosecutor will dismiss the criminal charge and notify the injured party thereof (Article 283, Paragraph 3). In such cases, the injured party will not be entitled to submit an objection (Article 51, Paragraph 2).

In the cases of environmental criminal offences, the application of the aforementioned possibility should be taken into consideration only under some specific circumstances. However, it should not be applied if human health and other substantial social and environmental values have been endangered or harmed by the commission of criminal offence.[37]

For criminal offences punishable by a fine or a term of imprisonment of up to five years as the principal penalty, the public prosecutor may in his motion to indict request the holding of a hearing for the imposition of a criminal sanction (Article 512, Paragraph 1). The public prosecutor may propose such request if in his opinion, based upon the

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[35] Bugarski, T.: Krivični postupak za dela protiv životne sredine, *Zbornik radova Pravnog fakulteta u Novom Sadu,* 49(4), 2015, p. 1634.

[36] *Ibid, 1637.*

[37] Bugarski, T.: Krivični postupak za dela protiv životne sredine, *op. cit.*, p. 1636.

complexity of the case and evidence collected (particularly the arrest of the accused during the commission of criminal offence or his confession of the criminal offence) there is no need for the main hearing (trial) (Article 512, Paragraph 2).

If the accused has confessed the commission of a criminal offence punishable by a term of imprisonment of up to five years, the public prosecutor may propose the following punishments: imprisonment of up to two years, a fine of up to 240 daily amounts or up to 500.000 dinars or probation with the ordering of incarceration of up to one year or a fine of up to 180 daily amounts or up to 300.000 dinars and a probation period of up to five years. If the accused has committed criminal offence for which a fine or imprisonment of up to three years may be imposed, the public prosecutor may propose imprisonment of up to one year, a fine of up to 180 daily amounts or up to 300.000 dinars, up to two240 hours of community service, revocation of the driver's licence for up to one year, probation with the ordering of incarceration of up to one year or a fine of up to 180 daily amounts or up to 300.000 dinars and a probation period of up to three years, with a possibility of placing the defendant under protective supervision or imposing a judicial admonition (Article 512, Paragraph 3).

5. Public prosecutor's role in proving under Criminal Procedure Code of the Republic of Serbia

As current Criminal Procedure Code came into force, the Republic of Serbia has replaced its former mixed type of criminal procedure with the adversary criminal procedure, which is typical for common law systems such as the United Kingdom and the United States of America. This has made the role and the position of the public prosecutor even more important, similarly to the ones he has in the United States. Today, the Republic of Serbia belongs to legal systems that give the public prosecutor key role in criminal proceedings, particularly in its pre-investigative and investigative phase. [38]

As prescribed by Article 285, Paragraph 1 of Criminal Procedure Code of the Republic of Serbia, the public prosecutor conducts the pre-investigative phase of criminal proceedings. In this phase of criminal procedure, the public prosecutor can order the police to undertake certain activities in order to discover criminal offences and find the suspect. The police is obliged to act in accordance with public prosecutor's order as well as to inform him regularly about the conducted activities (Article 285, Paragraph 2). Furthermore, the public prosecutor is entitled to conduct the activities that the police already conducted on their own in accordance with the law (Article 285, Paragraph 4).

The initiation and conduct of investigation are within the jurisdiction of the public prosecutor and the police. According to Article 296 of Criminal Procedure Code of the Republic of Serbia, the investigation is initiated upon the order of the public prosecutor. There is no any legal remedy that the defendant could use against the order of the public prosecutor-neither the appeal to a higher court nor the objection to a higher

[38] Čvorović, D. Javni tužilac kao moćna figura savremenog krivičnog procesnog zakonodavstva, in: Blagojević, M. & Stevanović, Z. (Eds.) *Kriminal i društvo Srbije: izazovi društvene dezintegracije, društvene regulacije i očuvanja životne sredine*, pp. 223-236, Beograd: Institut za kriminološka i sociološka istraživanja, 2015, p. 225.

prosecutor.[39] The abbreviated criminal proceedings (conducted for almost all criminal offences against the environment) is initiated on the basis of public prosecutor's motion to indict, which is submitted to the court (Article 499, Paragraph 1). In this case, the court can control whether the motion to indict has been written in a proper manner (Article 501). In regular criminal proceedings, the public prosecutor conducts the investigation with the assistance of the police or other state bodies, if necessary (Article 298). On the other hand, in the abbreviated criminal proceedings, the public prosecutor conducts certain evidence collecting activities in the shortest term possible, prior to deciding whether to submit motion to indict or discard criminal charges (Article 499, Paragraph 2). It is obvious, however, that in both types of criminal proceedings, the public prosecutor plays key role in the gathering of evidence.

As it has already been explained, the public prosecutor has some other authorisations that significantly influence the course of criminal proceedings, especially in the cases of criminal offences for which less severe punishments are prescribed, including environmental crimes. He decides whether to conduct criminal prosecution in the situations where he can exercise discretion and he is entitled to apply the principle of opportunity of criminal prosecution, the principle of restorative justice as well as the principle of consensual justice in cases of plea bargain.[40] Similarly to the legislation of Germany, United Kingdom and the United States, in the Republic of Serbia, the efficiency of criminal proceedings largely depends on the efficiency of its pre-investigative and investigative phase, which are predominantly in the hands of the public prosecutor.[41]

6. Discovering and proving corporate environmental crime

The main source of information about the commission of environmental criminal offences are criminal charges submitted to the police or the public prosecutor. In the Republic of Serbia, criminal charges for environmental criminal offences are usually submitted by individuals, non-governmental organisations specialised for environmental protection, police officers, inspectors or representatives of the Institute for Nature Protection.[42] Data collected by the Statistical Office of the Republic of Serbia show that the average number of criminal charges submitted against adult perpetrators of criminal offences against the environment between 2006 and 2014 was 1906 per year. This number represents around 2,03% of all reported criminal offences per year. For example, altogether 2148 charges for criminal offences against the environment were submitted in 2014. From that number, 926 charges were rejected: 171 because the reported offence could not be considered a criminal offence, 152 because the prosecution was excluded, whereas in 603 cases, the reasons for rejection included: lack of evidence, lack of viability and agreement etc.[43]

Unreported, undocumented or unacknowledged environmental harms seem to be rather common, which makes the measurement of actual scope and dynamics of

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[39] Bošković, A., Pavlović, Z.: Problemski osvrt na organizaciju prethodnog krivičnog postupka u Republici Srbiji i Republici Hrvatskoj, *Hrvatski ljetopis za kaznene znanosti i praksu*, 23(1), 2016, pp. 194-195.

[40] Čvorović, D. Javni tužilac kao moćna figura savremenog krivičnog procesnog zakonodavstva, *op. cit.,* p. 224.

[41] *Ibid.*

[42] Bugarski, T.: Krivični postupak za dela protiv životne sredine, *op. cit.*, p. 1635.

[43] *Ibid.*

environmental crime rather difficult.[44] In many countries, it is assumed that the percentage of so-called "dark" or "hidden" figure of crime is particularly high when it comes to environmental criminal offences.[45] This means that the number of committed environmental criminal offences is much larger than the number of those that have actually been reported or recorded by law enforcement agencies.[46] The dark figure of environmental crime is considered very high for several reasons. Environmental criminal offences are closely related to other crimes such as corruption or frauds. So, some of them might be prosecuted as these other criminal offences instead. Moreover, environmental crimes are so-called "control crimes" and, as such, the number of reported cases is in direct correlation to the number of controls conducted by, for example, supervisory agencies in charge of monitoring. Finally, "dark figure" can be considered very high due to the lack of priority given to environmental crimes by enforcement authorities in comparison to other crimes.[47]

Environmental crimes are often committed by organised crime groups that have found a new and highly lucrative business segment in the illegal disposal of waste, trade in endangered species or timber etc.[48] Criminal organizations are premeditated associations designed to the smallest details regarding the role and mode of action of those who constitute them. Their members are often privileged individuals, placed on top of the social and political pyramid, who use their influence position, wealth, political and economic power to commit unlawful acts which remain undiscovered by the police and criminal justice system.[49] Transnational environmental crime is particularly related to transnational organised crime, as it requires the cross-border cooperation between various public and private actors. So, transnational and organised environmental crime represent the most profitable illegal markets in the world, similarly to the illegal trade in drugs, firearms and human beings.[50]

This makes environmental crime even more difficult to discover and prove, especially if it includes direct or indirect participation of powerful international corporations. Namely, corporative crimes usually involve multiple actors connected by organisational structure[51] and "criminality within organisations is a shared event, conditioned by one's organisational power, position and motivation"[52] .

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[44] White, R.: *Crimes against Nature: Environmental Criminology and Ecological Justice*, New York: Routledge, 2013, p. 107.

[45] Sahramäki, I.: Enforcement and Professional Constructions of Environmental Crime in Finland, in: Potter, G., Nurse, A. & Hall, M. (Eds.) *The Geography of Environmental Crime: Conservation, Wildlife Crime and Environmental Activism*, pp. 189-216, London: Springer, 2016, p. 191.

[46] See: Penney, T.: Dark Figure of Crime (Problems of Estimation), in: Albanese, J. (ed.) *The Encyclopedia of Criminology and Criminal Justice*, Oxford: Wiley-Blackwell, 2014, pp.1-6.

[47] Vagliasindi, G.M.: The fight against environmental crime in the European Union and its member states: a perspective of the enforcement system, in: De La Cuesta, J.L., Quackelbeen, L., Persak, N. & Vermeulen, G. (Eds) *The Protection of the environment through criminal Law*, Antwerpen: Maklu, 2017, p. 166.

[48] Gerstetter, C *et al.*: *Environmental crime and the EU: Synthesis of the Research Project "European Union Action to Fight Environmental Crime" (EFFACE)*, *op. cit.*, p. 40.

[49] Stănilă, L.M.: Organized Crime in Action: Trafficking of Human Cells, Tissues and Embryos in Romania, *Journal of Eastern European Criminal Law*, 2(1), 2015, pp. 59-60.

[50] Gerstetter, C *et al.*: *Environmental crime and the EU: Synthesis of the Research Project "European Union Action to Fight Environmental Crime" (EFFACE)*, Berlin: Ecologic Institute, 2016, p. 40.

[51] Gibbs, C. & Simpson, S.S.: Measuring Corporate Environmental Crime Rates: Progress and Problems, Crime, Law and Social Change, 51(1), 2009, p. 90.

[52] Simpson, S. S., Harris, A. R., & Mattson, B. A. (1995) Measuring corporate crime, in: Blankenship, M.B. (Ed.), *Understanding corporate criminality*, pp. 115–140, New York: Garland, 1995, p. 129.

7. Conclusion: challenges and recommendations

Environmental criminal offences committed by legal entities, particularly by powerful international corporations, are rather difficult to discover and prove for several reasons. Their consequences are devastating and long lasting and sometimes emerge several years after the commission of criminal offence. It is not always easy to measure the exact harm caused by these offences, particularly in cases involving the damage or destruction of protected natural assets such as, for example endangered species of animals and plants or their natural habitats. The costs of providing expert findings that can be presented in criminal proceedings for these criminal offences are often very high and their results are not always completely reliable.

The situation becomes even more complicate in cases of corporate environmental crime. Corporate environmental crime is often committed in transnational and organised form, together with other similar criminal offences such as human trafficking, illegal trade in drugs and weapons etc. It is closely related to various forms of corruption and abuse in both, public as well as private sector, which all makes its discovering particularly difficult. A rather low level of environmental awareness of citizens and state representatives and a prejudice that environmental criminal offences represent "victimless crimes" [53] contribute to a small number of reported perpetrators. Even when they are reported to the police or to the public prosecutor, it seems that these state bodies do not demonstrate a sufficient level of interest to treat these criminal offences as particularly hazardous and prosecute their perpetrators in accordance with that. Due to these circumstances, the number of persons accused and punished for these criminal offences is rather small in comparison to other criminal offences.[54]

In accordance with new Criminal Procedure Code of the Republic of Serbia, the public prosecutor plays a very important role in both, pre-investigative proceedings and investigation (i.e. evidence collecting activities in abbreviated proceedings). This refers to criminal offences against the environment as well, whether committed by individuals or by legal entities. The fact that criminal proceedings for all criminal offences against the environment (apart from one) is conducted in the abbreviated form means that the public prosecutor does not conduct investigation but only conducts some evidence collecting activities in the shortest term possible. Latest findings and reports confirm that criminal offences against the environment are extremely hazardous as well as that the cases of corporate environmental crime are very complicated and difficult for discovering and proving. That is the reason why it could be discussed whether it is still reasonable to conduct abbreviated criminal proceedings in the cases of environmental crime in general, and particularly for corporate environmental crime.

Within current legislative framework, some improvements regarding the discovering and proving of criminal offences against the environment and the prosecution of their perpetrators could be made if the public prosecutor and the police were more environmentally aware. Namely, their additional education about the nature, scope, consequences and victims of corporate environmental crime and related issues could increase their eagerness to react in these cases in a more active manner, particularly when it comes to collecting evidence and proposing expert findings.

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[53] Batrićević, A.: Ekološka krivična dela – zločini bez žrtve?, *Temida*, 16(1)/2013, pp. 113-132.

[54] Čavoški, A., Trajković, D.: Analiza statističkih podataka o kaznenopravnoj zaštiti životne sredine u Srbiji, Beograd: OEBS misija u Srbiji, 2011, p. 11.

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Comparative Review of the Role and Authorisations of Investigative Judge According to Previous Criminal Procedure Code and the Role and Authorisations of Preliminary Proceedings Judge According to the Current Criminal Procedure Code of the Republic of Serbia – A Step Forwards or a Step Backwards?

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Abstract

The reform of the criminal procedural legislation in the Republic of Serbia was commenced in 2001, by adopting the Criminal Procedure Code used until the current CPC entered into force. Through this reform, the legislator wanted to create a normative basis for a more efficient criminal procedure by incorporating simplified forms and a different concept of processing criminal matters. However, this process did not go as smoothly. During all these years, the amendments to the procedural norms happened very frequently, which is not, and should not be characteristic for regulations of this kind. The extent of wandering in the process of finding the solution in this matter can be best exemplified by the fact that during the year 2006, a completely new Criminal Procedure Code has been made but has never been applied. Apart from that, the current CPC was adopted in September of 2011, and it initially started to be applied as of January 15, 2012 in the procedures for criminal acts of organized crime and war crimes conducted before special departments of competent court, while in other procedures conducted for "classic" criminal offenses, it was applied only as of October 1, 2013, after several consecutive postponements and amendments.

As a result of all this, according to the novelties introduced while approaching the regulation of the problem of criminal procedure, the current CPC has made a fundamental break away from Serbian criminal procedural tradition.

Among the numerous radical novelties introduced into the criminal procedure legislature of Serbia, what stands out is that the investigation, as one of the phases of criminal procedure, is exempt from the supervision of the court and is placed in the competency of the public prosecution.

The essence of the changes in the investigation phase according to the concept of the current CPC, whether new legislative solutions are better than those before, whether they are in opposition to the Constitution of the Republic of Serbia or other basic principles of criminal procedure, are all only some of the issues we will attempt to address in this paper.

Key words: *investigative judge, preliminary proceedings judge, public prosecution, investigation, Criminal Procedure Code of the Republic of Serbia.*

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1. Introduction – the most important changes in the criminal procedural legislation of the Republic of Serbia in terms of investigation

The day of application of the Criminal Procedure Code[1], October 1, 2013, marks revolutionary changes in the criminal-procedural legislation of the Republic of Serbia. The concept of criminal proceedings was radically changed, and one of the most important changes is that the investigation, as one of the phases of criminal proceedings, was placed into the competency of the public prosecution (instead of being in the competency of the court as has previously been the case). In this way, the function of investigative judge has ceased, and in its place a completely new institution has been created – preliminary proceedings judge. "This is an essential turn in domestic criminal-procedural legislation, which has, even before passing the Code, during its creation, been recognized in public as the most characteristic novum that in a certain measure symbolizes this entire legal project."[2]

Therefore, through these amendments, the public prosecutions have taken over the authorizations previously in competency of the investigative judge, but not completely as the preliminary proceedings judge was left with a part of the authorizations previously in competency of the investigative judge related to decision-making regarding the limitation of human rights and liberties, or, the decisions regarding the measures employed to limit such freedoms and rights, as well as a part of evidence gathering procedures during by the use of which human rights and liberties are restricted.

In a narrower sense, the basic changes in the investigation phase introduced by the application of the new Criminal Procedure Code could be listed in seven points:

1. The investigation is placed in the competency of the public prosecutor, and unlike in the previous model it is not initiated by a court decision upon the motion of the public prosecutor, but it is formally initiated by an order of the public prosecutor.
2. Appeal is not allowed against the order of the public prosecutor regarding the initiation of an investigation.
3. The investigation can be initiated with the existence of the lowest level of suspicion, i.e., when there are grounds for suspicion that a specific person has committed a criminal offense, or grounds for suspicion that a criminal offense has been committed – which is a lower level of suspicion compared with previous legal solution where grounded suspicion was necessary to initiate an investigation.
4. According to the new legal solution, an investigation can be conducted both against a known suspect, and an unknown perpetrator of a criminal offense, unlike in the previous legal solution when investigation could be conducted only against a specific person.
5. The role of the court in the investigation is reduced to a very limited number of competencies, or actions that the preliminary proceedings judge can take. As previously stated, such actions include, for example, deciding upon certain measures of procedural coercion (where temporary arrest is particularly important as a measure of deprivation of liberty, or some other measure for ensuring the presence of the accused and an unhindered conducting of criminal procedure listed in Art. 188 of CPC), measures which

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[1] "Official Gazette of RS", no. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013.

[2] Ilić Goran, Majić Miodrag, Beljanski Slobodan, Trešnjev Aleksandar, *Komentar Zakonika o krivičnom postupku,* sixth and revised edition, Belgrade, The Official Gazette, 2013, pg. 685.

cannot be independently ordered by the public prosecution even with the fact that it is competent to conduct the investigation, but it is only authorized to propose those measures that are decided upon by the preliminary proceedings judge in the investigation phase. Furthermore, the court retained the competency to make decisions that are exclusively in the competency of the court, such as issuing a search order of apartments, other facilities or persons. In evidence gathering during the investigation, practically the largest authority that a preliminary proceedings judge can have to influence the evidence material would be accepting a complaint by the defense counsel and issuing an order to the public prosecutor to conduct a certain evidentiary action.

6. According to the new legal solution, in an investigation formally conducted by the public prosecution, certain evidence gathering procedures in favor of the defense can be done by the defendant and the defense attorney, with the obligation of notifying the public prosecutor of this in a corresponding manner. According to the previous legal solutions, the defense had only the possibility of proposing the obtaining of certain evidence in the investigation, while the investigative judge had the final say in this matter.

7. Finally, it is necessary to point out that, according to the new Criminal Procedure Code, the investigation is not an obligatory procedural phase, not only because it is not conducted in terms of the criminal offenses that are the subject of shortened procedure, as it was the case earlier as well, but also due to the fact that the prosecutor, instead of conducting the investigation, can always and without special conditions provided raise indictments, which was not possible according to the previous legal solution considering that that required either the consent of the investigative judge, or special conditions to be met from Art. 244, para.6 of the "old" CPC[3].

2. Investigative judge – authorities and competencies according to the previous Criminal Procedure Code

According to the previously valid Criminal Procedure Code[4], the basic function of the investigative judge was to commence and conduct an investigation. Apart from this function, the investigative judge decided upon appealing to the decision regarding temporary arrest by the police (now under the jurisdiction of the preliminary proceedings judge – which is one of the similarities of these two institutions), but they also had the authority to punish and give out parole sentences in a special kind of procedure.

Therefore, all authorities in the investigation phase and all competencies were given to the investigative judge. According to the earlier concept of criminal proceedings, the investigative judge was the central figure of the investigation, without whom no evidence could be gathered, nor any measure limiting human rights and liberties could be ordered, even, as we mentioned before, the investigative judge had the right to give out punishments and parole sentences in certain conditions. Through such solutions, the investigative principle contained in the provision of art. 17 of the previously valid Criminal Procedure Code was met. In accordance with this principle,

[3] See more: Bejatović Stanko, Škulić Milan, Ilić Goran, (ed.), *Priručnik za primenu zakonika o krivičnom postupku,* Udruženje javnih tužilaca i zamenika javnih tužilaca Srbije, Belgrade, 2013, pg. 104.

[4] "Official Gazette of FRY", no. 70/2001 and 68/2002 and "Official Gazette of RS", no. 58/2004, 85/2005, 115/2005, 85/2005 – st. law, 49/2007, 20/2009 – st. law, 72/2009 and 76/2010.

the investigative judge was obliged to gather evidence for the purpose of discovering absolute truth in an objective and impartial manner (even though the absolute truth in real life is practically impossible and is more of a philosophical category), both the facts against the defendant and those in favor of the defendant. In this way, the principle of material truth was also met as the basic principle of the former criminal procedure to which all other principles were subject. The procedural parties had only the option of proposing evidence, meaning evidential means, but the investigative judge was the one who made the final decision regarding this matter.

3. Preliminary proceedings judge according to the new Criminal Procedure Code

In the introductory section of this paper we generally described the authorities of the preliminary proceedings judge, and in this subtitle we will decidedly list all their authorities and competencies by paraphrasing legal provisions.

1. In the pre-investigation proceedings and the investigation, the preliminary proceedings judge adjudicates in cases specified in this Code (Art. 22, para. 2 of CPC);
2. The preliminary proceedings judge motions the Supreme Court of Cassation to designate other court of jurisdiction to conduct the criminal proceedings if it is obvious that this will facilitate the conduct of the proceedings, or if other important reasons exist (Art. 33 of CPC);
3. A person that has been arrested without a court decision, or a person that was arrested and not interrogated, must be, without delay, within 48 hours at the latest, surrendered to the competent judge for preliminary proceedings, and if this does not occur, they are to be released (Art. 69, para. 2 of CPC);
4. The preliminary proceedings judge appoints a defense counsel at the expense of the state based on a request of a poor defendant – they decide regarding the validity of the request, while the defense counsel is appointed by the president of the court by a court ruling (Art. 77 of CPC);
5. The preliminary proceedings judge decides upon relieving the defense counsel in the investigation phase and the pre-investigation procedure (Art. 81 of CPC);
6. The preliminary proceedings judge receives unlawful evidence excluded from the case file records by the public prosecution, keeps them until the criminal proceedings are concluded, after which they are destroyed in accordance with the law (Art. 84, para.2 of CPC);
7. The preliminary proceedings judge decides upon granting protected witness status until the confirmation of the indictment (Art. 107 of CPC);
8. When the ruling determining protected witness status becomes final, the preliminary proceedings judge issues a special order that presents a secret, confidentially notifies the parties - the defense counsel and the witnesses about the date, hour and location of the questioning of the witness (Art. 108, para. 1 of CPC);
9. The preliminary proceedings judge governs the protected witness interrogation in the investigation phase (Art. 109 of CPC);
10. The preliminary proceedings judge keeps the data about the protected witness (Art. 110, para. 1 of CPC);
11. The preliminary proceedings judge decides upon the appeal against the ruling of the public prosecutor rejecting the request for the exemption of an expert in the investigation phase (Art. 116 of CPC);

12. The preliminary proceedings judge decides upon the appeal against the ruling of the public prosecutor that rejects the motion of the defendant during the investigation, or that of their defense counsel to order an expert examination (Art. 117 of CPC);

13. The preliminary proceedings judge, on the motion of the public prosecutor, issues a reasoned order regarding the order to monitor suspicious transactions (Art. 145 of CPC);

14. The preliminary proceedings judge can order a bank or other financial organization to temporarily suspend the execution of a suspicious transaction, upon the written and reasoned request of the public prosecutor (Art. 146 of CPC);

15. In the investigation phase, the preliminary proceedings judge makes a decision regarding temporary confiscation of assets that are the subject of a suspicious transaction and decides upon their placement on a special account for safekeeping (Art. 147 of CPC);

16. The preliminary proceedings judge decides upon the appeal against the ruling of the public prosecutor that sets forth a monetary fine to a person refusing to enable the access to suspicious items, refusing to give the necessary information, or refusing to hand them over, and who id obliged to do so based on the request of the public prosecutor (Art. 148 of CPC);

17. In the investigation phase and the pre-investigation procedure, the judge for preliminary proceedings, upon the reasoned request of the public prosecutor, issues a search order (Art. 155 of CPC);

18. The public prosecutor and the police are obliged to submit a report to the preliminary proceedings judge if the search of apartment, other facilities or a person was conducted without a search order. The judge evaluates if all the conditions for the search were met (Art. 160 of CPC);

19. The preliminary proceedings judge makes a minutes on the destruction of the material obtained by special evidentiary actions if the public prosecutor does not initiate criminal proceedings within 6 months from the day of becoming familiar with the material, or if they decide to not use it in the proceedings, meaning, that the prosecutor will not initiate a procedure against the suspect (Art. 161, para.1 of CPC);

20. The preliminary proceedings judge conducts surveillance over the destruction of the material from the previous paragraph and makes a record of it (Art. 163, para 2 of CPC);

21. The preliminary proceedings judge issues an order of covert communication surveillance, based upon the reasoned motion of the public prosecutor and receives reports of the results of the surveillance from the bodies that had conducted the covert surveillance (Art. 166, Art. 167, and Art. 168 of CPC);

22. The preliminary proceedings judge decide upon the motion of the public prosecutor to expand the covert communication surveillance within 48 hours after receiving the motion, and makes a note regarding this in the report (Art. 169 of CPC);

23. Upon the completion of covert communication surveillance, the bodies conducting the surveillance deliver the recordings of the communication, letters, and other packages, as well as a special report to the preliminary proceedings judge. The judge makes a minutes regarding the opening of the materials, inspects the material, and then delivers the material in its entirety to the public prosecutor (Art. 170 of the CPC);

24. The preliminary proceedings judge issues an order regarding covert surveillance and recording, upon a reasoned motion by the public prosecutor and receives daily reports by the bodies conducting covert surveillance and recording (Art. 147, Art. 172, and Art. 173 of CPC);

25. Upon the reasoned motion of the public prosecutor, the preliminary proceedings judge issues an order regarding the conclusion of simulated affairs (simulated purchase, sales and providing business services, and concealment of bribe), and gathers daily reports from the bodies conducting the order, and after the completion of those actions, they collect the entire documentation regarding the conducted evidentiary action, visual, audio, or electronic recordings and other evidence, as well as a special report, and then deliver the material and the report to the public prosecutor (Art. 174, Art. 175, Art. 176, and Art. 177 of CPC);

26. Upon the reasoned motion of the public prosecutor, the preliminary proceedings judge issues an order regarding computer search of data, and upon the completion of the order, the body conducting the order delivers a report to the judge, who delivers it to the public prosecutor (Art. 178, Art. 179, and Art. 180 of CPC);

27. Upon the reasoned motion of the public prosecutor, the preliminary proceedings judge issues an order regarding the use of an undercover investigator appointed by a minister of Internal Affairs, the director of the Security Information Agency, or the director of Military Security Agency, takes reports from a superior official of the body conducing the order, and then delivers the entirety of the material from the report to the public prosecutor (Art. 184, Art. 185, and Art. 186 of CPC);

28. In the investigation phase, the preliminary proceedings judge examines the investigator as an undercover witness (Art. 187 of CPC);

29. If the public prosecutor does not call for a witness, an expert or another participant in the procedure during the investigation, the judge for preliminary proceedings conducts the calling upon the request of the defendant and their defense counsel (Art. 193 of CPC);

30. During the investigation, upon the motion of the public prosecutor, the preliminary proceedings judge issues a resolution ordering the measure of prohibition of approaching, meeting or communicating with certain persons to the defendant (Art. 197, and Art. 198 of CPC);

31. The preliminary proceedings judge issues an order prohibiting the defendant to leave the place of temporary residence during the investigation upon the motion of the public prosecutor (Art. 199, Art. 200 of CPC);

32. The preliminary proceedings judge issues an order regarding temporary suspension of driver's license of the defendant upon the motion of the public prosecutor during the investigation (Art. 201 of CPC);

33. The preliminary proceedings judge issues an order regarding ordering, confiscation or repealing a bail (Art. 202-207 of CPC);

34. During te investigation, the preliminary proceedings judge issues an order regarding ordering, extension or repealing the prohibition of leaving a dwelling (Art. 208, and Art. 209 of CPC);

35. During the investigation, the preliminary proceedings judge issues an order regarding detention of the defendant upon the motion of the public prosecutor (Art. 210-215, and Art. 294, para. 4 of CPC);

36. During the investigation, the preliminary proceedings judge decides upon the rights and duties of the detainees, visitations, written communication, pronounces disciplinary penalties and monitors the detainee (Art. 217-222 of CPC);

37. Upon official duty, or upon the motion of the parties and the defense counsel, the preliminary proceedings judge issues a resolution on the exclusion of transcripts that cannot be used in the proceedings before the termination of the investigation (Art. 237 of CPC);

38. Upon the motion of the authorized parties, the preliminary proceedings judge issues a resolution ordering temporary measures during the investigation, ensuring a claim for restitution which arose due to the commission of a criminal offense, or wrongful act designed by law as a criminal offense (Art. 257 of CPC);

39. The preliminary proceedings judge decides upon the appeal against the resolution of the public prosecutor pronouncing a monetary fine to the state and other bodies, and legal entities that did not cooperate with the public prosecutor in the investigation (Art. 282, para. 3 of the CPC);

40. The preliminary proceedings judge, upon the motion of the public prosecutor, issues an order on obtaining telephone communication records, authorized base stations or locating the places of the communication (Art. 286 of CPC);

41. The preliminary proceedings judge issues the approval to the police to obtain intelligence from detainees in their supervision with a mandatory presence of the defense counsel (Art. 288, para. 7 of CPC);

42. The preliminary proceedings judge decides upon the appeal to the resolution of the public defendant and the police regarding detaining the suspect, within 4 hours after receiving the appeal (Art. 294 of CPC);

43. During the investigation, the preliminary proceedings judge issues the approval to the public prosecutor to interrogate the witness or experts in cases when the summon to the defendant or their defense counsel was not delivered in accordance with CPC provisions, or if the investigation is conducted against an unknown perpetrator (Art. 300, para. 6 of CPC);

44. On the motion of the defendant or the defense counsel, the preliminary proceedings judge orders the public prosecutor to the undertake evidentiary actions within a certain date that the public prosecutor had refused to take. The order is issued on the motion of the defendant or the defense counsel within 8 days (Art. 302, para.2, and para.3 of CPC);

45. The preliminary proceedings judge decides upon the objections of the defendant or the defense counsel regarding irregularities during the investigation committed by the public prosecutor (Art. 312 of CPC);

46. During the investigation, the preliminary proceedings judge decides upon a plea agreement on the motion of the public prosecutor – first they make a written record, then decide with a verdict in case the plea is accepted, or with a resolution in case the plea is dismissed or rejected (Art. 313-319 of CPC);

47. During the investigation, the preliminary proceedings judge decides upon the testimony agreement of the defendant (Art. 320-326 of CPC);

48. During the investigation, the preliminary proceedings judge decides upon the agreement on testimony of a convicted person (Art. 327-329 of CPC);

49. The preliminary proceedings judge decides upon inquiries - examines the witnesses or experts outside the main examination upon the motion of the president of the panel (Art. 357 of CPC).

According to the aforementioned, all authorities and competencies of the preliminary proceedings judge can be divided into several groups:

- decides upon the rights and duties of the parties during the investigation, as well as the measures ensuring the presence of the defendant and the measures for unhindered conducting of criminal proceedings;
- issues orders to obtain and secure the evidence exclusively in the domain of judicial jurisdiction (official activities that would intrude into citizen privacy, or would infringe upon their freedom of communication, movement, and similar);
- decides upon defense counsel appeals to the decisions of the public prosecution made during the investigation that concern evidentiary actions, as well as defense counsel appeals on the decisions made by the police regarding detaining the defendant;
- issues approvals to the public prosecution when such is proscribed by law;
- decides upon inquiries – examines the witnesses or experts outside the main examination, upon the motion of the president of the panel;
- decides upon defense complains to the acts of the public prosecutor during the investigation; and
- decides on a plea agreement.

4. Comparison and analysis of the authorities and competencies of the investigative judge compared with the preliminary proceedings judge

Taking into consideration all that was stated in previous items, we can draw the conclusion that the preliminary proceedings judge is in fact an institution extracted from the institution of the investigative judge, with an important difference being that with the application of the Criminal Proceeding Code adopted in the autumn of 2013, practically half of the authorities and competencies previously given to the investigative judge according to previous legal solutions have been taken away from the preliminary proceedings judge, and those authorities and competencies have been transferred to the public prosecution. We specifically refer to the authorities and competencies related to conducting of the investigation and evidence gathering. This is a logical consequence of the legislator trying to place conducting of the investigation into the hands of the public prosecution. The preliminary proceedings judge had thus retained the authorities and competencies regarding limitation of human rights and liberties, which is a logical solution taking into consideration the constitutional provisions regulating that they are exclusively in the competency of the court. However, the preliminary proceedings judge cannot make any initiative nor has any authorities concerning the direction of the investigation by making decisions regarding the necessity of the investigation to be conducted, nor regarding the results of the investigation, but instead, the preliminary procedure judge is practically a kind of controller or supervisor that controls and supervises public prosecutions for the purpose of preventing the overstepping of authorities and the abuse of authorities and competencies against the defendants, or their basic human rights and liberties.

5. Evaluation of the investigative judge and the preliminary proceedings judge institution from the standpoint of respecting the equity principle of criminal proceedings, constitutionality, impartiality, and eficiency in the investigation and the overall quality of the investigation

When comparing the institution of the investigative judge with the institution of the preliminary proceedings judge, it is impossible to do so without analyzing the concept of an investigation that is not conducted by the public prosecutor and the concept of the investigation that has previously been conducted by the investigative judge, all in relation to the basic principles that the current and the previously valid criminal procedure code are based on.

Taking into consideration that the principle of a fair and legal trial is the most important procedural principle, meaning that it is an essential principle of criminal proceedings that is superior to all other principles, it is important to mention that its importance stems from two basic reasons:

- this principle coordinates the effect of all other criminal-procedural principles for the purpose of an equitable solution of a specific criminal matter that is the subject of the proceedings;
- this principle is the only principle with a pronounced ethical character, which is of essential importance for modern democratic countries that respect basic human rights and liberties.

Considering that the principle of equity is founded on another principle, with which it is often equated – the principle of party equality, or the principle of "equal arms", this raises the question of the possibility of respecting this most important principle according to the current legal solutions, considering that a very important phase of the criminal proceedings is placed into the competency of a state body which is at the same time a party in the proceedings?!

Often in literature[5] such solution of the legislator is justified as a necessary efficiency and speed of conducting the proceedings. However, this raises the question – is all that is fast at the same time of high quality, and is all that is efficient at the same time fair? The right to a fair trial is explicitly proscribed by the provision of Art. 6 of the European Convention on Human Rights and Basic Liberties. According to this article of the Convention, when deciding upon their citizen rights or duties, or upon a criminal accusation, each person has the right to a fair trial within a reasonable time limit before an impartial and independent court, educated on the law.

According to our opinion, the current concept of Serbian criminal proceedings is a serious step backwards – opposite to the cited Convention. We are of the opinion that it is difficult to imagine in practice that until making the accusation the defense has an equitable position in the criminal proceedings with the prosecuting body as another party in the proceedings. The public prosecution, despite being a constitutionally designated independent state body[6], is however a state body that has access to the

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[5] Zoran Pavlović, Nada Bjekić, Aleksandar Bošković, *Preparatory Hearing in Criminal Proceedings according to the Criminal Procedure Code of the Republic of Serbia from 2011*, in „Journal of Eastern-European Criminal Law", no. 2/2016, Law Faculties of the West University of Timișoara and the University of Pécs, Universul Juridic Publishing House, 2016, p. 162; Goran Ilić, et al., *op. cit.*, p. 685.

[6] Art. 156 of the Constitution of the Republic of Serbia.

entire government apparatus and the state force. On the other hand, because a large number of criminal offenses is "not covered" by mandatory defenses, very often the defendants who do not have sufficient funds defend themselves in the evidentiary actions proceedings before the public prosecution. This raises the question if it is even possible to talk about equality when on one side there is a state body with all the power of educated attorneys, and on the other side there is a layman without the possibilities or resources as the other party. Precisely the solutions of the earlier Criminal Procedure Code prevented this situation from happening, as the court, or the investigative judge, would definitely be a more substantial guarantee of impartiality then the public prosecution is now – a party in the procedure, even though the public prosecution, as previously the investigative judge, is obliged to also gather the evidence in favor of the defendant.

From the aspect of constitutionality of the basic key norms of the new Criminal Procedure Code, we can point to serious irregularities of the legislative solutions compared with the provisions of the Constitution of the Republic of Serbia[7]. Namely, the Constitution guarantees a high level of protection of basic human rights and liberties, but some key provisions in the Criminal Procedure Code, in our opinion, have an unconstitutional character, which from a wider aspect can be considered a violation of the right to a fair trial. According to the provision of Art. 32, para. 1 of the Constitution (the right to a fair trial) "everyone shall have the right to a public hearing before an independent and impartial tribunal established by the law within reasonable time which shall pronounce judgement on their rights and obligations, grounds for suspicion resulting in initiated procedure and accusations brought against them."

In accordance with this, the Constitution guarantees the right of the citizen, i.e. the defendant who is the subject of criminal proceedings, *for the court to enable a public hearing* on the grounds for suspicion, and not only *for the public hearing to be done before the court* as is the solution of the new Criminal Procedure Code. Therefore, all the provisions of the CPC that regulate the trial proceedings are against the Constitution, as well as providing evidence being primarily transferred to the parties, and therefore, evidence gathering, while the court is mostly excluded from that process.

When making these statements, we primarily refer to the unconstitutionality of the concept of the main trial, but at the same time, we believe that the provisions regulating the investigation phase are also unconstitutional. Regarding this topic, the investigation is now in the competency of the public prosecution and is initiated by an order, without the possibility of the court (in a functional sense, this should be the preliminary proceedings judge) to decide upon the grounds for suspicion that was the reason to initiate the criminal proceedings, and in the light of the aforementioned provision of the Constitution of the Republic of Serbia, Art. 32, para. 1, which guarantees that the *court* also conducts a hearing on the grounds for suspicion resulting in initiated procedure. This particularly relates to the legal provisions regulating the formal designation of the moment of initiating the criminal proceedings and ordering of criminal prosecution, which, in our opinion, cannot be logically explained nor can a reasonable explanation be given why this was proscribed. (The Criminal Proceedings Code differentiates the beginning of the criminal prosecution from the beginning of the criminal proceedings, which practically means that there is the possibility to criminally prosecute without

[7] "Official Gazette of RS", no 98/2006.

criminal proceedings, which in turn raises the question of how can criminal prosecution be initiated without it initiating the criminal proceedings?!).

From the aforementioned, we can draw the conclusion that the legislator is of the opinion that the investigation is not a criminal proceedings phase, even though it has formally regulated it to be so, as without a court session and opposition of parties before court there is no procedural relationship and therefore, no criminal procedure.

Within the evaluation of constitutionality, our opinion is that by violating the principle of constitutionality, or the principle of hierarchy of general legal acts, generally acclaimed rights of the citizens to legal security has also been violated, considering that this is an inevitable result of infringing upon the Constitution.

In earlier statements we said that the *ratio legis* of the new legislator was to improve the efficiency, or, the speed of criminal proceedings. In essence we can agree that it is definitely necessary to speed up the procedure and to work on its efficiency, as previously, the proceedings have lasted for too long and have often led to obsolescence, or to a nonsensical ruling after several years of the procedure due to altered circumstances. However, we are of the opinion that the speed itself of conducting the proceedings cannot be equated with the idea of efficiency of the criminal procedure. We believe that the speed of the proceedings is a relative term that can and must be evaluated in each procedure individually (in practice there are no two identical proceedings, they are differ depending on a series of factors such as the complexity of the evidence material, the number of defendants, objective circumstances, severity of the criminal offense, the presence or the lack of one or more of the defendants, the number of committed criminal offenses in the proceedings etc.). We are of the opinion that, even though there was a realistic need to implement more efficient criminal proceedings, this should not have happened at the expense of the material truth principle or the equity principle. Starting from the fact that the result of the criminal proceedings is not the truth in the sense that all that should have or could have been done has been done to prove the truth, and that in doing so, no right of defense or the party equity principle in the proceedings has been violated, this is hardly fair criminal proceedings. For this reason, from an ethical standpoint, this raises the question whether the principle of efficiency and speed make sense if they are placed above the principle of material truth and the equity principle.

Finally, in this section we can look back at the quality of the investigations conducted by the public prosecutions in practice. Without particularly justifiable reasons, the public prosecutions have hastily and without adequate preparations taken as their competency to conduct investigations. The deputies of public prosecutors had no necessary experience or the necessary infrastructure as the investigative judges used to have until time the new CPC started to be applied. We also believe that the method of organizing the investigations by the public prosecutions is wrong where "all people do all things", meaning that there are no specialized and trained public prosecutor deputies that would exclusively conduct the investigation, but instead all deputies perform all tasks in the criminal proceedings, from the start of the criminal prosecution to the moment of possible appealing of legal remedies. Would it not be better to model their work based on the court organization in so far (investigative judge – judge arbitrating the main trial), where individual deputies would be specialized and would conduct investigations, while other public prosecutor deputy would make the indictment and represent the public indictment before court?! In this way, the public prosecutor

deputies could deal with individual phases of the procedure in more detail, and would work faster and more effectively without damaging the quality of the investigations.

6. Conclusions and suggestions on amending the current legal solutions

Even though we stand behind the opinion that it is necessary to thoroughly change the current Criminal Procedure Code, or to pass a completely new one, in this chapter we will retain only the opinions regarding the necessary amendments to the provisions regulating the investigation.

In previous section, we mentioned the reasons why we believe that the new legal solutions are worse than the solutions contained in the previous Criminal Procedure Code in terms of regulating the investigation. This results in our opinion which is that it would be adequate and good to return the investigation into the competency of the courts, which would ensure the principle of equity, or the equality of parties in proceedings, it would ensure the principle of material truth and the principle of impartiality, all of which would certainly improve the quality of the investigation as well. At the same time, *a priori*, we wish to distance ourselves from the claim that after four years the public prosecutions did not advance in raising the quality of the investigation to a higher level. On the contrary, the improvement is obvious in practice, however, we only claim that the current solution is not applied adequately in practice – that all deputies of public prosecutors, as we stated, "do all actions" instead of individually specializing for specific phases of the procedure.

Most probably, this argument will be met in opposition argumenting that it is not good practice to go back to the old solutions when the new solutions are already used in practice and have shown that, by applying the new Code, the criminal proceedings have become more efficient and faster, which we do not dispute. However, on the other hand, as we previously stated, we believe that a step backwards has been made in terms of respecting the principle of material truth and the equity principle at the expense of favoring the principle of efficiency, which we deem to be impermissible.

Returning the institution of investigative judge into the criminal legislature would enable for the defendant, as a weaker party in the criminal proceedings, to have guarantees that an impartial body which is not a party in the procedure – investigative judge, without any possibility (with rare exceptions), interests, or habits, acts in accordance with the principle of the presumption of innocence as one of the basic principles of criminal proceedings, that they would fully respect the universal principle of conducting an investigation, which is that all evidence are gathered, both those in favor and those at the expense of the defendant.

Considering that "the theoretical knowledge always precedes legislative solutions"[8], we finally want to make our opinion clear that it is very easy to find a compromise solution to the amendments, or to passing a new Criminal Procedure Code, which is to return the investigation into the competency of the court, thus meeting the principle of constitutionality, material truth and fairness, and retaining the adversarial system in the main trial modeled on the Anglo-Saxon system (of course, with respect towards the uniqueness of the continental criminal-legal tradition and absolute ensuring of the right

[8] Darian Rakitovan, *Definition of Organized crime – squaring the circle!?*, in „Security concepts and policies – new generation of risks and threats", International scientific conference, 04-05 June 2017, Vol. II, Ohrid, Skopje, Faculty of Security Skopje, "St. Kliment Ohridski" University, Bitola, 2017, p. 346.

to defense), all of which would improve the principle of efficiency. This is particularly the case now when we know that "in the last two decades the Continental System and the Common Law System have succeeded to get significantly closer[9]". We are of the opinion that these amendments would in any case be in the spirit of the Constitution of the Republic of Serbia and the European Convention on Basic Human Right and Liberties, meaning the provision in Art. 6 of the aforementioned Convention.

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[9] Laura Maria Stănilă, *Legal person and the tax evasion offences. From theory to practice,* in „Journal of Eastern-European Criminal Law", no. 2/2015, Law Faculties of the West University of Timişoara and the University of Pécs, Universul Juridic Publishing House, 2015, p. 158.

The Problem of Disparity in Sentencing: A Comparative Insight and what can be done to Make Sentencing More Uniform?

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Abstract

Criminal sentencing is one of the most challenging fields in criminal law and also a subject that judges frequently find to be their least favorite. When imposing a sentence to a perpetrator who has been found guilty, a judge has to find the proper balance between two diametrically opposed tendencies. On one side, there is the tendency towards justified sanctions, which serve to fulfill the purpose of general deterrence and a sense of justice. On the other side, there is the unquestionable need to adjust the punishment to the circumstances of the case and the perpetrator. Only criminal law that considers both the interest of the general public and the victim, but also the circumstances of the case, is able to serve as a true keeper of state order and the peace. This paper contributes to debates on disparity in sentencing. The authors first explain the theoretical basis of sentencing and the purpose of punishment in modern criminal law. In the second part, they discuss the problem of disparity and equality in sentencing from the comparative perspective of four different legal systems: German, Croatian, Serbian, and that of the United States. In the final part, the authors provide an explanation on their standpoint regarding this issue.

Key words: *sentence, punishment, guilt, equality, disparity, individualization, deterrence, prevention, justice, purpose.*

Introduction

Criminal sentencing is one of the most challenging fields in criminal law. According to *Fletcher*, "the institution of punishment invites a number of philosophical queries".[1] It is also a subject that judges frequently find to be their least favorite.[2] When imposing a

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[1] G. P. Fletcher, *What Is Punishment Imposed For?* in R. L. Christopher, *Fletcher's Essays on Criminal Law* (Oxford – New York: Oxford University Press, 2013), p. 43.

[2] M. A. Myers and S.A. Talarico, *The Social Context of Criminal Sentencing* (New York: Springer Verlag, 2012), p. 7.

sentence to a perpetrator who has been found guilty, a judge has to find the proper balance between two diametrically opposed tendencies.

On one side, there is the tendency towards a justified sanction, which will serve to fulfill the purpose of general deterrence and sense of justice. On the other side, there is the unquestionable need to adjust the punishment to the circumstances of the case and the perpetrator. Only criminal law that considers both the interest of the general public and the victim, but also the circumstances of the case, is able to serve as a true keeper of state order and peace. This problem has also been recognized at the regional[3] and international criminal law level.[4]

This paper is intended to contribute to the debates on disparity in sentencing. In the first part, the authors explain the theoretical basis of sentencing and the purpose of punishment in modern criminal law. In the second part, they discuss the problem of disparity and equality in sentencing from the comparative perspective of four different systems: German, Croatian, Serbian, and that of the United States of America. The results of such analysis show certain mutual characteristics in sentencing and the authors describe those characteristics and categorize them as global problems in sentencing. In the final part, the authors explain their standpoint on this issue.

1. Challenges in sentencing: the *"antinomy"* of sentencing purposes and the need for an individual approach

The question of adequate sentencing is actually a question of what is the (dominant) purpose of punishment. This question has its philosophical background in *absolute* theory, established by German philosophers *Immanuel Kant* and *Wilhelm Friedrich Hegel. Kant's* idea of punishment as a "categorical imperative" of reaching justice and *Hegel's* idea of punishment as a double negation (negation of negation) led to the development of the idea of retribution as the main purpose of punishment. To punish the perpetrator of a criminal offence means to achieve *aequilibrium societatiis (malum passionis quod infligitur propter malum actionis).* The punishment is, therefore, released from its later effects on the perpetrator, victim or society *(poena absoluta ab effectu)*.[5]

Although absolute theories were later abandoned, their unquestionable value is in the fact that they provoked further debates, not only in German but also in literature of other countries. At the end of the 19th century, *Franz von Liszt* advocated (special) prevention as the main purpose of punishment. The punishment must serve only to prevent the perpetrator from further criminal activities. Conversely *Anselm v. Feuerbach* saw the purpose of punishment in general prevention and believed that the main purpose was, on the one hand to deter other potential perpetrators, and on the other to foster the trust of citizens in the functioning of the legal order.[6]

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[3] *See* Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union, Brussels, 30 April 2004, COM (2004) 334 final

[4] *See* e.g. S. D'Ascoli, *Sentencing in International Criminal Law: The UN and ad hoc Tribunals and Future Perspectives for the ICC* (Oxford and Portland, Oregon: Hart Publishing, 2011), p. 54.

