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

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The future issue of the magazine appears at the end of December 2018. The main topic of the future issue is: **Economic crimes.**

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Artificial Intelligence influencing foreign Policy and Security

PhD Elena Tilovska-Kechedji[1]
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Abstract

Artificial intelligence is incorporated in our everyday lives more and more each day. We are using smartphones to conduct business, computers to learn information, we are driving smart cars with different apps and motion sensors. This is not a science-fiction movie, it is a reality. A reality which will progress in different fields and aspects, and it will not stop here. As much as it is interesting and helpful and improving our lives in any aspect or segment, there are many risks that are hindering in the background. Incorporating and improving Artificial Intelligence as a tool or mechanism for weapons or being able independently to make decisions on any level is not responsible or ethic and hopefully it will never be used by officials. Machines are not humans and they will never be able to manifest feelings or to differentiate what is right from wrong, they will never be able to be moral or ethical, to feel sorrow or pain. Just imagine living up to a machine to decide whether or not to press the button to lunch a missile. That is why all the world powers, International organizations and other actors should incorporate common AI standards, laws and ethics in order to use AI for improving the economical, commercial and social standards of life but not the political, lawful, security and decision-making processes. The national and world politics should be conducted by human beings like it was done so far, because, no matter how smart or sophisticated machine is, AI will always be just that, a machine.

Keywords*: Artificial intelligence, foreign policy, national security, US, EU*

1. Introduction to Artificial Intelligence

Artificial intelligence (AI) is part of all aspects of our lives. It is used in the most sophisticated and the most common aspects of life. For example, in medicine it is used for research and therapy, to find cures or diagnose illnesses. States use AI in policing in order to identify signs of crimes before they are committed. States also use AI for foreign

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policy strategies, they evaluate economic data from other states to use it for their own purposes. Human beings are slow when it comes to speed and analysis, but they must intervene and regulate things in order to avoid unwanted risks and mistakes which can be made by machines[4].

AI consists of mathematical tools, psychology, electronics, information technology and computer science tools, through which a machine learns to think as a human, but with the speed and security of a computer[5]. Therefore, what is AI (artificial intelligence)? There is still no common accepted definition, most definitions focusing on replicating human characteristics, like consciousness, self-awareness, language, the ability to learn, adapt and reason within a computer system. An AI system consists of hardware components (drone or robot) and software components (program running on computers). The ideal AI system is able to combine large amounts of data, recognize complex patterns and draw conclusions, make predictions or actions[6]. But still, AI systems are machines made by humans, they can never be a human being no matter how sophisticated, intelligent or fast it is, they do not have emotions, feelings, they do not feel pain or compassion, they don't have the sense of believing in something or to fear something which makes them a threat to society if they are given the chance of autonomy.

There are three main categories of AI. The first is *artificial restricted intelligence* which is specialized on machines who are able to do a specific task using deep-learning tools. The machine is able to quickly answer factual questions which are difficult to be answered by a human. The second type is *artificial general intelligence*, applied to a human-level AI machine that would be as smart as a human and be able to perform any intellectual task. Such an example is the robots C-3PO and R2-D2 from 'Star Wars'. The third type is *artificial super intelligence*, which is a machine that is smarter than 'Einstein', but in every field[7]. All of this sounds very interesting and appealing, but let's look at the other side of machines. The creation of the death machine, the robotic killing machines and algorithm with lethal force. The top priority of all super powers is updating arms control but the creation of common policies and strategies that deal with such weapons should be a priority as well. This means major powers should agree on common policies and work together for the common interests, protecting against these weapons falling into the hands of terrorists and other actors. This should be accompanied by diplomacy, in order to establish morality that will balance the threat of these weapons[8].

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[4] D. Marcel, J. Daniel, *The Global Debate on the Future of Artificial Intelligence*", in SWPComment No. 23 May 2018, retrieved from: https://www.swp-berlin.org/fileadmin/contents/products/comments/2018C23_dkw_job.pdf.

[5] V.E. Giancarlo, *Artificial Inelegance and inelegance*, in Modern diplomacy, Feb. 22, 2018, retrieved from: https://moderndiplomacy.eu/2018/02/22/artificial-intelligence-intelligence.

[6] S. Justin, *Smart Machines and Smarter Policy: Foreign Investment Regulation, National Security and Technology Transfer in the Age of Artificial Intelligence*, J. Marshall L. Rev. 279 (2018), The John Marshall Law Review vol. 51/Issue 2 Art. 3, 2018, retrieved from: https://repository.jmls.edu/lawreview/vol51/iss2/3.

[7] C. Gonçalo, *The EU and artificial intelligence: A human-centered perspective*, March 15, 2018. Https://doi.org/10.1177/1781685818764821 Retrieved from: https://journals.sagepub.com/doi/full/10.1177/1781685818764821

[8] B. Scott, S. Heumann, P. Lorenz, *Artificial Intelligence and Foreign Policy*, in Stiftung Neue Verantwortung Policy Brief January 2018, retrieved from: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3103961 or https://www.stiftung-nv.de/sites/default/files/ai_foreign_policy.pdf.

2. Artificial Intelligence influences national and world security, ethics, law and the future of international cooperation

After describing what is AI and what it means for the human race, what it can accomplish, especially referring to the positive aspects, it is only natural that it will be used by states and their governments in order to collect information for they to prosper economically or in any other field, and this kind of instrument will be used for the countries own interests and prospects[9].