[5] *See* e.g. H.-H. Jeschech and T. Weigend, *Lehrbuch des Strafrechts. Allgemeiner Teil. 5., vollst. neubearb. und erw. Aufl.* (Berlin: Duncker & Humblot, 1996), p. 66 and further.

[6] For details on both schools of thought *see* e.g. P. Novoselec, *Opći dio kaznenog prava, Peto, izmijenjeno izdanje* (Osijek: Pravni fakultet, 2016), pp. 362–364.

Nowadays there is the consensus that neither absolute theories nor theories of prevention provide a complete answer to the question of the purpose of punishment. Instead, modern literature argues that only a mixed and comprehensive approach, one combining both standpoints while adding something new, can solve the dilemma of why someone should be punished for a crime. In that sense, the discussion in this paper will follow a mixed approach.

According to representatives of mixed theories, the purpose of punishment has at least the following three aspects:[7]

1. General deterrence – in the abstract phase, when the legislator is proscribing punishment for certain criminal offences;
2. Retribution and justice – during sentencing, when the court decides on the duration of the measure; and
3. Special prevention (resocialization) – during the serving of sentence time.[8]

A mixed approach, although considered to be the best in modern society, is faced with the problem of *antinomy* of punishment purposes. If A, who is a highly socialized person (*e.g.* lawyer or professor) commits a negligent crime (*e.g.* traffic accident resulting in the death of a person), the purposes of retribution and (especially) of general deterrence require prison sentencing. At the same time, special prevention agitates strongly against such a sentence, since it will have negative consequences on the defendant's further life. Therefore, every society must strive to establish a complex sentencing system in which all of the above mentioned purposes will combine and complement each other in the best way possible.[9]

Another problem concerns the principle of legality and the demand that criminal law sanctions need to be as predictable as possible (*nullum crimen sine poena certa*). If understood literally, this principle requires that sentences are absolutely determinate already at the legislative level, as was established in the French *Code Pénal* (1791). However, such interpretation fails to take into account the circumstances of the exact case.[10]

If A steals 500 dollars from the cash register in a grocery store while the cashier is away on break, modern criminal law has to have the capacity to differ between at least three possible scenarios:

- A took the money because he or she needed it to buy his baby daughter medicine, food and diapers (and had no alternative because he or she is unemployed), or
- A took the money because he or she is a drug addict and needs the money to buy drugs, or
- A took the money because he wanted to buy himself a nice watch.

In each of these three hypothetical situations (and it is imaginable that there could be many more possible scenarios) the motives of the perpetrator and circumstances of

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[7] *Id*, p. 365.

[8] There are authors who claim that an individual approach towards sentencing is "an illusion" that leads towards arbitrarity and misuse of power by judges. *See* e.g. B. Schünemann, *Tatsächliche Strafzumessung, gesetzliche Strafdrohungen und Gerechtigkeits- und Präventionswertungen der Öffentlichkeit aus der deutscher Sicht* in H. J. Hirsch, *Krise des Strafrechts und der Kriminalwissenschaften* (Berlin: Duncker & Humbolt, 2001), p. 345.

[9] For the idea of *coalescence* of different punishment purposes *see* e.g. C. Roxin, *Strafrecht, Allgemeiner Teil, Band I: Grundlagen. Der Aufbau der Verbrechenslehre, 4. Auflage* (München: Verlag C.H. Beck, 2006), p. 85–87.

[10] P. Novoselec, *op. cit.*, p. 56.

the act are significantly different and they require very different approaches in sentencing. Therefore, it is essential that judges always have the option to weigh the opposed tendencies and to find a proper balance.

2. Comparative experiences: examples of Germany, Serbia, Croatia, and the United States

This section is devoted to the problem of disparity in sentencing in comparative law. An insight into comparative literature testifies to the problem of inconsistent penal policy being present in the majority of countries around the world. Disparity in sentencing, however, is not limited only to less developed legal systems; it is present in developed Western democracies with long-standing legal traditions. Here we analyze four legal orders, three being European: German, Croatian and Serbian. These three legal orders have much in common (since they are all established on the basis of German legal tradition). On the other hand, they are also very different: while Germany and Croatia are member states of the European Union, Serbia still does not enjoy such status; while Germany (or at least its Western part) is considered as one of the cornerstones of democracy and capitalism, Croatia and Serbia are transitional and post-socialist societies. The fourth system which will be analyzed in this chapter is the law of the United States. It has been chosen, not only as a representative of common law tradition, but also for its controversial approach to sentencing through mathematical algorithms and big data.

2.1. German experience: disparity in sentencing as a part of legal tradition

The problem of sentencing and concerns about disparity (and equality) in the sentencing process have been the subject of debates in German criminal law for so long that German authors have even developed a special branch called "sentencing law" (germ. *Strafzumessungsrecht*), and several monographs and textbooks have been written on the subject matter.[11] Such a development is not a surprise if one considers the fact that concerns about sentencing disparity in German law appeared soon after the first federal criminal code was passed in 1871 (germ. *Reichsstrafgesetzbuch*) which took the place of the diverse and partial criminal codes of the German states. From that moment on, different authors from both theory and practice have pointed to the legal uncertainty and disparity in sentencing as being one of the key issues of German criminal law.[12]

The majority of earlier writing on the topic of disparity of sentencing was based primarily on the personal experiences and observations of the authors (and was, therefore, deprived of any structured empirical confirmation of the research results). *Franz Streng* was the first German author who conducted a comprehensive empirical study on 500 criminal law practitioners (judges, prosecutor and legal trainees) in Lower Saxony and proved a very significant discrepancy in their attitudes towards proposed

[11] One of the very best and most comprehensive monographs on this subject in Germany is certainly the one by B.-D. Meier, *Strafrechtliche Sanktionen, 3. aktualisierte Auflage* (Heidelberg – Berlin: Springer, 2009).

[12] For a chronological overview of these standpoints *see* W. Frisch, *From Disparity in Sentencing Towards Sentencing Equality: The German Experience*, 28 Criminal Law Forum (2017), pp. 437–439.

sentencing. Participants were asked to suggest proper sentences in six different hypothetical cases. The results demonstrated very different views among the participants and those differences were mostly determinate by the following factors:

- participant's role in the criminal justice system (whether they were judges, prosecutors or trainees),
- which penal aims they thought of as being the most important,
- which court they were situated at etc.[13]

In more recent German literature, *Altenhain, Dietmeier* and *May* wrote a book exploring the disparities in sentences in cases of plea-bargaining.[14] German procedural law allows negotiation of a sentence between the prosecution, defense, and the trial judge in cases when the defendant wishes to give a full or partial confession for a criminal offence. The above mentioned authors conducted a comprehensive study on the sentencing policy of German criminal courts in such cases and found that there are quite substantial differences among specific courts, not only in all of Germany but also inside the German federal republics themselves.[15]

Several other German authors have also conducted similar empirical studies which all led to the mutual conclusion: the German sentencing system in practice is facing the problem of disparity and diversity.[16] In German literature, there is a consensus by the authors that despite the improvements throughout the years there is still a significant need to "further reduce sentencing disparity".[17]

After specifying the diagnosis of the problem, German authors and jurisprudence have started to put efforts into solving this important practical issue. One potential solution (often suggested by the offenders themselves) was to seek a quite rigid interpretation of the (Constitutional) principle of equality. The German Constitution[18] obliges courts to treat similar cases in the same manner. With reference to that Constitutional provision, several convicted offenders over the years have appealed their convictions, claiming that they contained much heavier punishments than others in related cases and therefore constituted a breach of the principle of equality. However, the German Federal Constitutional Court (germ. *Bendesverfassungsgericht*) had no understanding for such arguments. It rejected them by stipulating that the principle of equality requires only that the judgment was not based on any prejudice against the accused and that it is not arbitrary in the matter of law application.[19] German authors approve this standpoint and add that individuals have no right to have their case decided in the same manner as another similar case because each case has its own individual characteristics. Moreover, it is always possible that some mistakes have been made in certain cases and it would be unacceptable to repeat those mistakes only because of a similarity in the cases.[20]

Some German literature by criminologists and sociologists of criminal law has tried answering the question of what are the causes of sentence disparity in German

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[13] *Ibid.*

[14] K. Altenhain, F. Dietmeier and M. May, *Die Praxis der Absprache im Strafprozess* (Baden-Baden: Nomos Verlag, 2013).

[15] *Id*, pp. 116 f, 182 and further.

[16] For a brief overview of such studies *see* F. Frisch, *op. cit*, pp. 441–442.

[17] *Id*, p. 444.

[18] Article 3 of the German Constitution.

[19] F. Frisch, *op. cit*, p. 445.

[20] *Id*.

jurisprudence. The authors have mostly agreed on three main causes of the disparity, these being:

- the absence of objective criteria regarding the appropriate measure of punishment (meaning that the sentencing process is still under the substantial influence of the personal attitudes of judges, their inspiration and temperament)
- legislative reforms have failed to address the real deficits (since relevant provisions of the Criminal Code are too abstract to provide firm guidelines), and
- the available literature, as well as the jurisprudence of high courts, has failed to offer adequate solutions or guidelines.[21]

German authors are considering the possible solutions for ensuring consistency in sentencing *pro futuro*. Those solutions vary from ideas to establish quantitative algorithms similar as that in the U.S. (see further, at *3.4.*), to ideas of developing specialized bench manuals and data collection with information regarding other similar cases.[22] In addition, some authors point out that the legislator should avoid prescribing sentencing frames in the Criminal Code that would be too broad.[23]

2.2. Serbia

Serbian criminal law, as with other modern criminal legal systems nowadays, applies the system of relatively prescribed sentences. The legislator provides the framework and it is up to the judge to decide on a concrete measure, given the circumstances of each case. In that sense, the Serbian legislator also emphasizes the need for an individual approach when envisaging the prescribed punishment, the purpose of the punishment, and extenuating and aggravating circumstances as guiding principles in sentencing.[24]

The Serbian Criminal Code contains a specific provision regarding the purpose of the punishment.[25] In that provision, the legislator proclaims special and general deterrence as a dominant purpose, and it does not mention retribution at all. Serbian literature recognizes all of the three mentioned purposes of punishment (special and general prevention, retribution) and also points to the possible antinomy between them. As for retribution, some authors recognize this as one of the purposes of punishment and even claim that retribution is the guiding principle for the court when the latter needs to determine the maximum length of a sentence.[26]

Serbian authors have noticed the problem of sentencing disparity in the practice of Serbian courts, especially in cases of systematic corruption. *Jovan Ćirić* has explored several cases of bribery and reached the conclusion that Serbian courts tend to treat very similar cases in diametrically opposite ways. *Ćirić* accepts that it is not possible to establish jurisprudence that would be equal in every detail. However, he claims that the disparities he has spotted are far beyond acceptable. As an example, he describes two very similar cases of bribery. In the first case, a traffic police officer took EUR 100 from a participant in a traffic accident to write a report that would be more favorable for the driver. Despite the fact that he was married, with no previous convictions and the father

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[21] *See* details on all three causes in *id*, pp. 447-453.
[22] *Id*, pp. 454–469.
[23] C. Roxin, *op.cit,* p. 177.
[24] Serbian Criminal Code, Art. 54, para. 1.
[25] *Id*, Art. 42.
[26] Z. Stojanović, *Krivično pravo, opšti deo, XV. Izdanje* (Beograd: Pravni fakultet, 2009), p. 281.

of a minor child, he was sentenced to two years of imprisonment. In the second case, a financial inspector asked for EUR 35,000 from a company owner to write a report in which he would cover up the loss of US$200,000. The financial inspector was sentenced to just ten months of house arrest. The procedure lasted for ten years and the inspector married in the meantime, so the court took that as being a mitigating circumstance.[27] *Ćirić* finds similar cases regarding corruption in health, where a neurosurgeon was sentenced to four years of (unconditional) imprisonment for taking a EUR 300 bribe, while other doctors in similar situations were usually sentenced up to parole.[28] *Ćirić* points out that such cases have a very negative effect in the public because they undermine the reputation of the justice system. Moreover, the described practice fails to accomplish the effect of special prevention because the offender believes the sentence to be unjust and unequal.[29]

Ćirić also points to the fact that disparity in sentencing causes problems in the system of plea-bargaining, which was introduced in Serbian law relatively recently. Namely, the main purpose of plea-bargaining is to speed up criminal proceedings. If a defense counsel wishes to talk his client into pleading guilty he or she has to explain to the defendant what punishment is most likely to be imposed in such case. In case when there is no consistency in sentencing, the defense counsel is not able to estimate the sentencing issue and it is most likely that the defendant will not be motivated to plead guilty.[30] However, Serbian authors have not yet offered any practical suggestions on how to solve this problem.

2.3. Croatia

Similar as with Serbia, the Croatian Criminal Code also contains provisions with the purpose of providing certain guidelines for sentencing. In order to prevent disparity in sentencing, but at the same time leave enough discretional space for individualization of a sentence, Art. 47 of the Croatian Criminal Code regulates the *grounds* for sentencing and *aggravating and mitigating* circumstances. Grounds for sentencing point to the synthesis of general and special prevention (resocialization) along with retribution as goals that judges should be guided by when imposing a sentence. Aggravating and mitigating circumstances are listed only as an exemplar, as a guide in sentencing.[31]

Petar Novoselec points out that guarantees of objective sentencing are not posed only in substantive, but also in criminal procedural law. The Criminal Procedure Code regulates the court's duty to enlist and explain all relevant circumstances which were decisive in the sentencing. Failing to do so will constitute grounds for appeal. *Novoselec* emphasizes the need for individualization in sentencing, but at the same time, he warns that an "overemphasis of the principle of individualization can lead to the inequality of citizens by the law so it is the task of criminal law to establish a balance between these two principles".[32]

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[27] J. Ćirić, *Neujednačenost kaznene politike sudova* in S. Gavranović et al, *Kaznena politika kao instrument državne politike na kriminalitet* (Banja Luka: Ministarstvo pravosuđa Republike Srpske, 2014), pp. 148–150.

[28] *Id*, pp. 154, 155.

[29] *Id*.

[30] *Id*, p. 156.

[31] P. Novoselec, *op.cit*, pp.

[32] *Id,* p. 413.

However, despite the efforts of the legislator to avoid disparity in sentencing, it seems that such practice is not consistent in the interpretation of mentioned article. This problem has attracted the attention of several authors in Croatian literature. In one such empirical study, the authors conducted research into 160 verdicts of the County Court in Rijeka for the period between 1993 and 2002. Based on the results, they concluded that the Court, instead of having an analytical approach (which is much more reliable), used a "synthetic" approach in sentencing, meaning that the imposed sentence was "nothing more than the personal impression of a particular judge, which has no real connection with the mitigating or aggravating circumstances that the court tries to subsequently justify in the verdict".[33]

In another similar research conducted on 277 verdicts of all Croatian courts in the period between 1992 and 2002, *Damir Kos* concludes that courts paid much more attention to mitigating than aggravating circumstances and that they tend to mitigate punishment, sometimes even in cases where that was not the intention of the legislator.[34]

Other authors also criticize the superficiality of courts in the determination of aggravating and mitigating circumstances in Croatian jurisprudence. *Horvatić, Derenčinović* and *Cvitanović* note that Croatian courts tend to interpret certain circumstances as one or another without putting them in the context of the concrete case. They illustrate their standpoint on the example of treating a defendant's persistent denial of guilt as an aggravating circumstance, despite the unquestionable argument that the defendant is entitled to defend himself or herself in any way as he or she chooses.[35] Such examples are present in very recent jurisprudence of Croatian courts.[36]

In 2008, the institution of plea bargaining among the parties was introduced into Croatian criminal procedure law, where the court was assigned a passive role to control the legality of the settlement reached among the parties and to reject or accept such an agreement without the possibility of introducing alterations. Regarding the agreed sentence, the court is only authorized to check if such sentence is legal, or whether this sentence is in accordance with the stipulations of the Criminal Code.[37]

As opposed to the stipulated passiveness of the court, the State Attorney was given substantial freedom, both with regards as to what criminal offences they can settle with the defendant, and what sanctions they can offer to the defendant. Namely, plea bargaining is legally possible for all criminal offences and according to the direct stipulation of Article 49, Paragraph 2 of the Criminal Code, in case of plea bargaining between the State Attorney and the defendant, it is possible to apply up to a half milder

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[33] V. Grozdanić, Z. Sršen, and D. Rittossa, *The criminal justice policy of the municipal courts in the area of the County Court in Rijeka*, 11 Croatian Annual of Criminal Sciences and Practice 2 (2004), p. 607.

[34] D. Kos, *Zakonska i sudska politika kažnjavanja županijskih sudova u RH – ubojstvo, razbojništvo i teško djelo protiv sigurnosti javnog prometa*, p. 32, available at http://www.vsrh.hr/CustomPages/Static/HRV/Files/DKos-Zakonska_i_sudska_politika_kaznjavanja.PDF (30 Nov 2017)

[35] Ž. Horvatić, D. Derenčinović, and L. Cvitanović, *Kazneno pravo – opći dio II. Kazneno djelo i kaznenopravne sankcije, prvo izdanje* (Zagreb: Pravni fakultet, 2017), p. 245.

[36] E.g. the Municipal Court in Osijek qualified a defendant's persistent denial of theft "*without any shame or embarrassment*" as an especially aggravating circumstance. *See* Municipal Court in Osijek, No. 25. K-888/2013-173, p. 64.

[37] For details on the position of the court and introduction of plea bargaining *see* Z. Tomičić and A. Novokmet, *Nagodbe stranaka u kaznenom postupku – dostignuća i perspektive*, 28 Pravni vjesnik 3-4 (2012)

sanction than the lowest the court would normally be able to apply by observing all of the available mitigating stipulations.

Thus the sentencing was actually left to the parties, specifically to the State Attorney, which is clearly visible from the practice of the courts. Consequently, the County Court in Zagreb has not rejected any of the plea bargains among the parties since 2016, when the institution was first introduced.[38]

Since with plea bargaining the State Attorney always has to offer a sentence lower than the one that the defendant might expect in a criminal proceeding on trial before the court, or the defendant would not accept the offer, it is quite obvious that the application of the institution of plea bargaining additionally increases disparity in sentencing. This can be especially expected in cases when the State Attorney enters into plea bargaining with the defendant in order to reveal other criminal offences or perpetrators, and which is, according to Article 74, Paragraph 2 of the Act on the State Attorney's Office, a valid reason for plea bargaining. In such cases, sentencing often comes down to pure mathematics with the goal to mitigate the sentence, all the way to avoiding unconditional imprisonment. In such cases, there is a just reason for analyzing the purpose of sentencing, although the sanction is still within the extended legal framework of the aforementioned stipulation of Article 49, Paragraph 2 of the Criminal Code.

It can be clearly seen from the research conducted by the State Attorney's Office in 2010 on 6500 effective verdicts with the purpose of determining the expected sentencing for certain criminal offences that there was a large disparity in sentencing even before introducing the plea bargaining institution. Such expected sentences would be the starting point for mitigating in case of pleading guilty; however, the large disparity in sentencing disabled the providing of specific instructions.[39]

If, along with the aforementioned, we consider the increasing trend of plea bargaining, we can expect a further increase of disparity in sentencing. Namely, according to the research conducted at the County Court in Zagreb, the share of verdicts based on the plea bargaining of parties grew from 30% in 2013 to 60% in 2015 if we observe the cases from the jurisdiction of the Croatian State Prosecutor's Office for the Suppression of Organized Crime and Corruption, or from 1.4% in 2013 to 19% in 2015 if we observe the cases from the First Instance Criminal Department.[40]

2.4. U.S. and the digitalization of sentencing: can big data replace judges?

Sentencing is one of the most argued issues concerning the justice system in the U.S. It has been and still is the subject of many debates, academic and non-academic, especially in the context of disparity of sentences and racial discrimination in sentencing. Several criminological research projects illustrate that American judges tend to impose harsher sentences against black or Hispanic defendants.[41] In literature, it is

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[38] I. Turudić, T. Pavelin Borzić, I. Bujas, *Sporazum stranaka u kaznenom postupku – trgovina pravdom ili?*, 28 Pravni vjesnik 1 (2016), p. 148.

[39] http://www.dorh.hr/PresudaPoSporazumu, Naputak o pregovaranju i sporazumijevanju s okrivljenikom o priznanju krivnje i sankciji (30 Nov 2017)

[40] I. Turudić, T. Pavelin Borzić, and I. Bujas, *op. cit.*, pp. 147–148.

[41] *See* e.g. D. Steffensmeier, J. Ulmer, and J. Kramer, *The interaction of race, gender, and age in criminal sentencing: the punishment cost of being young, black, and male*, 36 Criminology 4 (1998), pp. 763–798.

considered that the chronological development of the sentencing practice in the U.S., from its beginnings until today, has undergone four stages (or four *generations*):

- "1G" approach, that relied only on the clinical and professional judgment of judges;
- "2G" approach, that started to rely on simple additive point scales and a few standardized factors;
- "3G" approach, which developed in the late 1970s and introduced empirically based and theory-guided sentencing with a broader selection of criminogenic factors; and
- "4G" approach as the most controversial, which introduced a computerized system of sentencing based on algorithms.[42]

The "4G" approach became the center of legal debates in 2016, after the Supreme Court of Wisconsin issued its appeals decision in *State v. Loomis*.[43] In 2013 Eric Loomis was charged with five criminal counts for a drive-by shooting. He denied participation in the shooting, but admitted to driving the car involved in the shooting. He pleaded guilty to two charges. During sentencing, the trial court referred to the COMPAS (*Correctional Offender Management Profiling for Alternative Sanctions*) risk assessment of Loomis's potential future risk of recidivism. COMPAS is used for several purposes but in the field of criminal sentencing, its main purpose is to estimate the risk of recidivism and to mark certain defendants as (non)eligible for parole or probation. The COMPAS assessment is based on an interview with the offender and information from his criminal records.[44] Based on such assessment, Loomis was sentenced to six years of imprisonment and five years of extended supervision.

Loomis appealed, claiming that the court's reliance on COMPAS constituted a breach of his right to due process. His appeal was based on the fact that COMPAS considers data relevant only to particular groups of offenders. In addition, the methodology used to make COMPAS reports is kept as a professional secret and cannot be subjected to objective and independent reviews. Therefore, Loomis objected that his conviction breached his right to an individualized sentence as well as his right to be sentenced according to accurate information and that the court had used gender at sentencing.[45] The Supreme Court did not uphold Loomis's arguments. Instead, it affirmed the decision of the trial court. Justice *Bradley* rejected all of Loomis's arguments by stating that he did not provide sufficient evidence that the sentencing court had actually considered gender, especially because COMPAS is based only on data which is publicly available. That presumes that Loomis had the opportunity to either explain or even deny any information that was used to make the relevant report, so he was able to verify the accuracy of the information which was used as the grounds for sentencing in this case. Justice *Bradley* also explained that the report was not the sole basis for the decision and that courts keep their discretion right and are still able to approach each

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[42] Details of all four *see* in T. Brennan, W. Dieterich, and B. Ehret, *Evaluating the Predictive Validity of the Compas Risk and Needs Assessment System,* 36 Criminal Justice and Behavior 1 (2009), pp. 21–22.

[43] Supreme Court of Wisconsin, State of Wisconsin v. Eric L. Loomis (further: State v. Loomis), No. 2015AP157-CR, July 13, 2016.

[44] *See* more in A. Christin, A. Rosenblat, and D. Boyd, *Courts and Predictive Algorithms* in Data & Civil Rights: A New Era of Policing and Justice, p. 3 and further; available at http://www.law.nyu.edu/sites/default/files/upload_documents/Angele%20Christin.pdf (25 Nov 2017)

[45] *State v. Loomis,* para. 7.

case individually.[46] Giving concurring opinion, Justice *Abrahamson* expressed her concern that the court had difficulty understanding a COMPAS risk assessment. She criticized the court's rejection to call the company that developed COMPAS to file an amicus brief.[47] In literature, *States v. Loomis* has been emphasized as a landmark decision that, unlike some other decisions, attempts to lower the growing enthusiasm for algorithms in sentencing.[48] However, we cannot help but notice that computerization of the sentencing process, if seen as the extent of a general trend of introducing artificial intelligence into the legal system,[49] could eventually lead to the complete objectification of sentencing. In such case, this could pose a new dilemma: will judges no longer be necessary?

2.5. Summary

In the previous sections, we closely examined the sentencing law, theory and practice of four countries. Each of these has its own specifics in the sense of a unique social and legal background, as well as in the different level of development of criminal justice as a system. While Germany and the U.S. are considered as world leading economies with a good justice infrastructure, Croatia and (especially) Serbia are still partially struggling with the repercussions of the transitional process. Yet it seems that they are all facing the same challenges regarding criminal sentencing. Therefore, challenges can be marked as being *global* ones. In our opinion, the comparative analyses have shown the following mutual characteristics (or issues) of sentencing policy:

1. There is a significant disparity in criminal sentencing;
2. It has existed for decades in each of the observed countries;
3. It contributes to legal uncertainty and raises the (constitutional) question of (in)equality;
4. This has a negative effect on preventive tasks of punishment and criminal law, because there is no predictability of sentences; and
5. There is no unique formula in how to solve this important theoretical and practical problem.

3. Appendix: is there a solution to the dilemma?

Using the comparative method led us to the conclusion that four different countries face almost the same sentencing issues, despite the fact that their legal background and justice infrastructure originates from very different social circumstances. All of the observed systems have great practical problems with sentencing disparity. Another conclusion that arises from an overview of comparative literature is that none of the

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[46] *Id,* para. 104-128.

[47] *Id,* para. 143 – 151.

[48] *See* more in D. Kehl, P. Guo, and S. Kessler, *Algorithms in the Criminal Justice System: Assessing the use of Risk Assessments in Sentencing,* Responsive Communities Initiative, Berkman Klein Center for Internet & Society, Harvard Law School (2017), pp. 20 – 21; available at https://dash.harvard.edu/bitstream/handle/1/33746041/2017-07_responsivecommunities_2.pdf?sequence=1 (30 Nov 2017)

[49] *See* e.g. N. M. Richards and W. D. Smart, *How should the law think about robots?* in R. Calo, A. M. Froomkin, and I. Kerr, *Robot Law* (Cheltenham, UK – Northhampton, MA, USA: Edward Elgar Publishing, 2016), pp. 3–22.

observed countries has yet managed to design and apply a model which would end disparity in sentencing as an unwanted practice. The U.S. has gone the furthest in these attempts. By implementing algorithms into the sentencing process, it has tried to maximize the objectiveness of judges, however not without legal consequences on basic constitutional principles and due process rights.

In our opinion, it is difficult to seek a potential solution in substantive criminal law, or to be more precise: in the provisions of a criminal code that concern sentencing. Sentencing is a very individual process that usually depends not only on the circumstances of the case but also on the characteristics of a specific judge: his or her personal attitudes, character, level of social awareness, consciousness, and similar. Therefore, it would be pointless to search for an adequate solution in this (subjective) area.

We believe that a realistic solution to disparity in sentencing can be found only at the procedural level, especially when it comes to institutions such as plea bargaining. We find plea bargaining is one of the very significant causes of disparity in sentencing. In systems such as Croatia, the main problem in sentencing during plea bargaining arises from the passivity of the court, which is generally against the accusatory principle (as one of the basic principles of criminal procedure). In such systems, the main role at this stage is played by the prosecutor. However, the prosecutor should not go beyond his original role – to prosecute. Instead, the court should become more involved and take over the key role in sentencing. If a prosecutor makes a final decision on sentencing (as is the case in Croatia), without even the option for the court to react in an adequate manner, then the prosecutor has *de facto* taken over the role of running a trial. This makes the criminal proceeding lose its basic characteristics and raises the question of due process.

A suitable idea for solving the problem of disparity in sentencing, in our opinion, is to consider the solution of Art. 19e of the Croatian Criminal Procedure Code. This provision predicts the possibility of establishing a specialized type of court – a high criminal court – that would be entitled to act exclusively as an appeal court for the entire state.[50] Such court would decide on appeals against decisions of all criminal courts (both at the municipal and county level) and would be in a position to have a comprehensive overview into the jurisprudence in a certain country. The concentration of such authority in the hands of one entity would, in our opinion, also contribute to solving (or minimizing) the problem of disparity in sentencing. This solution could be a proper one for smaller countries, such as Croatia or Serbia. For larger countries, such as Germany and the U.S., we believe that the only adequate solution would be if such high court would establish specialized councils divided by types of criminal offences. These councils would then monitor and harmonize sentencing policy for the entire country (each council for offences from their jurisdiction).

[50] Unfortunately, a high criminal court has still not been established in Croatia due to financial problems (lack of sufficient financial funding).

The Role of the Public Prosecutor in Criminal Proceedings Against Unsafe Road Traffic Control

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Abstract

Traffic accidents occur around the world on a daily basis, the situation being the same in the Republic of Serbia. In most cases, the behavior in drivers in traffic and their omissions are the causes of traffic accidents. In this paper, we presented the criminal offense of unsafe road traffic control, and, although it exists in the Criminal Code provisions, it rarely occurs in practice, and even rarer are criminal proceedings against traffic controllers due to omissions in road traffic control, especially in terms of road traffic signalization. We focused on the role of the public prosecutor in carrying out the investigation of traffic accidents, and the need to recognize in these procedures the omissions of not only the drivers but also other traffic participants, as well as the omissions of the traffic controllers, so as to accordingly initiate and conduct criminal proceedings against traffic controllers.

Key words: *traffic accidents, investigation, public prosecutors, traffic signalization, traffic controller.*

1. Introduction

Traffic accidents occur around the world on a daily basis, the situation being the same in the Republic of Serbia. Most often, these are traffic accidents with pecuniary damage that, according to their features, are misdemeanors from the area of public transport safety. There are, however, traffic accidents which result in injuries or death which, according to their features, are criminal offenses, whereupon the participants in the traffic accident are mostly known. In addition, a number of traffic accidents occur with no known perpetrator, due to the driver leaving the crime scene.

After a traffic accident, the officials who perform the investigation, mostly the police, arrive at the scene, much less often the competent public prosecutors. In the pre-investigative procedure, in accordance with the provisions of the Criminal Procedure Code[2] (hereinafter: CPC), appropriate evidence is collected and a decision made whether criminal proceedings are to be initiated, and also, which type – a misdemeanor or criminal offense.

The criminal proceedings are initiated against one of the drivers, as in Serbia it is almost unthinkable that another traffic participant is responsible for the occurrence of a traffic accident, especially a traffic controller. There are rare examples of initiating

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[2] Code of Criminal Procedure, Off. Gazette of the Republic of Serbia, nos. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014. – Article 43: Rights and duties.

criminal proceedings against traffic controllers after the investigation, due to committing a criminal offense of unsafe traffic control referred to in Art. 295 of the Criminal Code[3] (hereinafter: CC). This is rare even in the course of an investigation conducted against one of the drivers, even if the results of a road traffic accident investigator report on the causes of traffic accidents (especially with regard to a criminal offense of endangering road traffic from Art. 289 of the CC and a grave criminal offense against the safety of road traffic referred to in Art. 297 of the CC) indicate that the omissions of road traffic controllers are causally linked to the occurrence of a traffic accident. Traffic controllers are persons in charge of maintaining roads or monitoring the work of professional drivers.

The reason for this stance is unremitting official data, both older and newer, which indicate that this criminal offense from the group of criminal offenses against public transport safety, whether in a basic or qualitative form, is an extremely rare judicial practice.[4] The above data indicate that in court practice, the number of initiated and conducted criminal proceedings against traffic controllers is negligible, and the number of legally convicted persons for this criminal offense is practically on the level of statistical error, which some authors have analyzed.[5] Also, the media has written about this.[6]

Therefore, it is justifiable to assume that the criminal offense of unsafe traffic control is has a negative rating, especially in relation to bus and freight traffic and road maintenance operations. This is where the issue of active measures carried out by a competent public prosecutors is relevant, who, at different stages of the criminal proceedings, from the pre-investigation procedure and during the investigation of a particular traffic accident should identify not only the omissions by drivers, but also those by different categories of traffic controllers, *i.e.* a particular company which has contributed substantially to the cause of a traffic accident. Consequently, we investigate

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[3] Criminal Code, Off. Gazette of the Republic of Serbia, nos. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/16.

[4] Judicial statistics - adult criminal offenders no. 194 dated July 1, 2010, Republic Institute for Statistics and Informatics of the Republic of Serbia for the period 2005-2009: of 8,140 filed criminal charges for all criminal offenses in this group – 8,076 criminal charges referred to three criminal offenses – endangering traffic in the primary or qualified form, endangering traffic by dangerous acts and dangerous means and failing to assist persons injured in a traffic accident. Of a total of 6,552 indictments issued for all criminal offenses in this group – 6,502 indictments related to these three offenses. Of a total of 6,035 convicted persons during 2009, some 5,997 persons were convicted of all three criminal offenses in this group.

Statement of the Statistical Office of the Republic of Serbia no. 192 dated July 15, 2015 - Judicial Statistics: adult criminal cffenders in the Republic of Serbia, 2014: of 7,439 filed criminal charges for all criminal offenses in this group, only 18 criminal charges referred to the offense of unsafe traffic control. Of that number, only 3 persons were indicted, and 2 persons were convicted in 2014 for the criminal offense of unsafe traffic control in the all courts on the territory of the Republic of Serbia.

Statement of the Statistical Office of the Republic of Serbia no. 194 dated July 14, 2017 - Judicial Statistics: adult criminal offenders in the Republic of Serbia, 2016: of a total of 7,805 criminal charges filed for all criminal offenses in this group, only 7 criminal charges referred to the offense of unsafe traffic control. Of that number of criminal charges filed for this criminal offense, only 1 person was convicted in 2016 for the criminal offense of unsafe traffic control in all the courts on the territory of the Republic of Serbia.

[5] Stojadin Jovanović, Jovica Vasiljević, The criminal offense of unsafe traffic control in the period 2005-2009, Collection, 14th International Scientific Congress Synergy, 2013, 341.

[6] http://www.novimagazin.rs/vesti/rulet-na-drumovima/0/nedeljnik79., preuzeto dana 22.7.2016.

the possibility at their disposal of initiating and conducting criminal proceedings against traffic controllers as well as traffic participants for unsafe traffic control.

Due to a limited scope of work, special attention will be paid to the aspect of traffic signalization in view of the important novelties in the regulations related to this area - adopted first in December 2014, after the five-year application of the still valid Law on Traffic Safety, and then in September 2017.

Another motive for writing this paper is the recent tragic event in which two people died when a driver of a passenger vehicle with foreign registration plates misread traffic signalization and signs that led to him turning towards the unopened part of the motorway[7] and hitting a concrete barrier on the 12th kilometer section after the termination of the motorway.

2. The main features of the criminal offense of unsafe road traffic control

We deem it necessary to present this criminal offense in the shortest time possible, as well as its special features.

The first special feature of this criminal offense is that it is a *delictum proprium* offense, *i.e.* the **perpetrator** can only be an official or a person entrusted with supervision. The concept of an official and responsible person is defined according to Art. 112, para. 3, or para. 5 of the CC. An official person is a legal executor of the basic form of this criminal offense from the beginning of the application of the Criminal Code. However, in judicial practice, different categories of persons responsible dominate as perpetrators of these crimes (managers, conductors, railway workers, etc.).[8]

The CC foresees two forms of misconduct. In the first case, the perpetrator of the criminal offense may be an official and authorized person, and in the second case only an authorized person. Regarding the authorized person as the perpetrator, the difference is only in the nature of the responsibility of the authorized person who acts irresponsibly within these two forms of misconduct.

The execution of the first form of offense (from para. 1) consists in unsafe traffic control in its different manifestations: in relation to the condition and maintenance of roads and facilities, means of transport or public transport, realization of the given driving conditions, or unsafe driving. The execution is of a blanket character, since the responsibility of control and the contents of that responsibility, as well as the authorized and official persons are stipulated by appropriate road traffic regulations (by-laws and internal regulations). Therefore, the official and authorized person, their supervisory powers and the failure to perform them are determined in each specific case. This offense can be committed in both ways: by non-acting or acting.

The execution of the second form of offense (from para. 2) consists in issuing a driving permit to a driver who, due to fatigue, the influence of alcohol or other reasons,

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[7] http://www.blic.rs/vesti/hronika/automobilom-se-zakucao-u-betonsku-barijeru-dve-osobe-poginule-na-neotvorenom-delu/yb3t3b9, downloaded on Nov. 12, 2017: Two people were killed, while the driver of the car received multiple injuries in an accident that occurred around 4 a.m. on the unopened section of Corridor 11 from Lajkovac to Ub.

[8] Bora Čejović, Criminal law in court practice – book two, special part, Yugoslav Institute for Work Productivity, Belgrade, 1986, 940.

is not in a position to operate a vehicle in a safe manner, or issuing a registration for a defective vehicle. The legal description also uses a general clause (other reasons for which the driver is not able to safely operate a vehicle), which means that the authorized person issued a driving permit or allowed a vehicle to be operated by an unfit driver, or a person who is in a depressed mental state or a particular affective state, or under the influence of certain drugs.[9]

There is also an unusual example from previous court practice in which a driver who allowed a bus conductor to operate the vehicle was found guilty and punished for the criminal offense referred to in Article 295, para.2 of the Criminal Code.

Example 1. "The defendant acting as a responsible person entrusted with the handling of the vehicle permitted the conductor to operate the bus, although being aware that he was not in a position to safely do so, since in addition to his driving license to drive a certain vehicle category, he was also to be subjected to a medical exam. In the established actions of the defendant, there all the features of the criminal offense of unsafe traffic control referred to in Art. 199, para. 2 in regards to para. 1 of the CPC." [10]

The consequences of both forms of offenses are a danger to the life or the health of people or property on a large scale.[11]

With regard to the **form of guilt**, the offense referred to in para. 1 can be executed with intent or from negligence, and only by intent in para. 2. In order to have intent directed at the execution of the offense from para. 2, it is necessary that the authorized person possessed knowledge that the driver or vehicle were not in a state to drive or be driven safely, and that, despite this knowledge, the operation was approved. This subjective element of the crime indicates an awareness of the perpetrator of the offense of these circumstances and his consent to cause danger to traffic, so that this form can be executed only with intent, which is very clearly pointed out in the above example when the driver allowed the conductor to drive even though he was unable to safely operate the vehicle.

If the authorized person had no knowledge that the driver was unable to drive safely or that the vehicle was not working properly, this form of criminal offense is not applicable, but there may be an offense from para. 1 whereupon the authorized person was required, before giving approval, to check the driver's suitability but failed to do so.[12] In addition, a negligent performing of a duty by the authorized person does not exclude the responsibility of another authorized person who has also acted improperly, when the offense appears as a consequence of their joint action, and thus, each of them is responsible for their actions.[13] Therefore, court practice raised the issue of the responsibility of several persons for the alleged omission, and thereby it was considered

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[9] Nikola Srzentić, Stajić, A., Kraus, B., Lazarević, LJ., Đorđević, M., A commentary of the Criminal Code of the SR of Serbia, SAP Kosovo and SAP Vojvodina, Savremena Administracija, Belgrade, 1986, 622.

[10] Verdict of the District Court in Belgrade, CC 1532/91 and the verdict of the Fifth Municipal Court in Belgrade K.1679/89, Intermeks court practice database.

[11] According to the legal understanding of the Criminal Department of the Supreme Court of Serbia on April 17, 2006, large-scale property is considered property whose value exceeds the amount of 1,200,000. dinars. This legal interpretation is still in place.

[12] Nikola Srzentić et al., op. cit., 622- 623.

[13] Ljubiša Lazarević, CC Commentary, Savremena administracija, Belgrade, 2006, 741.

that it could be a matter of coincidental negligence,[14] which is especially present when it comes to rail transport.

Para. 3 stipulates the negligent form but only in relation to the basic form of this criminal offense.

The criminal offense of unsafe traffic control refers to all types of traffic except air traffic, since these offenses are stipulated in the criminal offense of endangering the safety of air traffic (Art. 291 CC).

3. Certain regulations significant for traffic controller responsibility

The most important traffic regulations which mention a traffic controller, the obligations and responsibilities in certain situations are the Law on Road Traffic Safety[15] (hereinafter: LRTS) and the Law on Public Roads[16] (hereinafter: LPR). These regulations are important not only for criminal responsibility, but also for compensation claims, which as a rule follow after the termination of criminal proceedings in connection with traffic accidents.

The provisions of **Art. 156 (Chapter VIII) of the LRTS** stipulates the following: "Public roads must be designed, constructed, reconstructed and maintained so that traffic can be carried out smoothly and safely and fulfils the stipulated conditions (para. 1)." Also, it is stipulated that "The traffic controller is obliged to monitor road traffic safety, provide independent projects in order to identify hazardous sites at least once a year, as well as carry out independent risk mapping projects on road sections and identify the most dangerous sections, perform expert analyzes of high risk sections (black spots), make an individual project for the rehabilitation of risky sections and dangerous places and undertake measures for remediation of high-risk road sections and hazardous sites in accordance with projects (para. 6); in the case of a traffic accident with at least one fatality, the traffic controller is obliged, on the basis of an independent assessment to determine within a month the cause or contribution of the public road to the occurrence of the accident or the consequences of a traffic accident and take measures in order to improve the public road (para. 7)."

To date, these provisions, as well as everything else mentioned herewith, in the longest article of the LRTS, have remained a critical zone in terms of the application of the LRTS provisions, due to the fact that the relevant by-laws have not yet been adopted. As a result, the traffic controller has certain obligations, but only declaratively. In essence, there are no checks carried out in practice if there are road failures that are causally related to the occurrence of a traffic accident and the consequences thereof.

One of the problems that arise in practice in the case of traffic accidents are the potholes that are inadequately marked by traffic signs and in the manner stipulated by the provisions of the LRTS but also by the relevant by laws.

When it comes to traffic signs, the LRTS prescribes the following: "Traffic signs must also mark danger spots of a temporary character, especially those caused by road

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[14] Verdict of the Supreme Military Court of Croatia, Kž 1575/64, according to Bora Čejović, op. cit., 940 - 941.

[15] Law on Road Traffic Safety, Off. Gazette of the Republic of Serbia, nos. 41/2009, 53/10, 101/11,32/13,55/2014.

[16] Law on Public Roads, Off. Gazette of the Republic of Serbia, nos. 101/2005, 123/2007, 101/2011, 93/2012, 104/2013

damage or its disabling, as well as temporary restrictions and provisional traffic prohibitions, and these signs must be removed as soon as the reasons for which they were placed are removed (Art. 132, para. 2)."

However, the LRTS and the Rulebook of Traffic Signaling (hereinafter: RTS 2014)[17] overlook stipulating a special traffic sign that would warn of potholes in the road, but at the same time, vertical signaling is not the only way to alert drivers to danger. Thus, if traffic controllers cannot react as soon as they gain knowledge of the existence of a pothole on the carriageway, they must set up temporary traffic signalization. However, the authorities often forget about the possibility of using vertical barriers or front barriers (railing) for temporary marking and warning.

In particular, there are only a few officials (public prosecutors above all, as well as police, judges and road traffic accident investigators) who are familiar with another by-law that is important for such situations (when potholes appear in the roads). This by-law is in the Rulebook on the Manner of Regulating Traffic on roads in a work zone.[18] Furthermore, it has remained in force even after the implementation of the 2017 Rulebook on Traffic Signaling (hereinafter: RTS 2017).[19]

The LPR is also significant for this area, along with the LRTS.

In its provisions, the **LPR** gives a definition of, inter alia, traffic controllers. A traffic controller can be a public company, a commercial company, or other legal entity or entrepreneur registered for carrying out public-domain management activities (Art. 2, para. 1, item 50 of the LPR). It also defines a public road – *i.e.* all that a public road (Art. 4 of the Law on Public Roads) covers, as well as public road management, which is a matter of general interest (Art. 7 of the LPR), and those who can carry out road traffic management (Art. 8 of the LPR).

The provisions of Art. 15 of the LPR state the following: "**The road traffic controller is obliged to ensure permanent, continuous and quality maintenance and protection of the public road and to secure a smooth and safe traffic flow. The traffic controller shall be liable for the damage caused to the users of the public road due to failure to carry out a timely performing of certain works on the regular maintenance of the public road stipulated by this Law**, that is, due to the execution of works contrary to the stipulated technical conditions and the manner of their execution." The provisions of Art. 57 of the Public Procurement Act state that "The traffic controller is obliged to maintain public roads in a way that ensures unimpeded and safe traffic, and the provisions of Art. 58 of the LPR give a definition of the works on the regular maintenance of a public road. **This category of works includes, among other things, traffic signalization: installation, replacement, completion and renewal of traffic signalization. The provisions of Art. 2, item 40 of the LPR define traffic signalization as follows: traffic signalization** includes the means and devices for monitoring, control, regulation and management of traffic flow (road traffic signs). Art. 63 of the LPR defines the shared responsibility for the maintenance of a public road in a community between a public company in charge of the management of roads with the municipality or city and the traffic controller who bears a proportionate share of the

[17] Rulebook on Traffic Signalization (Off. Gazette of the RS no. 134/2014, dated Dec. 11, 2014, enacted on Dec 19, 2014).

[18] Rulebook on the Manner of Regulating Traffic on roads in a work zone (Off. Gazette of the RS no. 134/2014, dated Dec. 11, 2014, enacted on Dec. 19, 2014).

[19] Rulebook on Traffic Signaling (Off. Gazette of the RS no. 85/2017, dated Sept. 21, 2017, enacted on Sept. 29, 2017).

costs for maintaining the public road. This means that the public company JP Putevi Srbije is authorized for the roads of the first and second category, and the competent municipal or city public companies that perform the tasks of traffic controller are responsible for the local roads and streets.

This paper will focus only on the first form of the criminal offense, in the part relating to the condition and maintenance of roads and the structures near them. Bearing in mind the blanket character of carrying out of the criminal offense referred to in Art. 295 of the CC, and that the responsibility of supervision and contents of the work as well as the responsible and official persons are stipulated by appropriate regulations regarding road traffic (by-laws and internal regulations), herein we will point out some significant regulations, of which little or almost nothing is known.

4. Unsafe supervision of public traffic in regards to traffic signalization

Until December 18, 2014, traffic participants were more or less familiar with the old Rulebook on Traffic Signalization (hereinafter: the old RTS)[20] which was used to regulate the public roads in Serbia.

Following that, the implementation of RTS 2014 took place from December 19, 2014 to September 28, 2017, which brought numerous and extremely important novelties in the field of traffic signalization, which were not well-known by, first and foremost, legal experts. Bearing in mind the significant novelties that this by-law brought, there are justified issues not only of criminal liability – primarily criminal in certain situations on the part of the authorized persons in the company in charge of road maintenance, *i.e.* the traffic controllers, but also damages liability. One of the most important novelties was the provision referring to transverse markings in **Art. 59, para. 4, item 2** in RTS 2014 that stipulates the following: "**A pedestrian crossing must not be marked on roads with several traffic lanes in one direction if the crossing is not regulated by traffic-light signaling, except in the case of roundabouts.**" This solution, in the period of the application of the RTS, has caused major practical problems, both from the criminal legal aspect and from the aspect of the responsibility of the traffic controller for the resulting damage.

Namely, **all traffic participants, due to inadequate marking of the pedestrian crossing in accordance with the new PSS 2014, were, starting from the beginning of application, misled by the traffic controller**. Thus, **the pedestrians were misled** in being on a pedestrian crossing at the moment of the commencement of the carriageway with several traffic lanes **if the passage is not regulated by traffic signals, except in the case of crossroads**. **On the other hand, drivers were misled that they were entering a marked pedestrian crossing due to transversal markings.**

In the situation where a traffic accident occurs in an inadequately marked place owing to a misconception by some participants due to an omission of a traffic controller who failed to provide adequate signaling (that is, the passage is not regulated by traffic-light signaling), we consider that the criminal liability, but also the liability for damage compensation falls primarily on the traffic controller.

In that case, the traffic controller would, in our opinion, could only prove that he is not the sole bearer of responsibility for the traffic accident, but rather, that there is a

[20] Rulebook on Traffic Signalization (Off. Gazette of the RS no. 26/2010).

criminal responsibility of other participants in the traffic accident as in the same traffic accident, court practice has so far unambiguously demonstrated that more participants may be covered by an indictment in the event of their omissions and charged if the omission of each of these individual participants is causally linked to a particular traffic accident. In the proceedings for damage compensation, the traffic controller in these situations may claim shared responsibility for damages. It is unknown whether there have been any such claims for damages against certain traffic controllers, such as the company JP Putevi Srbije or traffic controllers from certain municipalities or cities. However, there have been many traffic accidents from December 19, 2014, which is the date of the beginning of the application of RTS 2014, that occurred on the roads with several traffic lanes, and some of these traffic accidents and the measures applied by public prosecutors in these cases will be described in this paper as well.

5. The rights and capacities of the public prosecutor in a criminal procedure

Pursuant to the provisions of the applicable CPC, the fundamental right and the basic duty of the public prosecutor is the prosecution of perpetrators of criminal offenses. For offenses prosecuted ex officio, which includes the criminal offense of unsafe road traffic control referred to in Art. 295 of the CC, of particular importance is the jurisdiction of the public prosecutor referring to the fact that the public prosecutor manages the pre-trial procedure and conducts an investigation.

In this regard, it is also the duty of all bodies participating in the pre-trial procedure to inform the competent public prosecutor about any measures undertaken with a view to uncovering a criminal offense or finding a suspect. Also, the police and other state authorities authorized for the detection of criminal offenses are obliged to act upon every request of the competent public prosecutor.

In regards to traffic accidents with features of criminal offenses, it is extremely important, at least for certain types of traffic accidents (those with fatal consequences, serious bodily injuries, when a child is injured, when one of the participants in the accident with the vehicle fled from the crime scene, a traffic accident involving police vehicles), that the competent public prosecutor arrives at the crime scene and carries out an investigation. Among other things, when conducting an investigation, the public prosecutor needs to pay attention to the traffic signalization on site, as the existence or absence of traffic signaling is often the key to determining the cause of the traffic accident. Therefore, attention needs to be focused on who is responsible for the occurrence of a traffic accident, or whether there were any omissions by the traffic controller in regards to a lack of adequate traffic signalization.

In practice, the competent public prosecutor most often entrusts the conducting of an investigation to members of the police force, thus risking omissions in the part relating to traffic signalization – that it is not fully included in the investigation report. In situations where, due to the absence of corresponding traffic signalization, a traffic accident occurs which, according to its features, constitutes a criminal offense, whether it was noticed by the public prosecutor immediately when conducting an on-site investigation, i.e. it was noticed and noted in police records who, under the authorization of the public prosecutor conducted the investigation or it was pointed out by a road traffic accident investigator during the investigation, there is or there should be the issue of the traffic controller's responsibility.

In this regard, it is necessary for the competent public prosecutor to take certain official measures either personally or by entrusting them to the members of the police force, particularly the following:

- To unambiguously determine who is responsible for maintaining the section of the road at which a traffic accident occurred: for the roads of the first and second category, the traffic controller is the company JP Putevi Srbije, and the municipal or city authorities are authorized for the local roads and streets.

- To check whether there is a traffic signal on site or not. In addition, it is necessary to determine whether it is adequately set up in accordance with the provisions of the current Rulebook of Traffic Signaling at the time of the accident and whether there are signs of damage on the traffic signalization. This can be checked, in addition to a direct inspection on site, by the competent authorities (the Republic of Serbia, individual city, municipality) that keep records on traffic signals in their traffic register.

- Nowadays, modern technology can provide considerable assistance in this respect, *e.g.* Google Earth, which provides satellite images of every road section in Serbia. This kind of modern technology is a reliable way of obtaining evidence for court proceedings and its usage can undoubtedly determine whether there was at the moment of the accident an appropriate traffic sign on site or not, regardless of when this inspection is made in relation to the day of the traffic accident. Furthermore, this has already been applied by courts in Serbia.

- In regards to inadequately positioned traffic signalization, it is necessary to obtain information regarding the person authorized at the moment of the accident, which can be determined by acquiring the applicable Rules on job classification of certain public companies in charge of road maintenance, whether they are republic, city, or municipal public enterprises. The said Regulations contain or should contain a job description for each post in that public enterprise, based on which description the public prosecutor decides against which person (possibly one or more) criminal proceedings will be initiated.

- Also, if there are road works in progress, it is necessary to obtain the status of that road – whether it is a road that is open for traffic or road works are being carried out, which should be marked by the type of traffic signal in accordance with the aforementioned Rulebook on Traffic Signaling in a work zone. In addition, it could be a construction path that has not yet been approved by the contracting authority due to the fact that the necessary supervision of the works has not been completed and the appropriate permits have not been issued for the use of that road, which is marked or should be marked by another type of traffic signalization.

Of course, these are just some of the data related to traffic signals that the public prosecutors should focus on.

An additional reason to write this paper is the two criminal proceedings that are currently before the competent Basic Court in Valjevo. Although the situations are seemingly similar, there are some differences, and thus we will briefly mention both. An additional reason why both cases are mentioned is that the two traffic accidents happened in 2015 – at the time of the validity of RTS 2014, on the road section with several lanes where in both cases there was a pedestrian crossing not marked by traffic-light signaling. On this occasion, we also point to the measures undertaken by the public prosecutor in these cases.

6. Court practice analysis and the measures undertaken by the public prosecutor

1. On April 23, 2015 at 8.35 p.m. in Vladike Nikolaja Street in Valjevo, near the premises of the Gorić Council, a traffic accident occurred in which a pedestrian (a minor) was injured, who, according to the information obtained, received light bodily injuries. The other participant was a FIAT passenger vehicle driven by a Pančevo resident.

After the investigation carried out by the public prosecutor, the investigation stated report stated the following: "... that part of the Vladike Nikolaja Street has two lanes, while the right carriageway, from the direction of the movement of the passenger vehicle, that is, from the direction from Valjevo towards Belgrade, has three traffic lanes – the left lane, which is used by vehicles that turn left towards the Poljoplod building and the center and right lanes for vehicles moving on the right side. There is a traffic island between the right and left carriageways. At that point, the carriageway is made of asphalt, without impact holes, with horizontal and vertical signalization. The carriageway was dry, there was street lighting, so the site was lit up. Visibility conditions were nocturnal.

There were no traffic signs in the immediate vicinity, from the direction of the movement of the vehicle, but there was a 70 km/h speed limit road sign near the accident site....".[21]

After the investigation and collected documentation by the Valjevo police force who were on site during the investigation, making sketches and documenting the investigation, the Valjevo Municipal Public Prosecutor's office initiated criminal proceedings against the driver of the FIAT vehicle for the criminal offense of endangering public road traffic referred to in Art. 299, para.3 in regards to para. 1 of the CC. During the course of the procedure, road traffic accident investigators were appointed.

In his written forensic expert report, the investigator stated the following:

"Based on the stated, I am of the following opinion:

- Mal. N. created an unsafe traffic situation on the carriageway by believing he could cross the pedestrian crossing safely in spite of the considerable width of the pavement (9.8 m) consisting of three traffic lanes, and especially a part of the carriageway with no marked pedestrian crossing (via the right traffic lane), in which way he made an omission causally related to the occurrence of this accident.
- The defendant was not made aware of the pedestrian crossing by a traffic sign nor could he notice Mal. N. in the nocturnal driving conditions due to the presence of the vehicle on the left and part of the marked pedestrian crossing on the middle and left traffic lane, so that he made an omission which caused the accident in the event that vehicles in the middle and left traffic lanes stopped in front of the pedestrian crossing (which would correspond to the statements of Mal. N. and witnesses D.B. and Đ.M.), whereupon, in my opinion, the defendant would have a reason to anticipate the appearance of a pedestrian on the carriageway and reduce the speed of his vehicle.
- **The nonexistence of a traffic sign with the notice 'marked pedestrian crossing' (III-6), and an unmarked pedestrian crossing on a part of the carriageway via the right traffic lane, would be an omission by**

[21] Investigation report by the Valjevo Municipal Public Prosecutor's office, Kt.br. 1177/15 dated April 23, 2015.

the traffic controller, in this case the company JP Putevi Srbije Belgrade, which is in a causal connection with the occurrence of a dangerous traffic situation on the carriageway, due to the fact that the participants in this accident were misled – the plaintiff for crossing a marked pedestrian crossing, and the defendant for operating a vehicle along a road with no pedestrian crossing.[22]

2. On October 16, 2015, around 11 a.m. in Valjevo, Vladike Nikolaja Street, a traffic accident took place in which the driver of a Mercedes-Vito commercial van, moving from the aforementioned street from the direction of the city center to the suburb of Gorić, according to the indictment document against him taken after the conducted investigation and the reports by the Valjevo police force, acted contrary to the provisions of Art. 23, para. 2 of the CPS by driving along the left lane of the right carriageway. When approaching the pedestrian crossing opposite from street number 125, the afore mentioned driver failed to adjust the speed of the vehicle to such an extent that he could not stop the vehicle safely in front of the pedestrian crossing. At the moment when a city bus stopped in the right traffic lane in the immediate vicinity of the pedestrian crossing, plaintiff L. M. from Valjevo started crossing by the front part of the aforementioned bus, and the defendant failed to let her pass by, but rather, hit the plaintiff with the front right of the vehicle.[23]

The same road traffic accident investigator who testified in the first mentioned case, stated his opinion as the following:

"Based on the stated, I am of the following opinion:

- This incident occurred due to the fault of defendant M. I. for driving at unadjusted and excessive speed while approaching a marked pedestrian crossing, as in this situation in which, in my opinion, he had reason to anticipate pedestrians on a pedestrian crossing, especially in the incidence of a stopped bus at a bus stop, he ought to have driven at a speed less than 41.4 km/h, or less than 30 km/h, whereupon he could safely stop his vehicle in front of a pedestrian crossing.
- In my opinion, plaintiff M. L. has also contributed to the occurrence of the accident, as she started crossing a part of the pedestrian crossing on the left lane without checking beforehand for a safe crossing, as there was no visibility on the pedestrian crossing in the right lane due to the fact that it was obscured by the stopped bus at the bus station.[24]

Not taking into consideration at this opportunity the criminal aspect of these traffic accidents, we focused on analyzing the knowledge of traffic regulations of the officials who dealt with these cases, as knowledge of these regulations is the basis for conducting an appropriate procedure in accordance with the law.

Thus, we have established that in both cases, the traffic accidents occurred on roads with several lanes in the direction where the pedestrian crossing is unregulated by traffic-light signaling.

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[22] The report of the road traffic accident investigator given in the Valjevo Municipal Public Prosecutor's office case, Kt.br. 612/15 dated April 4, 2016 (excerpt from the report).

[23] Parts of the disposition of the indictment proposal of the Valjevo Municipal Public Prosecutor's office, Kt.br. 1268/15 dated April 19, 2016.

[24] The report of the road traffic accident investigator given in the Valjevo Municipal Public Prosecutor's office case, Kt.br. 1268/15 dated March 28, 2016 (excerpt from report).

In neither of the two cases for which he made an expert report under the order of the Valjevo Public Prosecutor's office did the road traffic accident investigator, who, according to the nature of his profession should be the best informed about traffic regulations, indicate in his findings and report that a traffic accident occurred at a road section where the pedestrian crossing is not properly marked in accordance with the provision of Art. 59, para. 4, item 2 of the new RTS.

Also, the deputy Valjevo Public Prosecutor who conducted the investigation in the first case failed to report that there was a traffic sign marked 'pedestrian crossing' (III-6) and an unmarked pedestrian crossing on the part of the carriageway on the right traffic lane, as noted by members of the Valjevo police force and by the road traffic accident investigator.

Finally, we noted that even after the written findings and reports, the Public Prosecutor's office failed in both cases, at least at the time of writing this paper, to initiate the appropriate criminal proceedings against the traffic controller, even though the road traffic accident investigator explicitly stated in one of these cases that the omission was made by the traffic controller, in this case, the company JP Putevi Srbije Belgrade, and is in a causal connection with the occurrence of a dangerous traffic situation on a carriageway because both participants in the traffic accident were misled by a specific omission, and the result is a traffic accident in which a minor was injured.

7. Conclusion

Within the group of criminal offenses against public road safety, the offense of unsafe traffic control is a crime that, in our opinion, deserves far more attention than it has had thus far.

In most situations where there are road traffic accidents, there are omissions by individual participants (one or more) in each specific accident.

However, not every traffic accident is the result of an omission by the participants in the traffic accident. Furthermore, a large number of traffic accidents on the roads in the Republic of Serbia occur due to omissions by traffic controllers, who are protected in terms of criminal responsibility so that appropriate criminal proceedings are not conducted against traffic controllers.

Therefore, the public prosecutor has a special role to play from the moment of conducting the investigation of a traffic accident in a situation when he is present on site and carries out an investigation, and on that occasion he can witness some of the omissions by the traffic controller in the part related to the traffic signals that are of a significance primarily for the issue of causative responsibility for the occurrence of a traffic accident, and therefore for the issue of criminal offenses, primarily the criminal responsibility of traffic controllers. In addition, the omissions which the public prosecutor detects in the course of the investigation or at the later stages of the procedure refer to certain new traffic situations and omissions by the traffic controller for failure to comply with applicable by-laws that are not yet sufficiently identifiable in judicial practice.

A brief analysis of the specific criminal cases mentioned in this paper points to the need of continuously monitoring the work of officials, primarily public prosecutors, in view of their role in criminal proceedings, to abide by the regulations. This is also valid for traffic road accident investigators as well as judges who make decisions not only in criminal proceedings but also in the compensation proceedings.

Relationship of Prosecutors and Expert Witnesses in Legal System of Bosnia And Herzegovina: Forensic Expertise – an Evidence that is in the Ascendant?

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Abstract

In the focus of this paper is the analysis of the relationship between the primary and auxiliary subject of the criminal procedure – prosecutor and expert witnesses in context of the B&H's criminal procedural laws with aim of presentation of limitations of the prosecutor's evaluation of facts that are obtained through application of scientific and expert knowledge. Furthermore, authors explore the perception of the forensic expertise in theory and judicial practice as a possible deviation from the fundamental legal principle of free evaluation of evidence, resulting with establishment of the forensic expertise as evidence of utmost evidentiary value and strength that is rarely disregarded by the prosecutor and the court.

Keywords: *expert witness, forensic expertise, prosecutorial evaluation of evidence*

1. Introduction

Legal system of the Bosnia and Herzegovina (B&H) is multilayered as a reflection of constitutional division of the sovereign power between the state and two entities: the Federation of Bosnia and Herzegovina (FB&H) and Republic of Srpska (RS), which have character of federal units.[1] Within the complex state organization Brčko District (BD B&H) has special status as self-governing administrative unit, and it is subjected only to the state control.[2] This complex state structure is manifested in the legislation regulating the criminal justice system - there are currently four material and procedural criminal laws in force in B&H: the Criminal Law of B&H (CL B&H),[3] the Criminal Law of FB&H (CL FB&H),[4] the Criminal Law of RS (CL RS);[5] the Criminal Law of BD B&H (CL BD B&H);[6]

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[1] See the Constitution of Bosnia and Herzegovina (available at: http://www.ccbh.ba/public/down/USTAV_BOSNE_I_HERCEGOVINE_engl.pdf); the Constitutions of the FB&H ("Official Gazette of FB&H", no. 1/94); the Constitutions of the RS ("Official Gazette of RS" no. 28/94).

[2] See the Statute of the Brcko District of Bosnia and Herzegovina ("Official Gazette of BD B&H", no. 3/07).

[3] "Official Gazette of B&H", no. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10, 47/14, 22/15, 40/15

[4] "Official Gazette of FB&H", no. 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, 42/11, 59/14, 76/14, 46/16, 75/17.

[5] "Official Gazette of BD B&H", no. 33/13.

[6] "Official Gazette of RS", no. 64/17.

the Law on Criminal Procedure of B&H (LCP B&H),[7] the Law on Criminal Procedure of FB&H (LCP FB&H),[8] the Law on Criminal Procedure of RS (LCP RS)[9] and the Law on Criminal Procedure of BD B&H (LCP BD B&H).[10]

In accordance with the established legal framework, exclusive competence of the prosecutor encompasses detection and prosecution of the criminal offences perpetrators within which it has right to conduct procedural actions and to investigate and establish all relevant facts against and in favor of accused[11] (Krapac, 2007; Sijerčić – Čolić, 2008). Comprehensive and careful evaluation of existence of the substantiated probability founded on the facts from which results reasonable suspicion that a certain person committed certain criminal offence must be performed by prosecutor in every case (Lakić, 2013:22). Reasonable suspicion as a legal condition for indictment entails level of certainty of cognition of exitance of the facts established on the basis of objective criteria (Glušac, 2014:209). Prosecutor's decision regarding the existence of the certain facts must be derived from the content of the obtained evidence (of every evidence individually and in relation to other evidences) and it is not restricted with formal evidentiary rules (*principle of free evaluation of evidence*).[12] This implies that there are no formal legal rules on predetermined value of certain evidences or that certain facts may only be proven with certain evidence. Nevertheless, in criminal procedural law and judicial evidence, forensic expertise is traditionally perceived as an evidence of utmost evidentiary value and strength provided that the testimony (finding and opinion) is given in accordance with the best knowledge or skill of the expert who has been appointed as an expert witness, and in accordance with the fundamental principles of science or profession whose rules and methods are applied in concrete expertise (Halilović, 2010:43). Specific position of the expert witness as an auxiliary procedural subject awarded with specific rights and responsibilities in criminal procedure is regulated by the provisions of the previously mentioned criminal procedural laws (LCPs) and laws on expert witnesses in force in entities[13] and the Rulebook on the conditions, manner and procedure for admission to the list of judicial expert witnesses in BD B&H.[14] Having in mind previously stated about the specific position of forensic expertise in evidentiary system, in this paper authors analyze relationship between prosecutor and expert witnesses in context of the B&H's criminal procedural laws in order to investigate perception of the forensic expertise/expert witness testimony as a possible deviation from the fundamental legal principle of free evaluation of evidence resulting with establishment of this evidence as an evidence of utmost evidentiary value and strength that is rarely disregarded by the prosecutor and the court.

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[7] "Official Gazette of B&H", no. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13.

[8] "Official Gazette of FB&H", no. 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 9/09, 12/10, 8/13, 59/14.

[9] "Official Gazette of BD B&H", no. 33/13.

[10] "Official Gazette of RS", no. 53/12, 91/17.

[11] See for example: Article 293(3) of the LCP B&H; Article 308(3) of the LCP FB&H; Article 293(3) of the LCP BD B&H; and Article 299(3) of the LCP RS.

[12] For more on principles of criminal law see: Pudovochkin and Adrianov (2016).

[13] "Official Gazette of FB&H", no. 49/05, 38/08. "Official Gazette of RS", no. 74/17.

[14] "Official Gazette of BD B&H", no. 38/16.

2. Relationship of prosecutors and expert witnesses

In the context of criminal procedural law, institute of forensic expertise represents procedural action within which an expert witness as an impartial individual with a particular scientific or professional knowledge or skills, applies that knowledge, skills and certain scientific methods on appropriate, questioned facts in given criminal matter. Involvement of expert in criminal procedure is focused on establishment of important facts trough implementation of particular professional knowledge or skill.

According to the provisions of the LCPs, forensic expertise shall be ordered when the findings and opinion of an individual possessing the necessary specialized knowledge are required for establishment or evaluation of certain important fact.[15] If scientific, technical or other specialized knowledge may assist the prosecutor in evaluating the evidence or clarifying the questioned facts, an expert as a special kind of witness may testify by providing his/her findings on the facts and opinion that contains evaluation of the facts.[16]

Forensic expertise is determined by the prosecutor that manages the procedure. Written order for forensic expertise is issued by the prosecutor[17] and in this order all facts subjected to the expertise must be stated.[18] Prosecutor may entrust forensic expertise both to the expert individual or to the specialized institution or state body[19] depending on the kind and complexity of the expertise. Although forensic expertise in judicial practice is usually entrusted to the individual expert witness, provisions of criminal procedural laws suggest priority of the specialized institution or state body since they explicitly prescribe that if there is specialized institution for performance of the particular kind of expertise or if expertise may be performed by the state institution/body, such expertise, and especially when it is has intricate nature should, as a rule be assigned to that institution or the body.[20] Such institution or body shall name

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[15] Article 95 LCP B&H; also: Article 109 LCP FB&H, Article 95 LCP of BD B&H, Article 160 of the LCP of RS.

[16] *Ibidem*. Sijerčić – Čolić (2008:433) concludes that forensic expertise may be undertaken in different phases of criminal procedure: prior to the investigation during the investigation, within the judicial insurance of evidence (during the investigation and accusation procedure), and on main hearing/main trial.

[17] As well as court. Authorized official may order forensic expertise as an urgent investigative action (with exception of medical examination, an autopsy and exhumation of the corpse). See: Article 221 of the LCP B&H; also: Article 236 of the LCP FB&H, Article 221 of the LCP BD B&H, and Article 229 of the LCP RS). Furthermore, at the main hearing, forensic/expert witness also may be employed by the accused and his/her counsellor. See: Article 269(1) of the LCP B&H, Article 284(1) of the LCP FB&H, Article 269(1) of the LCP BD B&H; and Article 284(1) of the LCP RS.

[18] Article 96(1) of the LCP B&H; also: Article 110(1) of the LCP FB&H, Article 96(1) of the LCP BD B&H, Article 160(1) of the LCP RS.

[19] According to the provisions of the LEW, the entity, canton, city or municipality or other legal or natural person may establish company for performance of forensic expertise in accordance with the provisions of relevant company law. This company may be registered in the Register of the legal entities for conducting forensic expertise if it has a team of professionals that fulfill the requirements and appropriate technical means for performance of those tasks. Company must perform the forensic expertise entrusted by the court or other body that manages procedure if object of expertise is within its professional activity.

[20] Article 96(2) of the LCP B&H; also: Article 110(2) of the LCP FB&H, Article 96(2) of the LCP BD B&H, Article 160(2) of the LCP RS.

one or more experts[21] to perform expertise.[22] The prosecutor shall warn the institution or the body performing forensic expertise, about the exemptions of persons on the basis of the Article 98 of the LCP B&H and on other legal basis.[23]

The ability to be expert witness requires cumulative fulfillment of two types of conditions: professional and legal (Krapac, 2007:424). Professional condition is only implied by provision contained in Article 95 of the LCP B&H, which stipulates that possession of professional knowledge is necessary for identification or evaluation of certain important facts.[24] Legal conditions for appointment of expert witness are prescribed in negative form by LCPs as a list of persons who may not be appointed as an expert witness: a person who may not testify as a witness;[25] a person who is exempt from the duty to testify;[26] and the person against whom the criminal offence was committed - injured person.[27] If such person is appointed resulting judicial decision may not be based on his/her testimony (findings and opinion).[28] Furthermore, laws exempts from forensic expertise: persons who are employed in the same body, company or other legal entity or by independent entrepreneur as the suspect, accused or injured person; persons who are employed by the injured or suspect or accused person; and person that was heard as a witness.[29] Beside the previously mentioned exemptions, on expert witnesses are also applicable general rules on exemption of judges (Articles 29-33 of the LCP B&H)[30].[31] The laws on expert witnesses specify conditions and procedure of their selection and appointment as an experts that will perform tasks in judicial procedures. As an expert witness in the FB&H may be appointed person which fulfills following requirements: citizenship of the B&H; appropriate experience and professional knowledge in particular area; appropriate degree; proven professional abilities and reputation of careful, objective and expeditious expert in particular area; and integrity and high moral qualities.[32] In the RS are prescribed similar but not identical general and special requirements for appointment of forensic experts.[33] Testing of candidates is performed by the commission in written and oral form in order to determine their

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[21] They don't have to be judicially appointed forensic experts/expert witnesses.

[22] Article 96(2) of the LCP B&H; also: Article 110(2) of the LCP FB&H, Article 96(2) of the LCP of BD B&H, Article 160(2) of the LCP RS.

[23] Article 102(1) of the LCP B&H; Article 116(1) of the LCP FB&H, Article 102(1) of the LCP of the BD B&H, Article 167(1) of the LCP of RS.

[24] Further professional qualifications are not specified in the provisions of the LCPs.

[25] Article 82 of the LCP B&H; Article 96 of the LCP FB&H; Article 82 of the LCP BD B&H; and Article 147 of the LCP of RS.

[26] Article 83 of the LCP B&H; Article 97 of the LCP F B&H; Article 83 of the LCP BD B&H; and Article 148 of the LCP of RS.

[27] Article 98(1) of the LCP B&H; also: Article 112(1) of the LCP FB&H, Article 98(1) LCP of the BD B&H, Article 163(1) of the LCP of RS.

[28] *Ibidem*.

[29] Article 98(3) of the LCP B&H; also: Article 112(3) of the LCP FB&H, Article 98(3) of the LCP BD B&H, Article 163 (2) and (3) of the LCP of RS.

[30] Articles 39-43 of the LCP FB&H; Articles 29-33 of the LCP of the BD B&H, and Articles 37-41 of the LCP of RS.

[31] Article 34(1) of the LCP B&H; also: Article 44(1) of the LCP FB&H, Article 34(1) of the LCP of the BD B&H, Article 42(1) of the LCP of RS.

[32] Article 3 of the LEW FB&H.

[33] Article 3 of the LEW RS also Article 5 of the Rulebook on the conditions, manner and procedure for admission to the list of judicial expert witnesses in BD B&H (Rulebook on judicial expert witnesses in BD B&H).

capabilities in regard to the following criteria:[34] professional knowledge and work performance; demonstrated professional ability based on previous career results, including participation in organized forms of education; ability proven through published scientific papers and through activities in professional associations; work ability and ability to professionally and clearly explain provided finding; the ability to perform expert tasks impartially, conscientiously, diligently, decisively and responsibly; conduct out of office, integrity and reputation.[35] On the suggestion of the commission expert witness is appointed by the entities ministers of justice and registered on the official list of judicial expert witnesses. Nevertheless, the published list of judicial expert witnesses is not mandatory for the prosecutor unless otherwise provided by the regulations governing the rules of procedure.[36] The expert witness is appointed for a period of six years and may be reappointed.

Activities of expertise in the entities may be performed by the expert witnesses from the entire territory of B&H. Exceptionally, if there is no expert witness of the necessary profession in Bosnia and Herzegovina, or there are other legal or factual reasons due to which experts from Bosnia and Herzegovina may not perform expertise in the particular case, expertise tasks in the Federation may, in specific cases, be performed by an expert from another country, which fulfills the conditions for carrying out the expertise in accordance with the law of that country.[37]

As previously mentioned, forensic expertise is generally ordered by prosecutor when findings and opinion of person who has professional knowledge are necessary for determination or evaluation of certain important facts. Therefore, when it will be ordered, generally depends on the assessment of the prosecutor However, there are few exemptions, specific situations prescribed by laws when forensic expertise is mandatory.[38]

Generally, performance of forensic expertise entails preparation of findings and opinion and their presentation before the court in form of the testimony. Before commencement of forensic expertise, expert witness is invited by the prosecutor to carefully review the object of the forensic expertise, to correctly state everything that she/he observes and identifies and to impartially present his/her opinion in accordance to rules of science or expertise. Expert witness must be expressly cautioned that false expert testimony is criminal offence.[39] Process of forensic expertise is managed by the prosecutor that ordered it. As a part of the management process, at the beginning prosecutor should indicate the object of forensic expertise and asks relevant questions, which should be within limits of scientific, technical or other professional knowledge of expert witness (Sijerčić – Čolić, 2008: 434). During the performance of forensic expertise on the object, forensic witness will rely on the evidence indicated by the prosecutor. Forensic witness may suggest possible evidence or obtaining of certain

[34] Article 7 of the LEW FB&H, Article 7 of the LEW RS.

[35] Article 9 of the LEW FB&H. In the RS procedure of qualification testing is prescribed by the Rulebook adopted by Minister of justice of RS.

[36] Article 11 of the LEW FB&H and Article 10(5) of the LEW RS.

[37] Article 45 of the LEW FB&H and Article 34 of the LEW RS.

[38] See Articles 103, 110, 107, 108 of the LCP B&H.

[39] Article 99(1) LCP B&H; Article 113(1) of the LCP FB&H; Article 99(1) of the LCP BD B&H; and Article 164(1) of the LCP of RS.

objects and information relevant for the presentation of his/her findings and opinion.[40] If expert witness is present at crime scene investigation, reconstruction of events or other investigative action, he/she may suggest to the prosecutor clarification of certain circumstances or that person that is being heard is asked certain.[41] Also clarifications may be given to the expert witness and he/she may be allowed to review the files. During the procedure of forensic expertise, expert witness examines objects at place where they are stored, unless forensic expertise involves extended examination or if examination is conducted in the institution or body or if that is requested by ethical reasons.[42] In case when analysis of certain substance must be performed during the expertise, only a portion of that substance shall be available to the expert witness, and remainder of substance shall be saved in the required amount for the event of subsequent analysis.[43]

Expert witness is obliged to deliver his/her report to the prosecutor who appointed him/her, which must contain: evidence examined, tests performed, the findings and opinion reached, as well as any other relevant information considered necessary for a fair and objective analysis.[44] The expert witness shall provide a detailed explanation of how he/she formed particular opinion.[45] In addition to the findings and opinion, expert witness also delivers to the prosecutor working material, sketches and notes. However, it should be noted that written findings and opinion of the expert witness are admissible as an evidence material only if she/he testifies at the hearing.[46] According to the LEWs, supervision of the work of the expert witness is assigned to the prosecutor who may submit its observations, objections and imposed fines to the competent minister of justice and propose establishing experts' responsibility in accordance with the law.[47]

From the previously elaborated procedure of forensic expertise, particular entitlements of expert witness are evident in the relationship with the prosecutor: right to request to carefully examine object of expertise; right to request clarifications and assess files; right to suggest possible evidence or propose obtaining the objects and information important for presenting his/her findings and opinion; right to suggest clarification of certain circumstances or suggest particular questions for person who is being heard (when expert witness is present at a crime scene investigation, reconstruction or other investigative action). Furthermore, expert witness enjoys (Sijerčić-Čolić, 2008: 439): freedom of the testimony – prohibition of the impermissible pressure or extortion of testimony; right to use his/her own language; and right to

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[40] Article 99(3) LCP B&H; Article 113(3) of the LCP FB&H; Article 99(3) of the LCP BD B&H; and Article 164(3) of the LCP of RS.

[41] *Ibidem*.

[42] Article 100(1) of the LCP B&H; Article 114(1) of the LCP B&H; Article 100(1) of the LCP FB&H; Article 100(1) of the LCP BD B&H; and Article 165(1) of the LCP of RS.

[43] Article 100(2) of the LCP B&H; Article 114(2) of the LCP B&H; Article 100(2) of the LCP FB&H; Article 100(2) of the LCP BD B&H; and Article 165(2) of the LCP of RS.

[44] Article 97 of the LCP B&H; Article 111 of the LCP FB&H; Article 97 of the LCP BD B&H; and Article 162 of the LCP of RS.

[45] *Ibidem*.

[46] Article 270(5) of the LCP B&H; Article 285(5) of the LCP FB&H; Article 270(5) of the LCP BD B&H; and Article 258(5) of the LCP of RS.

[47] Article 19 of the LEW FB&H and Article 14 of the LEW RS. Also, other parties or parties' representatives, as well as expert associations and expert associations may submit observations on the work of expert witnesses to the competent ministers of justice at entity level.

reward – right to reimbursement of cost and right to protection in case of evidence before the court of another country.

Previously stated rights of forensic expert are balanced with specific responsibilities: submission to the prosecutor of the report (findings and opinion), as well as working material, sketches and notes;[48] cautious review of the object of the forensic expertise, correct account of everything that was observed and identified, and impartial and truthful presentation of findings and opinion in accordance with scientific or expert rules; maintenance of confidentiality in regard to those facts or information that are learned in the course of conducting criminal procedure, and for which there are stipulated requirements for determination of their secrecy[49] (Sijerčić – Čolić, 2008:439).[50] In the subsequent phases of the criminal proceedings, forensic witness has other appropriate responsibilities: attendance at the trail;[51] taking an oath or giving a statement prior to presenting testimony, respecting the order and the dignity of the court during the main hearing.[52]

Although legal theory and practice distinguish many types of expertise (see: Pavišić and Modly, 1999:240-293; Halilović, 2010:171), the criminal procedural laws in B&H specifically regulate: forensic expertise in case of suspicious death;[53] toxicological expertise;[54] forensic expertise of physical injuries;[55] psychiatric forensic expertise in case of suspicion of exclusion or reduction of accountability,[56] audit of business books[57] and DNA analysis.[58] From the aforementioned forensic expertises mandatory expertises[59] are:

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[48] Article 97 of the LCP B&H; Article 111 of the LCP FB&H; Article 97 of the LCP BD B&H; and Article 162 of the LCP of RS. The report must contain: evidence examined, tests performed, the findings and opinion reached/gained, and any other relevant information considered necessary for a fair and objective analysis. Moreover, a detailed explanation of how particular opinion was formed must be provided.

[49] Article 33 of the LEW FB&H, Article 25 of the LEW RS, and Article 21 of the Rulebook on judicial expert witnesses in BD B&H.

[50] Article 99(1) of the LCP B&H; Article 113(1) of the LCP FB&H; Article 99(1) of the LCP BD B&H; and Article 164(1) of the LCP of RS.

[51] Article 249(1) and (2) of the of the LCP B&H; Article 264(1) and (2) of the LCP FB&H; Article 249(1) and (2) of the LCP BD B&H; and Article 264(1) and (2) of the LCP of RS. If an expert was duly summoned but fails to appear and does not justify his absence, the judge or the presiding judge may order that expert is be brought in, and may discipline the expert, with fine an amount up to 5.000 KM.

[52] Article 242(3) of the LCP B&H; Article 257(3) of the LCP FB&H; Article 242(3) of the LCP BD B&H; and Article 257(3) of the LCP of RS.

[53] Articles 103-106 of the LCP B&H; Articles 117-120 of the LCP FB&H; Articles 103-106 of the LCP BD B&H; and Articles 168-171 of the LCP of RS.

[54] Article 107 of the LCP B&H; Article 121 of the LCP FB&H; Article 107 of the LCP BD B&H; and Article 172 of the LCP of RS.

[55] Article 108 of the LCP B&H; Article 122 of the LCP FB&H; Article 108 of the LCP BD B&H; and Article 173 of the LCP of RS.

[56] Article 110 of the LCP B&H; Article 124 of the LCP FB&H; Article 110 of the LCP BD B&H; and Article 175 of the LCP of RS.

[57] Article 111 of the LCP B&H; Article 125 of the LCP FB&H; Article 111 of the LCP BD B&H; and Article 176 of the LCP of RS.

[58] Articles 112-115 of the LCP B&H; Articles 126 -129 of the LCP FB&H; Articles 112-115 of the LCP BD B&H; and Articles 177-180 of the LCP of RS.

[59] Categorization of expertise as obligatory/mandatory indicates that law explicitly prescribes that certain fact in procedure must only be determined or clarified through performance of certain type of forensic expertise.

examination and autopsy,[60] toxicological expertise,[61] forensic expertise of physical injuries;[62] and psychiatric forensic expertise.[63]

3. Evidentiary value of the forensic expert's testimony

Testimony of expert witness enjoys reputation of credible evidence, with almost unquestionable evidentiary value and strength as is continuously presented in judicial practice in the sense that judges in vast majority cases accept findings and opinions of expert witness (Pavišić and Modly, 1999:300, Bojanić, 2010; Kavazović, 2015; Bajraktarević Pajević, Kavazović, Lučić – Ćatić, 2017, etc.). In theory, this evidence is in criminal procedure evaluated in conformity with the principle of free evaluation of evidence, which implies that court appraises presented evidence on the grounds of its logical and physiological analysis (Sijerčić-Čolić *et al*., 2005) or its free belief (Halilović, 2010) and it is not constrained with legal rules on predefined value of certain evidence. However, testimony of expert witness unlike other evidences evades the rules of experience and logic due to its nature – it is subjected to the rules of specific profession or expertise and hence it is argued that court is actually bound with it. Krapac (2007:427) points out the viewpoint that forensic expertise represents an exception from the principle of free evaluation of evidence and thus forces court to always determine the facts as they result from findings or opinion of an expert witness. The very fact that the expert's testimony is obtained by applying scientific and expert knowledge (with the application of process norms) is a cause why it enjoys a high degree of evidentiary value and, at the same time, reason why its free evaluation by the court is only formally present, while in fact significantly limited or even non-existent.

Although this opinion is not generally accepted within the theory of criminal procedural law, from the current case law is evident that actual abilities of the court in regard to the evaluation of forensic expertise are smaller than in relation to the other evidence (Sijerčić-Čolić, 2010:445) and thus is argued that it must show greater carefulness in its work and deduction (Dimitrijević, 1971:191) in regard to this evidence. Sijerčić-Čolić (2010:445) urges that the court must especially pay attention to the following: whether the expert witness has remained within the limits of delegated expertise and within the limits of his/her profession and knowledge; whether expertise is based on objectively established facts; was there enough material for the expertise; and whether the methods used by the expert witness are generally recognized and accepted.

Even though courts rarely decide not to accept this evidence, there are various reasons for dispute of testimony of forensic expert and consequent refusal: incompleteness and qualitative deficiencies of the substances at disposal of the expert; the absence of convincing arguments that would support of the expert's conclusion; doubts about the and completeness of the findings and accuracy of opinion insufficient

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[60] Article 104 of the LCP B&H; Article 118 of the LCP FB&H; Article 104 of the LCP BD B&H; and Article 169 of the LCP of RS.

[61] Article 107 of the LCP B&H; Article 121 of the LCP FB&H; Article 107 of the LCP BD B&H; and Article 172 of the LCP of RS.

[62] Article 108 of the LCP B&H; Article 122 of the LCP FB&H; Article 108 of the LCP BD B&H; and Article 173 of the LCP of RS.

[63] Article 110 of the LCP B&H; Article 124 of the LCP FB&H; Article 110 of the LCP BD B&H; and Article 175 of the LCP of RS.

development of the relevant branch of professional knowledge; inadequate formal qualifications of expert witness; and violation of the provisions of the LCPs in the procedure of expertise (Dimitrijević, 1971:192, Pavišić and Modly, 1999:303). In any of the following cases the court is obliged to thoroughly explain its disagreement with opinion of the forensic expert.

4. Prosecutor's evaluation of forensic expertise

The LCPs discard the formal evidentiary rules on the quality and quantity of specific evidences as they prescribe that evaluation of existence or non – existence of facts by the court, prosecutor and other bodies in criminal proceeding mustn't be bound or limited to special formal evidentiary rules[64] and thus accept the free evaluation of the evidence as a fundamental basis of criminal proceeding system. This principle is applied during the entire criminal proceedings in regard to all decisions that are made. Consequently, free evaluation of the evidence is not only performed by the court, but also by the prosecutor, authorized persons and other bodies involved in the procedure (Sijerčić -Čolić *et al*., 2005:76). Prosecutor has right and obligation to provide evidence (Dimitrijević, 1971), and evaluation (qualitative as well as quantitative) of obtained evidence is essential part of its decision making: to indict or discontinue from the further proceeding (Halilović, 2010:33). Namely, prosecutor's due diligence (comprehensive and detailed examination) regarding the evaluation of probability is based on the facts from which stems grounded suspicion that certain person committed certain criminal offence (Lakić, 2013:22). So, evaluation of evidence has a diagnostic role in making decision on the substantiation or not substantiation of certain material facts whose existence or non-existence the subject of proving (Halilović, 2010:58). Prosecutor is the only one competent for analysis of the investigative subject in the context of the formal and material content related to the question existence of the conditions for indictment crucial for the transition from investigation to the phase of main criminal procedure (Glušac, 2014). When during the course of the investigation prosecutor concludes that circumstances in relevant subject matter are sufficiently clarified for indictment, investigation ends and indictment is prepared and submitted to the judge for preliminary hearing. For indictment is necessary standard of proof, which consists in the existence of sufficient evidence for a reasonable suspicion that the suspect has committed the criminal offence.[65] Reasonable suspicion is higher degree of suspicion based on the obtained evidence that refers to the conclusion on perpetration of criminal offence (Sijerčić – Čolić *et al*., 2005:610). Moreover, Glušac suggests that reasonable suspicion is a fixed degree of certainty of knowledge about the existence of these facts, in a sense that conviction is more likely than acquittal, and those prospects result from the obtained evidence on which suspicion grounded (2014:209). Subsequently, quality of indictment – determines the result of entire criminal procedure (see: Lakić, 2013:22).

The prosecutor has obligation to correctly, completely and impartially establish all relevant fact and circumstances regarding the criminal offence and its perpetrator, and

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[64] Article 15 of the LCP B&H; Article 15 of the LCP FB&H; Article 15 of the LCP BD B&H; and Article 15 of the LCP of RS.

[65] Article 226 of the LCP B&H, Article 241 of the LCP FB&H, Article 226 of the LCP BD B&H and Article 241 of the LCP RS.

after establishing such factual situation guided with principle of truth, which obliges prosecutor in the same way as a court, makes the prosecutorial decision (Glušac, 2014:211). This involves comprehensive assessment of all aspects of obtained evidences and especially those that direct the following actions of preparation and laying the indictment. Even though, the LCPs don't stipulate obligation to provide in indictment evidence in favor of the suspect,[66] the prosecutor must review all the facts and circumstances including the ones in in favor of the suspect in order to form clear picture about the strength of evidences of the future indictment (see: Krapac, 2007).

As previously stated, in evaluation of existence or nonexistence of the facts prosecutor is not tied by the formal rules,[67] which in advance determine evidentiary value of certain evidence or that certain fact may only be proven with certain evidence.[68] However, it couldn't be considered that this means that the process of forming the prosecutor's conviction on existence or non-existence of certain facts is entirely unrestricted,[69] because intersubjective validity in the criminal proceedings may be achieved only by factual findings that are free from arbitrariness (Krapac, 2007:392). Objective rules based on common human opinion and experience such as: specific and complete elaboration which facts and on the what ground are taken for proven, and meticulous evaluation each evidence individually and in conjunction with other evidence (especially if there is contradiction), should be followed by prosecutor in order to rationalize formation of its conviction on existence of certain facts. Furthermore, it should be stated that prosecutor's evaluation of evidence is in practice (but not formally) limited with expected judicial evaluation of evidence.

Free evaluation is especially questionable when it comes to evidentiary value of scientific evidence (see: Pavišić and Modly, 1999:300-301). As previously stated, forensic expertise shall be ordered when the findings and opinion of an individual possessing the necessary specialized knowledge are required for establishment or evaluation of certain important fact.[70] To be more precise, if scientific, technical or other specialized knowledge may assist the prosecutor in evaluating the evidence or clarifying the questionable facts, an expert as a special kind of witness may testify by providing his/her finding on the facts and opinion that contains evaluation of the facts.[71] However, this assistance must be restricted to the establishment of facts, while application of legal norm is excluded. In the theory of criminal procedural law and judicial evidence, forensic expertise is traditionally perceived as an evidence of utmost evidentiary value and strength (see Halilović, 2010:38-39) that is rarely disregarded by the prosecutor and the court as demonstrated by the judicial practice.

According to results of the research on use of questioned document expertise in judicial practice in B&H (Canton Sarajevo), within which a sample of total 95 court cases

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[66] See: Article 227(1) of the LCP B&H, Article 242(1) of the LCP FB&H, Article 227(1) of the LCP BD B&H and Article 242(1) of the LCP RS.

[67] Article 15 of the LCP B&H; Article 15 of the LCP FB&H; Article 15 of the LCP BD B&H; and Article 15 of the LCP of RS.

[68] With certain exceptions: Articles 103(1), 107(1) or 110(1), 327(2) and 328(2) of the LCP B&H.

[69] This is not case even when the court is concerned, because limitlessness generates danger of judicial arbitrariness.

[70] Article 95 of the LCP B&H; also: Article 109 of the LCP FB&H, Article 95 LCP of the BD B&H, Article 159 of the LCP of RS.

[71] *Ibidem*.

in period 2002-2007 were analyzed (Kavazović, 2017:11).[72] In analyzed sample, 94,34% presented opinions within the written finding of forensic experts were in accordance with the final judgement of the court. In the remaining number of court cases, a total of four experts' findings were not in accordance with the final judgement (3, 77%). Furthermore, in one analyzed court case five questioned document expertises were performed on the same sample of expertise by the three different judicial expert witnesses (Kavazović, 2017:11). Having in mind previously stated, it is clear that an only small number of judgements were in discord with presented findings and opinions of certain forensic experts.

Results of another research on forensic expertise conducted in B&H by Bajraktarević Pajević, Kavazović and Lučić – Ćatić (2017) verify accuracy of theoretical standpoints in regard to the prominent evidentiary value of the forensic expertise. In this research focused on the analysis of financial crime cases heard before the Court of B&H, prominence of forensic expertise in financial crime proceedings[73] was valued through the two criteria: incidence of forensic expertise in this type of criminal proceedings and its assessment by the court conducting the proceedings In regard to first criteria, in sample of analyzed judgements forensic expertise was used in 74, 45% of judgements and thus confirms prominence of forensic expertise in financial crime proceedings is courts assessment of this evidence (Bajraktarević Pajević, Kavazović and Lučić – Ćatić, 2017:82). In order to determine the court's assessments of this evidence and to establish the evidentiary significance of forensic expertise in financial crime proceedings before the Court of B&H, authors examined explanations of judicial decisions (judgements). Results show that forensic expertise was basis for courts decisions in 70% judgments (Bajraktarević Pajević, Kavazović and Lučić – Ćatić, 2017:83). Furthermore, in sample authors found that forensic expertise undeniably had a decisive influence on the court's decision. Namely, in 75,71 % of judgements forensic financial expertise was admissible evidence out of which 96,22% judgements resulted with conviction. It is important to note that in analyzed sample, in all judgements in which financial forensic expertise was admissible evidence, it was evidence presented by prosecutor. This also applies to the results regarding the questioned document expertise: when it was used it was admissible and it was evidence presented by prosecutor (Bajraktarević Pajević, Kavazović and Lučić – Ćatić, 2017:83).

Analogous conclusions were reached in research on the role of forensic expertise in forming judicial decision in cases of sexual criminal offences (see: Bojanić, 2010).

All evidence in criminal procedure including the forensic expertise should be evaluated in conformity with the principle of free evaluation of evidence, which implies absence of legal rules on predefined value of certain evidence. However, testimony of expert witness unlike other evidence evades the rules of experience and logic due to its subjection to the rules of specific profession or expertise and hence it is argued that even the court is bound with it. Given this, expert testimony may be regarded as a peculiar deviation from the principle of free evaluation of evidence, because possibility of prosecutor's evaluation of the facts that are obtained through application of scientific and expert knowledge is scarce, so he/she principally accepts the facts as they result

[72] The higher number indicates that in certain cases were performed repeated and additional forensic expertises.

[73] For more information on the role of forensic accounting and forensic audit in the South Eastern European countries see: Mojsoska and Dujovski (2015).

from findings or opinion of an expert witness. Privileged treatment of expertise by the prosecutor and consequently by the court indicates dependence on the findings and opinion of expert witness, and acceptation of forensic expertise without critical evaluation and comparison to other material and personal evidence (Bajraktarević Pajević, Kavazović and Lučić – Ćatić, 2017) may result in expert witness deciding about the fate of the criminal case. This urges for greater carefulness in regard to the forensic expertise, and prosecutor should pay attention to the evaluation of following aspects of the forensic expertise (Pavišić and Modly, 1999:303): the level of expert witness compliance with the procedural provisions during the process of forensic expertise; whether the expert witness has remained within the limits of delegated expertise and within the limits of his/her profession and knowledge; whether expertise is based on objectively established facts and are some important facts neglected; authenticity of the subject of expertise, and also suitability and adequacy of the substance in terms of quantity and quality in order to obtain correct conclusion; whether the methods used by the expert witness are generally recognized and accepted and whether the scope of expertise is satisfactory; compliance of the findings and opinion of expert witness with other evidences; value of the conclusion in regard to identicalness and whether is clear, understandable and logical.