But, as we all know, the job of foreign ministries in democratic systems are to promote and strengthen democratic institutions that protect social equality, human and civil rights, commerce, governance and security in the national and international community. Although the AI gives opportunities for free expression, civic activity, and social progress, they also open the possibility of deepening existing social discrimination, and other threats as well. Therefore, the challenge for foreign policy will be to promote a positive agenda, despite these risks. The theory about technology change at the global level must be made by institutions operating under political, economic, bureaucratic, and human resources restrictions[10]. It should never be made by machines or countries that promote this idea of the autonomy of the AI.

The impact of the connection technologies on foreign and security relations a couple of years ago was a booming issue, but it took time to be applied by policy makers, since foreign policy and diplomacy in the past was conducted with different tools and expertise. Smartphones, Facebook and Twitter were interesting new gadgets and platforms for communication which were not a global phenomenon. In 2010, Secretary of State Hillary Clinton gave a speech on Internet Freedom and made the issue a priority for the US. Then came Wikileaks, Stuxnet, the Arab Spring, and the digital communication became present everywhere, and all the time, as a factor in social and political movements. The diplomatic community could not manage and operate with this kind of system and information. This was not predicted nor anticipated to take such a move. Today, most capitals have cyber units in their foreign ministries[11]. But still this is not enough, operating with AI systems has to be conducted by trained professionals who will work in specific sectors, and machines should be used only to help resolve certain issues or problems. AI systems should be used with precision, knowledge and ethics, because they are more sophisticated than the communication technology that flooded us couple of years ago. A step by step scenario is the most suitable move that needs to be taken by all political actors to adopt to the fast-changing technologies of today and the same applies for the society.

Furthermore, AI applications bring up issues related to human safety and cyber security. As AI is installed in critical systems, they need to be secured from cyber – attacks, because, AI applications are used in email applications to perform spam filtering, but are also used in applications to detect more serious cyber security threats,

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[9] B. Scott, S. Heumann, P. Lorenz, *Artificial Intelligence and Foreign Policy*, Jan. 2018. Stiftung Neue Verantwortung, retrieved from: https://www.stiftung-nv.de/sites/default/files/ai_foreign_policy.pdf, p. 2.

[10] B. Scott, S. Heumann, P. Lorenz, *Artificial Intelligence and Foreign Policy*, Stiftung Neue Verantwortung Policy Brief January 2018, retrieved from: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3103961 or https://www.stiftung-nv.de/sites/default/files/ai_foreign_policy.pdf.

[11] *Ibidem.*

and other weapon systems[12]. Moreover, AI systems involve judgments and decision-making by machines which opens up concerns regarding ethics, fairness, justice, transparency, and accountability. The risk of discrimination and bias in decisions made by AI systems is higher[13]. The AI challenges regarding safety, privacy, data protection, and ethics needs legal and regulatory policies[14]. Intergovernmental organizations such as the United Nations, G7, and the Organization for Economic Cooperation and Development and Governments believe that AI would benefit from international cooperation because it will contribute even more in research and development. For example, the USA recommended a development on a strategy on international engagement and cooperation for AI. The European Parliament also calls for international harmonization of technical standards and international cooperation in setting regulations, under the UN[15]. Therefore, it is in the interest of democratic systems to work together to promote and invest in AI, but also to protect themselves from outside factors and from AI itself.

The race for AI dominance is intense and necessary for nations to keep the leading role in the global environment. The proper use and implementation of AI can assist a nation in the achievement of information, economic, and military superiority[16]. Governments must invest in developing talents and experts in AI. Understanding the capacities and limitations of artificially intelligent systems should not be the only job of experts. Better education and training on what AI is, and is not, should be available, while pointing out the ethical and policy goals. Furthermore, developing working relationships in the defense sector, between public and private sector is essential and ensuring that intelligent systems can carry critical tasks safely and ethically. In order to develop these practice, policymakers and technologists should understand the ways of regulating artificially intelligent systems which is different from regulating arms or trade flows. Artificial and human intelligence are different, and interfaces between the two must be designed carefully, and reviewed, in order to avoid misunderstandings that could lead to serious consequences[17].

Furthermore, autonomous weapons are an important issue, there is debate about the ethics, morality and legality of the development and use of such weapons. Autonomy will enable the development of new kinds of weaponry, robotic vehicles, new military capability, but we should look at the logistics and ethics of such systems because the society is not ready for such technology. AI will be paired with human analysts to manage tasks. The pairing allows combination of the best qualities of human and machine intelligence: the machine can process big amount of data fast while the human can spot irregularities, check, correct, understand, and respond to the results[18]. But this

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[12] S. Teleanu, *Artificial Intelligence: Policy implications*, in Diplo, 29 Oct. 2016, retrieved from: https://www.diplomacy.edu/blog/artificial-intelligence-policy-implications.

[13] S. Teleanu, *Artificial Intelligence...*, *op. cit.*

[14] *Ibidem.*

[15] *Ibidem.*

[16] E. Garcia, *The Artificial Intelligence Race: U.S. China and Russia*, in Modern Diplomacy, April 19, 2018, retrieved from: https://moderndiplomacy.eu/2018/04/19/the-artificial-intelligence-race-u-s-china-and-russia.

[17] M.L. Cummings, M.H. Roff, K. Cukier, J. Parakilas, H. Bryce *Artificial Intelligence and International Affairs Disruption Anticipated*, in Chatham House Report, retrieved from: https://www.chathamhouse.org/sites/default/files/publications/research/2018-06-14-artificial-intelligence-international-affairs-cummings-roff-cukier-parakilas-bryce.pdf.

[18] *Ibidem.*

only applies if the weapons are used by moral human beings. Also, there are political risks associated with malicious AI use. The technological information is already affecting the political institutions, for example the role of social media in elections, and protests. Historically, politics and instability have been collaborating with technological advances, and technological advances, have changed the security threats and needs. Technological advances can change the balance of power between states, leaders and protesters. Modern militaries and intelligence agencies use the technologies for surveillance and espionage. The technology allows rebel groups and revolutionary movements such as ISIS or Libyan rebels, to get their message or idea out in the world. Also, social media can give power to authoritarian regimes and manipulate with the information[19]. AI will cause and is causing changes in the political security. The widespread use of social media with no restrictions makes it easier for AI systems to manipulate, with the use of social media "bots". For example, during the Syrian Civil War and the 2016 US election bots actively tried to influence public opinion. Even if bots only succeed online, this will still create advantage for political ideologies and groups that thrive in undemocratic and weak states, like authoritarian regimes[20]. The political and security threat of AI is present even now, when the AI systems are not sophisticated enough to be used by either governments or people, just imagine what will happen with the world when they will be used commercially.

3. Artificial intelligence influencing foreign policy and security of the US

Artificial Intelligence has serious implications for national and international security. Due to these implications, the U.S. Department of Defense (DOD) is developing AI applications for military functions. AI research is used in gathering intelligence and analysis, logistics, cyberspace operations, command and control, and for military autonomous vehicles. AI applications were used in Iraq and Syria, with algorithms designed to faster target identification process. The United States should begin to compete for innovative military AI applications and stop the period of stagnation, because China is taking the leading competitor in this field, with its 2017 plan to take the global lead in AI development by 2030. China is focused on using AI to make faster and well-informed decisions, and develop different autonomous military vehicles. Russia is also active in this field, with a primary focus on robotics. AI technology can assist autonomous operations, lead to informed military decision-making, and will increase the speed and scale of military action. But it is also unpredictable, vulnerable to manipulation, and presents a challenge to human-machine interaction[21].

The United States, up until 2015, were the leader in the development and application of AI technologies. The government was committed to invest in research and development (R&D) that has helped AI's growth. In 2015 the United States led the world in R&D expenditures with $497 billion. The Defense Advanced Research Projects Agency (DARPA) announced the creation of the Artificial Intelligence Exploration program, "AI

[19] M. Brundage, A. Shahar, *The malicious use of Artificial Intelligence: Forecasting, Prevention and Mitigation*, Feb. 2018, Humanity Institute of Oxford, retrieved from: https://arxiv.org/ftp/arxiv/papers/1802/1802.07228.pdf, pp. 41-45.

[20] *Ibidem*, pp. 45-46.

[21] S.D. Hoadley, J.N. Lucas, *Artificial Intelligence and National Security*, Apr. 26, 2018, retrieved from: https://fas.org/sgp/crs/natsec/R45178.pdf.

Next", worth $2 billion investment. The program focuses on researching the 'third wave' AI theory and application, a possibility for machines to adapt to changing situations. A loss of American leadership in AI could pose a risk for the use of AI in weapons systems by nation-states which are covered by agreements who respect international laws. Because the authoritarian regimes like Russia and China do not focus on ethical implications of AI. Furthermore, the United States competitiveness is critical to its economic security, as AI is the leading driver of economic growth. AI applications will make the industry more efficient, cut costs, limit the use of natural resources. The United States considers the impact of AI in foreign and economic affairs very important, but it is also important for the American values: the right to privacy, free speech, the rule of law, and respect for intellectual property and etc.[22].

Companies such as Google and IBM are leaders in the development of algorithms and machine-learning. The Department of Defense should use these advances to determine defense applications. Thus, the role of the U.S. government with AI industry cannot be only as a consumer, but as a regulator[23]. If the U.S. government considers AI an instrument of national security, then it requires financial backing. Unfortunately, at the moment, the US invests only partially in this field. But Russia and China seem to be more successful in developing their own versions, not caring for the obstacles of democracy, the rule of law, and the free-market competition[24]. In a nutshell, AI is good for innovation and economic growth, and for society, but the US government position as a regulator is limited because of the system. The general vision is for the government to be able to manage what AI should be used for, collecting data and to further inform policy makers. The private sector should continue to innovate within a risk management regulatory framework set by the government[25].

Therefore, it can be concluded that for the last two years the US wasn't a leader in AI research and technology due to its other interests. It should be careful because as a global power it serves as a protector in many ways for its national but also international security and China and Russia are trying to take this leading role which represents a risk in so many ways, especially security risks. The US should begin investing in this field and progress in order to be able to manage the rules of the game in the international arena.

4. Artificial intelligence influencing foreign policy and security of the EU

On 31st May, 2016, the European Parliament's Committee on Legal Affairs (JURI) published the draft report on Civil Law Rules on Robotics. Compared to the US report, the EU report is shorter and focuses more on robotics than AI, with attention to

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[22] W. Hurd, R. Kelly, *Rise of the Machines. Artificial Intelligence and its going impact on U.S policy*, Sept. 2018, retrieved from: https://oversight.house.gov/wp-content/uploads/2018/09/AI-White-Paper.pdf.

[23] E. Garcia, *The Artificial Intelligence Race: U.S. China and Russia*, April 19, 2018, in Modern Diplomacy, retrieved from: https://moderndiplomacy.eu/2018/04/19/the-artificial-intelligence-race-u-s-china-and-russia.