Notwithstanding the problems regarding the evaluation of forensic expertise, this evidence should be disregarded by the prosecutor in the case of: incompleteness and qualitative deficiencies of the substances at disposal of the expert;[74] absence of convincing arguments that would support of the expert's conclusion; doubts about the and completeness of the findings and accuracy of opinion insufficient development of the relevant branch of professional knowledge; inadequate formal qualifications of expert witness; and violation of the provisions of the LCPs in the procedure of expertise (see: Dimitrijević, 1971).

Concluding remarks

Relationship of the prosecutor and expert witness, shaped through the provisions of LCPs, is built on the need of the latter for scientific or professional knowledge or skill in order to establish and evaluate of certain important facts in given criminal matter. Even though, prosecutor is not tied by the legal rules in the process of evaluation of existence or nonexistence of the facts, researches of judicial practice in B&H indicate that there is in fact rule that guides conduct of prosecutors: preference of the forensic expertise over other material and personal evidences. This specific form of deviation from the fundamental legal principle of free evaluation of evidence shouldn't be ignored and greater carefulness in regard to the evaluation of forensic expertise should be performed.

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[74] On specifics of typical shortcomings of forensic science and other expert evidence see: Roberts (2015).

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Criminalising Fraud Affecting the Union's Financial Interests. Implications for Romanian Criminal Law

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Abstract

At European level, since 1976 – the year of the first draft for a Treaty amending the founding treaties in this respect –, till now – when Directive (EU) 2017/1371 of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law was adopted (after five years of negotiations) –, the legislative process aimed at protecting the European Union financial interests is a long and difficult one.

In Romania, distinct criminalization of fraud affecting the European Union's financial interests, in Articles 18¹-18³ of Law no 78/2000, according to the definition of criminal offences from Article 1 of the "old" Convention on the protection of the European Communities' financial interests, makes the relevant national legislation comply with the minimum requirements of the above mentioned Directive. Attempting to harmonize in this area, however, has multiple implications for national legislation and, at the same time, for judicial practice in criminal matters.

Key words: *harmonization; criminal law; European criminal law; financial interests; European Union*

Introduction

On 26 July 1995, almost twenty years after the failure of the first attempt to establish a legal basis for the protection of the European Communities' financial interests in the founding treaties[1], under the third pillar of the Union the Convention on the protection of the European Communities' financial interests („PIF Convention") was signed, followed by three protocols (from 27 September 1996 to 19 June 1997). The lack of ratification or inappropriate implementation by the Member States, criticized in two Commission reports, have led the latter to successively attempt to replace them by initiating another harmonization instrument – the *directive* – binding (even if only as to

[1] Draft for a Treaty amending the Treaties establishing the European Communities so as to permit the adoption of common rules on the protection under criminal law of the financial interests of the Communities and the prosecution of infringements of the provisions of those Treaties, submitted by the Commission to the Council on 10 August 1976 (OJ C 222, 22.9.1976, p. 2–17).

the result to be achieved) and involving means of "coercion" towards the Member States in the absence of transposition or in the case of inappropriate transposition. Only on 5 July 2017, this process resulted in adoption of Directive (EU) 2017/1371 of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law („PIF Directive"). In the following, after a brief presentation of the harmonization instruments for the protection of the Union's financial interests by means of criminal law at European level, which have entered into force so far (PIF Convention and PIF Directive) (I), we will analyze the implications of the obligation – instituted at European level – to criminalize fraud affecting the financial interests of the Union on Romanian criminal law (II).

I. Instruments for protecting the Union's Financial Interests by means of Criminal Law at European Level

1. Convention on the protection of the European Communities' Financial Interests of 26 July 1995

At European level, the first elements to harmonize the protection of the Union's financial interests by means of criminal law were introduced in 1995, when the ***Convention on the protection of the European Communities' financial interests*** (hereinafter, „PIF Convention"[2]) and the Protocols thereto[3] were adopted. The PIF Convention, in force since 17 October 2002, has been ratified by all Member States[4] and provides, in summary:

- a definition of fraud affecting the European Communities' financial interests, in respect of expenditure and in respect of revenue[5];

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[2] "PIF" is the French acronym for *protection des intérêts financiers* (protection of financial interests), used by the European legislature and also in case-law and legal writings.

[3] The Convention of 26 July 1995 (OJ C 316, 27.11.1995, p. 49–57) (fraud); the Protocol of 27 September 1996 (OJ C 313, 23.10.1996, p. 2) (corruption), the Protocol of 29 November 1996 (OJ C 151, 20.5.1997, p. 2) (the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests) and the Second Protocol of 19 June 1997 (OJ C 221, 19.7.1997, p. 12) (money laundering). Romania and Bulgaria acceded to the Convention and the Protocols thereto according to Council Decision 2008/40/JAI of 6 December 2007 (OJ L 9, 12.1.2008, p. 23–24), and Croatia - according to Council Decision (EU) 2016/815 of 17 May 2016 (OJ L 133, 24.5.2016, p. 9–10).

[4] According to section 4.1 of the Second Commission Report on the Implementation of the Convention for the Protection of the European Communities' financial interests and its protocols (COM(2008)77 final, Brussels, 14.2.2008), almost all Member States ratified the Convention. The other Member States have since ratified the Convention and its protocols as well.

[5] According to Article 1(1) of the Convention, "(...) fraud affecting the European Communities' financial interests shall consist of:

(a) in respect of expenditure, any intentional act or omission relating to:

- the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities,

- non-disclosure of information in violation of a specific obligation, with the same effect,

- the misapplication of such funds for purposes other than those for which they were originally granted;

(b) in respect of revenue, any intentional act or omission relating to:

- the obligation for Member States to criminalize fraud affecting the European Communities' financial interests and to provide for effective, proportionate and dissuasive criminal penalties, including – at least in cases of serious fraud – penalties involving deprivation of liberty which can give rise to extradition[6];

- criminal liability of heads of businesses in cases of fraud affecting the European Community's financial interests, by a person under their authority acting on behalf of the business[7];

- rules on the application of the criminal law in cases with foreign elements, extradition and transfer of proceedings, international cooperation and the application of the *ne bis in idem* principle;

- the jurisdiction of the Court of Justice of the EU to solve any dispute between Member States concerning the interpretation or application of the Convention and any dispute between one or more Member States and the Commission, concerning the application of Article 1 or 10 of the Convention.

The first Protocol to the Convention on the protection of the European Communities' financial interests, in force since 17 October 2002, includes definitions of the terms 'official', 'Community official' and 'national official', as well as 'passive corruption' and 'active corruption', and provisions on the need to criminalize and harmonize punishments for acts of corruption affecting or likely to prejudice the financial interests of the European Communities by requiring Member States to provide for "effective, proportionate and dissuasive criminal penalties, including, at least in serious cases, penalties involving deprivation of liberty which can give rise to extradition"[8].

The Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests, in force since 17 October 2002, provides for the possibility for national courts to request the Court of Justice to give a preliminary ruling on a question concerning the interpretation of the Convention and the first Protocol thereto.

The Second Protocol to the Convention on the protection of the European Communities' financial interests, in force since 19 May 2009, provides for the liability of legal persons, confiscation, money laundering and cooperation between the Member States and the Commission in order to protect the financial interests of the European Communities and personal data.

- the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the general budget of the European Communities or budgets managed by, or on behalf of, the European Communities,

- non-disclosure of information in violation of a specific obligation, with the same effect,

- misapplication of a legally obtained benefit, with the same effect".

[6] According to Article 2 of the Convention, *serious fraud* shall be considered to be fraud involving a minimum amount to be set in each Member State, of at least 50.000 Euro; however, in cases of *minor fraud* involving a total amount of less than 4.000 Euro and not involving particularly serious circumstances under its laws, a Member State may provide for penalties of a different type.

[7] According to Article 3 of the Convention, „Each Member State shall take the necessary measures to allow heads of businesses or any persons having power to take decisions or exercise control within a business to be declared criminally liable in accordance with the principles defined by its national law in cases of fraud affecting the European Community's financial interests, as referred to in Article 1, by a person under their authority acting on behalf of the business.".

[8] Article 5(1) of the first Protocol to the Convention.

The legal framework established by the Convention on the protection of the European Communities' financial interests and the Protocols thereto has been complemented by *general measures in the field of criminal law* applicable at Union level, including in matters relating to the protection of its financial interests, regarding the confiscation of any instruments, proceeds or other property related to crime, as well as combating other illegal activities affecting licit economy, such as money laundering and corruption.

2. Directive (EU) 2017/1371 of the European Parliament and of the Council on the Fight against Fraud to the Union's Financial Interests by Means of Criminal Law

On 5 July 2017 the Directive (EU) 2017/1371 of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law[9] (hereinafter, „PIF Directive") was adopted, with deadline for transposition 6 July 2019. The Directive is based on Article 83(2) of the Treaty on the Functioning of the European Union (TFEU)[10] and replaces, starting with the deadline for transposition, the Convention on the protection of the European Communities' financial interests of 26 July 1995, including the Protocols thereto – of 27 September 1996, of 29 November 1996 and of 19 June 1997 –, for the Member States bound by it, for which references to the Convention shall be construed as references to the Directive[11].

2.1. Subject matter and scope. The Directive establishes *minimum rules concerning the definition of criminal offences and sanctions with regard to combatting fraud and other illegal activities affecting the Union's financial interests*, with a view to strengthening protection against criminal offences which affect those financial interests, in line with the acquis of the Union in this field.[12]

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[9] OJ L 198, 28.7.2017, p. 29–41.

[10] The Commission considered, however, that the legal basis of the Directive should have been Article 325(4)

TFEU (indicated in the initial proposal), and reserved its right to initiate legal proceedings about the legal basis before the Court of Justice. [COM(2017) 246 final, Brussels, 16.5.2017 (Communication from the Commission to the European Parliament pursuant to Article 294(6) of the Treaty on the Functioning of the European Union concerning the position of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law)].

[11] Article 16 of PIF Directive. Under the latter aspect, it should be noted that Ireland has notified its wish to take part in the adoption and application of the Directive. Denmark and the United Kingdom have not taken part in the adoption of the Directive and are not bound by it or subject to its application (See recitals (36) to (38) of the PIF Directive). Denmark will be therefore still bound by its obligations under the Convention on the protection of the European Communities' financial interests of 26 July 1995 and the Protocols thereto. As regards the United Kingdom, in July 2014 (before the expiry of the transitional period, on 1 December 2014), according to Article 10(4) of Protocol (No 36) on transitional provisions, it has notified to the Council that it does not accept the powers of the Commission and of the Court of Justice of the European Union as set out in the Treaties, with respect to the acts of the Union in the field of police cooperation and judicial cooperation in criminal matters which had been adopted before the entry into force of the Treaty of Lisbon, including the PIF Convention and the Protocols thereto (See Council Communication of 1 December 2014, *UK's block opt-out and partial re-opt-in to the ex-third pillar acquis,* available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha /145981.pdf).

[12] Article 1 of PIF Directive

As the Directive provides for minimum rules, Member States are free to adopt or maintain more stringent rules for criminal offences affecting the Union's financial interests[13], for example by extending the definition of the criminal offences in question or imposing penalties beyond the required limits.

The inclusion of VAT fraud within the scope of the PIF Directive, originally proposed by the Commission[14] – following the judgment of the Court of Justice of the European Union (CJEU) of 15 November 2011 – *European Commission v Federal Republic of Germany*[15] and according to the opinion of the European Court of Auditors in this respect[16] –, has been the subject of wide-ranging debates. In the majority, Member States (including Romania) have opposed the inclusion of value added tax (VAT) fraud within the scope of the Directive. In this regard, besides arguments relating to EU and Member States competences in the area of tax law, the main argument was based on "the lack of proportionality: (…) as only a very small portion of the VAT revenues collected by national Tax administrations is transferred into the budget of the EU, and as national protection mechanisms are already in place"[17].

After a general approach was reached in Council June 2013, on the proposal for a Directive, following the fifth trilogue on 2 June 2015 the negotiations were interrupted, mainly for the reason that the Parliament could not accept the exclusion of VAT – related fraud from the scope of the Directive[18].

The discussion on the inclusion of fraud with VAT in the draft PIF-Directive was revived as a result of the CJEU Judgment of 8 September 2015, in case *Ivo Taricco and others*, where the Court held, inter alia, that the concept of 'fraud' is defined in Article 1 of the PIF Convention as „any intentional act or omission relating to […] the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds from the general budget of the European [Union] or budgets managed by, or on behalf of, the European [Union]", and it „therefore covers revenue derived from applying a uniform rate to the harmonised VAT assessment bases determined according to EU rules"[19].

Finally, on 30 November 2016, the Council and the European Parliament have reached a compromise solution[20], in the sense that PIF Directive shall apply „only in

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[13] Recital (16) of PIF Directive

[14] COM(2012) 363 final, 11.7.2012, p. 9.

[15] CJEU (Grand Chamber), Judgment of 15 November 2011, *European Commission v Federal Republic of Germany,* C-539/09, EU:C:2011:733.

[16] Opinion No 8/2012 on the proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law (pursuant to Article 325 of the Treaty on the Functioning of the European Union) Avizul nr.8/2012 al Curții de Conturi Europene (prezentat în temeiul articolului 325 TFEU) (OJ C 383, 12.12.2012, p. 1–2), point 8.

[17] See Note with the subject "Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interest by means of criminal law (first reading) = Policy debate/Progress report", no 12686/16, Brussels, 30 September 2016, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_12686_2016_INIT&from=EN.

[18] See Note with the subject „PIF: Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law (First reading) = Progress report", no 15130/16, Brussels, 2 December 2016, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_15130_2016_INIT&from=EN.

[19] CJEU (Grand Chamber), Judgment of 8 September 2015, *Ivo Taricco and Others*, C-105/14, EU:C:2015:555, paragraph 41.

[20] See „A" Item Note, no 5478/17, Brussels, 1 February 2017, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_5478_2017_INIT&from=EN.

cases of serious offences against the common VAT system", namely where the intentional acts or omissions "are connected with the territory of two or more Member States of the Union and involve a total damage of at least EUR 10 000 000"[21].

2.2. Fraud affecting the Union's financial interests. Fraud affecting the Union's financial interests is defined in Article 3(2) of the PIF Directive. In addition to fraud affecting the Union's financial interests, PIF Directive provides for a number of other criminal offences, "related" to it (according to the original proposal). These are "money laundering" (involving property derived from the criminal offences covered by the directive), "passive corruption", "active corruption" and "misappropriation", which are not the subject of the present analysis.

Fraud affecting the Union's financial interests is structured, following the model of the PIF Convention, on two categories: *fraud in respect of expenditure*[22], with separate mention of fraud in respect of *procurement-related expenditure*[23], and *fraud in respect of revenue*[24], with a distinct definition of fraud in respect of *revenue arising from VAT own resources*[25].

2.3. The need to criminalise. PIF Directive sets out for the Member States the obligation to criminalize, inter alia, the acts or omissions defined in Article 3, when committed *intentionally*[26], including the *attempt* to commit them[27].

Aiding and abetting the commission of any of the criminal offences referred to in Article 3 are also punishable as criminal offences[28].

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[21] Article 2(2) of PIF Directive.

[22] „(...) any act or omission relating to: (i) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds or assets from the Union budget or budgets managed by the Union, or on its behalf; (ii) non-disclosure of information in violation of a specific obligation, with the same effect; or (iii) the misapplication of such funds or assets for purposes other than those for which they were originally granted" (Article 3(2) (a) of PIF Directive).

[23] „(...) at least when committed in order to make an unlawful gain for the perpetrator or another by causing a loss to the Union's financial interests, any act or omission relating to: (i) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the misappropriation or wrongful retention of funds or assets from the Union budget or budgets managed by the Union, or on its behalf; (ii) non-disclosure of information in violation of a specific obligation, with the same effect; or (iii) the misapplication of such funds or assets for purposes other than those for which they were originally granted, which damages the Union's financial interests" (Article 3(2) (b) of PIF Directive).

[24] „(...) any act or omission relating to: (i) the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the Union budget or budgets managed by the Union, or on its behalf; (ii) non-disclosure of information in violation of a specific obligation, with the same effect; or (iii) misapplication of a legally obtained benefit, with the same effect" (Article 3(2) (c) of PIF Directive).

[25] „(...) any act or omission committed in cross-border fraudulent schemes in relation to: (i) the use or presentation of false, incorrect or incomplete VAT-related statements or documents, which has as an effect the diminution of the resources of the Union budget; (ii) non-disclosure of VAT – related information in violation of a specific obligation, with the same effect; or (iii) the presentation of correct VAT – related statements for the purposes of fraudulently disguising the non-payment or wrongful creation of rights to VAT refunds" (Article 3(2) (d) of PIF Directive).

[26] Criminal offences which do not require intention are not covered by the Directive. The intentional nature of an act or omission may be inferred from objective, factual circumstances. [recitle (11) of PIF Directive].

[27] Article 5(2) of PIF Directive.

[28] Article 5(1) of PIF Directive.

2.4. Liability of legal persons. PIF Directive requires liability of legal persons for any of the criminal offences referred to in Article 3, where:

- any person, acting either individually or as part of an organ of the legal person, and having a leading position within the legal person [based on: (a) a power of representation of the legal person; (b) an authority to take decisions on behalf of the legal person; or (c) an authority to exercise control within the legal person] committed any of the criminal offences referred to in Articles 3 for the benefit of that legal person[29];
- the lack of supervision or control by a person referred to above has made possible the commission, by a person under its authority, of any of the criminal offences referred to in Article 3 for the benefit of that legal person[30].

For the purposes of the PIF Directive, "legal person" means "an entity having legal personality under the applicable law, except for States or public bodies in the exercise of State authority and for public international organisations" [31].

Liability of legal persons shall not exclude the possibility of criminal proceedings against natural persons who are perpetrators of the criminal offences[32].

2.5. Sanctions. PIF Directive provides for the Member States to ensure that the criminal offences affecting the Union's financial interests are punishable by *effective, proportionate and dissuasive criminal sanctions,* both for natural and for legal persons[33], while setting up, separately, a set of minimum rules that these sanctions must meet for the two categories of persons mentioned above:

A. Referring to ***sanctions with regard to natural persons,*** PIF Directive stipulates:

- a maximum penalty which provides for imprisonment[34];
- a maximum penalty of at least four years of imprisonment when the criminal offence involves *considerable* damage or advantage (more than EUR 100 000)[35];
- an aggravating circumstance where a criminal offence referred to in Article 3 is committed within a criminal organisation in the sense of Framework Decision 2008/841/JHA[36], mentioning that "Member States are not obliged to provide for this aggravating circumstance where national law provides for the criminal offences as defined in Framework Decision 2008/841/JHA to be punishable as a separate criminal offence and this may lead to more severe sanctions"[37].

At the same time, Member States may provide for sanctions other than criminal sanctions, where the criminal offence involves damage or an advantage of less than EUR 10 000[38], and the competent authorities may exercise disciplinary powers against public officials[39].

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[29] Article 6(1) of PIF Directive.

[30] Article 6(2) of PIF Directive.

[31] Article 2(1) (b) of PIF Directive.

[32] Article 6(3) of PIF Directive.

[33] Article 7(1) and Article 9(1) of PIF Directive.

[34] Article 7(2) of PIF Directive.

[35] Article 7(3) of PIF Directive.

[36] Article 8 of PIF Directive. According to Article 1.1 of Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime (OJ L 300, 11.11.2008, p. 42–45), "'criminal organisation' means a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit".

[37] Recital (19) of PIF Directive.

[38] Article 7(4) of PIF Directive.

[39] Article 7(5) of PIF Directive.

B. Referring to ***sanctions with regard to legal persons,*** these *shall include* criminal or non-criminal fines and *may include* other sanctions, such as: (a) exclusion from entitlement to public benefits or aid; (b) temporary or permanent exclusion from public tender procedures; (c) temporary or permanent disqualification from the practice of commercial activities; (d) placing under judicial supervision; (e) judicial winding-up; (f) temporary or permanent closure of establishments which have been used for committing the criminal offence [40].

Given the wide differences between the Member States' legislation on the liability of legal persons, the Directive does not require a *criminal* fine and the other sanctions are provided as an example.

2.6. Limitation periods for criminal liability and the enforcement of penalty. Another novelty of the PIF Directive is the attempt to approximate the provisions on limitation periods for criminal liability and the enforcement of penalty, for fraud affecting the Union's financial interests.

It thus establishes the need to provide provide for a limitation period that enables the investigation, prosecution, trial and judicial decision for a sufficient period of time after the commission of the criminal offences, in order for those criminal offences to be tackled effectively[41], respectively, for those which are punishable by a maximum sanction of at least four years of imprisonment, for a period of at least five years from the time when the offence was committed[42] or shorter than five years, but not shorter than three years, provided that the period may be interrupted or suspended in the event of specified acts[43].

According to PIF Directive***, limitation periods for the enforcement of penalty,*** for at least five years from the date of the final conviction (which may include extensions of the limitation period arising from interruption or suspension), are required for the the enforcement of: (a) a penalty of more than one year of imprisonment; or alternatively, (b) a penalty of imprisonment in the case of a criminal offence which is punishable by a maximum sanction of at least four years of imprisonment[44].

II. The Obligation to Criminalize Fraud Affecting the Union's Financial Interests. Implications on Romanian Criminal Law

PIF Convention (as well as the Protocols thereto) has been ratified by all EU Member States, but most of them opted to criminalise fraud affecting the Union's financial interests under the Criminal Code by assimilating the Union's financial interests to the national ones, without defining "fraud" according to the Convention.

In this context, *the fragmentation of existing national criminal law provisions* on the protection of the European Union's financial interests, the *updating of the definitions of offenses* affecting the Union's financial interests, which include those in respect of revenue arising from VAT own resources and misappropriation, plus *the need to approximate sanctions* (including liability of legal persons and sanctions with regard to

[40] Article 9 of PIF Directive.
[41] Article 12(1) of PIF Directive.
[42] Article 12(2) of PIF Directive.
[43] Article 12(3) of PIF Directive.
[44] Article 12(4) of PIF Directive.

natural persons) and *limitation periods*, as proposed more recently by the PIF Directive, imply important changes to Member States' criminal law, especially those that focus on financial sanctions for economic crime.

1. Criminalising Fraud Affecting the Union's Financial Interests

In Romania, in 2003, fraud affecting the Union's financial interests constitutes a criminal offence according to Articles 18^1-18^3 of Law no. 78/2000[45], with a similar definition to the one provided by Article 1 of the PIF Convention, although the acts or omissions were circumscribing some of the already existing criminal offenses (fraud or misappropriation, forgery and abuse of office, referring to the Criminal Code alone)[46]. Its provisions have been modified following the entry into force of the New Criminal Code, by Law no. 187/2012, for the implementation of Law no 286/2009 on the Criminal Code[47], in general in the sense of reducing penalties.

The abovementioned texts comply with the definition of fraud from Article 1 of PIF Convention and, in our opinion, also comply with the minimum requirements of Article 3 of PIF Directive. The need to ensure a system of protection for the Union's financial

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[45] Section 4^1 (Articles 18^1-18^5) of Law no 78/2000 on preventing, discovering and sanctioning of corruption acts – *Criminal offences against the European Union's financial interests* - was introduced by Book II Title I Article I point 18 of the Law no. 161/2003; its title was amended by Article 79 point 11 of Law no. 187/2012 (replacing the phrase "European Communities" with that of "European Union").

According to Articles 18^1(1) and (2) and 18^3(1) and (2) of Law no. 78/2000 the following acts or omissions shall be punished by imprisonment from 2 to 7 years and the interdiction of certain rights:

- the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the wrongful obtaining of funds from the Union budget or budgets managed by the Union, or on its behalf;
- the intentionally non-disclosure of information, in violation of a specific obligation, in order to obtaine funds from the Union budget or budgets managed by the Union, or on its behalf, which has as its effect the wrongful obtaining of those funds;
- the use or presentation of false, incorrect or incomplete statements or documents, which has as its effect the illegal diminution of the resources of the Union budget or budgets managed by the Union, or on its behalf;
- the intentionally non-disclosure of information, in violation of a specific obligation, which has as its effect the illegal diminution of the resources of the Union budget or budgets managed by the Union, or on its behalf.

According to Article 18^2(1) and (2) of Law no. 78/2000, the following acts or omissions shall be punished by imprisonment from 1 to 5 years and the interdiction of certain rights:

- the misapplication of funds from the Union budget or budgets managed by the Union, or on its behalf for purposes other than those for which they were originally granted;
- misapplication of a legally obtained benefit, which has as its effect the illegal diminution of the resources of the Union budget or budgets managed by the Union, or on its behalf.

According to Articles 18^1(3), 18^2(3) and 18^3(3) of Law no. 78/2000, if the abovementioned offences have caused particularly serious consequences ("a material damage exceeding 2,000,000 RON", according to Article 183 CC), the special penalty limits increase by half.

According to Article 18^4 of Law no. 78/2000, the attempt to commit any of the criminal offences referred to in Articles 18^1, 18^2 and 18^3 is punishable as a criminal offence (and the special penalty limits are reduced by half, as it is stipulated in Article 33 (2) CC).

[46] Regarding the necessity of a special incrimination, it was argued in the legal literature that "fraud affecting the Community budget under the incidence of the Romanian criminal law could only be partially sanctioned on the basis of existing provisions". (George Antoniu, *Protecția penală a intereselor financiare ale Comunităților Europene*, in Revista de drept penal, no 2/2002, p. 9-18).

[47] Romanian Official Journal no. 757 o 12 November 2012.

interests equivalent to that recognized for national financial interests would, however, require that, fraud in respect of Union's revenue, shall constitute one of the criminal offences provided by Articles 270, 272 and 273 of the Romanian Customs Code and Articles 8 or 9(1) point c) of Law no 241/2005 (to prevent and combat tax evasion), prior to the one provided by Article 18^3 of Law no 78/2000 (which would have a subsidiary character). The transposition of Article 3(2) point (b) of PIF Directive, providing for fraud „in respect of procurement-related expenditure", does not imply a new distinct criminal offence in Romanian criminal law, as these facts already constitute criminal offences, under Articles 18^1 and 18^2 of Law no. 78/2000, according to a unitary judicial practice in this respect, and the obligation to interpret national law in accordance with European Union law prohibits any change in that regard.

2. Liability of Natural Persons and Legal Persons for Fraud Affecting the Union's Financial Interests

Regarding the ***liability of natural persons***, strictly referring to fraud affecting the European Union's financial interests (defined in Article 3 of the PIF Directive), since the offenses provided by art. 18^1-18^3 of Law no. 78/2000 do not require a qualified subject, the transposition of the Directive does not entail modification of the Romanian legislation.

As for criminal participation, inciting, aiding and abetting the commission of fraud affecting the European Union's financial interests provided by art. 18^1-18^3 of Law no. 78/2000 are punishable as criminal offences (in the same conditions as the author of the offence); therefore, the Romanian law corresponds to the obligation stipulated by Article 5 (1) of the PIF Directive, on punishing incitement, aiding and abetting.

Regarding the ***liability of legal persons***, in Romanian criminal law, the general criminal liability of legal persons has been regulated since 2006 (Article 19^1 of Romanian Crminal Code of 1969[48] and Article 135 of Romanian Criminal Code of 2009, in force) and meets the requirements of Article 2(1) point (b) of the PIF Directive[49]. According to Romanian criminal law, there shall be liable legal persons[50] of private law, for profit or non-profit, after they have been legally constituted and until the closure of

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[48] Article 19^1 of the Romanian Criminal Code of 1969 was introduced by Article I point 1 of the Law no. 278/2006, amending and supplementing the Criminal Code (Romanian Official Journal no 601 of 12 July 2006), and according to Article VIII of the same Act, the provisions regarding legal persons entered into force 90 days after the date of publication (on 10 October 2006). Law no. 301/2004 – Criminal Code (Romanian Official Journal no 575 of 29 June 2004), the first law which established the criminal liability of legal persons as a principle, in Article 45, has never entered into force. For details on the regulation of criminal liability of legal persons in Romania, see Andra-Roxana Ilie, *Angajarea răspunderii penale a persoanei juridice*, C.H. Beck Publishing House, Bucharest, 2011, p. 15 ss.

[49] See *supra*, part I, point 2.4.

[50] *Legal personality* is a necessary condition for the criminal liability of legal persons in Romanian law, as shown by the literal interpretation of Article 135 CC; the literature in this sense (Andra-Roxana Ilie, *op. cit.*, p.56-66; Laura Maria Stănilă, *Răspunderea penală a persoanei juridice*, Hamangiu Publishing House, Bucharest, 2012, p.114-118) has recently been confirmed by the High Court of Cassation and Justice, The Panel for Clarification of Legal Aspects, who stated that „the individual undertaking, type of economic activity organised by an entrepreneur, under the provisions of Urgency Ordinance of the Government no 44/2008, does not have the status of a legal person and therefore cannot be held liable under the conditions set out in the Article 135 CC" (Decision no 1/2016, published in Romanian Official Journal no 138 of 23 February 2016).

their liquidation formalities[51], as well as legal persons governed by public law, except for the State, public authorities[52] and public institutions, in the case of the latter, whether the offense was committed in the exercise of an activity which is not subject to the private domain[53]. These conditions are complying with the requirements laid down in Article 2(1) point (b) of the PIF Directive.

3. Sanctions for Fraud Affecting the Union's Financial Interests

In the case of natural persons, in Romania, for fraud affecting the Union's financial interests, the law provides for a penalty over the minimum of four years of imprisonment, regardless of the amount of the damage, so that the PIF Directive does not require national legislation to be amended in this respect either.

The Romanian law already fulfills the requirements of Article 8 of PIF Directive[54]: committing the offence "within a criminal organisation" has even more serious consequences than the one foreseen there – considering it as an aggravating circumstance (which is, however, also provided in Romanian criminal law[55]) –, providing for a second, separate criminal offence, provided by Article 367 CC ("the organized crime group")[56].

According to Article 136 of the Romanian Criminal Code (CC), ***penalties applicable to the legal persons*** are criminal fine[57], as the main penalty, and complementary penalties: a) dissolution; b) suspension of the activity or of one of the activities (for a period ranging from three months to three years); c) closure of some establishments (for a period ranging from three months to three years); d) exclusion from public procurement tenders (for a period ranging from one year to three years); e) placement under judicial supervision (for a period ranging from one year to three years); f) publication of the judgement. The penalty provided by Article 136(3) (d) CC - exclusion from public procurement tenders -, as opposed to the corresponding sanctions laid down by Article 9 points (a) and (b) of PIF Directive ("exclusion from entitlement to public benefits or aid" and „exclusion from public tender procedures"), refers only to the possibility of participating in „public procurement tenders", and not to „public benefits or aid"; at the same time, this penalty, as well as the placement under judicial supervision are limited in time, although the Directive does not provide for such a

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[51] Andra-Roxana Ilie, *op. cit.*, p. 66-82.

[52] According to Article 240 of Law no. 187/2012, for the implementation of Law no. 286/2009 on the Criminal Code (Romanian Official Journal no. 757 of 12 November 2012), „*In applying the provisions of Article 135 of the Criminal Code, public authorities are the authorities expressly provided for in Title III, as well as in Articles 140 and 142 of the Romanian Constitution* [the Parliament, the President of Romania, The Government, Public Administration authorities, Judicial Authority, the Court of Audit and the Constitutional Court - a.n.]".

[53] Andra-Roxana Ilie, *op. cit.*, p.82-98. For the analysis of the criminal liability of public institutions, see also Viorel Paşca, in Matei Basarab (coordinator), *Codul penal comentat. Vol. I. Partea generală*, Hamangiu Publishing House, Bucharest, 2007, p. 105-106.

[54] "where a criminal offence referred to in Article 3, (...) sau 5 is committed within a criminal organisation in the sense of Framework Decision 2008/841/JHA, this shall be considered to be an aggravating circumstance".

[55] According to Article 77(a) of the Romanian Criminal Code (CC), „committing the deed of three or more people together" is an aggravating circumstance.

[56] This possibility is mentioned, however, expressly, in recital (19) of PIF Directive.

[57] Article 137(2) - (5) CC.

limit[58]. As sanctions under Article 9 points (a) to (f) are optional, and the enumeration - exemplary (the expression being that „ *may* include other sanctions, *such as* – a.n."), the fulfillment of the general condition of the "effective, proportionate and dissuasive sanctions" is rather a matter of interpretation and enforcement of the law, to be considered by the national court in the sanctioning process, and it is not for the national legislature to enact any special rule transposing those provisions.

4. Limitation Periods for Criminal Liability and the Enforcement of Penalty for Fraud Affecting the Union's Financial Interests

In Romania, taking into account the limits of penalties for criminal offences affecting the Union's financial interests provided by Law no 78/2000, ***limitation periods for criminal liability*** are of 5 years (for criminal offences provided by Articles 18^2 and 18^5) and of 8 years (for criminal offences provided by Articles 18^1 and 18^3)[59], including for the attempted or qualified form of the offenses[60], both for natural and for legal persons[61]. The limitation periods shall be interrupted by any procedural act in that case[62], but an interruption of the limitation period may give rise to an extension of that period by no more than the maximum prescribed period[63]; thus the maximum limitation periods ar of 10 years and 16 years respectively. The Romanian legal provisions meet the minimum requirements from Article 12(1), (2) and (3) of PIF Directive, and are also in compliance with the principle of equivalence laid down by Article 325(2) TFEU[64], whereas they are the same as those applicable to offenses of "illegal obtaining of funds", provided by Article 306 CC, şi "misappropriation of funds", provided by Article 307 CC, which protect the national budget.

The importance of the (special) limitation period for criminal liability for the fulfillment of the Member States' obligation to combat fraud affecting the Union's financial interests has been highlighted in a relatively recent CJEU ruling, in *Taricco and Others*[65], where the Court stated that „a national rule in relation to limitation periods for criminal offences (…) which provided, at the material time in the main proceedings, that the interruption of criminal proceedings concerning serious fraud in relation to value added tax had the effect of extending the limitation period by only a quarter of its initial

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[58] Article 9(a) does not provide for the temporary or permanent nature of the prohibition, as in the case of the sanctions provided for in points (b), (c) şi (d) of the same Article.

[59] According to Article 154 CC: „(1) Limitation periods for criminal liability are the following: (...) c) 8 years, when the law provides for the offense a term of imprisonment of more than 5 years, up to 10 years; d) 5 years, when the law provides for the offense a term of imprisonment of more than one year, up to 5 years; (...). (2) Limitation periods (...) start to run from the date when the offence was committed. In the case of continuing offenses, the term shall run from the date on which the act or omission, or the last act or omission ceased (...)".

[60] According to Article 187 CC, „By punishment provided by law is meant the punishment provided by the law that criminalizes the act committed in the form consumed, without taking into consideration the causes of reduction or increasing of punishment".

[61] According to Article 148 CC, „criminal liability of legal persons is submitted to limitation periods provided by law for natural persons".

[62] Article 155(1) CC.

[63] Article 155(4) CC.

[64] „Member States shall take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests."

[65] CJEU (Grand Chamber), Judgment of 8 September 2015, *Ivo Taricco and Others*, C-105/14, EU:C:2015:555.

duration[66], is liable to have an adverse effect on fulfilment of the Member States' obligations under Article 325(1) and (2) TFEU if that national rule prevents the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union, or provides for longer limitation periods in respect of cases of fraud affecting the financial interests of the Member State concerned than in respect of those affecting the financial interests of the European Union". Moreover, by the same judgment, the Court also stated that "in the event that the national court concludes that the national provisions at issue do not satisfy the requirement of EU law (…), that court would have to ensure that EU law is given full effect, if need be by disapplying those provisions", „without having to request or await the prior repeal of those articles by way of legislation or any other constitutional procedure"[67], but "it must also ensure that the fundamental rights of the persons concerned are respected"[68].

CJUE Judgment in *Taricco and others* Case sparked vivid controversy in legal literature[69] and judicial practice[70] and generated, in less than a year and a half, a new request for a preliminary ruling made from the Italian Constitutional Court („Corte Costituzionale"), by Order no. 24/2017[71], lodged on 26 January 2017[72]. The case also brought into question the legal nature of the limitation period for criminal liability in the

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[66] In the main proceedings, according to Italian law, the limitation period for criminal liability is of 6 years and cannot, in any circumstances, be extended for more than one quarter (so the total period was 7 years and 6 months maximum), no matter how many interruptions would occurr.

[67] CJEU (Grand Chamber), Judgment of 8 September 2015, *Ivo Taricco and Others*, C-105/14, EU:C:2015:555, paragraph 49 and the case-law cited.

[68] *Idem*, pct.53.

[69] Emmanouil Billis, *The European Court of Justice: A "Quasi-Constitutional Court" in Criminal Matters? The Taricco Judgment and Its Shortcomings*, în *New Journal of European Criminal Law*, Vol. 7, Issue 1, 2016, p. 20-38; Michele Caianiello, *Processo penale e prescrizione nel quadro della giurisprudenza europea. Dialogo tra sistemi o conflitto identitario?,* 24 February 2017, available at http:// www.penalecontemporaneo.it/foto/DPC_Riv_Trim_2_17.pdf#page=225&view=fit, and the legal literature cited.

[70] Some courts directly performed the *Taricco* rule and disapplied the national rules with strong effects in malam partem for the defendants of that case (Italian Court of Cassation, 3rd division, 2210/16, 17 September 2015, Def. *Pennacchini – apud* Stefano Bissaro, *The „Taricco" case and the courts' power to create new criminal law: strained dialogue between the Italian Constitutional Court and the European Court of Justice,* available at https://ddd.uab.cat/pub/poncom/2017/176433/Stefano_Bissaro_ The_ Taricco_case_and_the_courts_power_to_create_new_criminal_law_strained_dialogue_between_the_Italian _Constitutional_Court_ICC_and_the_European_Court_of_Justice_ECJ.pdf) or decided to apply the national provisions holding that the double conditions provided by the ECJ for the disapplication were not met (Italian Court of Cassation, 4th division, 7914/16, 25 January 2016, Def. *Tormenti and others – ibidem*).

[71] The Order is available at http://www.giurcost.org/decisioni/2017/0024o-17.html, and in English at http://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/O_24_ 2017.pdf.

[72] *M.A.S. and M.B.,* C-42/17. In the main proceedings, the Milan Court of Appeal (6421/15, 18 September 2015, Def. *De Bortoli and others*) and the Italian Court of Cassation, 3rd division (28364/16, 30 March 2016, Def. *Cestari and others*) have referred to the Italian Constitutional Court a question concerning Article 2 of Law no 130 of 2 August 2008, insofar as it authorises the ratification and gives legal effect to Article 325(1) and (2) TFEU, as interpreted by the judgement *Taricco* (see Stefano Bissaro, *op. cit.*).

By Order of 28 February 2017 (EU:C:2017:168), the President of the Court decided that the reference for a preliminary ruling is to be determined pursuant to an expedited procedure, according to Article 105(1) of the Rules of Procedure of the Court of Justice. Opinion of Advocate General Bot was delivered on 18 July 2017 (EU:C:2017:564); yet, the Court's judgement has not been delivered at the time of writing this article (28.09.2017).

Member States: institution of substantial criminal law (subject to the principle of retroactivity of the more lenient criminal law)[73] or of procedural criminal law (subject to the principle of immediate application of the law – *tempus regit actum*)[74]? Regarding the application of limitation period rules and the possibility of their retroactivity *in malam partem*, we must take into account the general principles laid down in the case-law of the European Court of Human Rights (ECHR)[75], in *Coëme and others v. Belgium*[76], *Previti v. Italy*[77] and *Cristian Borcea v. Romania*[78], that the immediate application of a law extending the limitation periods does not breach Article 7 of the European Convention on Human Rights (ECHR). For the purpose of Article 7 of the Convention and, implicitly, Article 49 of Charter of Fundamental Rights of the European Union (CFREU), limitation periods for criminal liability fall within the scope of criminal procedural law[79] and are governed by the *tempus regit actum* rule; so it remains to be determined to what extent the provisions of Article 52(3) CFREU allows for the prior application of national law, namely the non-retroactivity of a law modifying the rules on limitation if it is not in favor of the accused, as a result of its classification as substantive criminal law at the national level.

In this regard, the CJEU has already ruled, in the *Melloni* Case, that the interpretation according to which Article 53 CFREU gives general authorisation to a Member State to apply the standard of protection of fundamental rights guaranteed by its Constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law can not be accepted[80].

Therefore, irrespective of the internal legal provisions (even constitutional ones) that qualify the limitation periods for criminal liability as an institution of substantive criminal law, they can be removed from retroactive application, even to the detriment of the accused, under the conditions laid down by the CJEU in *Taricco and others*[81].

The previous reasoning could also apply to Romanian legislation (in the unlikely situation where limitation periods would prove to be too short and would create a risk

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[73] In the Hellenic Republic, the Kingdom of Spain, the Republic of Latvia, Romania or the Kingdom of Sweden, the limitation rules, as in Italy, form part of substantive criminal law. (*ibidem*, note no 13).

[74] In the Kingdom of Belgium, the Federal Republic of Germany and the French Republic the limitation rules are considered to be procedural rules. (*ibidem*, note no 13).

[75] According to Article 52(3) CFREU, „In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”.

As it results from the Explanations relating to the Charter of Fundamental Rights (2007/C 303/02, OJ C 303, 14.12.2007, p. 17–35), for Article 49(1) (with the exception of the last sentence) and (2) CFREU both the meaning and the scope are the same as Article 7 of the ECHR.

[76] ECHR, Judgement of 22 June 2000, final 18.10.2000, CE:ECHR:2000:0622JUD003249296.

[77] ECHR, Decision of 12 February 2013, CE:ECHR:2013:0212DEC000184508.

[78] ECHR, Decision of 22 September 2015, CE:ECHR:2015:0922DEC005595914.

[79] Although in *Taricco and others* (paragraph 57), the Court refers to those set out by the ECHR as regards the criminal procedural nature of limitation periods, it should be noted that the PIF Directive, including the approximation of limitation periods, was adopted on the basis of Article 83(2) TFEU, which refers to "the definition of criminal offences and sanctions"; the original legal basis proposed by the Commission (Article 325 TFEU) was changed during the legislative process (see *supra*, note no 10).

[80] CJEU (Grand Chamber), Judgment of 26 February 2013, *Stefano Melloni v Ministerio Fiscal*, C-399/11, EU:C:2013:107, paragraphs 56-57.

[81] In this regard, the Advocate General's Opinion from 18 July 2017, in case *M.A.S. and M.B.,* C-42/17, *cit. supra* (note no 72).

of impunity for fraud affecting the Union's financial interests), as limitation periods for criminal liability is an institution of substantive criminal law - according to literature as well as the judicial practice[82] -, and it is submitted, therefore, to the principle of the more lenient law, provided by Article 15(2) of the Romanian Constitution[83].

Regarding the ***limitation periods for the enforcement of penalty***, according to Romanian criminal law system, it is an institution of substantive criminal law as well[84] which, according to Article 161(1) CC, prevent the enforcement of the primary punishment[85]; the limitation periods relevant to the criminal offenses under review

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[82] See Vasile Teodorescu, in George Antoniu, Tudorel Toader (coordinators), *Explicațiile noului Cod penal*, vol. II, Universul Juridic Publishing House, Bucharest, 2015, p.456; Constantin Mitrache, Cristian Mitrache, *Drept penal român. Partea generală*, Universul Juridic Publishing House, București, 2014, p. 400; Florin Streteanu, *Considerații privind modificarea Codului penal prin Legea nr. 27/2012*, in Caiete de drept penal, no 1/2012, p. 11-22; Vintilă Dongoroz e.a., *Explicații teoretice ale codului penal român, Partea generală*, vol. II, Ediția a II-a, Academia Română and ALL BECK Publishing Houses, Bucharest, 2003, p.341; Vintilă Dongoroz, *Drept penal* (re-editing the 1939 edition), Bucharest, 2000, p.570. It has also been mentioned that "limitation period for criminal liability appears as a legal institution with effects both on the level of substantive criminal law, being a condition of punishment, as well as on the level of the criminal procedural law, being a condition of procedibility, the fulfillment of the limitation period preventing the exercise of the criminal proceedings" (Viorel Pașca, in Matei Basarab (coordinator), *op. cit.*, p.630). Following the amendments to the Romanian Criminal Code of 1969 by Law no 27/2012, increasing the special limitation period and causing the referral to the Romanian Constitutional Court, an opinion was also expressed regarding the reconsideration of the legal nature of the limitation period for criminal liability and its inclusion in the area of criminal procedural law (See Florin Plopeanu, *Prescripția răspunderii în dreptul penal sau cum o eroare a creat un mit*, 14.11.2013, available at https://www.juridice.ro/291577/prescriptia-raspunderii-in-dreptul-penal-sau-cum-o-eroare-a-creat-un-mit. html).

Romanian Constitutional Court has stated, by Decision no 1092/2012 (Romanian Official Journal no 67 of 31 January 2013), „the provisions of Article 124 of the Criminal Code (Article 124 of the Criminal Code of 1969, entitled "Special limitation period"– a.n.) (...) are constitutional insofar as they do not prevent the application of more lenient criminal law to the deeds committed under the previous law"; in this respect, it pointed out that *"limitation periods belong to substantive criminal law and not to procedural criminal law"* and, referring to the case of *Cöeme and others v Belgium* [*cit. supra* (footnote no 76)], that „in the legislation subject to the attention of the European Court, the limitation period has, unlike Romanian law, procedural meaning and is therefore susceptible to immediate application of the new law". Romanian Constitutional Court, in Decision no 147/2015 (Romanian Official Journal no 328 of 14 May 2015) reiterated those made by the abovementioned decision, with reference to Article 155(4) CC (identical with the provisions of Article 124 of the Criminal Code of 1969).

[83] „The law shall only take effect for the future, except the more favourable law which lays down penal or administrative sanctions.". Also, according to Article 20(2) of the Romanian Constitution, „Where inconsistency exists between the covenants and treaties on fundamental human rights to which Romania is a party, and national law, the international regulations shall prevail except where the Constitution or domestic laws comprise more favourable provisions.".

[84] Romanian Constitutional Court, in Decision no 511/2013 (Romanian Official Journal no 75 of 30 January 2014), made a detailed analysis of the relevant history, doctrine and jurisprudence. Although it establishes that the limitation periods for the enforcement of penalty belongs to the substantive law, the Court shall, by a majority of votes, state that the provisions of Article 125(3) of the Criminal Code, introduced by art. I, item 4 of the Law no 27/2012, which provided, *ex novo*, no limitation periods for the enforcement of penalty in case of murder, first-degree murder, aggravated homicide and intentional criminal offenses followed by the victim's death, including penalties for which, on the date of entry into force of these provisions, the limitation period had not been fulfilled.

[85] According to Article 162(2) CC, "complementary penalties applied to natural persons and safety measures shall not be subject to a period of limitation". In the case of legal persons, Article 149(2) CC provides that the enforcement of complementary penalties "shall be enabled within a period of three years from the date on which the fine was executed or considered as executed".

(affecting the Union's financial interests) are of 5 years plus the duration of the penalty to be executed, but not more than 15 years, or, if the penalty consists in a fine, of 3 years (for natural persons)[86] and of 5 years (for legal persons)[87]; they start from the date when the conviction sentence remains final[88] and may be interrupted or suspended[89]. Unlike the limitation period for criminal liability, for the enforcement of penalty, there is no longer a "special limitation period", so in order for the limitation period to produce its effects it must not be interrupted or suspensded[90].

Referring to the limitation period for enforcement of penalty - of 5 years for legal persons and of more than 5 years for natural persons (if the latter are sentenced to imprisonment), provided by the Romanian Criminal Code, it can be seen that it meets the requirements set out in Article 12(4) of PIF Directive[91], so that the implementation of the Directive does not require any change to national law in this respect either.

Conclusions

At European level, since 1976 – the year of the first draft for a Treaty amending the founding treaties in this respect –, till now – when Directive (EU) 2017/1371 of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law was adopted (after five years of negotiations) –, the legislative process aimed at protecting the European Union financial interests is a long and difficult one.