[24] *Ibidem.*

[25] C. Cath, S. Wachter, B. Mittelstadt, M. Taddeo, L. Floridi, *Artificial Intelligence and the 'Good Society' the US, EU and UK approach*, Doi10.1007/s11948-017-9901-7, 2 Jan 2017, Springer, retrieved from: http://www.bollettinoadapt.it/wp-content/uploads/2017/04/Artificial_Intelligence_and_the_Good_Soc.pdf.

autonomous vehicles, drones, and medical care robots. The understanding of AI in the EU has a different connotation. AI is approached as an integral part of 'smart autonomous robot'. Therefore, AI is thought of as something that allows autonomy in other technological systems. The report discusses a combination of hard and soft laws to guard possible risks. The European industry should be dominated by European standards, and there should be clear rules for the development and deployment of AI and robotics. EU stresses the importance of robots testing in real-life scenarios in order to identify and assess the risks and their development in the experimental phase. Also, the criteria should be uniform for all Member States, whether it is the ethical, soft rules, constraints, or the traditional legal tools of governance[26].

The creation of the Civil Law Rules on Robotics marked the first step towards artificial intelligence in the European Union. A Smart robot is defined as "(the) one which has autonomy through the use of sensors and/or inter-connectivity with the environment, which has at least a minor physical support, which adapts its behavior and actions to the environment and which cannot be defined as having 'life' in the biological sense." Furthermore, the resolution proposes two codes for dealing with ethical issues brought by robots: A Code of Ethical Conduct for Robotics Engineers and a Code for Research Ethics Committees. The first code distinguishes four ethical principles in robotics engineering, 1) beneficence (robots should act in the best interests of humans); 2) non-maleficence (robots should not harm humans); 3) autonomy (human interaction with robots should be voluntary); and 4) justice (the benefits of robotics should be distributed fairly)". Therefore, the attitude to autonomous systems whether robots or something else, and their role in society can have a transformational effect. The legal personality determines what is important for society and allows the decision of whether or not something is valuable and reasonable to possess rights and obligations[27].

Therefore, the EU believes that all of the AI aspects should be covered by laws equally applied to all actors and the human being is the one that is protected from AI systems.

In the area of defense, AI can represent both an opportunity and a danger. A lack of human oversight on AI allows weapon systems to be compromised, and might lead to unplanned actions and behavior that violates international norms, and the conduct of war. Also misuse by non-state actors and proliferation are risks but AI intelligence may improve military decision-making processes by cutting through the cloudiness and friction of the conflict[28].

The EU recognizes the importance of the phenomenon with the signing of a 'Declaration of Cooperation on AI' between 25 European countries in April 2018. Furthermore, the Preparatory Action on Defense Research's (PADR) strategic foresight project plans to include elements of AI in the future. The Capability Development Plan (CDP) also flags the importance of AI. The European Commission has begun to work on AI with a €1.5 billion investment for 2018-2020 under the Horizon 2020, a €500 million

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[26] C. Cath, S. Wachter, B. Mittelstadt, M. Taddeo, L. Floridi, *op. cit.*

[27] M. Karliuk, *The Ethical and Legal Issues of Artificial intelligence*, April 24, 2018, in Modern Diplomacy, retrieved from: https://moderndiplomacy.eu/2018/04/24/the-ethical-and-legal-issues-of-artificial-intelligence.

[28] D. Fiott, G. Lindstrom, *Artificial Intelligence. What implications for EU Security and defense?*, retrieved from: https://www.iss.europa.eu/sites/default/files/EUISSFiles/Brief%2010%20AI.pdf, pp. 1-2.

in start-up firms under the European Fund for Strategic Investments and the formation of a Commission-led European AI Alliance and High-Level Expert Group on AI[29].

The EC refers to AI as "systems that show intelligent behavior by analyzing their environment, and performing various tasks with some degree of autonomy to achieve specific goals." The EC believes that, by 2025, the economic impact of the automation of knowledge, robots and autonomous vehicles could reach up to €12 trillion, annually[30]. Also, the AI should be discussed on international level because with AI being easily tradeable across borders, only global solutions and interactions can help. The G7/G20, United Nations and Organization for Economic Co-operation and Development have begun to address the role of AI, in general and in the military. The EU will continue to encourage discussions on AI and on research and innovation cooperation as well as competitiveness. The EU can make a unique contribution to the worldwide debate on AI based on its values and fundamental rights[31].

To conclude, compared to the US and other states the EU has the most ethical and responsible approach towards AI systems. It believes that only with joint cooperation on the international level the states can be protected from the outside and inside cyber-attacks and threats.

5. Artificial intelligence influencing foreign policy and security of Russia

Russian President Putin said that, whoever is the leader in AI will be the leader in the world. Since 2008, as a result of the Russian-Georgian war, Russia developed a plan to develop autonomous military technology and weapon systems[32]. But the investment and research in AI are done in order to conduct unethical and irrational affairs.

It has been proclaimed that Russia uses cyberattacks to spin narratives, discredit democratic institutions and values, and social discord. This pattern was used in the United States, France, and Germany during 2016-2017 elections. Hacking email accounts of individuals or campaigns, leaking stolen information via a proxy (WikiLeaks), and then deploying disinformation agents (bots, trolls, state-controlled media) to distribute and amplify a politically damaging story. Such cyber-attacks can result in loss of life, destruction of property, or have impact on national and security interests. Western governments, which have been the targets of cyber-driven information war, have not responded in the correct manner[33]. For example, in May

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[29] *Ibidem*, p. 2.

[30] *New EU Strategy on Artificial Intelligence European Public Policy*, in SQUIRE PATTON, retrieved from: https://www.squirepattonboggs.com/~/media/files/insights/publications/2018/04/new-eu-strategy-on-artificial-intelligence-european-public-policy/new-eu-strategy-on-ai.pdf.

[31] Communication from the Commission to the European parliament, the European Council, The Council, the European Economic and Social Committee and the Committee of the Regions, Artificial Intelligence for Europe, Brussels 25.4.2018, retrieved from: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018DC0237&rid=1, p. 18.

[32] E. Garcia, *The Artificial Intelligence Race: U.S. China and Russia*, April 19, 2018, in Modern Diplomacy, retrieved from: https://moderndiplomacy.eu/2018/04/19/the-artificial-intelligence-race-u-s-china-and-russia.

[33] A. Polyakova, B.P. Spancer, *The Future of political warfare: Russia, The West, and the coming age of Global Digital Competition*, March 2018, retrieved from: https://www.brookings.edu/wp-content/uploads/2018/03/the-future-of-political-warfare.pdf.

2017, Wanna Cry ransomware attack crippled hospitals in Western Europe in order to exploit a vulnerability in Microsoft Windows. The exploit was originally identified by the NSA and was leaked. The Shadow Brokers, a hacker group, published the information from the National Security Agency (NSA). The United States identified North Korea as responsible for the Wanna Cry attack in the fall of 2017. Wanna Cry presents a clear threat aim of malicious actors that hack Western intelligence agencies' and post them publicly (to disrespect, discredit, threaten and shame the system)[34]. This is just one example of many that are used by different actors to threaten the national or international security of states. Imagine what can be done with more sophisticated AI systems if fallen into the hands of malicious actors.

Russia still follows China and the US in AI. The military modernization program they started in 2008 is expanding. The Russian Military Industrial Committee aims of making 30 percent of military equipment robotic by 2025. With a smaller tech industry compared to China or the US, Russia needs to set and achieve these goals to stay competitive in the arena. Russia is placing AI and machine learning as part of its propaganda, intelligence, social-media, and hacking campaigns. The Russian government is far more centralized and holds more power over the ways that AI will develop and it will be directed toward military and intelligence applications[35].

To conclude, Russia, compared to other states, still does not have the leading role, but is investing more and more to stay competitive in the AI sector. The use of AI systems is conducted in an opposite manner than that of the EU and the US. Russia is looking to progress in order to satisfy its own interests and whether or not this will change it is up to the future.

6. Artificial intelligence influencing foreign policy and security of China

Chinese policy support for AI begun in 2006, when the State Council released the National Medium and Long-Term Plan for the Development of Science and Technology (2006-2020). This strategic plan laid the foundations for future AI R&D by establishing smart sensors, smart robots, and virtual reality technologies. In April 2012, the Ministry of Science and Technology (MOST), China's primary agency responsible for science and technology development, released a Five-Year Plan for Intelligent Smart Manufacturing. Industrial robots and the Industrial Internet of Things are listed as key priorities[36].

China wants to try to detach from the emotions of humans with the help of AI. But what could possibly go wrong with this scenario. China is creating several prototypes of diplomatic systems using artificial intelligence and an early-stage machine, which is already used by the Ministry of Foreign Affairs[37]. The fact that AI could be helping

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[34] *Ibidem*, pp. 14-15.

[35] K. Lant, *China, Russia and the US are in an Artificial Intelligence Arms Race*, Sept. 12, 2017, retrieved from: https://futurism.com/china-russia-and-the-us-are-in-an-artificial-intelligence-arms-race.

[36] H. Yujia, *How China is preparing for an AI-Powered Future*, Wilson Briefs, June 2017, retrieved from: https://www.wilsoncenter.org/sites/default/files/how_china_is_preparing_for_ai_powered_future.pdf.

[37] A. Kesel, *China Explores Using Artificial Intelligence to Help Shape Its Foreign Policy*, in Activist Post, July 31, 2018, retrieved from: https://www.activistpost.com/2018/07/china-explores-using-artificial-intelligence-help-shape-foreign-policy.html

leaders and governments decide whether or not to go to war or conduct other policy decisions is worrying. The use of AI would not only implant decisions without human emotion into these officials' but it would eventually shift politics, allowing algorithms and systems to decide strategic decisions. This is exactly what China wants for its next generation of these machines. The machines have access to numerous Chinese government databases, artificial intelligence technology, deep learning and a neural network for risk assessment or prediction of events such as terrorist attacks[38]. Therefore, the machines can operate and conduct serious analysis and finally decide on certain managing scenarios. China has advanced way further than any of the other countries in the AI system and it is disturbing because it is giving to much freedom to the machines. The legal and ethical aspects are of no concern for them.

China, understands the global impact of AI and has dedicated research, money, and education to a comprehensive state plan. China's State Council published a document in July of 2017 entitled "New Generation Artificial Intelligence Development Plan". The plan maps out the nation's development of AI, including goals reaching all the way to 2030. AI has become the focus of international competition, and the world's most developed countries are using the AI as a major strategy to enhance national competitiveness and protect national security[39].

Placing diplomacy and foreign affairs in the hands of AI, China has moved ahead. Bureaucrats, politicians, researchers use AI as an assistant in their daily decision-making processes. The AI has been trained on data that relates to international politics, domestic politics and many other issues. The AI system thus trained can come up with policy suggestions and recommendations in a matter of seconds. There are also reports that there are many prototypes that are being built inside the defense industry of China. All Chinese ministries have vowed to actively adapt and explore the use of AI[40]. Compared to the EU or the US, China is taking the lead in the AI system.

7. Conclusion

To conclude, it is inevitable that the Artificial Intelligence will become part of our daily lives as today is the communication technology. But this technology should be used with precision, with great caution and should not be left autonomous to decide on issues which are crucial for the human being. The states, international organizations and other actors should work together on common policies that will regulate the use and presence of AI. AI systems have many positive characteristics but the negative is overshadowing them especially if used by the wrong people or actors.