In Romania, distinct criminalization of fraud affecting the European Union's financial interests, in Articles 18^1-18^3 of Law no 78/2000, according to the definition of criminal offences from Article 1 of the "old" Convention on the protection of the European Communities' financial interests, makes the relevant national legislation comply with the minimum requirements of the above mentioned Directive.

Attempting to harmonize in this area, however, has multiple implications for national legislation and, at the same time, for judicial practice in criminal matters. Both in the legislative activity and in practice the difficulty is generated not only by the complexity inherent in the approach, but also by the ambiguity of some of the provisions of the European normative acts, as well as by the importance of their correlation with the provisions of the Constitution or with the already existing provisions in the field.

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[86] Article 162(1) b) and c) CC.

[87] Article 149(1) CC.

[88] Article 162(2) CC.

[89] The cases, conditions and effects of interruption or suspension of the limitation period for the enforcement of penalty are provided at Articles 163-164 CC.

[90] Constantin Mitrache, Cristian Mitrache, *op. cit.*, p. 511; Viorel Paşca, in Matei Basarab (coordinator), *op. cit.*, p.646.

[91] See *supra*, part I, point 2.6.

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The Complicity in the Criminal Law of Republic of Serbia

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Abstract

The main characteristics of complicity are in the fact that each of accomplices is shown as a perpetrator of a criminal offense, while the criminal offense itself is their joint act. It means that every person that participate in undertaking of activities that commit a criminal offense, in order to be an accomplice, must possess all those features that are required according to the law for a perpetrator of that criminal offense. For existence of complicity it is necessary, beside the presence of several persons, to exist an objective and subjective relation between participants in perpetration of the criminal offense in order to classify that offense as a joint act.

The objective relation means that every accomplice undertakes some activity, which commits a criminal offense. Without undertaking of the activity there is no perpetration so that there is no complicity either because it considers attainment of the activity by all participants. In addition, it is not necessarily that all the accomplices participate from the very beginning in accomplishing the act of perpetration. In such a way, complicity will exist even when some of the accomplices undertake initial activities and others continue them but under the condition that there is a conscience about joint activity. It is so called successive complicity. In the same way, it is not necessary that all of them participate in perpetration of all activities from which the act of perpetration is consisted of. The complicity exists when a single person undertakes a single activity and the other one undertake some other activity. Accomplices can divide activities in advance but they also can join in perpetration without any previous agreements. In this paper the author has analyzed notion, characteristics and forms of complicity in Serbian criminal law from 2005.

Key words: *criminal offense, perpetrator, more persons, complicity, responsibility, penalty.*

1. Notion and types of complicity

Complicity exists if several persons jointly perpetrate a criminal offense. Persons who perpetrate a criminal offense are called accomplices. Thus, the complicity implies participation of several persons in perpetration of one criminal offense and the accomplice is every person who participated in perpetration of that criminal offense[1].

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[1] Many modern foreign criminal codes define on similar way a notion and characteristics of complicity. In such a way the Criminal code of Slovenia in the article 40 considers that the complicity exists if two or several persons jointly commit a criminal offense so that they participate in perpetration or by some other activities they decisively contribute to its perpetration. (Lj. Selinšek, Kazensko pravo, Ljubljana, 2007.); the Criminal code of Spain, in the article 29, defines a notion of accomplice. So that

Complicity[2] is not only a special type of criminal offense perpetration but also a special type of criminality, *i.e.* collective criminality, which is more dangerous for a society than a solitary crime. The collective criminality represents accumulation of criminal energy (criminal volition) due to joint volition of numerous persons in perpetration of one or several forbidden acts[3].

This joint volition of numerous persons in joint perpetration of a criminal offense gives this offense a special aspect of social jeopardy. Due to its special meaning, the complicity represents an institute that is regulated by definitions of general offense according to the new Criminal code of Republic of Serbia[4] from 2005. (articles 33-37)[5] .

For existence of the complicity[6], beside participation of several persons in perpetration of a criminal offense, it is necessary to be fulfilled another two conditions: objective and subjective relation. The objective relation means that every accomplice initiates some activity that contributes to perpetration of a criminal offense. All these activities that are initiated by accomplices, no matter to the fact whether they are perpetrated contemporaneously or not, and on the same place or not, must be related so that it leads to the same result – to cause a consequence. The consequence of a criminal offense must be a result of a joint activity of all accomplices. It means that a causal relation must exist between a consequence of criminal offense and every undertaken activity of several persons[7].

The subjective relation means that all accomplices possess knowledge about a joint activity that is directed towards perpetration of a certain criminal offense. It means further that accomplices know about each other and they know about perpetrators of that criminal offense. But they do not necessarily need to know each other personally. Personal acquaintance may, or may not exist, but it is not relevant for existence of complicity. The most important is that every accomplice knows that beside him/her there are other certain persons participating in perpetration of a criminal offense and a perpetrator of the criminal offense is from that circle of persons[8].

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persons are being considered as accomplices if participate in perpetration of a criminal offense, and also persons who undertake activities that precede to perpetration of a criminal offense, and in that way participate in perpetration of the criminal offense. (N.F. Kuznjecova, F.M. Rešetnikov, Ugolovnij kodeks Ispanii, Zercalo, Norma, Moscow, 1998.).

[2] D. Jovašević, Criminal law, General part, Belgrade, 2016.pp. 256-261.

[3] D. Toth, L.I. Gal, L. Kohalmi, *Organized crime in Hungary,* Journal of Eastern European Criminal Law, Timisoara, No. 1/2015. pp. 22-26.

[4] Official gazete of Republic of Serbia No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 108/2014 i 94/2016. More: D. Jovašević, *The Criminal code of the Republic of Serbia, Belgrade,* 2007. pp. 43-50.

[5] D. Atanacković, *Complicity in a criminal offense,* Yugoslavian magazine for criminology and criminal law, Belgrade, No. 1-2/1995, pp. 5-69.

[6] A. Bošković, Z. Pavlović, *Special Evidentiary Actions in the Function of Combating Organized crime,* Journal of Eastern European Criminal Law, Timisoara, No. 1/2015. pp. 40-56.

[7] J. Tahović, *Criminal law. General part,* Beograd, 1961, page 287, D. Jovašević, Criminal law, General part, Beograd, 2016. pp. 187-213.

[8] F.Ciopec, *Disorganized Crime,* Journal of Eastern European Criminal Law, Timisoara, No. 1/2015. pp.110-114.

Participation of several persons in perpetration of a criminal offense may be realized by different activities and on several ways[9]. In such a way, accomplices are all persons who equally participate in perpetration of a criminal offense in a way that they jointly carry out an activity of perpetration of criminal offense or undertake some other activity that decisively contributes to perpetration of that criminal offense. In this case there is complicity. Several persons may participate in perpetration of a criminal offense in a way that some of them guide a perpetrator to undertake an activity of perpetration of a criminal offense while the others help him/her to undertake the activity and cause a consequence of the criminal offense. In the first case, there is incitement, and in the other case there is accessory. Unlike some other foreign criminal codes,[10] which define organizing in criminal organization as a type of complicity, this type of complicity does not exists in the legislation of Republic of Serbia.

All these types of accomplices may but also may not be represented in perpetration of one criminal offense taking into consideration the fact that complicity is optional in a process of perpetration of a criminal offense. From everything that was earlier mentioned one can conclude that there are three types of complicity: co-perpetration, incitement and accessory[11].

A law theory distinguishes complicity in narrower and broader sense. The complicity in narrower sense is incitement and accessory, while the complicity in broader sense, beside the earlier mentioned forms, is a co-perpetration[12].

2. Criminal responsibility of accomplices

A criminal responsibility of accomplices is based on accountability and guilt and is the same as that of perpetrator of a criminal offense. There are no special rules for

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[9] M. Tomić, *Types of participation in perpetration of a criminal offense,* Collection of papers at Law Faculty in Mostar, Mostar 2002, pp. 85-98.

[10] Organizing in criminal organization is known by articles 20-21 of the Bulgarian criminal code or the article 26 of the General criminal code (former Criminal code of SFR Yugoslavia from 1976.). The French Criminal code from 1992 in the article 450-1 defines a malicious criminal organization as organized group inclined to perpetrate criminal offenses for which was threaten a punishment in prison and forced labor of 10 years (F.S. Piera, *Le Guide de la défense pénale,* Dalloz, Paris, 2003). On the contrary, organizing a criminal organization as a type of complicity is not known to criminal codes of Macedonia, Croatia, Montenegro, Slovenia or Germany.

[11] Different types of complicity are known to a series of modern criminal codes. So that the French criminal code in the article 121-4-7 defines the following forms of complicity: 1) incitement, 2) managing a perpetration of a criminal offense, 3) production, acquiring and delivery of means for perpetration of a criminal offense, 4) providing accessory while perpetrating a criminal offense and 5) mutual cooperation towards perpetration of a criminal offense in a way of cooperation in activities that precede to action of perpetration and collaboration in that action; The Bulgarian criminal code in the articles 20-21 defines: incitement, accessory, organizing in criminal organizations and co perpetration; The Spanish criminal code anticipates in the article 17. a specific way of complicity under the name of ''agreement or proposal for perpetration of a criminal offense". This type of complicity is punishable only when it is explicitly anticipated by the criminal code. The agreement exists when two or several persons agree or plan to perpetrate a certain criminal offense, and the proposal exists when a person who made a decision on perpetration of a criminal offense propose to another person or group of persons to perpetrate that criminal offense.

[12] I. Celina Pasca, *Evolution of the Legislation on Preventing and Combating Organized crime,* Journal of Eastern European Criminal Law, Timisoara, No. 1/2014. pp.128-133.

accountability, which would be valid only for accomplices. But as for the guilt, there are certain differences that do not refer on content of guilt elements but on forms of its demonstration. Namely, a perpetrator of a criminal offense, no matter is it one or more of them, i.e. accomplices, is always responsible for a criminal offense that was perpetrated with premeditation and as for carelessness only when it is defined by the law. However, an inciter and helper as well as accomplices, in narrower sense, are responsible only when a criminal offense was perpetrated with premeditation, what means that the premeditation is the only form of guilt for the accomplices in narrower sense.

The criminal responsibility of accomplices is a personal matter. Namely, every accomplice is independently and personally responsible. It means that criminal responsibility of one accomplice does not depend either on responsibility of offense perpetrator or responsibility of other accomplices. Thus, the criminal responsibility of accomplices is related to undertaking of an act of perpetration by the perpetrator but it is not related to his responsibility as well as responsibility of other accomplices[13]. The responsibility of accomplices, especially of inciters and helpers, is based on two principals:

1) everybody is responsible within the limits of own premeditation and it can not go above that, and

2) everybody is responsible up to the limit achieved by the perpetrator but also not below that.

These limits of responsibility of accomplices come from the article 36. of Criminal code of the Republic of Serbia.

Responsibility of accomplices within limits of own premeditation. The accomplices are criminally responsible only for premeditated participation in perpetration of a criminal offense. Their responsibility exists only within boundaries of their premeditation. It means that the accomplice will be criminally responsible for a consequence that was caused by a perpetrator only if it is comprehended by his own premeditation and in such way that he had anticipated. If the perpetrator commit a heavier criminal offense of the same type than the one that was comprehended by premeditation of accomplices, then the accomplice will not be responsible for that heavier criminal offense, but for the easier one that was supposed to be perpetrated by his premeditation.

However, the accomplice will be responsible for a heavier consequence that comes from the basic offense (offense qualified with a heavier consequence), if that heavier consequence can be imputed to his negligence. The accomplice will be responsible also for a qualified offense with special circumstances if those circumstances were known to him while participating in a basic offense*, i.e.* when he was undertaking his own activities in perpetration of a joint offense.

Responsibility of accomplices within limits of what was perpetrated. A perpetrator can do more than an accomplice wanted to do, but also he can do less than that. If the perpetrator do less than it was comprehended by premeditation of the accomplice, then the accomplice will be also responsible for the offense that was perpetrated or tried to be perpetrated by the perpetrator, and will not be responsible for the offense that had been comprehended by his premeditation. The accessory nature of complicity is fully

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[13] B. Čejović, *Some questions that concern limits of responsibility and punishability of accomplices,* Serbia and European law, Book 3, Kragujevac, 1998, pp. 17-29.

expressed here, whereby the accessoriness is related to the perpetrated criminal offense[14].

If a criminal offense remained as an attempt, responsibility of accomplices will be also limited to the attempt. Therefore, less is done by the perpetrator, better will be for the accomplice. An exception to this rule exists if incitement is failed, but responsibility of inciter here is not based on accessory but on principal conception. In case that the perpetrator perpetrate completely another criminal offense, *i.e.* a criminal offense that is not homogenous with the one that was comprehended by premeditation of the accomplice, then the perpetrator will be the only one responsible for a such criminal offense.

Influence of personal features and circumstances. A personal reference, features and circumstances because of which the law excludes a criminal responsibility or permits a possibility for acquitting from a sentence or mitigating the one, can be taken into consideration only to a such perpetrator, accomplice, inciter or helper whom is found with such reference, features, and circumstances (article 36. of the Criminal code of the Republic of Serbia). However, there are exceptions where personal features or references that exist with a perpetrator can be a reason for establishing a criminal responsibility of accomplices. These are the cases when a personal feature is en element of nature of a criminal offense. Thus, in such cases, the personal features, references or circumstances that exist with a perpetrator can have an influence at the criminal responsibility of participants.

3. Complicity

The heaviest form of complicity is a co-perpetration[15]. It exists in a way, according to the article 33. of the Criminal code of the Republic of Serbia, when several persons participate in perpetration of a criminal offense or in some other decisive way jointly commit a criminal offense[16]. It is consciously and willingly a joint participation in perpetration of activities that commit a criminal offense.

The main characteristics of complicity are in the fact that each of accomplices is shown as a perpetrator of a criminal offense, while the criminal offense itself is their joint act. It means that every person that participate in undertaking of activities that commit a criminal offense, in order to be an accomplice, must possess all those features that are required according to the law for a perpetrator of that criminal offense[17]. For

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[14] A. Schonke, H. Schroder, *Strafgesetzbuch, Kommentar,* 22.Auflage, Munchen, 1995, page 364; E.Foregger, E.Serini, Strafgesetzbuch StGB,9.Auflage, Wien, 1989, page.56 and further on.

[15] B. Petrović, D. Jovašević, A. Ferhatović, *Criminal law of Bosnia and Herzegovina, General part,* No. 1, Sarajevo, 2015, pp. 253-259; D. Jovašević, *The commentary of the Criminal law of FR Jugoslavia,* Belgrade, 2002. pp. 213-215.

[16] D. Jovašević, Lj. Mitrović, V. Ikanović, *Criminal law of Republic of Srpska,* General part, Banja Luka, 2017, pp. 214-126.

[17] Some other understandings about complicity can be found in the theory. In such way, S. Frank is of the opinion that complicity exists always when some person perpetrates some action that would have been done by the perpetrator if he would commit the offense alone. (S. Frank, *Criminal law theory, General part,* Zagreb, 1955, page 180); According to D. Atanacković, accomplice is a person that perpetrates an action without which there would be no perpetration of a criminal offense and which the perpetrator was not able to perform alone. (D. Atanacković, Complicity in a criminal offense, Yugoslavian magazine for criminology and criminal law, Belgrade, No. 1-2/1995, page 30). Again, LJ. Lazarević is of

existence of complicity it is necessary, beside the presence of several persons, to exist an objective and subjective relation between participants in perpetration of the criminal offense in order to classify that offense as a joint act[18].

The objective relation means that every accomplice undertakes some activity, which commits a criminal offense. Without undertaking of the activity there is no perpetration so that there is no complicity either because it considers attainment of the activity by all participants. In addition, it is not necessarily that all the accomplices participate from the very beginning in accomplishing the act of perpetration. In such a way, complicity will exist even when some of the accomplices undertake initial activities and others continue them but under the condition that there is a conscience about joint activity.

It is so called successive complicity. In the same way, it is not necessary that all of them participate in perpetration of all activities from which the act of perpetration is consisted of. The complicity exists when a single person undertakes a single activity and the other one undertake some other activity. Accomplices can divide activities in advance but they also can join in perpetration without any previous agreements.

The subjective relation consists of in existence of conscious of all perpetrators to jointly perpetrate an act of perpetration. If there is no conscious then there is no so-perpetration, but every person is occurred as an individual perpetrator of a criminal offense. The subjective relation between accomplices must be distinguished from guilt. The subjective relation between accomplices is a conscious on collaboration in a joint act, while the guilt is a psychical relation of each of them towards the act on which perpetration they worked. These relations must exist in the moment of perpetration of that act.

According to the article 33. of the Criminal code the complicity exists when several persons jointly perpetrate a criminal offense, by participating in the perpetration of a criminal offense or by taking some other act by which a decisive contribution can be made to its perpetration. It means that the Criminal code of Republic of Serbia accepts the objective-subjective theory. Therefore, two categories of persons can be considered as accomplices:

1) persons that participated in the act of perpetration no matter if they wanted to commit that offense as their own or as somebody else's achievement, and

2) persons that have not participated in the act of perpetration but they participated in some other action by which a decisive contribution was made to the perpetration of that act and who consider the act as their own and as a mutual achievement[19].

Important element of complicity is in the fact that several persons jointly perpetrate a criminal offense. That joint perpetration is being made in a way that some of the participants perpetrate an action of perpetration described as a criminal offense, while

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the opinion that complicity is a conscious and willing joint accomplishment of a criminal offense by several persons. (Group of authors, Comment on the Criminal code of SRJ, Belgrade, 1995, page 138).

[18] M. Đorđević, *Complicity,* Yugoslavian magazine for criminology and criminal law, Belgrade, No. 1/1988, pgs. 29-36.

[19] D. Jovašević, *Institute of complicity in the criminal law,* Law, theory and practice, Novi Sad, No. 11/2002, pgs. 14-26.

the others participate "in some other decisive way". That way of participation "in some other decisive way" by which is being contributed to perpetration of a criminal offense means that persons who perform such activities that belong to a field of accessory, but which are narrowly related to the act of perpetration so that together they make a whole, will be considered as accomplices. The complicity as a conscious and willing joint participation of several persons in perpetration of a criminal offense may exists in almost all criminal offenses. However, there are such criminal offenses in which the complicity is not possible. They are: delicta propria and personal criminal offenses.

As for the delicta propria or criminal offenses with a special subject, the complicity can exist only when several persons, who have special features that are required by the law for a perpetrator of such offense, participate in its perpetration. It is the case of real official and military criminal offenses, especially where is required a feature of plenipotentiary or commanding officer. The complicity is not also possible with personal criminal offenses, i.e. those offenses that can be perpetrated just by a certain person and only personally. So that, the complicity is not possible with a criminal offense of making a false statement because of that agreed false testimony is not considered as complicity due to the fact that everybody make a statement individually. It is a similar case with infanticide that can be perpetrated only by mother of the child.

A law theory distinguishes several forms of complicity: illusory, successive and unavoidable complicity:

1) Illusory, unreal or parallel complicity exists when several persons participate in perpetration of a criminal offense but without decision on joint perpetration of the activity, so that every person is shown individually as an independent perpetrator,

2) Successive or subsequent complicity exists when several persons who participate in perpetration of a criminal offense replace each other in perpetration of the criminal offense, i.e. when the offense is being perpetrated in phases or shifts or if one person who started perpetration of a criminal offense is joined by another person before the criminal offense is completed, then there is a successive complicity and

3) Unavoidable complicity, the complicity is an institute of optional nature in the most of criminal offenses, it means that it may exist or not. But there are some criminal offenses that can not be perpetrated by one person and it is necessary for two or several persons to participate in its perpetration. Then, there is an existence of unavoidable complicity. With some criminal offenses of unavoidable complicity, actions that are perpetrated by necessary accomplices are being carried out opposite to each other, *i.e.* it encounters each other. Those are criminal offenses of encountering or divergent criminal offenses (bigamy, incest). Second group criminal offenses of unavoidable complicity make offenses where actions of complicity are being carried out in the same direction and blend together. Those are so called criminal offenses of attainment or convergent criminal offenses (mutiny in arms, mutiny of persons deprived of freedom).

An accomplice is criminally responsible within the limits of premeditation or negligence. Even if the complicity is by rule a willing, *i.e.* agreed joint perpetration of a criminal offense, in other words premeditated, but it does not mean that a negligible complicity is not possible to occur. The negligible complicity is possible to happen not only compared to a heavier consequence as qualified circumstance, but also compared to basic consequence. Responsibility is within boundaries of premeditation, *i.e.* negligence, it means that one accomplice either is not responsible for an excess of

another accomplice or for actions that the one has perpetrated outside of an agreement. A negligible responsibility may exist only when the law anticipates it to exist for the offense in question.

Criminal responsibility of an accomplice is independent. Responsibility of one accomplice is not dependable on responsibility of other accomplices. All perpetrators do not have to have the same type of guilt, therefore some of the perpetrators act with premeditation and other with negligence while perpetrating the same criminal offense. The guilt must be independently established for every accomplice. It means that form and level of responsibility must be established for every accomplice. Personal relations, features, and circumstances may benefit or jeopardize only to such perpetrator who possesses all of that but not to the other accomplices. So that, an accomplice who voluntary prevent perpetration of a criminal offense may be relived from a sentence issued by the law.

4. Incitement

The incitement is premeditated inciting of another person to commit a certain criminal offense (article 34. of the Criminal code of the Republic of Serbia). An action of inciter must be directed to provoke or determine a decision at another person to undertake an action by which will be caused a consequence of a criminal offense. Therefore, there is no incitement if the perpetrator already had a firm decision for perpetration of a criminal offense.

However, if there was a decision that was not firm enough, *i.e.* hesitation, and such decision had to be firmed up, then there is an incitement. From the point of view of causality, the incitement occurs as causing of decision of perpetrator to undertake an action of perpetration and accomplish a consequence of a criminal offense. But, if incitement is a reason for decision, it is not a cause for consequence itself. The cause of consequence is an action of perpetration so that the incitement is shown compared to a consequence as its condition.

An action of incitement is consisted of undertaking of activities by which is being influenced on will of other person with an aim to make him perpetrate a criminal offense[20]. Activities by which the incitement is being carried out can be different. So that, the incitement can be made by persuading, showing an interest, giving gifts and promises, abuse of position or special relation towards a person that is being incited, misleading a person or keeping a person mislead, threat, pointing out a situation that might be unfavorable for a person that is being incited if such person does not perpetrate a criminal offense, etc. Sometimes, the incitement can be made by illusory dissuading from undertaking an action of perpetration but in such way by which it foments to its perpetration.[21]

An incitement is an active activity so that it can be made only by doing it. It can be done by words (in written form or orally), gestures, signs, mimics and concludent

[20] The incitement is, according to the article18, of the Spanish criminal code, direct motivation of a person to perpetrate a criminal offense by public publications, radio and other means for mass communication or popularization of a criminal offense in front of gathered citizens on a public place.

[21] D. Jovašević, *Incitement as form of complicity in criminal law,* Law collection, Podgorica, No. 1-2/1999-2000, pgs. 118-134.

actions. In order to have an incitement there must be a certain relationship between inciter and person that is being incited as well as between inciter and criminal offense that is being incited.[22]

Inciting on perpetration of a criminal offense must be directed towards one certain person or certain group of people taking into consideration that incitement cause or make firmer a decision of another person so that an inciter must have a possibility to influence on such decision. Such possibility may be if an inciter comes in contact with one certain person or with a certain group of people. Thus, it is not necessary that the inciter has to know exactly the person who is about to perpetrate a criminal offense that is incited by him, but it is sufficient to know that one of the persons from the group, anyone, will perpetrate the criminal offense. On contrary, there is no incitement if an invitation was directed to uncertain group of people, e.g. by advertisement. This type of incitement can have a character of independent criminal offense or propaganda but in that case it is not considered as incitement.

The incitement must be directed towards perpetration of a certain criminal offense. There is no incitement if the incitement refers to perpetration of uncertain criminal offense. Then, there must be a criminal offense of propaganda but not incitement as a form of complicity[23]. Finally, for existence of incitement it is necessary that incitement of some person on perpetration of a certain criminal offense is done with premeditation. It means that negligible incitement that may exist in practice does not come under criminal responsibility.

The incitement can be direct and indirect. The direct incitement exists when an inciter alone incites another person (incited one) on perpetration of a criminal offense, and the indirect incitement exists when an inciter uses other persons for inciting of the incited person on perpetration of a criminal offense. With the indirect incitement, one person (inciter) incites another person to incite the third person (incited one) to commit a certain criminal offense.

The direct incitement can be made not only by one but several persons. In the case that several persons consciously make a joint incitement of one person to perpetrate a certain criminal offense then a co-incitement exists. For the existence of the co-incitement two elements are necessary: joint participation in incitement of another person to perpetrate a certain criminal offense and conscious about that joint action. The indirect incitement occurs always as a co-incitement, especially as successive co-incitement.

There may be also a co-incitement on accessory. Considering the fact that the law considers as an inciter a person who incites on perpetrator to perpetrate a criminal offense, in such way this case is considered as accessory.

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[22] For existence of incitement it is necessary that the incited person did not have a firm decision on perpetration of a criminal offense at the time of perpetration and that decision was formed just under influence of the inciter while the incited person does not have to be aware of the fact that the decision was made under influence of the inciter (sentence of the Supreme Court of Serbia, Kž. 875/86 dated October 14, 1986).

[23] Incitement can be made by leading only on perpetration of a certain criminal offense. Therefore, in the situation when the inciter and perpetrator of a criminal offense are on the opposite sides in conflict and have different interests, the inciter could not influence on decision of the perpetrator to perpetrate the criminal offense. (Sentence of the Supreme Court of Kosovo, Kž. 174/78 dated September 6, 1979).

Te inciter is criminally responsible only for premeditated incitement, inciting of another person on perpetration of a criminal offense. Premeditation of the inciter must have a conscious about the incitement of another person to make a decision to perpetrate a certain criminal offense and a wish to make such decision and then to perpetrate an action that commits a criminal offense. Besides the conscious on incitement, inciting of another person to perpetrate a criminal offense, the premeditation of inciter must consist a conscious of all actual circumstances (attributes) of a criminal offense on which the incitement is referred to.

However, compared to a conscious of perpetrator that comprehends concrete forms of some characteristics in its realization, the conscious of inciter must comprehend only basic contours of some characteristics and even the whole criminal offense itself. In other words, the conscious of inciter must refer to perpetration of a certain criminal offense by comprehending the action, causative relation and causing of a consequence in its general form and not in its concrete accomplishment with all the details.

An element of will at premeditation of the inciter is represented in a wish of the inciter to provoke, by his actions, a decision of the incited person to perpetrate a criminal offense, *i.e.* in acceptation that under his influence such decision is being made by the incited person and then in his wish to undertake such action and cause a consequence of a certain criminal offense. For existence of premeditation of the inciter is not important whether an immediate perpetrator, while committing a perpetration, was acting with premeditation or with negligence.

It is possible that the inciter with premeditation incites the perpetrator to perpetrate a criminal offense but the perpetration was made with negligence. In the case when the law seeks an intention or motive as en element of a criminal offense, then such intention or motive does not have to exist at the perpetrator but it is sufficient to exist at the incited perpetrator while the inciter is aware of its existence only. If such intention does not exist at the perpetrator but exists at the inciter, then the inciter is considered as indirect perpetrator of a criminal offense.

The inciter, according to the article 34. of the Criminal code will be punished for a criminal offense on which the perpetrator was incited as if the inciter had perpetrated such offense. In other words, the inciter is being punished for a criminal offense by punishment that was anticipated for a perpetrator. This equalization in punishment of inciter with perpetrator comes from the fact that the inciter is intellectual author of a criminal offense while the perpetrator is only physical, factual implementer. Punishing of inciter depends on perpetrated criminal offense in boundaries of its premeditation.

So that, if a criminal offense was perpetrated on which the perpetrator was incited then the inciter will be punished by a sentence that was anticipated for perpetration of such offense. If the offense remained as an attempt then the inciter will be punished for an attempt if an attempt of such offense is punishable. In such case the inciter and perpetrator may be punished less severe then it would be in the case of perpetration. The inciter may be relieved from a sentence in the case if he voluntary prevents perpetration of a criminal offense.

Negligible incitement that is practically possible is not punishable.

An unsuccessful incitement exists in the following three cases[24]:

1) when the inciter with his incitement fails to create, *i.e.* to make firmer a decision of the incited person,

[24] D. Jovašević, *Criminal law,* General part, Belgrade, 2006. pp. 188-189.

2) when the inciter succeed to create or make firmer a decision of the incited person, but the person never perpetrated a criminal offense for any reason, and

3) when the inciter creates or make firmer a decision of the incited person but the person perpetrate completely some other criminal offense independently from the action of incitement.

According to the article 34. paragraph 2. of the Criminal code of the Republic of Serbia[25] the unsuccessful incitement is punishable if for a criminal offense, which was incited to be perpetrated, can be imposed a punishment of imprisonment for a term of three years or even more severe punishment. According to the article 34., paragraph 2. of the Criminal code, the unsuccessful incitement is punishable only if the action of inciter was directed towards perpetration of a criminal offense for which can be imposed a punishment of imprisonment for a term of five years or even more severe punishment, and the criminal offence has never even been attempted.Then, the unsuccessful inciter is being punished as if he had attempted to perpetrate a criminal offense.

In some cases the criminal codes anticipates that leading to perpetration of a criminal offense is the same as an action of perpetration of independent criminal offense. In such cases the incitement is not considered as a form of complicity, but as a form of independent criminal offense.

Such criminal offenses are the following: organizing of a group and incitement on perpetration of criminal offenses of genocide, crimes against humanity and war crimes, incitement on suicide and accessory in a suicide, calling for a violent change of constitutional structure. If the incitement is considered as a criminal offense by the law then the action of incitement itself represents an independent criminal offense that can be achieved as an accomplished offense or it can remain as an attempt.

The criminal offense is accomplished if the action of incitement is completed and that is in the case when the incitement was made on a incited person while at this matter it is not significant if that incitement was successful or not. Thus, successful and unsuccessful incitement is considered as an accomplished criminal offense of incitement. An attempt of incitement exists in the case when the action of incitement is undertaken, but for any reason it has not made an influence on a will of a person who was incited (*e.g.* when a written letter was addressed and sent but it never reached hands of addressee).

5. Accessory

The accessory is a premeditated undertaking of action by which is contributed to a perpetrator to perpetrate a certain criminal offense[26] (article 35. of the Criminal code of the Republic of Serbia). The action of helping is consisted of undertaking such activities by which the action of perpetration is not accomplished, but it is contributed to its accomplishment. Compared to perpetration, helping does not cause a reason but a

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[25] Lj. Lazarević, B. Vučković, V. Vučković, *Commentary of Criminal code of Montenegro,* Cetinje, 2004. pp. 94-97; D. Jovaševuć, *Criminal code of the Republic of Serbia,* Belgrade, 2007. pp. 49-50.

[26] B. Pavišić, V. Grozdanić, P. Veić, *Commentary of Criminal code,* Zagreb, 2007. pp. 169-173; K.Turković et al., *Commentary of Criminal code,* Zagreb, 2013, pp.78-83.

condition of a consequence. Activities that make accessory are outside of action of perpetration[27]. Thus, helper does not participate in perpetration of a criminal offense but it contributes to a successful accomplishment of the perpetrator. That contribution consists of making favorable conditions and assumptions for undertaking the action of perpetration and causing a consequence of a criminal offense[28].

The accessory can exist only when a perpetrator already had a decision to perpetrate a criminal offense. From there, if there is no such decision then there is any accessory. In such case there could be an incitement but not the accessory. From there, the basic difference between incitement and accessory comes from, because of the fact that the incitement can exist until a decision for perpetration of a criminal offense is not made and the accessory can exist only after such decision was made by the perpetrator of a criminal offense. From the other side, the accessory may exist before and during perpetration of a criminal offense but not later. Exceptionally, the accessory can exist even after the action of perpetration is undertaken, but before occurrence of a consequence of a criminal offense. It is so called inter-accessory. Helping that is provided after perpetration of a criminal offense has a character of independent criminal offense. But in this case it can be accessory if that accessory was promised in advance before perpetration of a criminal offense[29].

Even for the accessory it is necessary that a certain relationship exists between helper and perpetrator of a criminal offense as well as between helper and the criminal offense, which is being assisted. The helper must know that there is a person who will perpetrate a criminal offense and who is a person to be provided with accessory by undertaking activities that will enable or make easier to a perpetrator to perpetrate a criminal offense. While at that matter it is not necessary that he knows personally a perpetrator, it is sufficient to know that it would be a person from a certain circle[30].

From the other side, the accessory must be directed towards perpetration of one certain criminal offense. A helper should know that he contributes to perpetration of a certain criminal offense. Finally, for existence of accessory it is necessary an existence of premeditation of helper.

Considering the fact that accessory can be undertaken by different activities, the criminal code defined in the paragraph 2. that the following, in particular, shall be considered as helping in the perpetration of a criminal offence:

1) giving advice or instructions as to how to perpetrate a criminal offence,

2) supplying the perpetrator with tools for perpetrating a criminal offence,

3) removing obstacles to the perpetration of criminal offence and

4) prior to the perpetration of the criminal offence, to conceal the existence of the criminal offence, to hide the perpetrator, the tools used for perpetrating the criminal offence, traces of the criminal offence, or items acquired by perpetration of the criminal offence.

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[27] D. Jovašević, *Lexicon of criminal law,* Belgrade, 2011, pp. 390-395.

[28] See: D. Petrović, *Accessory as a form of complicity,* Belgrade, 1994.

[29] Lj. Selinšek, *Criminal law,* Ljubljana, 2007. pp. 216-219.

[30] For the accessory in perpetration of criminal offense it is not necessary that helper personally knows a perpetrator of a criminal offense but it is sufficient to know that there is a conscious of helping other persons in perpetration of a criminal offense, i.e. it is not significant if the previous agreement between perpetrator and helper existed or not as well as whether they had a mutual relation or not (sentence of the Supreme Court of Serbia, Kž. 232/86 and sentence of the Supreme Court of Montenegro, Kž. 240/80).

In the matter of undertaking the activity by which is contributed to perpetration of a criminal offense, helping is accomplished and several persons may participate in perpetration of a criminal offense so that there is so called co-accessory[31] .

There are several types of helping considering the following: character of activity, way of extending a help, time of help and way of perpetration of the helping activity.

Considering the character of activity, helping can be physical and psychical. The physical helping exists when activates of physical, material character are undertaken by which is contributed to perpetration of a criminal offense (acquiring means for perpetration of a criminal offense, removing obstacles, surveillance of facilities where will be perpetrated a criminal offense, accommodation of a perpetrator before perpetration of a criminal offense). The psychical accessory exists when the activities of psychical nature are undertaken (giving advices and instructions for perpetration of a criminal offense, encouraging a perpetrator to persist in perpetration of criminal offense, giving promises in regard with concealing the traces of the criminal offense or items acquired by perpetration of the criminal offence)[32].

According to the way of extended help, the accessory can be direct and indirect. The direct accessory exists when a helper alone undertakes activities by which he enables, make easier or contribute to a perpetrator to perpetrate a criminal offense. The indirect accessory, however, exists when a helper provides accessory through somebody else, i.e. indirect helper. The indirect accessory exists even when one person provides help to indirect helper or indirect inciter. So that, the indirect helper will be a person who gives advices and instructions to an indirect helper how to assist a perpetrator in perpetration of a criminal offense. The incitement on helping is also an indirect helping as well as helping in the incitement.

Considering the time of helping, one can distinguish a previous, simultaneous and subsequent accessory. The previous accessory exists when a helper undertake activities on providing a help to a perpetrator of a criminal offense before the perpetrator undertook an action of perpetration. The simultaneous accessory exists when a helper provides a help to a perpetrator during perpetration of a criminal offense. The subsequent accessory exists when a helper, after a perpetrator perpetrated a criminal offense, provides a shelter, hide things, remove traces etc. This subsequent accessory is considered a complicity only if it was promised in advance.

There is one more special case of extending a help to a perpetrator after perpetration of a criminal offense, which is called a contact with a criminal offense, concealing (or supporting). A contact can be made in several ways: hiding a perpetrator of a criminal offense, traces of criminal offense, tools used for perpetrating a criminal offence, items acquired by perpetration of a criminal offence but also concealing a criminal offense itself. Concealing was considered in the earlier legal theory as accessory in the real sense of that word. But lately, this understanding was abandoned because it is practically impossible to participate in a criminal offense that was already perpetrated, where there was already a forbidden consequence. In such case any conditionality of occurred consequence is excluded.

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[31] M. Tomić, *Accessory in perpetration of a criminal offense,* Advocacy, Belgrade, No. 12/1986, pp. 27-33.

[32] D. Jovašević, *Institute of accessory in perpetration of a criminal offense – theoretical and practical aspect,* Journal of AK Vojvodina, Novi Sad, No. 7-8/1999, pp. 223-241.

Concealing can be: actual (where traces or items of a criminal offense are hidden) and personal (helping a perpetrator of a criminal offense not to be discovered and arrested, i.e. convicted). Therefore, the concealing itself does not represent accessory in a criminal-law sense, but a promised concealing if it was done before perpetration of a criminal offense represents accessory as a form of complicity. If the concealing was not promised priory, to a perpetrator, it is punishable only if the law anticipates it as an independent criminal offense.

Finally, compared to a way of perpetration of activity, it can be positive and negative. The positive accessory is achieved by doing it (active action), and the negative accessory is helping by doing nothing. Helping by doing nothing can be achieved only in a case when there is an obligation of helper to do it.

A criminal responsibility of helper according to the article 35. paragraph 1. of the Criminal code, exists only if a perpetrator acts with premeditation. A negligible accessory does not represent accessory in a criminal sense. Helping can be done with direct or possible premeditation. The direct premeditation exists only in a case when a helper knew that by his actions contributes to a perpetration of a criminal offense and he wanted to achieve his contribution by doing so. The possible premeditation exists in a case when a helper was aware that his actions can contribute to perpetration of a criminal offense so he agrees to achieve that contribution by doing so.

Premeditation of a helper must contain a conscious about all characteristics of a criminal offense. In other words, the helper must be aware of all those actual circumstances of the offense, of which the perpetrator of the criminal offense is aware of as well. A conscious about illegality of helping in a criminal offense of the perpetrator, about his personal features and circumstances, is demanded only when illegality, personal features or circumstances are shown as an element of a certain criminal offense. Criminal offenses for which is required an intention or motive, for responsibility of a helper it is sufficient that the intention or motive existed with a perpetrator and that it was known to him. If in this case the intention or motive exists with a helper and not with a perpetrator, then the helper will not be hold responsible for a such offense but for the offense that will hold a perpetrator responsible. The helper can not be indirect perpetrator of a criminal offense except in special cases anticipated by the law.

A helper has to know that his actions assist a perpetrator to achieve a criminal offense and it means that he had to know for perpetrator's presence, but he does not have to know him necessarily. But for establishing an existence of criminal responsibility of helper, it is not decisive that a perpetrator acted with premeditation while perpetrating a criminal offense. He can be criminally responsible even when a perpetrator perpetrated a criminal offense with negligence. If a perpetrator perpetrated a criminal offense then a helper will be punished that offense as if he perpetrated it alone, but he may be also punished less severe.

A possibility for less severe punishment of helper comes from the fact that he is not intellectual or factual author of a criminal offense, but a person who contributed to perpetration of a criminal offense. Less severe punishment of helper is optional. It means that its application depends on judgment of the court in each concrete case. If a criminal offense remained as an attempt, the helper will be punished for an attempt, under the condition that an attempt of that offense is punishable by the law.

Finally, the helper can be relieved from a sentence if he voluntary prevents perpetration of a criminal offense (article 36. paragraph 2. of the Criminal code).

6. Conclusion

Unsuccessful accessory exists when a helper achieves an action of helping and the assisted perpetrator does not undertake an action of perpetration or perpetrate a criminal offense independently from the helping action. Unsuccessful accessory is not punishable.

In some cases anticipated by the law, helping is incriminated as independent criminal offense. It means that by taking an action of helping there is a criminal offense for which the law imposes a certain type and size of punishment. Such is the case of e.g. criminal offenses: leading into suicide and helping in suicide, allowing conclusion of prohibited marriage, allowing enjoyment of narcotics, financing terroristic activities, accessory to a perpetrator after perpetration of a criminal offense.

Helping may be incriminated as a criminal offense even in the case when a perpetrator is not being punished. Such is the case in helping in suicide that remained as an attempt, although a person who attempted a suicide is not being punished. Or in the case of illegal termination of pregnancy, it is incriminating to help a pregnant woman to make an abortion, although the pregnant woman is not being punished for making an abortion over herself. These two cases are exception from the rule that a helper can not be an indirect perpetrator.

The accessory as a type of complicity and accessory as a criminal offense are excluding each other and there can not be a concurrence. If the accessory was promised in advance, and even extended after perpetrated offense, then the accessory will exist as complicity, and if the accessory was not promised in advance then the accessory will exist as independent criminal offense, *i.e.* as accessory to perpetrator after perpetration of a criminal offense.

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The Regulation of Crimes Against Information Systems in Hungary*

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Abstract

The aim of this study to present the legislation of the Hungarian criminal law in relation to cybercrime in the light of the European Union's effect on it. Since cybercrime has a transnational nature it presents a great challenge for legislators and law enforcement as well as on an international and on a national level like in Hungary too. The paper also deals with the most current and dangerous cyber challenges such as DDoS attacks and ransomware through demonstrating how these committed cyber-attacks are considered to be punished in accordance with the Hungarian Criminal Code's provisions. Introducing the following crimes: breach of information system and data, compromising or defrauding the integrity of the computer protection system or device and information system fraud.

Key words: *system, cyber challenges, fraud, crimes, computer protection system, device, information system.*

1. Introduction

Developments in information and communication technology (ICT) and digital computing devices have dramatically changed the ways in which people live and communicate, making their life more convenient with the offered advantages. However the developments also provide new opportunities for cybercriminals to exploit. Firstly, new offenses targeting computer and data have become increasingly common thank to the advancement of mobile devices and technology – so-called Internet of Things – that makes possible to connect all type of devices such as computers, smartphones and other smart household appliances and so on. Secondly, traditional offences are also stimulated by the new opportunities. Since cybercrime has a transnational nature it presents a great challenge for legislators and law enforcement as well as on an international and on a national level like in Hungary too.[1]

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[1] WANG, Qianyun: A comparative study of cybercrime in criminal law: China, US, England, Singapore and the Council of Europe. 2016. p. 1.

2. The European Union's effect on the Hungarian criminal law legislation in cybercrime

The European integration has reached several fields of criminal law in the last decades and cybercrime is one of them.[2] The European Union's regulation affects the Hungarian legislation greatly and the author highlights the most relevant agreements related to the cybercrime.

In 2001, Hungary joined to sign the European Council's Convention on Cybercrime, which is the most influential international legal instrument in cybercrime. The Convention is open to signature and ratification for states who are not member of the European Council.[3] It was the first document which contained the substantive and procedure criminal law in regard to cybercrime. As a consequence of enactment of the Cybercrime Convention into the Hungarian legislation, the legislators altered the Hungarian Act IV of 1978 on the Criminal Code and refreshed the regulation of the computer crimes too. The old Criminal Code introduced the 'criminal conduct for breaching computer systems and computer data' in Section 300/C. and 'compromising or defrauding the integrity of the computer protection system or device' in Section 300/E. The legislators always must play an active role to make new regulations in this constant changing cyber environment.[4]

In 2013, the new Directive 2013/40/EU of the European Parliament and of the Council on the attacks against information systems came into effect and replaced the earlier EU regulation, the Council Framework Decision 2005/222/JHA. Both the EU Directive and the Council Framework are determinative to the Hungarian legislation.[5] The new EU Directive established minimum rules concerning the definition of criminal offenses and the relevant sanctions and to improve cooperation between competent authorities. It also draws attention to information systems[6] which are a key element of political, social and economic interaction in the EU, while introducing a new term which is more accurate to the ICT developments rather than using the old 'computer' term. The EU has realized the fact that botnets pose a higher level of threat to the Member States in the public and private sector too. The Directive aims to introduce criminal penalties for the creation of botnets and also encourages the Member States to use more severe penalties and make available as aggravating circumstances where an attack against an information system is committed. According to the Directive (Article 3 – 9), the following crimes must be punishable in Member States: illegal access to information system, illegal system interference, illegal data interference, illegal interception, tools used for committing offences. In accordance with the Directive, the new Hungarian Act C

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[2] GÁL, István László – TÓTH, Mihály: Az uniós jog és a magyar jogrendszer viszonya – büntető anyagi jogi jogharmonizáció. In: Tilk Péter (editor): Uniós jog és a magyar jogrendszer viszonya. Pécs, 2016. pp. 463 - 465.

[3] The European Council accepted the Convention on Cybercrime in Budapest, on 24 November 2001.

[4] DORNFELD, László: A kiberbűnözés elleni küzdelem kihívásai. [The challenges of fight against cybercrime] Diskurzus: Batthány Lajos Szakkolégium Tudományos Folyóirata 5. p. 1.

[5] SINKU, Pál: A vagyon elleni bűncselekmények. [Offenses against property] In: Busch Béla (editor): Büntetőjog II., HVG-Orac Lap- és Könyvkiadó. Budapest, 2012. p. 623.

[6] According to the Directive 2013/40/EU: 'information system means a device or group of interconnected or related devices, one or more of which, pursuant to a programme, automatically processes computer data, as well as computer data stored, processed, retrieved or transmitted by that device or group of devices for the purposes of its or their operation, use, protection and maintenance.'

of 2012 on the Criminal Code introduced the new information system term and an individual chapter (Chapter XLIII – 'illicit access to data and crimes against information systems') for the attacks against information systems. The new Criminal Code includes the following by name and content changed crimes: 'breach of information system or data' in Section 423, 'compromising or defrauding the integrity of the computer protection system or device' in Section 424.

It also introduced a new crime, the 'information system fraud' in the chapter of offenses against property (Chapter XXXVI). According to the justification of the Criminal Code, the information system fraud is an act of causing damage fraud, which first of all violates financial interest, furthermore these fraud like conducts are absent of the classical fraud's conditions, which are the use of deceit, deception or trickery, *i.e.* explains why it is appeared as a sui generis crime in the new Criminal Code. The current regulation differs from the former ones: firstly, this crime was handled as fraud,[7] but later in our previous Criminal Code (due to the amendment of 1994) it was regarded as computer fraud. There was also an amendment in 2001 when this crime found its place among the economic crimes as the criminal conduct for breaching computer systems and computer data, also as the cash-substitute payment instrument fraud.

3. The effective regulation of cybercrime in Hungary

3.1. Breach of Information System or Data

Section 423

(1) Any person who gains unauthorized entry to an information system by compromising or defrauding the integrity of the technical means designed to protect the information system, or overrides or infringes his user privileges is guilty of a misdemeanor punishable by imprisonment not exceeding two years.

(2) Any person who:

a) disrupts the use of the information system unlawfully or by way of breaching his user privileges; or

b) alters or deletes, or renders inaccessible without permission, or by way of breaching his user privileges, data in the information system;

is guilty of a felony punishable by imprisonment not exceeding three years.

(3) The penalty shall be imprisonment between one to five years for a felony if the acts defined in Subsection (2) involve a substantial number of information systems.

(4) The penalty shall be imprisonment between two to eight years if the criminal offense is committed against works of public concern.

There are more *protected legal objects* of this crime: firstly, in the Subsection (1), it is the integrity and security of the information systems. Secondly, it is more specific in the a) and b) points of the Subsection (2), which is the safe operation of the information systems without interruption and complemented with the interest of the integrity, stability and authenticity of the electronic data in the b) point.