US should invest more in the AI sector and maintain to be the leader with cooperation and help from its allies. The EU is on the right path and it is the only one who is cautious and is aware of the supposed threats of AI. Therefore, it has developed the right policies and regulations but it should strive to push them to be acknowledged and accepted by the international community, because this is a global matter not only a national (between member states). Russia falls behind, but it is striving to be with the rest on power. China is the leader but I believe that its strategy for autonomous AI is worrying and will pose a threat to national and international security.

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[38] *Ibidem.*

[39] E. Garcia, *op. cit.*

[40] A. Katte, *How AI is running China foreign policy*, Jul. 31, 2018, retrieved from: https://www.analyticsindiamag.com/how-ai-is-running-chinas-foreign-policy.

AI systems are part of our world and they are not a science-fiction movie any more, but if not handled with caution, the human race faces a real threat.

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Artificial Intelligence and Human Rights. A Challenging Approach on the Issue of Equality

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Abstract

Artificial Intelligence itself, its increased development and expanded use in all dimensions of social life, tends to rise very complex questions on the interactions between humans and AI systems. AI, with its algorithms, seems to provide models of perfect conduct aiming perfect objectivity. But is this really possible or are we to fall in a hidden trap, ready to lose one of our most important human rights – the right to equality and non-discrimination. Recent research had demonstrated that, despite careful programming, AI has generated situations of discriminatory labelling of certain social groups, in total opposition with our standards and goals. Can we prevent such results or the model of conduct imposed for AI is eventually going to fail?

Keywords: *Artificial Intelligence (AI), human rights, non-discrimination, right to equality, bias, risk assessment*

1. Artificial Intelligence (AI) – a new actor in the area of social relations

AI is a new actor in the area of social relations, having all the answers, simplifying decision making process for humans, due to its perfect mathematic algorithms. By "intelligence", Risse means "the ability to make predictions about the future and solve complex tasks (...) ability demonstrated by machines, in smart phones, tablets, laptops, drones, self-operating vehicles or robots that might take on tasks ranging from household support, companionship of sorts, even sexual companionship, to policing and warfare"[1].

Artificial intelligence systems aim to improve and are constantly changing the ways of action in the activity of companies and public authorities all around the world, and leading to a potential interference with human rights. As Andersen pointed out, "data protection laws and safeguards for accountability and transparency, may be able to mitigate some of the worst uses known today, but more work is necessary to safeguard human rights as AI technology gets more sophisticated and expands into other areas[2].

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[1] M. Risse, *Human rights and Artificial Intelligence. An Urgently Needed Agenda*, Carr Center for Human Rights Policy, USA, 2018, p. 2, https://carrcenter.hks.harvard.edu/files/cchr/files/human rightsai_designed.pdf, accessed on 10.12.2018.

[2] L. Andersen, 2018, *Human rights in the Age of Artificial Intelligence*, Access Now, https://www.accessnow.org/cms/assets/uploads/2018/11/AI-and-Human-Rights.pdf, p. 37.

But under the denomination of "Artificial Intelligence" (AI), there is a sum of systems, devices, technologies and algorithms. In fact, the term "Artificial Intelligence" was called "umbrella term"[3] under which AI systems may be classified into two categories[4]: *a) knowledge-based systems* and *b) systems with the capacity of continuously improving the decision-making performance.*

a) The knowledge-based systems include "expert systems" which use formal logic and coded rules to engage in reasoning. E.g. commercial tax preparation software, healthcare diagnostic decision support algorithms. These kind of AI systems are reasoning optimal decisions based on defined rules within a specific domain and usually cannot learn or automatically leverage the information they have accumulated over time to improve the quality of their decision-making process.

b) The systems with the capacity of continuously improving the decision-making performance use statistical learning in order to achieve the so-called "machine learning" and "deep learning" e.g. self-driving vehicles, facial recognition systems used by police forces, automate translation systems, algorithms that tell you what to watch next on video streaming services. This category of AI systems has been criticized as not being reliable at the individual level: "For example, deep learning computer vision systems can classify an image almost as accurately as a human; however, they will occasionally make mistakes that no human would make – such as mistaking a photo of a turtle for a gun"[5]. AI in the form of "neural networks" are increasingly used in technologies like self-driving cars, in order to be able to see and recognize objects. Such systems could be used to identify explosives in public spaces security lines, but, as studies have showed, they are making mistakes. A research team has showed that they were not only able to fool a neural network into thinking that a gun was another object, but they could actually determine the AI system to classify a physical object as anything they wanted. The research team has slightly changed the object's texture, so a bomb would get classified as a tomato, or could potentially even render an object entirely invisible for AI. The consequences in using such a system would be disastrous[6].

Another doctrinal classification divides AI systems into four categories[7] more comprehensive for the "AI non-educated" public:

1) systems that think like humans (e.g. cognitive architectures and neural networks);

2) systems that act like humans (e.g. pass the Turing test, knowledge representation, automated reasoning, and learning);

3) systems that think rationally (e.g. logic solvers, inference, optimization);

4) systems that act rationally (e.g. intelligent software agents and embodied robots that achieve goals via perception, planning, reasoning, learning, communicating, decision-making, and acting).

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[3] F. Rasso, H. Hilligoss, V. Krishnamurthy, C. Bavitz, L. Kim, *Artificial Intelligence & Human Rights. Opportunities and Risks*, Berkman Klein Center for Internet and Society at Harvard University, 2018, p. 10, https://cyber.harvard.edu/sites/default/files/2018-09/2018-09_AIHumanRightsSmall.pdf, acces sed on 12.12.2018.

[4] *Idem*, pp. 10-11.

[5] A. Conner-Simons, *Fooling Neural Networks w/3D-Printed Objects*, MIT Computer Science, https://www.csail.mit.edu/news/fooling-neural-networks-w3d-printed-objects, accessed on 12.12.2018.

[6] *Idem*.

[7] S.J. Russell, P. Norvig, *Artificial Intelligence: A Modern Approach*, Prentice Hall Series in Artificial Intelligence, Englewood Cliffs, N.J Prentice Hall, 1995, pp. 31-53. https://www.cin.ufpe.br/~tfl2/artificial-intelligence-modern-approach.9780131038059.25368.pdf, accessed on 2.12.2018.

2. Human rights and AI – are there any perils?

As reliance on artificial agents continues to grow, what are the consequences and risks of such an "addiction"? A better understanding of attitudes toward and interactions with algorithms is essential, due to "the aura of objectivity and infallibility today's culture ascribes to algorithms", as Osoba and Welser observed[8].

AI is widely used in the business sector and, because of that, the risks of its interfering with human rights was probably observed in the first place, certain counter-actions being triggered by the parties involved.

United Nations Guiding Principles on Business and Human Rights adopted by United Nations in 2011[9] is an international document seeking to provide an efficient risk management for enterprises involved in business relations from the point of view of interactions between human rights and business. AI is widely used by business enterprises with important risks for specific human rights and that is why we consider useful to present some of the guiding principles contained by this important document, which has not the power of law, but sets useful standards in order to safeguard human rights in the business sector.

Business enterprises may be involved with adverse human rights impacts either through their own activities or as a result of their business relationships with other parties. According to Principle 13, the responsibility to respect human rights requires that business enterprises:

a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;

b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.

According to Principle 17, human rights due diligence[10]:

a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;

b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;

c) Should be ongoing, recognizing that the human rights risks may change over time, as the business enterprise's operations and operating context evolve.

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[8] O. Osoba, W. Welser IV, *An Intelligence in Our Image. The Risks of Bias and Errors in Artificial intelligence*, 2017 RAND Corporation, p. iii, https://www.rand.org/content/dam/rand/pubs/research_reports/RR1700/RR1744/RAND_RR1744.pdf, accessed on 10.12.2018.

[9] The Guiding Principles on Business and Human Rights seek to provide an authoritative global standard for preventing and addressing the risk of adverse human rights impacts linked to business activity. Full text in several languages available at www.ochr.org; English version available at https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf, accessed 19.12.2018.

[10] Principle 17 of the Guiding Principles on Business and Human Rights.

Human rights risks are understood to be the business enterprise's potential adverse human rights impacts. Potential impacts should be addressed through prevention or mitigation, while actual impacts – those that have already occurred – should be a subject for remediation in accordance to Principle 22 of UN United Nations Guiding Principles on Business and Human Rights.

Another sector of increasingly extended use of AI is the criminal justice system. The results of using AI in this field could also lead to dramatic breaches of human rights. The system of rights and guarantees for defendants and convicts could be easily eluded by the so-called risk-assessment tools which are in fact AI systems used to ease the decision-making process for humans in different phases of a case: pre-arrest phase, conviction phase etc. Risk assessments tools are usually used in different legal systems (U.S., Canada, and U.K.) to inform decisions about pre-trial detention, sentencing, and parole, due to their positive impact on the rights of individuals accused and convicted for crimes. Nevertheless, flaws or unknown limitations in the operation of such systems may produce harmful effects on the rights of indicted or convicted persons. In recent years, the use of algorithmic risk assessment tools in the criminal justice systems tends to spread and to be over-used. "All such tools automate the analysis of whatever data has been inputted into the system. Most of these tools still rely on manually-inputted data from questionnaires similar to those that were part and parcel of the last generation of risk-assessment tools, while newer tools are fully automated and rely on information that already exists in various government databases"[11].

As AI systems constantly developed, they needed more sophisticated data, so statisticians began to consider both static factors, such as a defendant's age and gender, as well as dynamic factors, such as a defendant's skill set or psychological profile[12].

Several risk assessment inventories are currently in use, one of the most used being the Level of Service Inventory-Revised (LSI-R). LSI-R is an assessment instrument originally developed in Canada through collaboration between academics, correctional psychologists and probation officers, being widely used in probation and custodial settings in Canada. It is in use also in other countries such as Scotland, and in about 20 probation services in England, Wales and the Channel Islands. It is the product of about 20 years' development, and a considerable amount of research has been carried out on its psychometric properties and its capacity to predict reconviction and various other correctional-relevant outcomes in North America[13].

Risk assessment tools in the U.S. criminal justice system have been critiqued as inherently unfair due to the disproportionate targeting of minority individuals and communities by the police. This, in turn, raises the risk that such tools will miscalculate the risk of recidivism for individuals from minority versus majority communities. This may also have deleterious effects on the rehabilitation of offenders from minority communities by impacting their access to cultural programming and their opportunities for parole[14].

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[11] F. Rasso *et al.*, *op. cit.*, p. 22.

[12] T. Mathiesen, *Selective Incapacitation Revisited*, Law and Human Behavior, issue 22, no. 4 (1998), pp. 455-469.

[13] P. Raynor, J. Kynch, C. Roberts, S. Merrington, *Risk and need assessment in probation services: an evaluation*, Home Office Research Study 211, 2000, p. viii, https://www.researchgate.net/publication/267419138_Risk_and_Need_Assessment_in_Probation_Services_An_Evaluation/download, accessed on 12.12.2018.

[14] K.C. Land, *Automating Recidivism Risk Assessment: Should We Stay or Should We Go?*, Criminology & Public Policy issue 16, no. 1 (February 2017), pp. 231-233, https://doi.org/10.1111/1745-9133.12271, accessed on 12.12.2018.