The *subjects of the crime* are the followings: information system and data in the information system. In accordance with the closing provisions, 'information system'

[7] PALLAGI, Anikó: A vagyon elleni bűncselekmények. [Offenses against property] In: Blaskó – Hautzinger – Madai – Pallagi – Polt – Schubauer, Büntetőjog – Különös Rész II.; Rejtjel Kiadó. Budapest - Debrecen, 2013. p. 200.

shall mean equipment intended for the automatic processing, handling, storage and transmission of data or a collection of such devices that are interfaced. According to the Subsection (5), in the application of this Section 'data' shall mean facts, information or datum stored, controlled, processed and transmitted in information systems in all forms which allows them to be processed in information systems, including those programs designed to execute certain functions by the information systems.[8]

There are three different basic cases with different *criminal conducts* in Subsection (1) and (2). First of all, *gaining unauthorized entry* to an information system, id est hacking, is a punishable act in Subsection (1). "The mere unauthorised intrusion, *i.e.* 'hacking', 'cracking' or 'computer trespass' should in principle be illegal in itself. It may lead to impediments to legitimate users of systems and data and may cause alteration or destruction with high costs for reconstruction. Such intrusions may give access to confidential data (including passwords, information about the targeted system) and secrets, to the use of the system without payment or even encourage hackers to commit more dangerous forms of computer-related offences, like computer-related fraud or forgery."[9] In the firs scenario, unauthorized entry is when the hacker pretends to be the entitled user and uses the information system which is owned or used by the legitimate user. It means basically logging on without permission. At the more sophisticated level it may involves using networks to gain remote access via information systems in several jurisdictions. Such hacks may be 'user level', where the hacker has the same access to the system as an ordinary user of the system, or 'root level' or 'god' access, where the hacker has the same rights as the system administrator and can view or modify data at will. The hackers are seeking the 'bugs' in different software to exploit them. There are essentially three motivations to entry a system: access to information (*e.g.* confidential commercial or government information such as trade secrets, intellectual property or personal information like medical records, credit card, social security numbers), modification of data (*e.g.* delete or modify accounts, databases etc.) or use of a computer (*e.g.* obtain valuable services for free, 'wardriving' which means using a wireless network without authorisation and gives rise to a number of potentially criminal scenarios).[10]

It is significant to be emphasised that the information system *must be protected by technical-security means* such as passwords or programs and it must be active, otherwise the entry is not considered to be unauthorized. It is regarded to be culpable if the perpetrator compromises or defrauds the technical protection, but it is irrelevant how the criminal acquired it like by using social engineering techniques, using force or intimidation, capturing the information thank to the negligence of the target user, using decoder or spyware program.[11] Generally the weakest link in security chain is the human element that's why attackers prefer social engineering techniques (such as phishing) rather than using technical solutions. According to Kevin Mitnick – the world's most famous hacker – social engineering bypasess all the technologies, including

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[8] NAGY, Zoltán András: XLIII. Tiltott adatszerzés és az információs rendszer elleni bűncselekmények. [Illicit acces to data and crimes against information systems] In: Tóth Mihály – Nagy Zoltán (editors.): Magyar Büntetőjog – Különös Rész. Osiris Kiadó, Budapest 2014. p. 594.

[9] The Explanatory Report to the Convention on Cybercrime. Budapest, 2001. p. 9.

[10] NAGY, Zoltán András: Számítógépes környezetben elkövetett bűncselekmények. Ad Librum Kft. Budapest, 2009. pp. 271-272.

[11] NAGY (2014a) Op. cit. pp. 594-595.

firewalls by using manipulation, influence and deception to get a person, a trusted insider within an organization, to a comply with a request, and the request is usually to release information or to perform some sort of action item that benefits that attacker.[12] Unfortunately in case of cybercrime, most of the time users contribute to become the victim of these type of crimes like by sharing too much personal information, falling for phishing easily and so on.[13]

In the second scenario of this Subsection, unauthorized entry shall happen when the authorized user overrides or infringes his privileges, which means that he logs in with his own name and password but he does such operations which he has no right like the system administrator of an institution or a company starts collecting the data of the system's users.

According to Subsection (2) point a), *the unlawful disruption of the use of the information system* is punishable. It might happen by installing, activating malicious software (malware)[14] offline like inserted directly via pendrive, CD or DVD or online via Internet or other computer network via executable files (e.g. downloading infected e-mail attachments or files from Peer-to-Peer networks), which are able to affect the operation of the information system differently.[15] Launching a distributed denial of service (DDoS) attack is a good example of disruption without entering the system. It is a cybercrime in which the primary goal is to deny users of computers or other types of electronic devices access to an information system or its resources (such as making unavailable online services like e-banking or webshop of businesses etc.). DDoS attacks often involve flooding a computer network with massive amounts of data in a short period of time so that servers cannot keep up with the amount of data being transmitted.[16] In point a), besides the criminal conduct, the *consequence* is also stated, requiring the realized and unlawful disruption, which includes the case when the system does not work at all, but also it covers when it does not work properly by any aspects or it does not operate properly for its intended purpose[17]. For example in 2016, the Hungarian government's websites were under a wave of DDoS attacks, which caused information system partially breakdown for few hours.[18] It is worth to mention that there is a new tendency when cybercriminals use an extortion scheme with DDoS attacks against specified website owners (*e.g.* the targets are like from the energy,

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[12] MITNICK, Kevin D. – SIMON, William L.: A legendás hacker – A megtévesztés művészete. Perfect Kiadó Budapest, 2003.

[13] PARTI, Katalin – KISS, Tibor: Informatikai bűnözés. [Cybercime] In: Borbíró Andrea – Gönczöl Katalin – Kerezsi Klára – Lévay Miklós: Kriminológia 2. Wolter Kluwer, Budapest, 2016. pp. 505-506.

[14] For example the most common ones are viruses, worms, Trojans, bots and spyware. A virus infects another program. Worms are self-replicating without infecting other programs. Trojans are programs which appear to be innocent but contain a hidden function (like opening 'back door' access). A bot is a program which infects a targeted computer and allows it to be controlled remotely. The term'spyware' is a generic description for a range of programs that in some way monitor computer use.

[15] NAGY (2014a) Op. cit. pp. 594-595.

[16] MCQUADE, Samual C. III.: Encyclopedia of cybercrime. Greenwood Publishing Group 2009. p. 63.

[17] MOLNÁR, Gábor Miklós: XLIII. Tiltott adatszerzés és az információs rendszer elleni bűncselekmények. [Illicit acces to data and crimes against information systems] In: Belovics Ervin – Molnár Gábor Miklós – Sinku Pál (editors): Büntetőjog II. – Különöse Rész. HVG-Orac Lap és Könyvkiadó Kft. Budapest, 2016. november p. 948.

[18] http://www.kormany.hu/hu/belugyminiszterium/hirek/senki-nem-vallalta-magara-a-kormanyzati-informatikai-rendszerek-elleni-tamadast Downloaded: 11.11.2017

financial sector or gambling websites), if they pay the ransom – cryptocurrencies like Bitcoin[19] – then they may regain control of their site without interruption.[20]

In point b), it subjects to punishment for altering or deleting, or rendering inaccessible data in the information system. It is important to note that software, programs are also regarded as data. *'Alteration'* means the modification of the content of existing data like make it misleading and/or worthless[21] by overwriting or deleting it partially etc. It is irrelevant whether it is stored in internal or external data medium (e.g. HDD, SSD or pendrive).[22] For example Supreme Court of Hungary established this crime when somebody entered the higher education's study system – so-called NEPTUN – and changed the grade of a not fulfilled exam. It may be used to obtain different advantage for example by increasing a line of credit.[23] The unlawful modification of the content of a website is the so-called 'website defacement', when the website's appearance is changed like different pictures and or/words are placed there. It is considered to be a virtual graffiti by most like hacktivist.[24] The targets are generally government organizations (*e.g.* the Constitutional Court of Hungary's website was defaced in 2012) and religious websites.[25] *Deleting* means the complete removal of data. For example there was a case handled by the Supreme Court of Hungary when the system administrator logged from his own workstation in his boss's computer and unlawfully deleted data files.[26] *Rendering inaccessible* do not need any comments, it may happen when data is hidden in a file or folder, which is protected by password or it becomes encrypted.[27] Ransomware continues be one of the most prominent malware threats in terms of the variety and range of its victims and the damage done by the criminal use of encryption. Ransomware encrypts certain file types on infected systems and forces victims to pay the ransom to get a decrypt key, because it is based on data encryption the attacker accomplishes the breach of data offence according to the Hungarian Criminal Code. This malware is popular among cybercriminals since beyond the initial infection, all the attacker has to do is collect the ransom payment, and by using pseudonymous currencies such as Bitcoin, then laundering and monetisation is considerably simple. Furthermore, the nature of the attack means that ransomware can attack a much more diverse range of targets. Victims are atypical from the usual financial targets, and include entities such as hospitals, law enforcement agencies, and government departments and services. While the public also continues to be targeted, small to

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[19] Bitcoin, launched in 2009, was the first decentralised convertible virtual currency, and the first cryptocurrency based on blockchain technology. Transactions are publicly available in a shared transaction register and identified by the Bitcoin address, a string of letters and numbers that is not systematically linked to an individual. Therefore, Bitcoin is said to be "pseudoanonymous".

[20] NAGY, Zoltán András: A sértett szerepe néhány kibertérben elkövetett bűncselekményben – alkalmazott viktimológia. . [The role of the victim in commited crimes in the cyberspace - applied victimology] In: Finszter Géza – Kőhalmi László – Végh Zsuzsanna (editors) Egy jobb világot hátrahagyni… Tanulmányok Korinek László professzor tiszteletére. Pécs, 2016. p. 488.

[21] CLOUGH, Jonathan: Principles of cybercrime. Cambridge University Press, 2010. p. 29.

[22] NAGY (2014a) Op. cit. p. 598.

[23] CLOUGH Op. cit. p. 29.

[24] See more: SIMON, Béla: Hactivism and its status in Hungary. Magyar Rendészet. 2016. 16:(2) pp.161-174.

[25] https://www.techopedia.com/definition/4870/defacement Downloaded: 21.11.2017

[26] MOLNÁR Op. cit. p. 950.

[27] NAGY (2014a) Op. cit. p. 598.

medium enterprises, who often lack the resources to fully safeguard their data and networks, are also key targets.[28]

One of the *aggravating circumstances* of this crime is accomplished if the attack affects a *substantial number of information systems*, although the Criminal Code does not define it, so the practice of the law enforcers has to deal with it.[29] For example, when the attacker obtain access in more information systems and infects them with malware. Nowadays the two most dangerous viruses are ransomware and botnet virus. In 2017, The WannaCry ransomware is believed to have rapidly infected up to 300 000 victims in over 150 countries, including a number of high-profile targets such as the UK's National Health Service, Spanish telecommunication company Telefonica, and logistics company Fed-Ex.[30] Another good example is a DDoS attack, which is launched from botnets. Botnets are large clusters of connected devices via Internet (*e.g.* PCs, smartphones, routers, other smart devices), infected with malware that allows remote control by the attacker – so-called botmaster – without the computer user's knowledge. These infected devices are called zombies. Some botnets might have a few hundred or a couple thousand computers, but others have tens and even hundreds of thousands of zombies at their disposal. Once created, the infected network of computers that constitute the botnet can be activated without the computer users' knowledge in order to launch a large-scale cyber-attack, which usually has the capacity to cause serious damage like a cyber-attack against national critical infrastructure have the potential to inflict significant, real-life disruption and prevent access to critical services that are vital to the functioning of our economy and society (*e.g.* energy, transportation, health and financial services).[31] After the first devastating Stuxnet worm, which was designed for a targeted attack and managed to stop Iran's nuclear plan for years by destroying large number of uranium enriching centrifuges, there are an increasing number of targeted cyber-attacks against SCADA systems, which is an industrial control system at the core of many industries as manufacturing, energy, water, power and more.[32] *Critical infrastructure* means the assets or systems essential for the maintenance of vital social functions, health, safety, security, and economic or social wellbeing of people.[33] The most commonly reported (to law enforcement) attacks against critical infrastructures in the EU were DDoS attacks, with over 20% of countries reporting cases.[34]

Another *aggravating circumstance* of this crime happens if the criminal offense is *committed against works of public concern*. According to the closing provisions, 'works of public concern' shall mean: public utilities, public transportation operations, electronic communication networks, d) logistics, financial and IT hubs and operations necessary

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[28] EUROPOL (European Cybercrime Centre – EC3): Internet Organised Crime Threat Assesment, 2017. p. 19. https://www.europol.europa.eu/activities-services/main-reports/internet-organised-crime-threat-assessment-iocta-2017 Downloaded: 24.11.2017

[29] MOLNÁR Op. cit. p. 950.

[30] EUROPOL (2017) Op. cit p. 19.

[31] NAGY, Zoltán András – MEZEI, Kitti: A zsarolóvírus és a botnet vírus mint napjaink két legveszélyesebb számítógépes vírusa. [Ransomware and botnet virus as the most dangerous computer viruses]. In: Szent Lászlótól a modernkori rendészettudományig. Pécs, 2017. p. 163 – 166.

[32] *NAGY, Zoltán András: A kiber-háború új dimenzió – a veszélyeztetett állam biztonság (Stuxnet, DuQu, Flame – a Police Malware). [Cyber warfare as a new diemnsion – endangered state security (Stuxnet, DuQu, Flame – Police Malware] Pécsi Határőr Tudományos Közlemények XIII. Pécs, 2012. p. 225-226.*

[33] Directive 2008/114/EC on the identification and designation of European Critical Infrastructures

[34] EUROPOL (2017) Op. cit. p. 26.

for the performance of the tasks of universal postal service providers carried out in the public interest, plants producing war materials, military items, energy or basic materials destined for industrial use. It is noteworthy that the definition of works of public concern and critical infrastructure do not cover each other, since the social wellbeing, health-care institutions are missing from the enumeration, which may rise concern since cyber-attacks against health institutions are on the rise and this year the Hungarian government introduced e-health-care system which means our medical records, as sensitive and valuable data for the cybercriminals, are at more risk.

It is an *intentional crime*, which means it can committed with dolus directus and dolus eventualis. In Subsection (2) point b), the intent must be aimed at the fact that due to the attacker's act the information system is unlawfully disrupted. The *perpetrator* can be anybody, who commits the abovementioned criminal conducts.

The breach of information system or data's different basic scenarios may happen side by side or one after another, but the part actions forms a unit and the perpetrator is going to be called to account for the more serious case. For example if the attacker does hacking in a protected computer and after he or she installs a virus or delete data, then he will be responsible for the latter one, it is threatened with a more serious sentence.

The multiple counts of this offense depends on the number of the attacked information systems. The Criminal Code protects all information systems individually whether it has the same or different owners, operator etc.[35]

3.2. Compromising or Defrauding the Integrity of the Computer Protection System or Device

Section 424

(1) Any person who, for the commission of the criminal offense defined in Section 375 or 423: a) creates, transfers, supplies, obtains or places on the market passwords or computer programs required therefor or facilitating thereof; or

b) offers his economic, technical and/or organizational expertise to another person for the creation of passwords or computer programs required therefor or facilitating thereof; is guilty of a misdemeanor punishable by imprisonment not exceeding two years.

The *protected legal object* is the interest of the information system's operation without disruption and stability, authenticity and privacy of the stored, managed, processed or transmitted data.

The *subjects of the crime* are passwords or computer programs. According to Subsection (3), for the purposes of this Section 'password' shall mean any identifier comprised of a string of alphanumeric characters, codes, biometric data or the combination thereof, designed to gain entry into an information system or any segment thereof.

In Subsection (1) point a), the first criminal conduct is creating, transferring, supplying, obtaining or placing on the market passwords or computer programs. *Creating* means any conducts which has an outcome as a finished password, program like writing program, generating or overwriting a password. *Transferring* is referred to conveying profession from the creator to different person, although it may happen by making available the password or program or passing the knowledge. *Supplying* occurs

[35] NAGY (2014a) Op. cit. p. 598 -599.

when due to activity or negligence the program or password becomes available for not entitled person or people. *Obtaining* means gaining possession on the program or password from the program write or any other people. *Placing on the market* means the perpetrator intentionally makes available the password or program for more, just as well indefinite number of people which may happen by giving it to only one person while the offender is aware of that the chosen person is going to hand over for more people. In all cases, it is indifferent whether it happens free or for a valuable consideration or by deception or other way.

In Subsection (1) point b), a *sui generis act of aider* is punishable, which involves the psychic and physical form of aiding and abetting. The *criminal conduct* is offering economic, technical and/or organizational expertise to another person for the creation of passwords or computer programs required therefor or facilitating thereof. Offering expertise means that the involved person acquires the knowledge, which might be simple the knowledge or an object containing it (e.g. theoretical and practical knowledge of breaking passwords, writing malicious programs sharing contacts etc.). The perpetrator can be only that person who has the knowledge to offer.

In both cases it can be committed only intentionally and this Section also states an aim which means it has to be perpetrated in order to commit the criminal offense defined in Section 375 or 423.[36]

The legislator has set a *ground for exemption from criminal responsibility* in Subsection (2), which says that in the case of Paragraph a) of Subsection (1), any person who confesses to the authorities his involvement in the creation of any password or computer program required for the commission of the criminal offense, or facilitating thereof, before the authorities learned of such activities through their own efforts, and if the person surrenders such produced things to the authorities and assists in the efforts to identify the other persons involved, shall not be prosecuted.

The multiple counts of this offense depends on the number of the attacked information systems as well as, but if the perpetrator accomplishes information system fraud or breach of information system or data then he or she will be prosecuted for those crimes and his or her preparation, which means the carried out compromising or defrauding the integrity of the computer protection system or device, will be an unpunished pre-action.[37]

It is noteworthy to mention, which present a great challenge to law enforcement especially regarded to investigations: the '*illicit online markets*, both on the surface web and *Darknet*, provide criminal vendors the opportunity to purvey all manner of illicit commodities, with those of a more serious nature typically found deeper in the Darknet. Many of these illicit goods, such as cybercrime toolkits or fake documents, are enablers for further criminality.'[38] The so-called *Crime-as-a-Service* (CaaS) business model drives the digital underground economy by providing a wide range of commercial services that facilitate almost any type of cybercrime. The anonymisation techniques (e.g. by using specialised browser like Tor instead of the regular ones and carrying out transactions by using hard-to-trade virtual currencies such as Bitcoin) used in parts of the Internet, known as Darknets and hidden services, allow users to communicate and trade illicit goods (such as online trade in drugs, child abuse material, cybercrime tools and services, data and weapons) freely without the risk of being traced and captured.

[36] NAGY (2014a) Op. cit. pp. 600-601.
[37] MOLNÁR Op. cit. p. 954.
[38] EUROPOL (2017) Op. cit. p. 48.

Cybercriminals generally use two platforms for this purpose: underground forums (such as Alphabay) or criminal marketplaces (like Silk Road). The cybercriminal's toolkit may include malware, supporting infrastructure, stolen personal and financial data and the means to monetise their criminal gains. Cybercrime toolkits are available to purchase or hire as a service (*e.g.* DDoS-as-a-Service, Malware-as-a-Service, Data-as-a-Service), it is relatively easy for cybercrime initiatives – even if the attacker has lack of experience and technical skills - to launch – even high scale -cyber-attacks not only of a scale highly disproportionate to their ability but for a price similarly disproportionate to the potential damage (e.g. a DDoS attack tool and a whole botnet infrastructure is available from 5$ to 1000$ and it is almost only one click for the attacker without any technical knowledge). Not to mention it allows experienced cybercriminals to focus on their core activities, becoming more efficient and specialised since they can buy everything else they need.[39]

3.3. Information system fraud

Section 375

(1) Any person who, for unlawful financial gain, introduces data into an information system, or alters or deletes data processed therein, or renders data inaccessible, or otherwise interferes with the functioning of the information system, and thereby causes damage, is guilty of a felony punishable by imprisonment not exceeding three years.

(2) The penalty shall be imprisonment between one to five years if:

a) the information system fraud results in damage of substantial value; or

b) the information system fraud involves a considerable value and it is committed in criminal association with accomplices or on a commercial scale.

(3) The penalty shall be imprisonment between two to eight years if:

a) the information system fraud results in damage of particularly considerable value; or

b) the information system fraud involves a substantial value and it is committed in criminal association with accomplices or on a commercial scale.

(4) The penalty shall be imprisonment between five to ten years, if:

a) the information system fraud results in damage of particularly substantial value; or

b) the information system fraud involves a particularly considerable value and it is committed in criminal association with accomplices or on a commercial scale.

(5) Any person who causes damage by using a counterfeit or forged, or unlawfully obtained electronic payment instrument, or by accepting payment with such payment instrument shall be punishable in accordance with Subsections (1)-(4).

(6) In the application of Subsection (5) cash-substitute payment instruments issued in other States shall receive the same protection as cash-substitute payment instruments issued in Hungary.

As far as the information system fraud is concerned in the new Criminal Code, *the protected legal object* of this felony is the interest of the function of the financial relations, information systems and cash-substitute payment instruments without any interruptions.[40]

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[39] EUROPOL (European Cybercrime Centre – EC3): Internet Organised Crime Threat Assesment, 2014. p. 19 -23.

[40] AKÁCZ, József: A vagyon elleni bűncselekmények. [Offenses against property] In: Kónya István (editor), Magyar Büntetőjog Kommentár a gyakorlat számára 3. kiadás II. kötet; HVG-Orac Lap- és Könyvkiadó. Budapest, 2013. p. 1412.

Since the delict consists of two statement of facts, consequently it has also two *subjects of crime*: on the one hand the information system,[41] which becomes the subject of crime through its data or program not by itself, and on the other the counterfeit, or unlawfully obtained electronic payment instrument (cash-substitute payment instruments issued in other States shall receive the same protection).[42]

The passive subject can be not only a natural person, but a legal person as well. The crime's injured party is the one to whom the damage is caused.[43]

The criminal conducts of the first statement in the Subsection (1) are the followings: any person who, for unlawful financial gain, introduces data into an information system, or alters or deletes data processed therein, or renders data inaccessible, or otherwise interferes with the functioning of the information system, and thereby causes damage, is guilty of a felony. *Introducing data* means uploading any fact, information or programs into an information system[44] in offline mode (for example with the help of keyboards, data mediums, external hard drives), or it could happen in online mode (with hacking). *Altering processed data* signifies that the modification is made in the content of the data, which is already in the information system (it can occur in various modes such as completing, deleting partially, or overwriting data). *Deleting data* means that the processed data is wiped.[45] *Rendering data inaccessible* occurs when the person, who is authorized for data the cognition, management or application, cannot access the data, even if it is hidden only temporarily.[46] The last perpetration conduct includes every action besides the enumerated ones, which *interfere with the functioning of the information system*.

The intention of these conducts is the unlawful financial gain, therefore it is considered to be an *intentional crime*. Damage causing[47] is needed for the consummated crime, which makes this crime *materialistic.* At the same time if the perpetrator starts the illegal intervention into the information system it means the attempt of the crime can be established.[48] The proved relation of the cause and effect between the perpetrator's conduct and the damage is a necessary condition. The intention of the unlawful financial gain assumes specific intent, though from the aspect of damage occurring and its extent the foreseeable intent is sufficient.[49]

The perpetrator can be anybody, who does the factual perpetration conduct, so it is not required to have an adequate qualification for committing the crime.[50] The following typical fraud actions with introducing data or altering processed data in the information system are regarded as information system fraud: opening a fictive bank account or credit account; transferring illegal payment to fictive/real bank account; transacting fictive transfers to the bank account; cutting down on someone's debt; duplicating

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[41] Act C of 2012 Section 459. (1) 15.

[42] SINKU Op. cit. p. 623.; Act C of 2012 Section 459. (1) 19 and 20.

[43] NAGY, Zoltán András: A vagyon elleni bűncselekmények [Offenses against property] In: Tóth Mihály – Nagy Zoltán (editors): Magyar büntetőjog – Különös rész, Osiris Kiadó. Budapest, 2014. p. 461.

[44] PALLAGI Op. cit. p. 202.

[45] NAGY (2014b) Op. cit. p. 461.

[46] SZOMORA, Zsolt: A vagyon elleni bűncselekmények. [Offenses against property] In: Karsai Krisztina (editor): Kommentár a Büntető Törvénykönyvhöz, Complex Kiadó. Budapest, 2013. p. 788.

[47] NAGY (2014b), Op. cit. 461, 463.; Act C of 2012 Section 459. (1) 16.

[48] CSÁK, Zsolt: A vagyon elleni bűncselekmények. [Offenses against property] In: Polt Péter (editor), Új Btk. Kommentár 7. kötet, Nemzeti Közszolgálati és Tankönyv Kiadó. Budapest, 2013. p. 118.

[49] SZOMORA Op. cit. p. 788.

[50] CSÁK Op. cit p. 116.

lawful payments (such as salaries, pensions etc.). It does not matter whether these actions are committed in the interest of the perpetrator or a third party.[51]

The second statement of the crime includes *the misuse of the electronic payment instrument*, which is regulated in the Subsection (5): any person who causes damage by using a counterfeit or forged, or unlawfully obtained electronic payment instrument, or by accepting payment with such payment instrument shall be punishable in accordance with Subsections (1)-(4). Using the payment instrument as a perpetration conduct is known as the usage with the intended purpose (such as paying by credit card, collecting cash etc.). Accepting the payment instrument is virtually a sui generis physical accessory, both in the real (for example exchanging check or bill for cash, or paying with SZÉP card) and virtual space (online purchasing).[52] The perpetrator can be anybody in the first phrase, while in the second phrase it is necessary to be an authorized person for accepting the instrument. Culpability can be only intentional. The intention has to be regarded to the damage causing, and in the second case the authorized person has to be aware that the electronic payment instrument is counterfeit or forged, or unlawfully obtained.[53]

The aggravating circumstances are defined by the extent of the damage and the commitment in criminal association with accomplices or on a commercial scale. The basic case includes the damage of the minor and considerable value, the classified cases start from the damage of a substantial value. This crime does not have a minor offence form, so the action will be considered as a crime if it is in compliance with the requirements of the statement of facts. *The count of the crime* is determined by the numbers of the injured parties (typically the number of the bank account owners).[54]

4. Conclusion

The information systems are not regarded to the national borders, by the virtue of the connected information systems through the networks allow to access the data files from distance. The development of the ICT is rapid and as a consequence a lot of various new types of crime commitment has appeared, therefore the number of the committed cybercrimes is gradually increasing year by year and becoming more sophisticated. On that score, it is essential to harmonize the criminal laws and frame minimum rules on the international level. The EU legislation has set these minimum rules by the new Directive and the Hungarian Criminal Code meets its requirements, though there are still some parts regarding the information system crimes which need further harmonization (for example de lege ferenda extending the classified cases considering the organized crime commitment and sanctioning identity theft).[55]

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[51] GYARAKI, Réka: A számítógépes környezetben elkövetett gazdasági bűncselekmények. A PIN kód megadása sikeres vagy biztonságos az internet?! [Economic crimes in the computer environment. Giving the PINcode or is the internet safe?!] = Pécsi Határőr. Tudományos közlemények. 13. [köt.], 2012. pp. 317-318.; NAGY (2014b), Op. cit. p. 462.

[52] NAGY (2014b) Op. cit. p. 461.

[53] PALLAGI Op. cit. p. 206.

[54] SZOMORA Op. cit. p. 789.

[55] NAGY, Zoltán András: A 2013/40-es Uniós direktíva az informatikai rendszereket érő támadásokról. Budapest, 2014. p. 5.

http://www.rendeszetelmelet.hu/Graphics/pdf/Nagy_Zoltan_Andras_A_2013_40_es_Unios_direktiva.pdf – Downloaded: 28.11.2017.

Since cybercrime presents a complex problem it needs a solution in more steps including focusing on the prevention, raising public awareness since in most cases cybercrime could be avoided if the average users are more aware of the danger of different cyber trends. It is also essential to provide up-to-date training and education for the law enforcement, judges and prosecutors on this specific field of expertise. It is also important to make it a curriculum for the related law enforcement and law faculties.

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Methodology of the Detecting and Investigating of War Crimes with the Special Focus on Western Balkans Cases

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Abstract

The work on the detection and prosecution of war crimes in attempting to provide evidence in criminal proceedings of war crimes at the Western Balkans is extremely hard and difficult. Despite the fact that the first investigations started more than fifteen years ago, a large number of unexplored and unresolved cases remain. The reasons for this is that research of this type of crime is more complicated and difficult than investigations of the classic crime. In this paper we suggest methods to gather personal and material evidence in war crimes cases in the Western Balkans. Paying attention to the information and attending to the recommendtions of this paper, practioners and theorists alike will become familiar with the problems of investigating and prosecuting war crimes in the Western Balkans, and possibly also set the foundation for new research in the field. Based on an analysis of the specificity of the armed conflicts in the former Yugoslavia, we nevertheless conclude that none of the countries involved in the conflict has adequate technical and human resources for the effective investigation and prosecution of war crimes. This suggests that the effective investigating and prosecuting of these most serious crimes require mutual cooperation between the police and the judicial authorities of the countries of the former Yugoslavia.

Key words: *methodology of war crime investigation, providing of evidence, planing of investigation, Western Balkans.*

1. Introduction

The work on the detection and investigation of war crimes in attempting to provide evidence in criminal proceedings of war crimes at the Western Balkans is extremely

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hard and difficult. These crimes are both factually and legally the most complicated of crimes, not the least in terms of their severity. Knowledge of the existence of a war crime offense can come from many different sources. The *primary* source is by criminal charges from citizens (Bošković, 2015:61). Citizens report the crimes to a prosecutor and to authorized officials by submitting written information to the prosecutor, the police or by reporting the events by phone or e-mail (Bejatović, Šulić & Ilić, 2013:214). Alternative sources of information can be criminal charges from victims or witnesses. Information about the existence of a war crime is important because victims and witnesses of said crimes have been personally affected by the particular offense. They have experienced trauma during the war, as a result of the offense. Such offenses may include rape, imprisonment and torture in camps and the murder or disappearance of family members. Victims and witnesses of war crimes may due to their common traumatic experience, develop specific relations considered as a predominant connecting element for the establishment of various associations of victims and witnesses. These associations may empower the victims and the witnesses to exercise their right in an organized and synchronized way. In the former Yugoslavia, there are various associations of victims and witnesses, such as the Association of Detainees; the Women's Victims of War; the Civilian Victims of War; the Child Victims of War and the Associations of Families of Missing Persons, to name but a few.

These non-governmental organizations have catalogues of information which contain detailed statements by members who may be searching for information on crimes committed, the offenders of these crimes, the location of the crime, the location of the evidence or the identities of witnesses. These organizations have filed many reports on war crimes committed. Some of these include highly detailed descriptions of victims' and witnesses' experiences and are often very useful sources of information for the prosecutor. Many local non-governmental organizations have been active in collecting evidence about the identities of the victims or of the perpetrators. The victims may in this way come into contact with people who can testify about the crimes committed against them. Generally speaking, members of these organizations may not be trained in criminal investigations. Some organizations may also be influenced by political interests. Material gathered by them may thus be considered "hearsay" and would therefore not be admissible at trial. However, cooperation inside of these organizations may lead to valuable or tentative leads that prosecutors in turn can examine before a trial. Such pretrial dialogue may also be beneficial in building trust between the prosecutors and the victims.

The *second* source of information, the criminal charge, is submitted by an authorized official. The regular duties of authorized officials include various operational actions to prevent and detect crime. When authorized officials, as a result of these actions, gather information on the basis of reasonable doubt that a crime has been committed, they are required to notify the prosecutor, either immediately or within a specified time frame.

The *third* source of information is from cases that have not been resolved. A large number of unresolved war crimes cases have been the subject of extensive investigation during and immediately after the war by former investigative judges, military prosecutors, courts, and other investigative agencies from the countries of the former Yugoslavia. In the old investigative files one may find numerous witness statements, documentary evidence of decisions to conduct an investigation, transcripts of hearings,

international arrest warrants, and decisions on custody, summary files, and more. This information is a crucially important source for the plaintiff in any new investigation.

As already pointed out, investigations of war crimes represent serious work that require enormous resources compared to other criminal cases. Most of the criminal acts occurred in an area where the conflict was still ongoing. Witnesses are often traumatized refugees who now live in other countries around the world. Given that the crimes occurred during an armed conflict, it is much more difficult if not impossible to gather evidence compared to similar methods applied in times of peace. These and other factors make such investigations extremely difficult and expensive compared to researching crimes of a more classic nature.

The procedure of criminal investigation is generally divided into the investigative work of the police in pre-trial proceedings (so-called. criminalistics procedure) and in the investigative work of the public prosecutor in criminal proceedings (ie. during the investigation phase) (Ivanović & Ivanović, 2013:26). Unlike the procedures of a criminalistics investigation of classic crime cases, practice has shown that in the case of a war crimes investigation it is crucial that the criminal investigation procedure include an integrated legal approach and analysis by experienced prosecutors from the start. Police investigators and experienced prosecutors must work closely together when experiencing the existence of the criminal offense of war crimes. Throughout the investigation they must cooperate to ensure reliability in the investigation of the incident, so that the collected evidence is sufficient to substantiate prosecution.

2. Problems in detecting and investigating war crimes in the Western Balkans

The detection and investigation of evidence in criminal proceedings is extremely difficult because they are factually and legally the most complicated of crimes. Numerous challenges arise, such as the following:

– a lack of political will to prosecute the crimes;

– limited prosecutorial resources, including a limited number of specialised prosecutors and a shortage of prosecutors and support staff;

– the shocking fact that the majority of the perpetrators of war crimes belonged or continue to belong to legal structures that are performing the detection and prosecution of war crimes;

– the enormous lapse of time from the moment the crime was committed to the moment of starting an investigation;

– the circumstances in which the crimes were committed;

– the deliberate destruction and removal of evidence;

– the fact the crimes were committed in territories outside the jurisdiction of the state authorities;

– the lack of physical evidence and the unreliability of personal evidence;

– the negative influence of the media;

– complications from the great number of victims, offenders and accomplices in specific war crime cases;

– difficulties pertaining to the availability of evidence;

– problems with the intimidation of potential witnesses and the opportunities for their protection; and

– problems with victims' testimonies (Ivanović & Soltvedt, 2016:146).

a) Lack of political will to prosecute

In almost all countries of the former Yugoslavia, there exists some lack of political support for prosecuting these crimes, as can be seen in the campaign attacks on judicial institutions, interference in procedures, attempts to undermine the existing reforms of the judiciary and the legislature, and in the denial of crimes as determined by final judgements. Mistrust is present despite the important judicial reforms and the lack of evidence of bias in the conducting of proceedings. This indicates a concern that adverse conditions make it difficult to defend against deliberate attempts at disinformation of the public and to carry out appropriate actions for dealing with it.

In fact, high-ranking war crimes suspects of the former Yugoslavia who are members of the police or government are considered heroes by a large share of citizens. This leads to a problem where the processing of such persons can cause resentment among the public, which then results in the authorities losing popularity or perhaps even legitimacy among the citizens. The political opposition, of course, uses this resentment for what it is worth. Accordingly, politicians in power avoid giving support to the authorities tasked with prosecuting criminals because they run the risk of losing votes (Ivanović & Soltvedt, 2016:147).

Further, some of those suspected of war crimes made profits during the war so, by the end of the war, they had become very influential businessmen. In fact, they became so influential that they financed the campaigns of some political parties, or even formed their own political parties with great voter support. Finally, after the war some of these individuals became very influential in the field of organised crime, with a huge amount of capital at their disposal and a number of connections in the legislative, executive and judicial branches of government. Due to all of this, in certain periods there has neither been the will or courage of the leading political structures to process these persons nor to investigate their possible crimes.

b) Limited prosecutorial resources, including a limited number of specialised prosecutors of war crimes, crimes against humanity and genocide, and a shortage of prosecutors and staff

A major task of prosecutors when investigating war crimes is to organise the collection of physical evidence and witness testimonies in order to remove the possibility of any suspicion of doubt before seeking an indictment. They are then to prepare an indictment for trial.

All former Yugoslav countries had have problems, especially in the initial years after the armed conflict with a shortage of prosecutors. In the war crimes context, they have a very small number of prosecutors specialising in these crimes and almost none who work exclusively on cases like these. Trials in such cases require expertise in international law, including the Geneva Conventions, customary international law, the human rights conventions and the jurisprudence of international and hybrid courts.

Further, investigating these crimes, especially those committed years ago, requires specialist qualifications and knowledge. In the former Yugoslav countries, there is no specialisation of prosecutors by type of crime; all prosecutors involved process all types of crime. Solving this problem started with the establishment of special departments for prosecuting war crimes whose staff were trained in the field of crimes under international law. The problem of an inadequate number of prosecutors is also reflected

in a universal lack of support personnel in the Office. The result of this shortage is that prosecutors are forced to do almost all aspects of work related to a case, working alone on witness interviews, the development of criminal charges and other routine administrative tasks.

c) The majority of war crime perpetrators belonged or still belong to legal structures detecting and prosecuting war crimes

Responsibility for detecting, prosecuting and gathering war crimes evidence lies primarily in the hands of the police. However, it is difficult to expect this type of help from the police when many members of the police force are themselves perpetrators of war crimes who have either destroyed or concealed the evidence of their crimes. In fact, a significant number of individuals suspected of committing the said crimes following the former Yugoslav conflict still belong to the police, the military or the security services. Certainly some of them have retired, but they remain in contact with former colleagues and friends who exert a significant influence on the functioning of these institutions. This has all led to enormous challenges in carrying out and efficiently processing war crimes investigations. There is a reasonable suspicion that some people still in the police, the military or the security forces deliberately obstructed investigations and misdirected them. Also, it is reasonable to believe that members of these services have sabotaged the locating and arresting of war crimes suspects (Ivanović & Soltvedt, 2016:148). These persons are tipped off in advance about suspicions and orders to arrest suspects. Further, there are reasonable grounds to suspect that members of the police, military and security services directly participate in concealing persons suspected of war crimes by providing them with shelter, transport, logistical support, false identification documents, funds, and more.

However, despite the above, it must be noted that many members of the War Crimes Investigation Service have revealed a high degree of efficiency and professionalism when acting according to the requirements of the War Crimes Prosecutor.

d) Large time lapse from the moment of crime perpetration to the initiation of investigation

War crimes in this region took place in the period between 1991 and 1999, whereas the actual investigation of these crimes and their perpetrators is happening only at the present time. The great lapse in time between the crimes committed and the start of the investigating these crimes provides another complication. In the detection and prosecution of crimes in former Yugoslavia time has not been a good ally because the high-ranking perpetrators at the time the crimes took place were in aged their fifties or older. In other words, many of them have died. The situation is similar with older witnesses or victims who have also died or whose paths in life have taken them on different parts around the world. Unfortunately, judicial authorities find it difficult to track the latter.

Younger perpetrators between 17 and 30 years and who were lower ranking members of the police, the military, the security or the paramilitary may have gone to South Africa and to Latin America where for work they protect narcotics bosses. Some are even mercenaries fighting in armed conflicts in Asia and Africa, making them subsequently unavailable to the state police and prosecuting authorities.

e) The circumstances in which crimes were committed

War crimes committed during the armed conflict prevented the collection of physical evidence such as written reports, crime scene examinations, ballistics and other forensic reports. This caused valuable material evidence to be lost forever because the duration of the war inhibited authorised services from making it to the crime scene and taking investigative measures.

f) The deliberate destruction and removal of war crimes evidence

The perpetrators of war crimes have systematically covered up evidence of their crimes, of the murder of war prisoners, civilians, the wounded and the war-time sick. Basically the perpetrators have done this by removing bodies, relocating bodies from mass graves to individual graves, burning bodies and by removing and replacing clothing and personal belongings in order to impede the identification process. Covering up war crimes also occurs by transferring bodies from mass graves to several secondary mass graves, as well as by the systematic destruction of documents describing the involvement in these crimes of certain individuals from the military, the police forces or the political establishment.

g) Crimes committed in territories outside the jurisdiction of state authorities

The collection of evidence is especially difficult because the crimes were committed in territories actually outside the jurisdiction of the state authorities. While it would be normal for the state to exercise criminal jurisdiction for acts committed inside its territory, or for acts committed by its citizens, international humanitarian law provides universal jurisdiction for grave breaches of the notion of war crimes. Thus, this law requires all states to prosecute war criminals regardless of their citizenship, the citizenship of the where the war crimes were committed does not have its own citizenship. In this region (former Yugoslavia) war crimes occurred, as a rule, inside an area not presently under the jurisdiction of the state authorities; these authorities having the responsibility to conduct proceedings against the perpetrators of these crimes. The witnesses, on the other hand, are usually located outside the state in which the crimes are investigated. These facts point to the need for regional cooperation which would be in addition to the above, and consist of the possibility and the right of a state to carry out certain investigations in the territory of other states in the region. In this way, national authorities competent in the prosecution of war crimes would have free access to the scene, the victims and the witnesses which would be of great value for the effectively resolving these cases.

Regarding war crimes in the former Yugoslavia there is a problem of witnesses' willingness to participate in the process if it takes place in another country. There is also lack of professional support teams for such witnesses. Some countries, however, have entered into an agreement to exchange information and cooperate in the investigation of such crimes. For example, such an agreement was signed by representatives of the Republic of Croatia and the Republic of Serbia. With this agreement, they have committed themselves to exchange information, reports, documents and information assisting in the investigation of war crimes.

The largest obstacle to regional cooperation in these cases is the ban on the extradition of states' citizens between countries in the region. Hence, extradition is prohibited by the laws of Bosnia and Herzegovina, of Serbia and of Croatia. As the suspects often have dual nationality or are foreign, it is frequently impossible to ensure their presence at trial. Therefore, 'a space for impunity' has been created, which of course poses a serious obstacle to justice for many victims (Ivanović & Soltvedt, 2016:150).

h) Lack of physical evidence and the unreliability of personal evidence

The war crimes in former Yugoslavia happened 15 or 20 years ago, and the detection and prosecution of the offenders is only now underway. This has resulted in a scarcity of physical evidence. Given the passage of time, in most cases there is not enough physical evidence showing a connection between a specific person and a specific crime. Corpses are frequently found in an advanced state of decay so that it may be difficult to conclude whether a person died in legal battle or they died as a civilian or a prisoner. Yet a very small amount of physical evidence presents itself in the following forms. Various objects are found in mass graves, such as personal documents, blindfolds and wires used to bind a person's arms, personal items, canned food, and more. Also, there are certain documents that may indicate the identity of the people who were in the camp before they were killed. Then there is evidence that may appear in certain written correspondence between military leaders, as well as transcripts of intercepted conversations between military and police officers. In addition, there are sources of material evidence which can serve as images and photos. In the majority of cases, the most important pieces of evidence are eyewitness testimonies, other witnesses and witnesses who are also victims. However, it should be noted that their view of past events may be unreliable, given the passage of time and the fact that the witnesses of war crimes are often traumatised.

i) The negative influence of the media

Many people in the countries of former Yugoslavia are against the trials by the ICTY. In addition, some believe that the suspects from their own countries are heroes or patriots; people who were simply following orders to defend their homeland and their people. They believe that judging these people makes no sense anywhere.

This sentiment is present every day, be it in print, on television, on the Internet, the radio or in other forms. Members of the media may go so far during a trial as to often express their own views and draw their own conclusions on important facts from the legal proceedings. The media may conceal or openly root for its 'candidates' and underestimate the court and the judicial organs. Very often, the media publishes biographies of suspects, depicting the honourable origins of the person's family, the difficulties he or she has had to face in life, or interviews with close relatives in which they praise the suspect as a good and honest person. These pressures and circumstances usually have a negative impact on participants in the legal process; they must resist, remain cool-headed and clear of mind, and strictly keep to the law and the relevant facts. There have also been cases in which the identity of protected witnesses has been revealed by the media. These situations have, of course, a negative influence on the acquisition of new witnesses for the legal process. Other challenges related to the

detection, prosecution and trial of war crimes in the Western Balkans involve complications due to the large numbers of victims, offenders and accomplices in specific cases, difficulties pertaining to the availability of evidence, problems related to intimidation of potential witnesses and, finally, problems with the testimony of victims themselves.

In many cases, witnesses of war crimes from former Yugoslav countries received inadequate protection and, due to intimidation, were reluctant to give their testimony in court. In fact, there have been cases where they changed previously given testimony. Naturally, victims play a crucial role in war crimes proceedings. In interviews with the investigator and by giving their testimony in court, victims contribute to the process of establishing the truth regarding war crimes. This requires considerable courage on the part of the witnesses (Ivanović & Soltvedt, 2016:152).

Fifteen years after the war, witnesses are simply less willing to testify, and that is the main problem – many have returned to their homes and are again friendly with neighbours from the other ethnic group. Many victims are reluctant to talk about their war experiences under any circumstances and prefer to move on with their lives. More than a decade since the end of the conflict, many have died or left the country, and the testimony of the remaining witnesses is less detailed and, thus, less useful for the prosecutors. If witnesses are elderly, many have forgotten many details of their experiences; especially if the period from crime to trial is more than 20 years. In the meantime, much has happened in their lives and they choose to forget what they saw. However, it has been noted that some witnesses simply refuse to speak about what they know. Perhaps, this is one form of psychological defence mechanism. Certainly, these people do not want to remember a trauma they experienced 20 years ago and which they no longer wish to be a part of.

3. Categories of perpetrator's of war crimes

Before we describe how such an investigation should be undertaken, it would be useful to point to the different categories of people involved in a war crime. Some of these people are aware of their participation in the crime, while others are unaware and may simply be involved as instruments used to assist in the crimes.

The *first* category of offenders are the direct perpetrators. These are the person or persons who are in contact with the victim and who are physically committing the crime. This group also includes the immediate superior of the direct perpetrators if they are directly involved in the planning, ordering, instigating or committing of the crime (Manual for investigations of war crimes, crimes against humanity and genocide in Bosnia and Herzegovina, 2013: 32).

The *second* category consists of the perpetrators that are more indirectly involved in the crime. This middle category includes those distant offenders who do not belong to the high-level offenders but who knowingly participate in the commission of crimes by the direct perpetrators. For example, if the direct perpetrators are soldiers, the indirect perpetrators are those superiors who are aware of any criminal activity and who give logistic support to the direct perpetrators of the crimes, or who do not take the necessary measures to ensure the prevention of the crimes or punish the perpetrators. These indirect perpetrators may be any higher level police or civilian authorities who abuse their powers or who participate in the crime in some other way.

The *third* category consists of higher-level members of the military, police and political institutions that have used their authority to initiate or participate in crimes that are committed by the direct perpetrators. These are offenders whose participation is often carried out through complex institutional channels under their control. These are the people that the UN Security Council and the International Criminal Court deem "most responsible" for war crimes. These distant perpetrators of high-level crimes can initiate or participate in crimes that are carried out by the direct perpetrators and are aware of the types of crimes that are being carried out. In addition, they are aware of who the victims are, but they do not need to know the specific crimes or victims who the direct perpetrators have selected for their crime.

The *last* group of persons who may be involved in this complex operational crime chain are those who have a legal duty to act but who are unwilling to do so. They are linked to the operational crime chain and are used as tools by the perpetrator of the crime. This is the so called side level.

So, in the investigation of war crimes we have several levels of execution or contribution to execution, and we therefore have a multi-level investigation. First, we have the primary level - the level of direct physical execution, then the middle level of more indirect support by higher level officials, then the highest level – that of high-ranking individuals who use their authority to initiate the crimes and, finally, the side level - people who are used as a instruments for the actual execution of the crime.

4. Investigation at the primary level

The investigation at the primary level includes an investigation of the direct and immediate physical execution. One of the most important questions that should be answered at the primary level is the identity of the direct perpetrators, as well as the determination of the military units that participated in committing the crime. This question is often difficult to answer because these offenders usually do not wish the victims or witnesses to know their identity, so they wear a mask, or remove all identifying characteristics from their uniforms and equipment. Victims and witnesses who survive such serious crimes can be too anxious or preoccupied with attempting to escape, so that some of them will not be able to make detailed observations that can reliably identify the perpetrators and organizations which they may belong to. Notwithstanding the trauma of surviving horrific crimes, victims and witnesses still often show amazing recall with respect to the perpetrators and are able to provide detailed information useful in the investigation (Manual for investigations of war crimes, crimes against humanity and genocide in Bosnia and Herzegovina, 2013:39). It is necessary to conduct in-depth interviews as soon as possible to gather as much information as possible from these valuable witnesses. Even if such evidence cannot conclusively identify the perpetrator, it can provide important clues useful to the investigation. Witnesses should be asked about all information which they can give about the identity of the individual perpetrators, including their clothes, names, nicknames which were used in communicating with each other and in which accent they spoke. Careful analysis of the statements made during the crimes, often in the light of other information, can reveal important clues regarding the group to which the perpetrator belonged (Manual for investigations of war crimes, crimes against humanity and genocide in Bosnia and Herzegovina, 2013:39). The careful descriptions of the

uniforms, even without the insignias, when analyzed in the context of the evidence, may discover reliable information about the perpetrators.

During the investigation, it may happen that a member of the group that committed the crimes decides to cooperate with the investigators. In such cases, at first apparently insignificant information obtained from witnesses about nicknames, clothing and vehicles may become very important with the help of an insider witness, who may explain the internal organization and functioning of his unit or group (Manual for investigations of war crimes, crimes against humanity and genocide in Bosnia and Herzegovina, 2013:39). It is further necessary to consider reviewing the logistics records, daily reports and border crossing records that can reveal which military units were stationed in the area when the crimes were committed. Practice has shown that, although these groups conceal their identities from victims and witnesses, their identity is often recorded in official documents. Any evidence that could indicate which group or unit that belong to the offender is important. This evidence may include observations that are presented by the witnesses about the direct perpetrators (Manual for investigations of war crimes, crimes against humanity and genocide in Bosnia and Herzegovina, 2013:40).

It is also important to consider the possibility of locating witnesses who were in the area of the crime before it was committed. If the perpetrators were there and prepared the crimes, these witnesses might be able to provide detailed information that will help determine the identity of the perpetrator (Manual for investigations of war crimes, crimes against humanity and genocide in Bosnia and Herzegovina, 2013:40).

It is desirable to look at official records that document the movement of different units and groups in the area where the crime occurred. These records can be found in logistics documents or books kept at border crossings and checkpoints. It is important to try to locate and review the daily reports that were prepared by the units that might have been located in the area. It is also necessary to determine which types of existing records can be used to determine the identity of the direct perpetrators. It is important to identify and collect all the evidence relating to communications which is available, bearing in mind that one may need to contact the governments that had some reason to collect such evidence through their intelligence services (Manual for investigations of war crimes, crimes against humanity and genocide in Bosnia and Herzegovina, 2013:40). Some governments may be in possession of satellite images or photographs made by means of aerial surveillance, manned or not. Countries that are located adjacent to an armed conflict are interested in obtaining reliable information about the fighting so they can be prepared for possible consequences. In this connection, one should consider the possibility of contacting these countries in order to find out whether they have relevant intelligence information, and if they want to deliver it to the authorities of our country. If in the area of the conflict international observers are present, then they should be interviewed and their records reviewed for the purpose of providing further evidence.

If local or international humanitarian workers were present in the area where the crimes were committed, then they should also be interviewed about their perceptions of the events that occurred. It is, as already stated, necessary to find a way to identify and examine the members of the group of perpetrators who may be involved. Finding an "insider" may be an effective way of getting important information (although biased) about the group. Such cooperation may provide important investigative leads that in turn may lead to more objective sources of evidence (Manual for investigations of war crimes, crimes against humanity and genocide in Bosnia and Herzegovina, 2013:40).

5. Investigation at the secondary level

When the organization of the direct perpetrator is identified, the investigation must consider the structure of the organization. The most important initial step in the investigation of the organization is to achieve clear insight into its structure. The investigation must be able to accurately identify the persons in authority and to determine how different people in the organization exchange information and collaborate with each other. A detailed organizational chart should be made of each institution under investigation. It should show all the key positions of power and their relationships with other key positions. People who are in these positions will change over time so the chart should be displayed in such a way that it may be possible to determine the time periods during which each individual was in a certain position. Information on the organizational structure can be obtained from various sources, including laws and regulations, witnesses (both inside and outside the organization) and internal correspondence demonstrating the relationships between the different parts of the organization (Manual for investigations of war crimes, crimes against humanity and genocide in Bosnia and Herzegovina, 2013:41).

6. Investigation at the highest level

When the investigation establishes the identity of the direct perpetrators and determines their formal and de facto relationship with the military, police and political institutions, then the investigation must consider whether senior officials are involved. If so, an investigation may be launched to determine whether they are responsible for the crimes committed by the direct perpetrators. A decision about the investigation of a senior official may be the result of a careful legal analysis of the laws and regulations of the country which clearly indicate that the officer had authority and responsibility in relation to the direct and indirect perpetrators. In some cases, in the absence of formal links between senior officials and the direct and indirect perpetrator, the evidence can confirm that the senior person still participated in the activity that could have contributed to the commission of the crime. Then the investigation must consider whether such participation constitutes a criminal offense.

At this level the investigation must focus on some key issues:

a) What is the role of the senior officials in enabling crime?

b) Which senior officials knew about the crime and his or her impact and participation in the crime?

c) What is the competence of the senior official in relation to the direct and indirect perpetrators of the crime?

At the highest level, it is necessary to clearly identify legal and de facto relationships between a senior official who is the subject of the investigation and the direct and indirect perpetrators. Evidence of formal relations can be found in state laws and regulations. If it is a de facto chain of jurisdiction which bypasses the formal link, it will be important to identify witnesses within the organization (insiders) who may provide convincing and reliable information. Public statements that may be relevant to the investigation of a suspect at the higher level should be obtained and systematically reviewed. When these public statements are analyzed in the context of other evidence, they can substantiate conclusions about what the senior person knew at the time which

is relevant to the investigation. One should also seek to obtain access to communications between the senior official and the indirect perpetrator.

7. Investigation of people used as instruments

In the complex chain of jurisdiction used by higher-level officials in the execution of a crime, one is likely to find people who are used as instruments of enforcement. Depending on how important the role of certain persons in the chain of jurisdiction is, that person can be an important and valuable witness in determining some of the links in the chain. The person, as well as detailed records, may help determine the relationship between the person who ordered the distribution of material and the units that participated in the criminal activity. It is clear that these people are attractive as witnesses because they are not themselves involved in committing the crime. They are witnesses from the inside ("insiders") without personal guilt, and they do not have problems with neither credibility nor reliability in comparison to insiders who are guilty or potentially guilty.

Finally, it should be noted that when the investigation identifies individuals who are suspected, then one should begin to consider how these suspects will defend themselves, or what their defense strategy will be based upon. It is necessary to take steps to consider possible ways of defense and gather evidence to support or refute them. Possible elements of defense will depend on the particular case and may be numerous. The usual defense of senior officials, who are claimed to be criminally responsible as a superior, is that they were taking certain steps, but unfortunately without success, to prevent and punish crimes committed by their subordinates.

8. Planning the investigation

The investigation plan is a key element that greatly affects the success and efficiency of the investigation. Making such a plan may involve the following (Manual for investigations of war crimes, crimes against humanity and genocide in Bosnia and Herzegovina, 2103:144-145):

– Determining the known facts and circumstances, as well as the well-known direct or indirect evidence of war crimes and offenders

– Making an hypothesis (or legal theory)

– Defining the objectives of the investigation

– Determining whether it is necessary to implement measures to insure the presence of the suspect or the accused in the criminal proceedings

– Defining the facts and circumstances necessary and useful to the investigation in the certain case of a war crime

– Determining the investigative measures to be applied in order to prove specific facts and circumstances

– Determining individuals who will carry out the plan defined by investigative measures (investigators, authorized officials, associates, other prosecutors)

– Establishing the order by which investigative measures will be carried out

– Determining deadlines for all investigative measures

– Determining deadlines and means of communication between the prosecutor, the investigator, the authorized officials and analysts involved in the investigation of the crimes.

In practice, a good plan of investigation should answer all questions relevant to the investigation, including the following:

Are there:

- Witnesses or potential witnesses of crimes:
  - Whether potential witnesses alive, healthy and willing to testify
  - How many witnesses should be examined in order to prove certain charges?
  - Is there need to enter into a plea agreement with the suspect / accused to prove an offense or a particular count of the indictment?
  - Which documents are required as evidence?
  - Is there an element of widespread or systematic attack?
  - Is there a need for analysis of written evidence located in the database of ICTY. (Manual for investigations of war crimes, crimes against humanity and genocide in Bosnia and Herzegovina, 2013:145)

Good investigations are carried out on the basis of a good *plan of investigation*. The plan of investigation in complex cases are usually made after a preliminary study phase, when all the available information is carefully investigated, analyzed and evaluated. Furthermore, the investigation plan is developed as a management tool and is used as an overall guide for the conduct of the investigation. In most cases, a plan of investigation is produced by the prosecutor together with leading investigators and analysts who are engaged in the case. It is a flexible document that must be updated and revised as the investigation progresses.

The Investigation plan should include:

– Clear objectives and strategy of the investigation

– A description of the nature of the allegations that are being investigated

– The identity of potential subjects or suspects and their location, function and so on at the time of the alleged offense;

– The provisions of the legislation violated by the alleged behavior and the essential elements of the crimes

– Information about potential subjects and key witnesses for the investigations

– Tasks to be carried out in the investigation, and resources that will be needed

– Risk assessment of investigations which may face the investigation team and potential witnesses

9. Conclusion

Based on the foregoing, we can conclude that the investigation and prosecution of war crimes in the Western Balkans is a complex job; a job that will work over generations in order to deal with the many war crimes cases that have occurred in the area. To avoid the imfamous impunity gap, they should all be thoroughly investigated and their perpetrators adequately punished.

Despite the fact that the first investigations started more than fifteen years ago, a large number of unexplored and unresolved cases remain. The reasons for this is that research of this type of crime is more complicated and difficult than the investigations of classic crime. Based on an analysis of the specificity of the armed conflicts in the former Yugoslavia, we can conclude that none of the countries involved in the conflict has adequate technical and human resources for the effective investigation and prosecution of war crimes. As evidenced and argued elsewhere an analysis of statistical data on

prosecuted and adjudicated cases of war crimes, suggest that effective investigating and prosecuting of these most serious crimes require mutual cooperation between the police and the judicial authorities of the countries of the former Yugoslavia.

Considering the existence of armed conflict around the world including the Arab Spring, the conflict in Afghanistan, in Syria, the recent invasion of Israel on the Gaza Strip and now the conflict that is currently taking place in the Ukraine, it is evident that research in the field of the investigation of war crimes will continue to be of immense importance. In this regard, the experience of the countries of the former Yugoslavia can be valuable to both domestic as well as international judicial bodies that deal with such investigation, and to the prosecution of possible war crimes that occurred in these conflicts. Finally we suggest that the education of future lawyers incorporate content related to the methodology of the detection , investigation and proving of war crimes, described above.

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Notion, tendencies, milestones, principles of criminalistics

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I. Preface[1]

Pursuant to a fragment of a decree issued in 294 by Emperor Diocletian:
"….alud nihil in iudiciis quam iustitiam locum habere debet", which means that the task (aim) of court proceedings is nothing else but to find out the truth. (C7, 62, 6,1. MOLNÁR I.) However, in criminal cases it takes a long way to this "finding out". First of all, one has to find the facts that are relevant from the aspect of criminal law as well as the evidence supporting those facts. There is also another saying formulated by Roman law which has been incontestable since then and can be ranged among basic principles: da mihi factum, dabo tibi ius. Give me the fact(s), I will give you the law.

Calling to account in criminal cases or the application of criminal substantive law within the frames of criminal procedure is unimaginable without a factual basis or knowledge of the facts. Questions of fact always precede law, since the law may be applied only based on the knowledge of the facts. On the other hand, the requirement to find the facts leads on to the science of criminalistics.

In the same way as criminal law without procedural law is only a knife handle without the edge, and the other way round, procedural law without criminal substantive law is an edge without a handle, (MOMMSEN) one may also say – based on this pattern – that the law of criminal procedure is only a handle without the edge of criminalistics, and likewise, criminalistics is only an edge without the handle of criminal procedural law. In criminal cases of significance one cannot expect successful and undistorted criminal proceedings or, within their frames, fair and just adjudication without the accurate and authentic exploration of facts.

II. The continental and common-law notion, system and contacts of criminalistics and their tendencies

II.1. The notion and purpose of criminalistics

Academic literature seems to be uniform in its summary, formulated also below, that criminalistics is, in essence, mainly a practical and – to a smaller extent – theoretical science of criminal investigation, in other words, it is a branch of criminal sciences that explores, creates, systemizes and applies – within normative legal frames – means and

[1] The present scientific contribution is dedicated to the 650th anniversary of the foundation of the University of Pécs, Hungary.

methods for the detection (prevention) and proving of crime (BELKIN, BÍRÓ, BÓCZ, FILIPPOV, FINSZTER, GEERDS, KATONA, KERTÉSZ, KIRK, MOLNÁR J., TREMMEL, VISKI). Apart from the supplementary role of the effective – indirect and direct – prevention of crime, its basic functions comprise detection, obtaining as much and as reliable evidence as possible, providing a basis for and ensuring the ultimate establishment of criminal responsibility by the court. In summary, criminalistics is the science of the effective and professional investigation of crime, which has no subfield, either on the European continent having given birth to it or beyond the borders of Europe, that does not serve the fight against crime, the detection of offenders and their being brought to trial.

Even the expression "criminalistics" is of European origin, since it was first used by GROSS in his basic work of 1893, which was translated in the English language publication as the headword "criminal investigation" and it was used in that form right until the 1950s-1960s, and it is still used today, albeit with a changed content.

In the common-law jurisdictions (Great-Britain, USA, Canada, Australia etc) "criminalistics" as a scientific term relating to the whole branch of science has not become widespread, or it is not to be interpreted in its European meaning (KATONA). Following the initial "criminal investigation" – through the designations "scientific investigation" (BEVERIDGE, OSTERBURG) and "police science" (PERKINS) – especially from the 1960s (LUDQUIST-CURRY) the terminology of "forensic science" – translated into Hungarian as bűnügyi tudomány=criminal science (or törvényszéki tudomány= court science, or maybe igazságügyi tudomány= judicial science) – has been used. In my view, there is no need to find a Hungarian translation for this term, since the attribute "forensic= forenzikus" can serve as a solution that may be accepted internationally as well. (KÁRMÁN) Therefore, in my opinion, the term "forenzikus tudomány" as the Hungarian expression for the common law terminology (forensic science) is simply a Hungarianized equivalent, its attributive form is adequately expressive and it is becoming more and more accepted.

On the other hand, today, in my view, forensic science as a technical term of American origin based on the common law conception ("forensic science" – NICKOLLS), as a matter of fact, exhibits the content of continental crime-solving techniques (KATONA), while the elements of crime-solving tactics can mainly be detected in criminal psychology (or forensic psychology) and "criminal investigation". Consequently, by scientific investigation of crime ("forensic scientific investigation") or detection of crime ("detection" – CUTHBERT), Anglo-Saxon academic literature means the application of natural scientific methods (WELLS, O'BRIEN-SULLIVAN, FRASER-ROBIN, KIRK, O'HARA, C.-O'HARA, G., SWANSON-CHAMELITO-TERRITO, SAFERSTEIN, RICHARD-WARD, HOUCK-SIEGEL, OSTERBURG-WARD). Based on the traditional approach, behind "criminalistics" as a technical term there is only one "branch of forensic science", namely the one that deals specifically with the scientific collection and analysis of physical evidence, especially of traces and material remains found during the inspection of the crime scene.

In recent decades, however, a tendency of some kind of approximation, interplay, unification of content and convergence (even if not with identical forms of expression) has been observable concerning the two conceptions: the continental and common law approaches. Since the 1960s there have been and still are an increasing number of volumes published under the title "criminalistics", drawing nearer to the continental designation. (KEVIN-SULLIBAN, MELOAN-JAMES-SAFERSTEIN, O'BRIEN-SULLIVAN, O'HARA-OSTERBURG, SAFERSTEIN)

One example for this is the Lab Manual volume published in the United States in 2001. Its sub-title ("An introduction to forensic science") refers to forensic science, at the same time the main title is "Criminalistics". (MELOAN-JAMES-SAFERSTEIN, and KEVIN-SULLIVAN, SAFERSTEIN, O'BRIEN-SULLIVAN) As for its content, it provides a detailed analysis of the meticulous methodology relating to the examination of physical evidence based on natural scientific knowledge. A similar conception may be found in the works of several authors, let us mention as an example the case of O'HARA. In two of his basic works, he deals with "Criminalistics" having the nature of criminal techniques and "Criminal investigation" having the nature of crime-solving tactics (O'HARA, C.-OSTERBURG, O'HARA, C.-O'HARA, G.). In the 2000s, especially in American summary works one may – repeatedly – increasingly encounter the expression "criminal investigation" (SWANSON-CHAMELIN-TERRITÓ, WESTON-LUSBAUGH), which is also drawing nearer to the continental use of terminology. As for its content, nowadays it covers mainly continental crime-solving tactics and crime-solving methodology. More specifically, it comprises methods of crime scene investigation, line-up or one on one confrontation (USA), or identity parade (England), the interrogation (USA) or questioning (England) of suspects and witness interviews. This category may also include data collection from informants, analyses and other sources (e.g. records, surveillance), the planning, organization, logistics and "management" of investigation (BLOCH-WEIDMAN), modes of search, body-search, seizure, the tactics of arrest, custody, detention, pre-charge detention, preliminary detention, the interpretation of rules of evidence, as well as tactical recommendations, professional "tricks of the trade" applicable to the individual crimes and groups of crime.

Thus, on the whole, the review of content elements leads one to the conclusion that, basically, both approaches divide the field of science designated as criminalistics by us and on the Continent into identical areas. In other words, criminalistics is divided into crime-solving techniques, constituting the forensic part – "forensic science" or "sciences" in the plural with reference to the underlying natural sciences –, and crime-solving tactics based mainly on social scientific knowledge, which is embedded in "criminal investigation" and "criminal psychology" in common law academic literature. Crime-solving methodology focusing on individual crimes is also included in "criminal investigation".

In addition to the above it must be noted that out of the continental countries in France (in Belgium GODDEFROY, LOUWAGE, LECHAT, in Italy OTTOLENGHI, ALTAVILLA) apart from "la criminalistique" (CECCALDI, CHEVET-MARAND, BUQUET), or criminalistics, the knowledge termed as "police scientifique" (ROBINSON, SANNIE, RIBERIO) or scientific police, "police judiciaire" (HREBLAY) or judicial police science, or pursuant to LOCARD's "Manuel de technique policiere" (LE CLERE), police technique has also been linked to the cultivation of some areas of criminal investigation. Today one encounters the term "criminalistics" again. (CECCALDI, CHEVET-MARAND, FOMBONNE, LOCARD) The university textbook published in Paris in 2001 already bore the main title "Manuel de criminalistique moderne" (Manual of modern criminalistics) and the sub-title "La science et la recherce de la preuve" (The science and research of evidence). (BUQUET)

In Europe in German-speaking countries (e.g. SCHNEICKERT, GROSS-SEELIG, KLEINSCHMIDT, WIETCZOREK, GEERDS, KUBE-STÖRZER-TIMM, BRODAG, CLAGES) and to the east of them, the term "criminalistics" was customary almost everywhere in the past and this is the accepted terminology today as well. (E.g. ALAMOREANU,

BELKIN-WINBERG, BÍRÓ, BÓCZ, FILIPPOV, GARAMVÖLGYI, KERTÉSZ, KOBOVAC, KRAJNIK, KRIVOKAPIC, LATIFI, HOLYST, HOROSZOWSKI, MALEVSKI, MAVER, METENKO, MIRCEA, MUSIL, PAPES, PAVISIC-MODLY, POPA, PORADA, SIMONOVIC, STANCU, TREMMEL-FENYVESI-HERKE, VODINELIC-ALEKSIC, ZAMFIRESCU-POPESCU)

At the same time, one may also observe changes in the continental conception, more specifically, phenomena, the adoption and application of terms pointing in the direction of forensics. (LIEBEL-USLAR, DERN) It is being infiltrated through the cultivation and terminology of the subfields applied in the common law system. As an example of approximation and convergence between the two systems one may mention that the interpretation of evidence, the "show up" model plays an increasing role in the continental approach as well.

It may also be perceived concerning both schools of thought that the underlying basic scientific knowledge is derived from (forensic) biology, chemistry, physics, anthropology, pathology, serology, toxicology, but there are also close links with knowledge in the fields of applied ballistics and photographic technology. In recent decades this circle has been extended to cover, as new fields, molecular genetics, information technology (computer forensic technology, cyber forensics, digital forensics, digital investigation, web-analysis), including for example the computerized analysis of human voice and voice carriers (computer-voice analysis), identification of computer writing and computer printers (printer-identification), forensic archaeology, forensic dentistry, modern forensic entomology dealing with insects, modern forensic geology, DNA profiling (DNA analysis), forensic botany and zoology.

As a special technical method one may also mention the analysis of evidence (crime analysis), operating with the help of crime mapping and geographic profiling (ROSSMO), the application of the mathematics-based Bayes' Theorem in the context of identification analyses, the theory of document analysis (hand- and machine-written documents), images analysis, and analyses for the identification of ridges and edges in skin patterns ("ridgeology"-"edgeology").

Within the range of tactics, one may highlight the knowledge areas of forensic administration-management and logistics, forensic nursing, security management and personality profiling (profile-analysis-TURVEY). As new – a few decades old or even younger – fields in the methodology of individual crimes one may regard, for example, the investigation of accidents caused by design or construction (engineering failures), cases of fire (fire science) and explosions (bombs, explosives and residues).

In summary, it may be concluded that although there are notional differences between the continental and common law conceptions of the science of criminal investigation, their subject-matter and objectives are identical, and their contents are in accordance with each other. As a tendency it may be established that one may witness the gradual demolition of the rigid boundaries between these conceptions, and the present is already characterized by their mutual interaction.

II. 2. The system of criminalistics

In accordance with the continental conception, criminalistics may be divided into three parts also in Hungary: a general part consisting of crime-solving techniques and tactics, and crime-solving methodology, which may be regarded as a special part. Apart from the above, the history and theory of criminalistics and crime-solving strategy are

also classified under the general part by academic literature, and in my opinion, crime-solving logistics also belongs here now. (DÉRI, KATONA)

Out of crime-solving techniques and tactics, playing a significant role in the dissertation, crime-solving techniques serve the purpose of the expedient and professional utilization of natural scientific and technical-technological means and methods in the field of the detection and prevention of crime. (KERTÉSZ) These means and methods may include any results achieved in other fields and subfields of science that may be used effectively by crime-solving techniques without any change, e.g. physical, chemical instruments, measuring procedures, optical and computer devices, or that may be utilized in criminal investigation following their further development precisely by crime-solving techniques, for example, forensic photography, voice identification, serological analyses. Finally, there are special subfields and disciplines of significance that have been established, elaborated and provided with firm foundations by crime-solving techniques. Such are, for example, criminal traceology, the keeping of records and personal identification based on a system of fingerprints, dactiloscopy, forensic computer analysis of writing and documents, criminal ballistics (HAUTZINGER) or (special) scent identification (by sniffer dogs). (HORVÁTH)

In comparison, criminal tactics concentrates not on information carriers of a physical nature, but rather on the main characteristics and interconnections of the phases of obtaining evidence of a personal nature, connected with defendants, victims and witnesses. It contributes to the effective and efficient execution of investigatory acts also by pointing out sources of danger concerning the origin and obtaining of individual types of evidence and potential shortcomings in the conduct of the body or person carrying out the investigation. On the other hand, with the assistance of forensic computer technology and behavioural science, crime-solving tactics endeavours to harmonize, as required, the requirements relating to the planning, organization, integration and logistics of overt and covert investigation and operations connected with data acquisition and processing.

Crime-solving methodology is traditionally regarded as the third part of criminalistics. In the Anglo-Saxon model, both in England, her environment and the United States, analyses and guides relating to individual offences appear under the headword “criminal investigation”. Crime-solving methodology does not deal with the efficient investigation of crime in general, but instead – linking and adapting, as far as possible, basic knowledge derived from crime-solving techniques and tactics – it concentrates directly and specifically on the exploration and proof of individual categories of crime and tactical recommendations relating to them (for example, relating to the investigation of homicide, arson, explosions, burglary.) Basically, crime-solving methodology may also be considered a specialized area of criminalistics which focuses on the typical ways of perpetration of a given type of criminal offence, the potential physical and personal sources of information relating to it and the characteristics of the criminal case in general; it specifies, supplements and modifies general criminal technical and tactical information and tasks as required and links them with different points of emphasis and criteria.

With respect to all of the above, it seems right to divide criminalistics into a general and a special part. The first one includes - apart from crime-solving techniques and

tactics, theory and logistics - also crime-solving strategy, which focuses mainly on objectives defined by crime-solving politics, being of a criminological nature. It endeavours to outline a series of comprehensive national, regional or municipal-local measures, which serve both the purpose of crime detection (reactive measures) and that of crime prevention (proactive measures).

As opposed to all this, methodology as the special part – both in Continental Europe and in the Anglo-Saxon territories – comprises the most important and most peculiar technical and tactical potentials, problems, difficulties, troubles and erring factors relating to detection essentially only with regard to individual types of crime.

II. 3. Contacts of criminalistics with other disciplines

Criminalistics, as an empirical science of fact, has a wide-ranging system of contacts. (KATONA) Based on my classification, three main groups may be distinguished.

A) The first group is that of sciences having the closest contacts with criminalistics, which comprises criminal sciences dealing primarily with criminal activity, criminal offences and perpetrators of crime. They include:

a) criminal law (normative),
b) criminal procedural law (normative),
c) criminology (as a factual science),
d) victimology (becoming more and more independent, also as a factual science),
e) law of penal enforcement (penalogy as a normative science),
f) forensic psychology (as a special branch of psychology),
g) forensic medicine (including anthropology).

B) The second significant group of contacts of criminalistics is made up of technical and natural sciences as "cross-section" sciences (KATONA), including - in my view – in particular:

a) biology,
b) chemistry,
c) physics,
d) technical (engineering) sciences,
e) mathematics (mathematical logics),
f) information science (information theory),
g) cybernetics,
(h) "bridge or ferry sciences". (KATONA)

C) The third large group of sciences having contacts with criminalistics is made up of the following branches of "intellectual scientific" (GEERDS) social sciences in particular:

a) philosophy,
b) psychology,
c) logics,
d) sociology,
e) pedagogy,
f) statistics,
g) archaeology,
h) science of policing.

From the examination of the contacts of criminalistics one may draw the conclusion that from the beginning, the fast development of modern criminalistics was due to the fact that it was increasingly able to adapt to the challenges posed by large-scale criminal activity in major cities caused by urbanization, and it did so within the frames of an interdisciplinary (and at the same time, mutual) transfer of knowledge. This development was assisted by the transplantation of knowledge relating to discoveries and inventions unearthed by medicine (toxicology) at first, then by various other social and natural sciences, as well as through the utilization and sensible adoption of the research results. Meanwhile, criminalistics itself, with its theoretical and practical experts and organizations working professionally and competently as a single group – relying on the results of information science – established and elaborated autonomous branches of knowledge and methodologies, having special regard to the increased demands as well as technical, scientific possibilities. (As an example for this, see traceology, dactiloscopy, ballistics, writing analysis, profiling, polygraph testing or covert means.)

It may be added in summary of the above contacts that criminalistics can be characterized not only as a continuously expanding treasury of indirect evidence obtained and analysed based mainly on natural scientific knowledge, but also as the involvement, integration and transplantation of the most diverse professional knowledge and, in general, of branches of science into the detection of crime. Making use of this diverse special expert knowledge requires above all the employment of experts and consultants. Having regard to this interconnection, it may also be stated that the more knowledge one has of interdisciplinary criminalistics, the more special fields and experts he can make use of in order to detect crime and so he will have a more effective, or more diversified and thorough information base, and he will collect data and obtain evidence more effectively. In my view, all this, in turn, is always focussed on identification.

III. Milestones in the history of criminalistics

Since criminalistics is a universal discipline, it is worth having a glance at and examining in a (world) historical perspective through what stages one has arrived at the techniques, tactics and methods applied today. Reviewing the past in the spirit of this idea has been useful for my research, because this review has become an organic, preparatory phase in the analysis of the present tendencies of criminalistics.

The historical development of criminalistics is dealt with extensively in world academic literature. In my dissertation I presented important historical data derived rather from sources that had so far been treated to a lesser extent in Hungary. On the other hand, I tried to highlight milestones and the persons connected with them in an attempt to clarify the starting points and main forces behind the development of modern criminalistics and so as to understand the present events and developments better through the past and, at the same time, to be able to form a more accurate conception for the future, based on which I could model possible development and which would back up my intuitions and suggestions.

Based on my approach, the past of criminalistics may be divided in two major stages. The watershed is the middle of the 19th century. 1838 saw the publication of a

volume by Ludwig Hugo Franz von JAGEMANN (1805-1853) entitled "Handbuch der gerichtlichen Untersuchungskunde" ("Manual of the Science of Criminal Investigation"). The date or timing of the publication is not accidental. It is from this time on that, as a consequence of the development in natural sciences, one has been able to insert the expression "modern" and omit the attribute "traditional" before the word criminalistics. By this I would like to refer to the fact that prior to that time in the history of mankind one cannot really speak of human activity directed at the fair and authentic revelation of facts relying on (natural) scientific knowledge. It was in the 19th century that it was finally declared as a principle that the emphasized role of confessions as the queen of evidence could no longer be maintained. This is explained by the fact that confessions implied forcible interrogation or torture – with thousands of horrible varieties – which used to be a legally approved and regularly applied tool in the hands of "fact finders" from ancient times right until the end of the feudal age. As a result of the work of the greatest thinkers of the Enlightenment, the French MONTESQUIEU, VOLTAIRE, DESCARTES, DIDEROT, the Italian BECCARIA, the German THOMASIUS, reforms in criminal law, including procedural law, swept through the whole of Europe. Parallel to the abolition of torture (ordeals and trials), forced confessions of defendants were also pushed to the background, instead the principle of the free evaluation of evidence was introduced, in which witness statements no longer played a dominant role, because their truth content became also questioned; as cultivators of science started to recognize possibilities of error already at that time. All this served as a starting point and basic precondition for authorities to search for other evidence than personal statements made by the person under prosecution or the witness; in other words, this led to the fact that traces and material remains, physical evidence based on special natural scientific knowledge and factual experience – as "objective witnesses" – came into the limelight. It is their impartial analysis by experts that provides the answers to the fundamental, relevant questions relating to the facts of criminal cases – proceeding from the bare suspicion, intuition and version to certainty. Consequently, the history of criminalistics is also the history of – the beginning, expansion and increasing accomplishment of – the continuous, still ongoing development of indirect evidence.

After all this it is obvious why one may consider epoch-making JAGEMANN's work of 1838 and GROSS's work ("Handbuch für Untersuchungsrichter als System der Kriminalistik") of 1893 – the latter author being regarded as the "father" of criminalistics. They really marked the beginning of a new era, which was triggered off by two changes. On the one hand, in the field of social sciences the intellectual movement of the Enlightenment established the conceptual system of the rights of the accused as forming part of human rights. Codes of criminal law and criminal procedure were born one after the other, supplying the underlying principle and legal frames for the fair exploration of facts and for a genuine demand to reveal the truth. On the other hand, the revolutionary, sudden development of natural sciences created the theoretical and practical possibility for rendering the past cognizable in such a way so as to shift the emphasis from confessions classified as personal evidence to "incorruptible" or "silent witnesses" (HOUCK), physical evidence, traces and material remains. The healthy, one might say, well-timed co-development of the two basic pillars, social and natural sciences – especially biology, chemistry, physics – served as a basis for the evolution of the new fact-finding methodology. It flows from this very origin that criminalistics is – partly – considered an applied science, since both its evolution and later development

are closely connected with the results of the underlying basic sciences. Criminalistics develops and steps forward day by day by applying those results to the detection of crime, and this is a process that has been going on for around one and a half centuries. When one speaks of criminalistics in a modern sense, in any case, it may be regarded a young branch of science.

In order that one could speak of criminalistics, as a matter of course, the basic social and scientific conditions for this had to be established even in the states said to be developed at that time. The first and second of those conditions were:

a) the nationalization of criminal investigation and, at the same time, the elimination of the hegemony – but not of the existence – of criminal investigation of a private nature,

b) achieving a certain level of development of natural sciences.

Ad a) Within the range of criminal investigation activity:

– the State undertakes to give a repressive official response to criminal offences, provides a service within the frames of performing this obligation, it forbids criminal behaviour and takes action against the offender,

– the State provides protection to its citizens and assumes responsibility for their security.

Ad b) The development of natural sciences as the second condition can also be dated to the 19th century in Europe, therefore, Europe, more specifically its continental part with a Prussian-French axis, may be considered as the "cradle", place of birth of modern criminalistics. It was here that the anomaly of the inquisitorial model and uncertainties relating to personal evidence and interrogations were first recognized and pointed out. It was here and at this time that the demand for social cognizance, or one might say, the unappeasable intellectual desire to give priority to physical evidence first arose. The authentic cognition of the past first acquired significance in the economy, then in public safety and investigation.

It is not by accident that the milestones of the historical route of modern criminalistics are basically linked to the old continent. In my view, the five milestones are:

1. personal identification based on finger-marks and finger-prints (starting from 1900-1910) (BERTILLON, COULIER, HERSCHEL, FAULDS, HENRY, HERSCHEL, GALTON, VUCETICH) (+other traces – BALTHAZARD, GODDARD, GROSS);
2. identification of blood (1920s-30s) (including the analysis of other material remains) (LOCARD and GETTLER, GONZALES, NICEFORO, NORRIS, OTTOLENGHI, POPP, REISS, SÖDERMANN);
3. identification by neutron activation analysis (from the 1930s-40s) (JERVIS, GUINN, PERKONS);
4. identification based on DNA (WATSON-KRICK – from 1953, JEFFREYS – from 1986);
5. digital data serving the purpose of establishing the facts of a case – from the 1990s (CASEY, MARSHALL).

In this context I would like to emphasize that, in my view, DNA profiling does not simply constitute the fourth milestone, but it also plays a pioneering role as second

generation evidence requiring a different type of expert, instrument, method and approach. DNA profiling, in conjunction with the fifth milestone of digital data – as a change in paradigm – constitutes new generation evidence as opposed to the customary, classical, traditional first generation analysis of traces (including finger-marks, foot-marks, marks of footwear, tool marks, marks of weapons and tracks left by vehicles), material remains (blood serology, hair, textile threads, fibres, poisons, paper, glass etc.), handwriting and type-writing.

The detailed analysis of the above milestones in the dissertation shows that "craftsmen's" criminalistics characterizing the 19th century came to an end in the 20th century. On the other hand, in the 21st century MORRIS has rightly stated that detective work as "artisan craft" is a thing of the past, but the professional objectives of the investigator have not changed and they may be achieved only through life-long and continuous development and learning.

IV. The basic principles of criminalistics

Concerning the contacts of criminalistics, I analysed its relationship with other branches of law, including for example its interaction with the law of criminal procedure, having the closest link with it, and its relationship with criminal law, which formulates facts that are of relevance from the aspect of criminal law. Both branches of law have basic principles that have been elaborated for several hundred years, which serve as guidelines and usually, right at the beginning of the codes, provide guidance and indicate with exclamation marks the "paths" to be followed by the appliers of law. One must not deviate from them during the entire course of action and they illuminate the right way as lanterns. As criminalistics is not a science of law, but that of facts, it has no summary code either. The representatives of the science hardly ever formulate principles carved in stone at the beginning of monographs or textbooks on criminalistics – forensic sciences. At the level of generalities, one may most frequently come across the notions of lawfulness and speed, while in some places one may read about the requirements of completeness, flexibility, purposefulness, professionalism, control as well, and in the case of covert means expedience, proportionality and subsidiarity also occur. In my view, it is possible to formulate other special principles as well in addition to the above which, as basic principles, may provide more specific support to those who explore past facts for the sake of accurate and undistorted detection. However self-evident these principles may seem, they do great service by enabling us to see more clearly.

Logically, the six lines of basic principles are built up so that the main questions relating to the detection of the facts of the case are always to be clarified first:

1. Seven main criminalistical questions (the main list of questions) in order to get to know and reconstruct the past.
2. The past is cognizable, namely, with the help of traces and material remains.
3. Every crime leaves a trace. These traces are to be collected systematically just like personal evidence.
4. Each criminalist is worth as much as many data he has, on the other hand, the mine of data is constituted by the scene and the primary measures linked to it.

5. The importance of the first strike(s), from which one may recover and obtain the necessary data required for the ultimate aim, identification.

6. Natura non facit saltum. Nature does not repeat itself. It renders possible the individual identification of persons.

In the context of the six enumerated principles, concerning the fourth "each criminalist is worth as much as many data he has" I set out in detail the types of scenes and records, their roles, the significance and accessibility modes of data obtainable by raster investigation, covert forces-ways-means, the "first strike" – "erster Angriff" – and measures taken on hot trail.

V. Present world tendencies of criminalistics

By pointing out the milestones of modern criminalistics dating back one and a half centuries – I consider – I also presented the tendencies in the development of the science and also changes in paradigm and generations of evidence. By the following enumeration I would like to outline the most characteristic features of criminalistics in the present age – the beginning of the 21st century.

In my study I pointed out and presented in detail the following major current world tendencies in criminalistics.

a) The primacy of crime-solving techniques,
b) Specialization,
c) Minutization (microscopization, miniaturization),
d) The past drawing closer – the sharpening of pictures,
e) Expertization,
f) Increase in the level of probability,
g) Dominance of team-work,
h) Computerization,
i) Cyber intelligence (pushing forward of the "digital commando"),
j) Increased value of covert means and methods,
k) Internationalization,
l) Multiplication of situations of danger,
m) Privatization.

The enumeration of tendencies is not exhaustive, but the listed tendencies, in any case, comprise basic guidelines for the second decade of our century. Between them one may discover numerous interconnections. First of all, their major part is based on technical breakthrough as a starting point, while there is also interaction between them. Let us just mention the computer as an achievement that provides a possibility for the primacy of technology, quality specialization and a sharper view of the past. It also appears in the rising level of expertization, probability and digital data collection, in the development of overt and covert means, cyber-investigation and international cooperation, and it is significantly present in the work of the private sector as well.

Besides the intertwining and close interaction between these tendencies, one may also perceive that they point in the same direction and their progress has the same

focus: to create a more secure world by increasing the quantity and mainly the quality of means for the prevention and detection of crime.

VI. Closing thought

At the end of my dissertation I remarked that even if all my predictions, prognoses, intuitions and recommendations found a berth, even if technology, digitalization, computers, natural and social sciences all joined forces, it would still not be possible to replace and substitute for the real pledge of the success of future criminalistics, the criminalist himself. He constitutes the other focus besides identification. The specialist, explorer, data collector, the efficient law enforcer, who undertakes risks and dangers, faces continual challenges, the "great fighter" on the real and virtual battlefields that seem unremittingly infinite, where he has really only one weapon in his hands: criminalistics as an "international treasure". (UBELAKER)

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The Sources of Probabilistic Thinking in Forensic Science

Motto: *„In mathematics, one does not understand things but gets used to them."*
John von Neumann

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Abstract

The paper provides a historical introduction to the sources of probabilistic thinking including Bayesian Methods in forensic science. Starting form Aristotle and through the ages of Bayes the key figure of founding the contemporary probabilistic methodology used everywhere in different sciences. In forensic science substantial for DNA and fingerprint analysis. The Bayesian Networks will be important to the evidence evaluation and taken into consideration as a tool for the future forensic scientists. Some samples of miscarriage of justice caused by improper usage of probabilistic approach are given providing variety of viewpoints to the readers.

Key words: *Probability, Bayesian methods, Forensic Sciences.*

1. The origins of probabilistic thinking

Making sense of information in probabilistic terms must have originated with the dawn of human cognition. The probability, or in other words the credibility and relevance – or degree of exclusion –, of a special kind of information, criminal evidence, is the basis of legal judgement, the culmination of the criminological process. In this process, the results of the enquiry and the possible consequences of decisions require further decisions to be made, which can be conceived of as a game between the decision maker and the party on the opposite side. The party on the opposite side may be a real entity, such as the defendant, the witness, nature, or a fictive one, such as political interest, for example. It is easy to realize that game theory, which provides a mathematical framework for understanding the dynamics of such processes, is of far greater significance than its name suggests, and it constitutes an important part of a scientifically informed strategy construction in legal decision making. While taking into account multiple uncertain factors simultaneously, strategies in military or criminal investigation aim to provide a course of action for – and subsequently enhance the decision making of – the relevant lead investigator. Experience, quick recognition of connections, and intuition significantly improve the appropriateness of the decision maker's judgement. The degree of success of the decision making process can be enhanced by the application of probabilistic networks, or, in other words, Bayesian networks: the simultaneous utilization of probability theory, combinatorics, game

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theory, decision theory, graph theory and artificial intelligence[2], which may speed up the formation of verdicts substantially. Apart from enabling the kind of fast acting that is required in fresh pursuit, it has the additional advantage of reducing the possibility of error even in the case of an exceptional decision maker. The evolution and intertwining of the contributing disciplines listed above accounts for the current scientifically buttressed basis for sound decision making.

The conceptual framework of probability theory was developed as a response to problems in games of chance. By insisting on proofs as a way of arriving at judgements, human thinking favoured categorical decisions over probabilistic ones, to the extent that the word "perhaps" was frequently subject to scorn.[3] In the darker days of the history of criminal justice, proof – at times acquired even by means of torture – merely served the purpose of supporting the case for the guilty verdict, foreclosing the possibility of exculpation.[4] On Aristotle's account, the fundamental principles of proof include the notion that everything has to be either stated or denied and that "it is impossible for anyone to suppose that the same thing is and is not."[5] "Nor can be any intermediate between contrary statements, but of one thing we must either assert or deny one thing."[6] According to Brakel (1976) and Schneider (1980) Aristotle divided events into three classes: 1) those that are certain to occur, 2) those that occur reliably in most cases, 3) and those that occur occasionally and unpredictably. Regarding the etymology of the term "probability", Cicero is credited with the first use of the Latin word *probabilis*, which subsequently became established in similar forms in English and the neo-Latin languages after the 17th century. Prior to that, the near-synonymous word "chance" had been in use in the English speaking world. The term "likelihood" became widespread in the 20th century, and it took root in Hungarian, as well.

At the dawn of the development of Roman law, the experiences and dilemmas encountered in the evidentiary process of legal disputes led to the emergence of financial-legal categories and principles.[7] The phrases *fecisse videtur* and *fecisse non videtur* ("it seems that") appearing in the sentence constructions of extant Roman judgements suggest that the distinction between the objective truth and the version of the truth that emerges in the course of a lawsuit is not a recent invention.[8] However, the use of the mutual corroborative or weakening force of non-definitive evidence was possible only in private lawsuits and even there, only with certain restrictions. In criminal cases, only the use of definitive evidence was allowed. As the Roman emperor Gratian put it in 382, evidence has to be unequivocal and as clear as day. In Bartolus, some traces of the probabilistic process approach to proof can be discerned in that the judge's initial absolute lack of knowledge (*nesciencia*) is replaced by a conception of the

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[2] The approach according to which artificial intelligence involves all the previous ones is also reasonable.

[3] This is well illustrated by a humorous Hungarian folk saying, according to which the difference between politicians, women and men is that for the latter, the use of the word *talán* ("perhaps") is forbidden, while for the latter two, it is a requirement.

[4] Torture was abolished in Hungary by clause XLII of 1791.

[5] Aristotle, *Met.*, IV 1005b 24.

[6] Aristotle, *Met.*, IV 1011b 25.

[7] A Bessenyő: *Római magánjog I. A római magánjog az európai gondolkodás történetében* [Roman Private Law I. Roman Private Law in the History of European Thought] (Dialóg Campus 2003) 133.

[8] T Nótári: *Római jog* [Roman Law] (Lectum Kiadó 2014) 304.

events open to doubt (*dubitatio*) on the basis of the testimony of the opposing parties. Proof served the purpose of resolving the tension between the unlikely, the uncertain, the probable and the definite. The first effects of proof result in the judge's forming a suspicion (*suspicatio*), which then solidifies into stronger and stronger – if not indubitable – opinion (*opinio*) in the light of stronger and stronger arguments. With the presumption of full-fledged certainty (*perfecta probatio*), the judge arrives at the judgement with a sense of perfect conviction (*perfecta credulitas*).[9] The sense of unease felt in connection with the application of non-definitive evidence is well demonstrated by the *in dubio pro reo* principle that is still in use today. That is why the acquisition of the defendant's confession was deemed so important, because it rendered the decision definitive. Opportunities for the elimination of doubt were seen in oath, torture as well as in the attainment of different sorts of divine evidence.

St Thomas Aquinas drew a threefold distinction between certain knowledge, probabilistic knowledge and chance.[10]

According to Hald, two early conceptions of probability are the objective, statistical or aleatory probability on the one hand, which was held to provide the outcome of experiments or games, and subjective, personal or epistemic probability on the other hand, which is a measure of the degree of belief and is not necessarily based on statistical evidence.[11] Hald's historical overview is primarily concerned with objective probability, which was previously referred to as "chance". As he points out, James Bernoulli was the first to distinguish unambiguously between the two kinds of probability.[12] Hasover and Rabinovich provides Talmudic and rabbinic examples.[13] Ian Hacking gives a clear articulation of the modern dual understanding of probability in his seminal 1975 book, *The Emergence of Probability*.

2. Probability research until the end of the 19th century

Doubt can be understood as a sign indicating a lack of perfect certainty, or, in other words, the presence of uncertainty, which can be rendered measurable most appropriately by the application of mathematical probability. The evaluation of evidence and the subsequent – especially legal – decision provide a basis for the exploration of the mutual relationships between mathematics and the law, which is why the development of the two disciplines will be discussed in tandem.

2.1. From the Pascal-Fermat correspondence to the Bernoullis

Relatively late, in the 17th century, scientific progress began to take off spectacularly partly due to the influence of empiricism and rationalism characterizing the

[9] F Benedek, 'Jogtörténeti adalékok a bizonyosság és valószínűség problémájához' [Addenda from legal history to the problem of certainty and probability] In: L Vargha (ed), *A valószínűség szerepe az igazságszolgáltatásban* [The Role of Probability in Legal Justice] (Conference volume Pécs 1979) 4.

[10] A Hald, *A History of Probability and Statistics and Their Applications before 1750* (Wiley 2003) 30.

[11] *Ibid*. 28–29.

[12] *Ibid*.

[13] AM Hasover, 'Random mechanisms in Talmudic literature' (1967) 54 Biometrika 316; NL Rabinovitch, 'Combinations and probability in rabbinic literature' (1970) 57 Biometrika 203.

Enlightenment. It was around that time that the correspondence between Pascal and Fermat – so frequently quoted in the literature on probability theory – began. Fermat was a lawyer by profession and a mathematics enthusiast.[14] The correspondence concerns a problem in a game of chance originally posed in mediaeval times and rediscovered by Chevalier de Méré. The two scientists reached the solution by 1654, which is also the year to which the birth of probability theory is dated on account of Pascal's letter to the academy in Paris in which he expressed his intention of constructing a mathematics of chance.[15]

The simultaneous treatment of the two seemingly disparate disciplines is not a modern invention as indicated by the title – *De Usu Artis Conjectandi in Jure* – of the doctoral dissertation of Nicolaus Bernoulli, a member of the famous Bernoulli dynasty[16], which he submitted on 14 June 1709 in Basel and concerns the theory of probability.[17] Nicolaus also published a book written by his uncle Jakob after the latter's death titled *Ars Conjectandi* ("The Art of Conjecturing"), which introduces the concept of the law of large numbers. This bears some emphasis because the principles of probability formulated in this work are only valid in cases in which the number of events considered is sufficiently large.

2.2. Thomas Bayes

The Huguenot Abraham de Moivre transported the doctrines from continental Europe to England in 1718 when escaping persecution thanks to the publication his textbook, *The Doctrine of Chances*. Given the similarity of the titles[18], it is reasonable to assume that Thomas Bayes was one those numerous British mathematicians who were influenced by de Moivre's work. The biographical data of Bayes paint an interesting picture. Due to the close relationship between Bayes and the present subject, I believe it is important not to restrict the mention of the main events of his life to a footnote. Thomas Bayes was born in 1702[19] in Hertfordshire. At 18 years of age, he takes up the intriguing combination of Theology and Logic at the University of Edinburgh. He returns to his birthplace three years later to assist his father in tending to the life of the nonconformist congregation of his father. Later, in 1734, he moves to Tunbridge Wells where he holds the position of minister of the Mount Sion chapel. In 1742, he is elected to be a fellow of the Royal Society, but we can only speculate as to the nature of the work warranting his admission. A few years later, he retires from chaplaincy on account of his illness, and in 1761, he passes away. The beginning of the resurrection of his spirit can be dated to 10 November 1763, when Richard Price, a Welsh philosopher of

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[14] *Ibid.* 43.

[15] M Sain, *Nincs királyi út! Matematikatörténet* [There is No Royal Path! A History of Mathematics] (Gondolat 1986).

[16] It is rightly regarded as remarkable that the Huguenot Bernoulli family enhanced Basel's reputation by producing eight famous natural scientists. That is the reason why it makes sense to always mention the first name when referencing the work of one of the members of the dynasty.

[17] N Bernoulli, *De Usu Artis Conjectandi in Jure* (Basel 1709). Reprinted in *Die Werke von Jakob Bernoulli, Vol 3* (Birkhiiuser 1975) 287–326. Translated into English by T Drucker (unpublished 1976).

[18] Cf. Bayes's 'An Essay towards solving a Problem in the Doctrine of Chances'.

[19] Due to a lack of birth records, his date of birth is questionable. On the basis of indirect evidence, some date it to 1701, while others to 1702.

considerable influence[20], sends his essay[21] found among his documents to John Canton with the personal recommendation that he regards Bayes' essay as a piece of "experimental philosophy"[22] the "communication" of which to the Royal Society "cannot be improper".[23] The social connections of Price, who was socially considerably active and 20 years the junior of Bayes, made the success of the posthumous publication likely. Bayes' hardly more than twenty page long study stirred Price's imagination, and he regarded it as containing the mathematical proof of God's existence.

In his short essay, Bayes constructed one of the most important theorems of probability theory, the Bayes theorem. By means of his letter of recommendation referred to above, in which he emphasized the importance of the topic, Price made possible the publication of the document that proved to be the foundation of what subsequently became known as Bayesian statistics.

2.3. The treatment of probability after Bayes until the 19th century

Until the 18th century, the theory of probability was referred to as the *doctrine of chances* in the English speaking world, and it remained dormant until as late as the middle of the 19th century. Maxwell motivated the importance of probability theory by pointing out that logic is applicable only in those things that are certain, impossible or entirely equivocal, and (fortunately!) none of those do we have to support with arguments. The logic of the real world, however, requires that the rational thinker take the degree of probability into consideration.[24]

2.4. The influence of the methods of probability theory on science in the 20th century

The importance of chance and uncertain events, and concomitantly, the importance of probability theory became fully recognized in the 20th century. Kolmogorov's tiny book published in 1933 marked the beginning of a new chapter in the history of probability theory with the conception of the foundation of frequentist probability.

Bayesian thinking can be illustrated by its deep and diversified literature, while the primacy of the simple (naïve) approach is better served by the need for acceptance and assimilation.

During World War II, the demand for radar technology in the arms industry prepared the ground for the development of a new theoretical framework. First, the need for calculating the probability of wanted signals, then the need for the probabilistic identification or friend or foe (IFF) created an immense opportunity for the evolution of applied mathematics, and especially to the detailed elaboration of the domain of

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[20] Among his numerous connections, noteworthy are his ties to some of the Founding Fathers, such as Benjamin Franklin, John Adams or Thomas Jefferson (the latter two of whom being the second and the third president of the United States of America, respectively). Honourable mentions are David Hume and Adam Smith, names that will be more than familiar to those with an interest in philosophy or economics.

[21] Subsequently published as '*An Essay towards solving a Problem in the Doctrine of Chances*. By the late Rev. Mr. Bayes, communicated by Mr. Price, in a letter to John Canton, M. A. and F. R. S.'

[22] The theory of probability was treated as the Cinderella of mathematics until as late as the beginning of the 20th century as it was regarded a dubious discipline on the border of mathematics, physics and philosophy. A Rényi, *Ars Matematica* (Typotex 2005) 167.

[23] T Bayes and R Price, 'An Essay towards Solving a Problem in the Doctrine of Chances' (1763) 53 Phil Trans R Soc 370.

[24] ET Jaynes, *Probability Theory: The Logic of Science*, BG Larry (ed) (Cambridge 2010) 3.

credible probability. In the realm of radar signal processing, complex mathematical derivations led to the appropriate interpretation of theoretical problems, which subsequently became one of the invisible pillars of the safe air transport of civilians. Certain concepts took such deep root that the notion of ROC[25] assigned to the decision logic of the radar receiver was adopted without modification in biostatistics, for example.[26] Why did one of the most avid adopter of the methodology happen to be biostatistics? Biological – and especially human biological – research concerns the study of organisms that belong to the same species but whose response characteristics can only be probabilistically described as uniform. This drew the attention of biostatistics researchers to the concept of subjective probability.

A special domain of the practical application of Bayesian subjective probability is that of Bayesian networks, the emergence of which can be derived from Wright's study of hamster reproduction published in 1921[27], and was substantially developed and refined towards the end of the 1970s with the advent of Artificial Intelligence research, to the extent that it is now of accessible benefit in terms of organizational problem solving. At the beginning, the scientist mainly responsible for the study and popularization of Bayesian networks was Judea Pearl.[28] The study and application of Bayesian networks in forensic science and criminalistics was carried out overseas and in the Far East. By way of notable examples, publications by research groups in the United States[29], Brazil[30] or Hong Kong[31] spring to mind. In 1977, Feinstein bemoaned the lack of sufficient support of biostatisticians,[32] but in 2004, David Spiegelhalter and his colleagues welcomed the favourable change that had occurred since then.[33] It is also worth mentioning a sceptical voice in connection with the approach: in criticising Spohn's paper[34], Cartwright questions whether a blanket causal interpretation of Bayesian networks is warranted, and in doing so, she also attacks Spohn's treatment of probabilities.[35]

It is appropriate at this point to mention a few relevant studies, for instance, the work on computer forensics carried out at the University of Hong Kong in which the

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[25] ROC: Receiver Operating Characteristic.

[26] L Lugosi and I Molnár, 'Orvosi diagnosztikus próbák értékelése: Bayes-tétel, ROC-görbe és Kappa-teszt alkalmazása' [The assessment of medical diagnostic trials: The application of Bayes' theorem, the ROC curve and the Kappa test] (2000) 141 *Orvosi Hetilap* 1725.

[27] S Wright, 'Systems of Mating I: The Biometric Relations between Parent and Offspring' (1921) 6 Genetics 111.

[28] J Pearl, 'Reverend Bayes on Inference Engines: a Distributed Hierarchical Approach' (1982) Proceedings, AAAI National Conference on AI, Pittsburgh 133.

http://www.ece.tamu.edu/~bjyoon/ecen689-604-fall10/Pearl_1982.pdf accessed on 20/07/2013.

[29] AB Hepler, 'Improving Forensic Identification Using Bayesian Networks and Relatedness Estimation: Allowing for Population Structure'https://www.ncjrs.gov/pdffiles1/nij/grants/231831.pdf accessed on 20/07/2013.

[30] RN Carvalho, KB Laskey, PCG Costa, M Ladeira, LL Santos, Matsumoto, 'Probabilistic Ontology and Knowledge Fusion for Procurement Fraud Detection in Brazil' http://link.springer.com/chapter/10.1007%2F978-3-642-35975-0_2#page-1 accessed on 20/07/2013.

[31] MYK Kwan, FYW Law, PKY Lai, 'Computer Forensics Using Bayesian Network: A Case Study' http://i.cs.hku.hk/cisc/forensics/papers/BayesianNetwork.pdf accessed on: 20/07/2013.

[32] AR Feinstein, 'Clinical Biostatistics XXXIX: The Haze of Bayes, the Aerial Palaces of Decision Analysis, and the Computerised Ouija Board' (1977) 21 Clinical Pharmacology and Therapeutics 482.

[33] DJ Spiegelhalter, KR Abrams, JP Myles, *Bayesian Approaches to Clinical Trials and Health-Care Evaluation* (John Wiley & Sons 2004) 3.

[34] W Spohn, 'Bayesian Nets are all there is to Causal Dependence' in MC Galavotti, P Suppes and D Costantini (eds) *Stochastic Causality* (CSLI Publications 2001) 157.

[35] N Cartwright 'What Is Wrong With Bayes Nets?' (2001) 84 The Monist 242.

researchers test hypotheses concerning the illegal file sharing (Bit-Torrent) activity of a defendant by means of a Bayesian network.[36] Another study run by Hepler and Dawid illustrates the potential of Bayesian networks in terms of dealing with paternity cases relying on population substructure-based DNA evidence.[37] Prakken and colleagues employ Bayesian networks to model crime scenarios.[38] Hepler, Dawid and Leucari demonstrate the use of Bayesian networks via the analysis of the evidence concerning the Sacco and Vanzetti murder case.[39] Interestingly, Kadane and Schum already provided a detailed Bayesian analysis of the Sacco and Vanzetti case back in 1996.[40]

As an extension of evidence-based medicine[41], an approach rooted in Bayesian philosophy, Sherman lays down the foundations of what he refers to as "evidence-based policy".

It is an indication of the reactionary nature of the judiciary that in spite of the considerable research, in 2010, the Court of Appeal in the United Kingdom ruled in connection with the R v T case that neither the Bayes theorem nor the likelihood ratio may be used for the appraisal of forensic evidence except in the special case of DNA-based investigations.[42] In their paper dedicated to the assessment of the ruling, Fenton and Neil indignantly point out that one need not understand everything about how the circuits of a calculator operate in order to be able to use it fruitfully.[43]

Already in 1982, the American Pearl alluded to the potential usefulness of Bayesian networks in judicial reasoning and referenced Schum and Martin's report concerning their research into the legal application of Bayesian networks.[44]

The method can be applied to the search for forensically interesting documents and verbal expressions on computers used by criminals as well to the continuous observation of the correspondence of monitored individuals. In their work on an information retrieval system mentioned above, de Campos and his colleagues relied on the belief network model of Ribeiro and colleagues.[45]

In many cases, the application of Bayesian networks to criminological research can already be considered a success. Boondao, who is concerned with the risk factor analysis of criminal behaviour, cites a study carried out by WSEAS which provides a Bayesian network-based overview of the nature and situation of breaches of law.[46]

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[36] MYK Kwan, FYW Law, PKY Lai, 'Computer Forensics Using Bayesian Network: A Case Study.'

[37] AB Hepler, AP Dawid, 'Incorporating Population Structure into Forensic Bayesian Networks' https://www.researchgate.net/profile/Alexander_Dawid/publication/242322970_Incorporating_population_structure_into_forensic_Bayesian_networks/links/00b7d5289f828da379000000/Incorporating-population-structure-into-forensic-Bayesian-networks.pdf accessed on 04/12/2014.

[38] H Prakken, C Vlek, B Verheij, BS Renooij, 'Modeling Crime Scenarios in a Bayesian Network' http://www.cs.uu.nl/groups/IS/archive/henry/icail13vlek.pdf accessed on 08/12/2017.

[39] AB Hepler, AP Dawid, V Leucari 'Object-Oriented Graphical Representations of Complex Patterns of Evidence' https://www.ucl.ac.uk/statistics/research/pdfs/rr275.pdf accessed on 07/12/2014

[40] JB Kadane and DA Schum, *A Probabilistic Analysis of the Sacco and Vanzetti Evidence* (John Wiley & Sons 1996).

[41] C Heneghan and D Badenoch, *Evidence-Based Medicine Toolkit* (Blackwell 2006) 81.

[42] http://www.bailii.org/ew/cases/EWCA/Crim/2010/2439.pdf accessed on 08/12/2017.

[43] N Fenton and M Neil 'On Limiting the Use of Bayes in Presenting Forensic Evidence' (2012) http://www.eecs.qmul.ac.uk/~norman/papers/likelihood_ratio.pdf accessed on 08/12/2017.

[44] Pearl, 133.

[45] LMd Campos, JM Fernández-Luna, JF Huete, C Martín and AE Romero, 'An Information Retrieval System for Parliamentary Documents' in O Pourret, P Naim and B Marcot (eds) *Bayesian Networks: A Practical Guide to Applications* (Wiley 2008).

[46] R Boondao, 'Crime risk factor analysis' in O Pourret, P Naim and B Marcot (eds) *Bayesian Networks: A Practical Guide to Applications* (Wiley 2008).

In 2000, Kaye[47] emphasized the beneficial effects of the Bayesian method in terms of decreasing the number of legal mistakes citing Professor Ronald Allen, who had warmly recommended the method to legal professionals as a support tool. The relationship between Bayesian methods and Artificial Intelligence is strong, since Bayesian networks can be improved by means of self-learning mechanisms. I wish to emphasise, however, that in many cases, the application of AI[48] should be understood as providing support rather than replacement in the work of the forensic expert.

The work of Challa and colleagues leads to areas that may prove a rich source of both theoretical and practical knowledge directly applicable in criminalistics and crime-prevention. Although their research focuses on target tracking radar technology, it provides such general, mathematically grounded, visually illustrated object tracking examples that their method, applied to CCTV footage, may be fruitfully utilized in the investigative phase of criminalistics.

2.5. The emergence of probabilistic thinking in Hungary and its relevance to forensic science

One of the first and most interesting examples of Hungarian probabilistic thinking in the 19th century appears in the work of Antrás Fáy, who collected human lifespan-related statistical information in his effort to establish the first Hungarian life insurance company. The first noteworthy Hungarian mathematician who specialised in probability theory may be Károly Jordan on the basis of his paper published in 1921.[49] In a monograph, he criticized those statisticians who intended to ignore probability theory.[50] Names such as György Pólya[51], Alfréd Rényi[52], András Prékopa[53] and László Lovász may also be mentioned. Among the Hungarian representatives of biostatistics, the name of Elek Dinya springs to mind.

In criminal acts, suspicion is related to probability, and degrees of suspicion represent degrees of probability, as was well articulated by Endre Bócz in 1962.[54]

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[47] DH Kaye, 'Bayes, Burdens, and Base Rates' (2000) 4 IJE & P 260.

[48] In my view, the concept of Artificial Intelligence does not satisfy the ordinary expectations (sometimes also reiterated in scientific circles) generated by its name. In comparison, human intelligence is constituted by the brain's – partly learned, partly individual-specific – information related assembly of complex experience manipulating capacities including recognition, recall, association, inference, decision-optimizing and decision-monitoring. Artificial Intelligence is concerned with the computational modelling of some of the listed abilities as well as with producing so-called intelligent devices bestowed with capacities faintly resembling those of humans, such as making human-like decisions or storing and recognizing information, thus producing the semblance of intelligent behaviour. However, such efforts rarely come close to replicating the original capacities. Thus, even mechanisms dedicated to problems trivial to humans such as the spellcheck system of computers can produce endearingly – or annoyingly – inaccurate suggestions, not to mention the lack of text-interpreting abilities or web-based translating tools capable of producing minimally acceptable results.

[49] K Jordan, 'A valószínűség a tudományban és az életben' [Probability in science and life] 53 Magyar Közlöny 775.

[50] K Jordan, *Matematikai statisztika* [Mathematical Statistics] (Athenaeum 1927) 13.

[51] Gy Pólya, *A Gondolkodás iskolája* [The School of Thinking] (Akkord 2000).

[52] A Rényi, *Levelek a valószínűségről* [Letters on Probability] (Akadémiai Kiadó 1969).

[53] A Prékopa, *Valószínűségelmélet műszaki alkalmazásokkal* [Probability Theory with Applications in Engineering] (Műszaki Könyvkiadó 1962) 52–59.

[54] E Bócz, 'Az alapos gyanú a büntetőeljárásban' [Probable cause in criminal action] (1962) 11 Jogtudományi Közlöny 578.

In 1964, Géza Katona authored his keynote paper concerning probabilistic expert opinion in which he suggested the comprehensive application of the probabilistic approach, including expert opinions as well as probabilistic proofs.[55] The mathematicians Mátyás Arató[56] and Imre Kertész published a study in 1966 on handwriting-recognition by means of cybernetic methods[57] in which they examined a writing sample constituting the evidence in a murder by poisoning case via comparative mathematical analysis and probabilistically identified the suspect.[58]

In his 1972 paper, Árpád Erdei summarized the research carried out in 1969 in the National Institute of Criminalistics in which he urged the legal application of cybernetic, mathematical and logical methods.[59] Providing supporting examples from the literature, he recommended thinking in terms of a process approach, which is also indispensable in the case of the application of Bayesian networks. The significance of his work lies partly in the fact that legal experts are often sceptical about the use of mathematical methods in the legal domain.

In his still timely monography, Géza Katona presented multifarious support for the proposition that the role of probabilistic thinking in criminal action is essential.[60] He offered a prescient discussion of the applicability of probability theory and mathematical logic in legal action, and provided examples of the use of biostatistics in Hungary.

The concepts of suspicion (applying to the suspect and representing different degrees of probability), and probable cause (the condition for becoming the defendant) are of crucial significance from the point of view of the commencement and subsequent course of development of criminal investigations. Árpád Erdei talked about a confusion of terms when he pointed out that "the prosecution is against the suspect, not only against the defendant", although he denied that establishing probable cause happens in an arbitrary way.[61]

In 1979, a conference featuring László Vargha was organized in Pécs with the title "The Role of Probability in Criminal Justice".[62] András Vág's discussion offered in his 1983 paper can be regarded as a foreshadowing of what later became known as a

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[55] G Katona, 'Az un. Valószínűségi szakértői vélemények értékeléséről' [Concerning so-called probabilistic expert opinions] J Gödöny and B Popovics (eds) *Kriminalisztikai Tanulmányok III* [Studies in Criminalistics III]. (Közgazdasági és Jogi Könyvkiadó 1964) 75.

[56] It is worth mentioning that Arató published numerous papers on probability theory at different universities, including some on Bayesian-type estimation applications. The Professor Emeritus of the Informatics Department of the University of Debrecen, who passed away in 2015, moved to Moscow in the 1950's with the recommendation of Alfréd Rényi to study under Kolmogorov.

[57] Nowadays, we would refer to these as "computer-based" or "computational" methods.

[58] M Arató and I Kertész, 'Kibernetikai módszerek alkalmazásának lehetőségei a kézírás vizsgálatában' [Possibilities for the application of cybernetic methods in the examination of handwritten texts] (1966) 4 Belügyi Szemle 27.

[59] Á Erdei, 'A kibernetikai, matematikai és logikai módszerek jogi alkalmazásával kapcsolatos néhány problémáról' [On a few problems concerning the application of cybernetic, mathematical and logical methods in law] in J Gödöny (ed) *Kriminológiai és kriminalisztikai tanulmányok IX* [Studies in Forensic Science and Criminalistics IX] (Közgazdasági és Jogi Könyvkiadó 1972) 241.

[60] G Katona, Büntetőítélet a jog határán [Criminal Sentence on the Boundary of Law] (Közgazdasági és Jogi Kiadó 1972) 225–312.

[61] Á Erdei, 'A nyomozás megindításának feltétele' [The condition of commencing the investigation] (1972) 8 Belügyi Szemle 50.

[62] L Vargha, *A valószínűség szerepe az igazságszolgáltatásban* [The Role of Probability in Criminal Justice] (Pécsi Tudományegyetem 1979).

Bayesian network.[63] In his framework, he made use of the correlation coefficient (which may take a positive or a negative value) that is a measure of the relationship – or mutual exclusivity – between events. On the basis of Hagan's Canadian study, he provided a sketch of the entire length of the legal procedure, from its commencement all the way to the judgement. Mueller Othmár wrote approvingly on the use of probabilistic evidence in 1986, but he placed the onus of responsibility on the judge.[64] It is important to highlight legal training in Pécs on account of its relevance to probabilistic thinking, since the University of Pécs has been the first institution in which the philosophy of Bayes is promoted both in textbooks[65] as well as in lectures. In his curriculum, Csaba Fenyvesi incorporates an emphasis on the importance of the theoretical exploration of Bayesian inference and supports the idea of its imminent practical application. He has also repeatedly expressed his views in a number of conferences. As an example of an application of Bayesian inference, the forensic dictionary of the current website of the Hungarian Institute for Forensic Sciences mentions only genetic tests.[66] The likelihood ratio is also listed, and the example used is that of genetic identification.[67]

Summary

The study provides an introduction and an overview to the history and the sources of probabilistic approaches including Bayesian Methods in forensic science from Hungarian viewpoints. Starting form Aristotle and through the ages of Bayes the key figure of the theory founder of the contemporary subjective probabilistic methodology used everywhere in different sciences. The Bayesian subjective provability in forensic science substantial for DNA and fingerprint analysis. The Bayesian Networks will be important to the multiple evidence evaluation and taken into consideration as a tool for the future forensic scientists. Some samples of miscarriage of justice caused by improper usage of probabilistic approach are given providing colorful viewpoints to the readers.

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[63] A Vág, 'Matematikai módszerek a kriminológiai kutatásban' [Mathematical methods in research in forensic science] in J Gödöny (ed) *Kriminalisztikai Tanulmányok XX* [Studies in Criminalistics XX] (Közgazdasági és Jogi Könyvkiadó 1983) 253.

[64] O Mueller, 'A szakértői működésre, a szakvélemény hatósági értékelésére, valamint a szakértők díjazására vonatkozó rendelkezések' [Injunctions concerning the functioning of experts, evaluation of expert opinion by the authorities and the remuneration of experts] in Gy Molnár (ed) Az igazságügyi szakértői vizsgálatok kézikönyve [Handbook of Expert Investigation in Criminal Justice] (Közgazdasági és Jogi Kiadó 1986) 121.

[65] F Tremmel, Cs Fenyvesi and Cs Herke, *Kriminalisztika* [Criminalistics] (Dialóg-Campus 2005) 290–294.

[66] "Bayesian inference: the use of the Bayes theorem in probability theory for drawing inferences. On the basis of certain considerations, one assigns prior (a priori) probabilities to events, then, relying on the sample - as well as the Bayes theorem - other (a posteriori) probabilities can be calculated, forming the basis of the statistical inference. The method has numerous advantages, however, in practice, it is rarely possible to establish unambiguous a priori probabilities that are acceptable to all parties concerned. In forensic genetics, it plays a role in testing and interpreting probabilities of identity (*e.g.* paternity probability)." Source: http://bszki.hu/page.php?653 accessed on 28/11/2015.

[67] Source: http://bszki.hu/page.php?674 accessed on 28/11/2015.

To Punish or to Torture? About Inhuman Treatment in the Recent view of the Strassbourg Court

Dr. Laura Maria Stănilă*

Abstract

Facing a pilot decision of ECHR on prison conditions, decision following countless other previous decisions by which the Romanian state was convicted for violating art. 3 of European Convention of Human Right, Romania needs to change and adapt its penal post-crime policy in order to meet European standards in the field of detention and other deprivation of liberty measures. The Case of Dorneanu vs. Romania by which the Romanian state literally sentenced to a undignified death a terminal-ill inmate was the turning point for both the scholars and the practitioners pointing out the gaps and malfunctions of the Romanian detention system. Something has to be done, and right away!

Key words: *penal policy, punishment, inhuman treatment, European Court of Human Rights, art. 3 of ECHR, inmate in terminal phase cancer*

"Murder in the name of the Rule of law!" – this was the title of a press article drawing attention to one of the most mediatized cases in Romania that was presented for justice to the European Court of Human Rights[1]. At the time of the final decision of the Court, the plaintiff was already dead for almost 4 years.[2]

The *Case Dorneanu vs. Romania*[3] allowed to bring to the forefront some taboo-related issues regarding the detention conditions and the serving of prison sentences by inmates suffering from incurable diseases or other serious health conditions. Given that the penitentiary system in Romania is far from meeting the minimum standards imposed at European level on the rights of detainees and ensuring decent and human conditions of detention, the Strassbourg Court has settled the matter through its judgment. Thus, in the ruling on *Dorneanu v. Romania* on 28th of November 2017, the ECHR established that the refusal of the Bacău Court of Appeal to order the interruption

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1 https://www.luju.ro/international/cedo/crima-in-numele-statului-de-drept-cedo-a-condamnat-romania-pentru-tratament-inuman-dupa-ce-curtea-de-apel-bacau-a-refuzat-intreruperea-executarii-pe depsei-unui-detinut-bolnav-de-cancer-a-fost-incarcerat-la-4-martie-2013-nu-i-a-permis-chimioterapia-a-deced, accessed on 2.12.2017.

2 Dorneanu died in prison of terminal cancer on 13th of December, 2013.

3 Application no.55089/2013, Jugement of the Fourth Section, 28th of November 2017, https://hudoc.echr.coe.int/eng#{"itemid":["001-178903"]}, accesed on. 2.12.2017.

of the punishment for a person suffering from terminal-pase cancer *is an inhuman treatment, breaching art. 3 of the European Convention of Human Rights.*

The applicant was convicted in February 2013 of economic crimes and was imprisoned on March 4th, 2013. On the same day, he filed a petition to interrupt the execution of the punishment for medical reasons, showing that he suffered from terminal-phase cancer and needed chemotherapy. Of course, this treatment could not be provided properly in the carceral environment. Through a medical expertise it was established that Mr. Dorneanu depends on the quality of his medical surveillance, and the Bacău Tribunal ordered on June 25th, 2013 to interrupt the execution of the sentence for a period of 3 months. The appeal of the Public Ministry was admitted by the Bacau Court of Appeal on June 29th, 2013. The health of Mr. Dorneanu degraded and did not allow chemotherapy treatment to be provided anymore. The applicant died on December 24th, 2013 in the Bacau hospital, on Christmas Eve.

The Court found that between the date of the imprisonment and the date of death, Dorneanu was the object of 27 transfers from one penitentiary to another and 7 transfers to penitentiary hospitals, all of them far apart from one another. The transfers lasted a few days when Mr. Dorneanu did not receive any kind of medical care. The Court also found that, as the illness advanced, Dorneanu could not remain in the detention environment, with the national authorities failing to take into account humanitarian aspects of the case. The Court considers that, in view of the applicant's illness and the acts he committed, the risk of recidivism was minimal. The Court also found that Romanian judges were not very interested in the concrete ways in which the applicant received medical treatment. The Court stated that the national court had focused more on the procedural considerations than on the humanitarian ones and has prevented Mr. Dorneanu to live his last days in dignity, but handcuffed in a hospital bed.

The Court recalls that it has already decided that an appeal based on the provisions of Law no. 275/2006[4] on the execution of the punishments and the measures ordered by the judicial bodies during the criminal trial constitutes an effective remedy within the meaning of Article 35 § 1 in respect of allegations of lack of adequate care for detainees. The Court noted that the applicant submitted to the national courts an application to interrupt the execution of his sentence for medical reasons and filled several written submissions for the same purpose. However, these measures do not directly concern the lack of medical treatment *but the conflict between the applicant's health and detention conditions*[5].

However, in the circumstances of the present case, the Court considers that it is not necessary to consider whether the actions indicated by the Government constitute effective corrective measures and whether, by merely interrupting the execution of the sentence, the applicant has properly exhausted internal remedies in relation to his complaint under Article 2 of the Convention. Even assuming that this was the case, there is no apparent breach of that provision in the case of the applicant for the following reasons.

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[4] Law no. 275/2006 on the execution of the punishments and the measures ordered by the judicial bodies during the criminal trial, published in the Official Monitor, Part I, no. 627/20.07.2006, in force from October 18th, 2006 to January 31st, 2014, being repealed and replaced by Law 254/2013 on the execution of sentences and detention measures ordered by the judicial bodies during the criminal trial published in the Official Monitor, Part I, no. 514/14.08.2013, in force since February 1st, 2014.

[5] Paragraph 46, *Case Dorneanu vs.Romania*, Application no.55089/2013, Jugement of the Fourth Section, 28th of November 2017.

The Court reiterates that the obligation to protect the lives of detained persons implies the rapid provision of medical care capable of preventing death[6] and remainded that this was its view in previous cases such *Tais v. France*[7] and *Anguelova v. Bulgaria*[8]. The obligation to provide adequate medical assistance is not limited to prescribing appropriate treatment: *prison authorities must also ensure that they are properly administered and supervized*[9].

The applicant Mr. Dorneanu alleged that his detention in the hospital bed constituted inhuman treatment and that his state of health was incompatible with detention. In his opinion there was a breach of Article 3 of the Convention: *"No one shall be subject to torture or inhuman or degrading treatment or punishment."*

The Court provided a complex analysys of the compatibility with Article 3 of the Convention with the applicant's detention in the hospital and the compatibility of his detention with his health.

A. The applicant's detention in the hospital

The applicant's son claimed that his father had drawn the attention of the authorities to the conditions of detention in Bacău hospital where he was immobilized in bed and handcuffed. At the time, the use of handcuffs to immobilize interned prisoners was strictly prohibited by the Regulations under Law 275/2006 mentioned above. The applicant was both physical and psychological vulnerable.

B) The compatibility of applicant's detention with his health.

As regards the quality of the medical care and assistance provided by the authorities, the Court observed that the applicant was already suffering from a short-term lethal disease on the 4th of March 2013 when he was imprisoned, because of the aggravation of his condition (bones methastasys). The Court has found that, except for the failures reported by the chief doctor of the Bacău Oncology Service, the applicant was treated in accordance with the doctors' prescriptions. However, it is not clear from the evidence that the national authorities have at any time considered the possibility of merging these treatments *in one place*, which should save the number of transfers to the applicant or at least to limit the number and the harmful consequences for the patient's welfare. In addition, the Court had already expressed the view that, during the subsequent stages of the disease, if no hope of remission is allowed, inherent stress in life imprisonment could have repercussions on the prisoner's hope and state of health.[10]

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[6] Idem, paragraph 48.

[7] Application no. 39922/03, § 98, 1st June 2006, www.echr.coe.int, accessed on 1.12.2017.

[8] Application no. 38361/97, §§ 125-130, ECHR 2002-IV, www.echr.coe.int, accessed on 1.12.2017.

[9] *Case Jasińska v. Poland*, Application no. 05, § 78, 1 June 2010, www.echr.coe.int, accessed on 1.12.2017.

[10] *Case Gülay Çetin v. Turkey*, Application no. 44084/10, judgment 5.03.2013. In February 2007 the applicant, who had been in pre-trial detention since December 2006, began to complain of gastric and digestive problems. In September 2008 the Assize Court found her guilty of intentional homicide and sentenced her to fifteen years' imprisonment. Following an appeal against that decision, she remained in pre-trial detention. In April 2009 she was diagnosed with advanced stomach cancer. All her subsequent applications for provisional release were rejected. In February 2011 the Court of Cassation upheld the applicant's conviction, which became final as a result. In June 2011 proceedings were instituted for the suspension of her sentence, after a medical report had concluded that her illness was incurable and her life would be endangered by attempting to treat her in a prison environment. On 12 July 2011 the applicant died of her illness before the completion of the proceedings she had brought in the hope of securing either provisional release, the suspension of her detention or a presidential pardon. It was not disputed that the applicant's condition had been serious and had deteriorated over time, a fact that raised issues regarding her treatment in a prison environment. While she had been in pre-trial

There was a time when the applicant was severely weakened and diminished, both physically and mentally, so that he could not carry out the basic acts of his everyday life without help, and that a detainee has been appointed to help him, which was unqualified for the monitoring of a seriously ill individual. In addition, nothing in the record presupposes that the applicant has received adequate counseling during his hospitalization or prison stay while presenting a depressive syndrome. As the illness progressed, the applicant could no longer endure life in prison. The applicant had shown good conduct during the trial, he had benefited from the most favorable detention regime and due to his health, the risk of relapse would could have been minimal.

The Court noticed that the length of the proceedings initiated by the applicant to interrupt the execution of his sanction for health reasons was too long, given the terminal illness he suffered and that the replies given by the prison authorities to whom the applicant requested assistance to secure his release were characterized by their lack of consideration for the circumstances of the applicant.

Once more the Court had emphasized that the increasing requirement for the protection of human rights and fundamental freedoms implies greater firmness in the assessment of violations of the fundamental values of democratic society. The applicant was imprisoned at the end of his life and suffered from the effects of heavy medical treatment under difficult conditions of detention. According to the Court, in this context, the lack of diligence by the authorities makes the person more vulnerable and, in return,

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detention, her successive requests for release had all been rejected even though they were supported by medical reports. The courts had refused to implement the applicable procedures for prisoners with serious illnesses, on the ground that only those who had been convicted with final effect were eligible for them. This interpretation was partly due to the imprecise nature of the relevant legal provisions and the lack of a clear rule requiring judges to have due regard to the prisoner's clinical picture when applying the Code of Criminal Procedure. Accordingly, the system for protecting prisoners with diseases had lacked the requisite clarity, foreseeability and effectiveness.

Once her conviction had become final, the applicant had satisfied the practical conditions for applying for the statutory measures aimed at protecting the health of prisoners with serious illnesses, since by then her disease had reached the terminal phase. Her lawyer had submitted a further application for a presidential pardon and a request for the suspension of her sentence. On 8 April 2011 the hospital department responsible for the applicant had declared that she was unfit to remain in prison. However, the public prosecutor's office, which was required by law to refer the matter to a panel of specialists from the Institute of Forensic Medicine, had waited some twenty days before doing so. Yet there was no indication that the panel was more competent to assess a particular individual's health than the specialist hospital department which had been monitoring her regularly. It was therefore difficult to understand why the Institute had seen fit to re-examine the applicant by transferring her to another city or why it had waited until 8 June 2011 before doing so, when the only issue to be determined was whether the illness diagnosed at the hospital rendered her eligible for a measure provided for by law. Lastly, the forensic medical experts had then taken a further week to submit their report, which had ultimately authorised the applicant's release. The report had not been forwarded to the appropriate public prosecutor but had simply been made available on the Ministry of Justice's official online portal one week after it had been produced on 15 June 2011, and had not been received by the public prosecutor's office until 18 July, six days after the applicant's death. The procedures in question had thus been applied in a manner that placed formalities above humanitarian considerations, thus preventing the applicant, who by that stage was dying, from spending her final days in dignity. Her detention without access to the protection system available in theory in Turkish law had undermined her dignity and caused her hardship exceeding the inevitable level of suffering associated with deprivation of liberty and with cancer treatment. https://hudoc.echr.coe.int/eng#{"itemid":["002-7490"]}, accessed on 2.12.2017.

unable to maintain his dignity towards the end to which the disease has progressed in a fatal and inevitable way.

Having issued an overall assessment of the relevant facts on the basis of the evidence before it, the Court concluded that the Romanian authorities did not provide the applicant with an adequate treatment breaching the provisions of Article 3 of the Convention and causing the terminal patient to receive inhuman treatment due to his detention under the conditions above.

In another case, *Jasińska v. Poland* [11] the Court had stated that a breach of art. 2 of the Convention[12] occurred in relation with a suicide of prisoner who died of an overdose of psychotropic drugs prescribed for mental disorders. The applicant was the grandmother of R.Ch., who had been undergoing treatment since his childhood for psychological problems and headaches. In 2002 R.Ch. began a prison sentence for theft. In August 2004 he was taken to hospital, where he died after admitting that he had swallowed 60 psychotropic tablets, prescribed by a prison doctor. The autopsy established that death was due to drug poisoning. Criminal proceedings instituted by the public prosecutor's office were closed on the ground that R. Ch. had committed suicide after taking a substantial quantity of drugs in one go, having hidden them under his tongue each time the nurse had distributed them. In 2006 the applicant brought further proceedings against the authorities, but the criminal investigation was terminated on the ground that there was no evidence to suspect that a third party had been involved or that the authorities had been negligent. An expert report of 29th of May 2002 had indicated that he had mentioned a previous attempt to commit suicide and, three days before his death, a doctor's report had found that he was suffering from depression. Accordingly, the prison authorities, who had been apprised of the deterioration in his mental state, should have given thought to the risk of suicide. However, the medical prescriptions had been renewed without any consideration being given to other means of monitoring his condition. Moreover, after the proceedings against R.Ch., no thought had ever been given to a possible placement in a specialized institution or in solitary confinement. *The Court questioned whether a prison regime had been appropriate in the present case.* The authorities in charge of the post-mortem procedures had never attempted to clarify the exact circumstances in which the psychotropic drugs had been administered or how supervisory duties had been carried out by the medical staff, whose task was, in theory, to ensure that prisoners swallowed their pills. Nor had the Government provided a plausible explanation for how R. Ch. had managed to elude the vigilance of the prison authorities by amassing a lethal quantity of drugs. There had accordingly been a clear deficiency in the system, which had allowed a first-time prisoner, who was mentally fragile and whose state of health had deteriorated, to gather a lethal dose of drugs without the knowledge of the medical staff, and to commit suicide. The duty to provide inmates with adequate medical care should not be confined to prescribing appropriate medicines without also ensuring that they were properly taken and properly monitored. This was particularly important where mentally disturbed prisoners were concerned. Accordingly, the authorities had failed to comply with their obligation to protect R.Ch.'s right to life.

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[11] Application no.28326/05, Judgment 1.6.2010, Section IV, https://hudoc.echr.coe.int/eng#{"itemid":["002-902"]}, accessed on 1.12.2017.

[12] *"Everyone's right to life is protected by law."*

Leaving the decisions of the Court of Strassbourg behind, let us remember that, in 1992, the Council of Europe adopted Recommendation no. R (92) 16 on European rules on community sanctions and measures[13] which recommends that Member States achieve and maintain a balance between the *desirability of protecting society and the victim's interests on the one hand and re-socializing the offender on the other*, and aligning Member States to international standards on penal response to crime phenomenon. This initiative focuses on respecting the rights of inmates to be regarded as worthy human beings. Member States are therefore advised that no measure or sanction may be applied for an indefinite period of time and that alternatives to detention can not be automatically converted into other penalties.

According to the European penitentiary rules adopted by the Council of Europe in the penitentiary field[14], the re-socialization and treatment of delinquents are governed by nine principles:

1. All persons deprived of their liberty will be treated with respect for human rights.

2. Persons deprived of their liberty retain all their rights which have not been withdrawn by law following the conviction of imprisonment or preventive arrest.

3. Restrictions imposed on persons deprived of their liberty must be reduced to the minimum necessary and proportionate to the legitimate objectives for which they were imposed.

4. *Detention conditions that violate human rights can not be justified by lack of resources.*

5. Life in prison should come as close as possible to the positive aspects of life outside the penitentiary.

6. Each period of detention must be managed in such a way as to facilitate the reintegration of persons deprived of their liberty into the free society.

7. Co-operation with external social services and civil society participation in prison life should be encouraged as much as possible.

8. Prison staff carries out an important civil service mission and their employment, training and working conditions must enable them to provide a high level of assistance to detainees.

9. Regularly, all detainees must be subject to government inspection and control by an independent authority.

The Council of Europe has, therefore, set clear standards for the penitentiary environment, the aim of which is to ensure a successful social reintegration of convicted offenders, while respecting human rights and, in particular, human dignity.

This is to ensure the conditions for maintaining the state of health, in order to reduce the psychological trauma of the convicted person. The detainee retains and exercises its civil rights (most of them) - the right to vote, the right of association, religious freedom, the right to property, the right to have a family and to continue marital life by ensuring, under appropriate conditions, marital visits. The normalization principle, as it has been called in the literature, prevents and diminishes the negative

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[13] Recommendation no. R (92) adopted by the Committee of Ministers of the Council of Europe on 19th of October 1992 at the 482nd meeting of the Ministers' Deputies.

[14] REC (2006) 2, adopted by the Committee of Ministers on 11th of January 2006, at the 952nd Meeting of Delegates Ministers.

effects of detention - family breakdown, lack of contact with children and relatives, psychological trauma, stigmatization and moral labelling[15].

In this way may be provided:

a) opening - in certain penitentiary systems, by atonement, in open and semi-open establishments of punishment. In these facilities, inmates are provided with decent living conditions, unlimited mailing, weekly visits, permanent family contacts, access to the media, sporting competitions. They can not move outside of these establishments and have a controlled living environment.

b) responsibility - it is achieved through the efforts of the specialized personnel. Thus, detainees are educated in the spirit of personal empowerment, respect and self-esteem, being involved in daily social and community activities at the place of detention, in order to facilitate their social reinsertion after serving the punishment and preventing relapse.

In Romania, in 2016, according to an average of 27,984 persons in custody of the National Penitentiary Administration, there were 98 deaths , respectively 3.5 deaths per thousand inmates. This figure is about 3 times lower than in the general population, according to the official statistics of the National Institute of Statistics for 2015 (11.7 deaths per one thousand inhabitants). Deaths have also been caused by chronic medical conditions / terminal cases. Thus, out of the 98 cases, 31 had as a cause of death neoplastic diseases, which represents 31.63% of the total deaths in 2016. Compared to this, in 2015 from the total of 113 deaths, 41 had as cause neoplastic diseases, which represents 36.28% of the total. There were 11 cases of suicide death (3.95 to 10.000 inmates) in 2016 as compared to 2015 when there were only 10 cases. From this point of view, the official statistics of the Council of Europe show that the Romanian penitentiary system is far below the incidence of suicide at European level. Thus, in 2013 there were suicidal acts as follows: Norway 30/10000 inmates; France 12.4 / 10000 inmates; Belgium 11/10000 inmates; Spain 10/10000 inmates; Portugal 9.1 / 10000 inmates; Germany 7.4 / 10000 inmates.[16].

ECHR President Guido Raimondi said that the number of requests against Romania doubled over the past year, many of them being caused by detention conditions, and he recommended legislative measures such as those taken by Italy where the sentences of detainees were reduced or served at home, with surveillance bracelets.[17] The ECHR president also said the number of cases at Strasbourg Court increased by 32%, mainly due to the detention conditions situation in three countries: Hungary, Romania and Turkey. "As regards Hungary and Romania, where the number of cases increased by 95% and 108% respectively in 2016, they mainly refer to detention conditions. They are priority cases because they fall under Article 3 of the Convention which prohibits torture and inhuman punishment, but there are repetitive cases that reflect systemic or structural problems and require solutions at national level".[18]

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[15] S. Rădulescu, D. Banciu, *Sociologia crimei și criminalității*, Casa de Editură și Presă "Șansa" S.R.L., București, 1996. p. 235.

[16] Press statement of the General Director of National Penitenciary Administration, January 20th, 2017, *http://anp.gov.ro/wp-content/uploads/2017/04/Declaratie-de-presa-pentru-site.pdf*, accessed on 22nd October 2017.

[17] https://www.digi24.ro/stiri/actualitate/justitie/cedo-este-asteptata-sa-se-pronunte-astazi-in-legatura-cu-decizia-pilot-referitoare-la-situatia-din-penitenciarele-din-romania-711969, accessed on 2.12.2017.

[18] *Ibidem.*

The Director of the National Penitentiary Administration, Marius Vulpe, argued that, in order to comply with the provision that a detainee has the right to four square meters and that the Romanian state should no longer be sanctioned to the ECHR for this reason, it should either 8,500 detainees leave from the system, or build other penitentiaries. Marius Vulpe stated that there are 33,000 beds in prisons in the country and 27,500 detainees, but the legal area for each detainee and four square meters is not respected. He specified that 19,500 detainees should be accommodated in order to comply with this obligation. The ANP Director added that more than 500 detainees have won lawsuits at the ECHR and there is no prison in the country that has no cause lost to the European Court of Human Rights.

The European Court of Human Rights ordered the Romanian State on June 18th, 2015, to pay 164,150 euro for moral damages and court costs for violating Article 3 of the European Convention on Human Rights. The amount awarded as compensation in one decision is unprecedented, since in 2014 the ECHR granted damages in the 33 cases that concerned the violation of Article 3 of the Convention in a total amount of 243,683.92 euros. In fact, most of the convictions suffered by Romania at the ECHR are due to poor conditions in the penitentiary system. In the case of *Oprea and others v. Romania*[19], the ECHR has established that 18 prisons and three pre-trial detention centers in Romania do not meet the conditions imposed by the CTP Standards on the prevention of torture and inhuman or degrading treatment. Twenty Romanians complained to the ECHR about penitentiary conditions. Thus, in the judgment pronounced on 18 June 2015, the European Court of Human Rights ruled that the Romanian State must grant as a moral damages not less than 161 700 euro, but also 2,450 euro representing costs and expenses, to several persons have appealed the inhuman and degrading conditions of detention in Romanian penitentiaries. Among the 20 plaintiffs in the case Oprea and others vs. Romani is the name of a well-known politician. This is the former Democratic Liberal Party deputy, Mihail Boldea, held in custody for 1 year and 8 months after he was accused by Directorate for Investigating Organized Crime and Terrorism (DIICOT) of alleged acts of deception and constitution of organized criminal group. In the action against Romania, in November 2012, Mihail Boldea complained that in cells no. 6, 10 and 11 of the Central Arrest of the Galati Police has been constantly exposed to cigarette smoke coming from roommates, since he is non-smoker, he was deprived of clean air and natural light and forced to stay in unhygienic conditions which favored the entry of rats, permanently refusing access to the library or anywhere outside the cell. Facing these allegations, the Romanian Government was notified to transmit to ECHR judges information on cell size, number of cells and number of cell detainees, during the period when Mihail Boldea was preventively arrested, facilities to which detainees had access, and the way in which separation between smokers and non-smokers was made. The decision issued on June 18th, 2015, confirms that Mihail Boldea's allegations were real and well founded, so the ECHR decided to award him damages of 4,200 euros for the degrading conditions he was subjected to, between 27.03-26.10.2012 in the Central Police of Galati Arrest and between 31.10.2012-23.11.2013 in the Galati Penitentiary.

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[19] *Case Oprea and others v. Romania,* applications nos. 54966/09, 57682/10, 20499/11, 41587/11, 27583/12, 75692/12, 76944/12, 77474/12, 9985/13, 16490/13, 29530/13, 37810/13, 40759/13, 55842/13, 56837/13, 62797/13, 64858/13, 65996/13, 66101/13 and 15822/14), Final Judgment 18.06.2015, https://www.luju.ro/static/files/2015/iunie/18/CASE_OF_OPREA_AND_OTHERS_v._ROMANIA.pdf, accessed 2.12.2017.

The European Court of Human Rights (ECHR) delivered on 25th of April 2017 the pilot-decision on prison conditions in Romania[20]. The rulling states that the Romanian state has 6 months to present a plan of measures to address overcrowding and prison conditions. The ECHR amended Romania in this pilot decision with 17,850 euros, in the *case Rezmives v. Romania* (the judgement and the starting point of the decision-pilot). In the decision, the ECHR does not impose any specific measures on Romania and does not say anything about pardon or the relaxation of the criminal policy. Moreover, in a concise opinion, ECHR judge Krzysztof Wojtyczek warns Romania that measures to relax the criminal policy, such as those in GEO 13, have led to massive protests in Romania. The ECHR stated that Article 3 of the Human Rights Convention, which prohibits inhuman and degrading treatment, has been violated. It should be noted that the ECHR has not advanced a deadline for adopting measures to improve prison conditions, but only a 6 month deadline for Romania to submit a plan of measures. Of course, this pilot-decision is only tangent with the issue of ill convicts, but, nevertheless, it comes to emphasize the need of improvement of the detention conditions in Romania and to force us to do the right thing.

[20] http://media.hotnews.ro/media_server1/document-2017-04-25-21732170-0-decizia-pilot-cedo-privind-penitenciarele-din-romania-franceza.pdf, available also in French on echr.coe.int, accessed on 2.12.2017.

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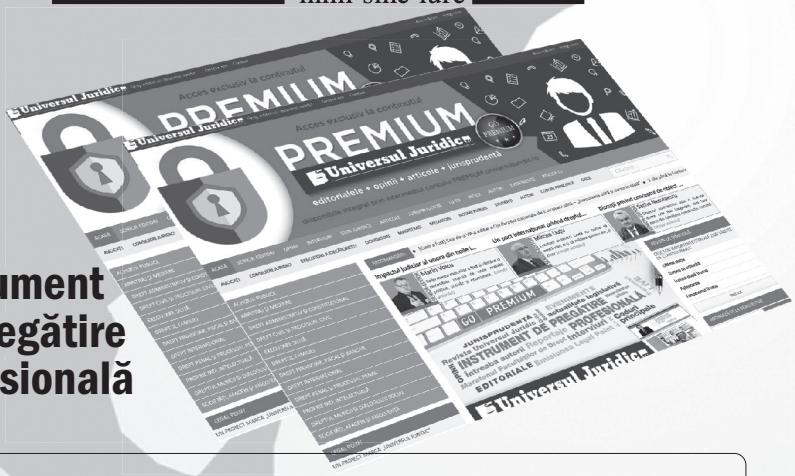

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