Another risk assessment tool is COMPAS. COMPAS is one of the fourth-generation risk assessment instruments currently being utilized in US. COMPAS can be used to predict a variety of outcomes, and provides separate estimates for violence, recidivism, failure to appear, and community failure. Also similar to other fourth-generation tools, the COMPAS is both guided by theory (e.g. social learning theory, low self-control theory, strain theory, and social control theory) and provides gender specific calibrations[15].

But studies have shown that COMPAS has perpetuated racial bias, being used by U.S. state courts in making bail and sentencing decisions. The results of the study had shown how African-American offenders were labelled as "high-risk" at twice the rate of Caucasians[16].

Risk assessment tools as AI systems were qualified as unpredictable and opaque, an increasing awareness raising that specific human rights are to be particularly affected[17].

The use of algorithms may lead to rights violations or may undermine the effective enjoyment of these human rights in the following cases:

1. Fair trial and due process

Automated processing techniques and algorithms in crime prevention and the criminal justice system may affect the presumption of innocence and other procedural rights of the defendant. In the present high-risk society, following the terrorist attacks that took place in Europe and U.S., online social media platforms were and are used to identify potential terrorists and to become efficient in the fight against terrorism[18]. They are also used to identify accounts that generate extremist content. From this point of view, we must agree that there are consequences for the freedom of expression, but also for fair trial standards – art. 6 of the ECHR[19] –, notably the presumption of innocence, the right to be informed promptly of the cause and nature of an accusation, the right to a

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[15] T. Blomberg, W. Bales, K. Mann, R. Meldrum, J. Nedelec, *Validation of the COMPAS risk assessement clasification instrument*, 2010, Center for Criminology and Public Policy Research, Florida, p. 8, http://criminology.fsu.edu/wp-content/uploads/Validation-of-the-COMPAS-Risk-Assessment-Classification-Instrument.pdf, accessed on 10.12.2018.

[16] J. Angwin, J. Larson, S. Mattu, L. Kirchner, *Machine Bias. There's software used across the country to predict future criminals. And it's biased against blacks*, ProPublica, 23 May 2016, Study available on https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing, accessed on 12.12.2018.

[17] Council of Europe, *Algorithms and Human Rights. Study on the human rights dimensions of automated data processing techniques and possible regulatory implications*, DGI (2017)12, Prepared by the Committee of Experts on Internet Intermediaries, (MSI-NET), p. 10, https://rm.coe.int/algorithms-and-human-rights-en-rev/16807956b5, accessed on 15.12.2018.

[18] Lindsey Andersen, 2018, *Human rights in the Age of Artificial Intelligence*, Access Now, p.22, https://www.accessnow.org/cms/assets/uploads/2018/11/AI-and-Human-Rights.pdf, accessed on 12.12.2018.

[19] Article 6 par.1 and 2 of the ECHR – Right to a fair trial

1. In the determination of his rights and obligations, or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

fair hearing and the right to defend oneself in person. Risk assessment tools may contribute, as shown, to prejudicial and discriminatory decision-making.

2. Privacy and data protection

Due to the fact that all risk assessment tools are using algorithms in order to collect and sort all sorts of data and images, serious questions about breaching right to respect private and family life provided by art. 8 of the ECHR[20], including the right to data protection. "Algorithms are used in online tracking and profiling of individuals whose browsing patterns are recorded by *cookies*. Moreover, behavioural data is processed from smart devices, such as location and other sensor data through apps on mobile devices, raising increasing challenges for privacy and data protection". Scholars emphasized that ML ("machine learning") models were developed, that can accurately estimate a person's age, gender, occupation, and marital status just from their cell phone location data. They were also able to predict a person's future location from past history and the location data of friends[21].

At the same time, everyone could notice that AI is enabling more invasive surveillance tools. The negative impact of AI-powered surveillance would be felt most acutely by the marginalized populations who are disproportionately targeted by security forces. Also, because permanent monitoring of the general population is neither necessary, nor proportionate to the goal of public safety or crime prevention, this will lead to the breach of the right to privacy with certainty[22].

3. Non-discrimination

The right to enjoy all human rights and fundamental freedoms without discrimination and in full equality is one of the most important rights in the democratic countries.

In a study prepared for the Council of Europe on algorithms and human rights, it was emphasized that "search algorithms and search engines by definition do not treat all information equally. While processes used to select and index information may be applied consistently, the search results will typically be ranked according to perceived relevance. Accordingly, different items of information will receive different degrees of visibility depending on which factors are taken into account by the ranking algorithm"[23].

A biased algorithm that systematically discriminates one group in society, for example based on their age, sexual orientation, race, gender or socio-economic standing, may raise considerable concerns not just in terms of the access to rights of the individual

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[20] Article 8 of the ECHR – Right to respect for private and family life:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[21] S.M. Bellovin, R.M. Hutchins, T. Jebara, S. Zimmeck, *When enough is enough: Location tracking, mosaic theory, and machine learning,* New York University Journal of Law and Liberty, 8(2), (2014) 555 – 6, https://digitalcommons.law.umaryland.edu/fac_pubs/1375, accessed on 10.12.2018.

[22] L. Andersen, *op. cit.*, p. 21.

[23] Council of Europe, *Algorithms and Human Rights. Study on the human rights dimensions of automated data processing techniques and possible regulatory implications*, DGI (2017)12, Prepared by the Committee of Experts on Internet Intermediaries, (MSI-NET), p. 26, https://rm.coe.int/algorithms-and-human-rights-en-rev/16807956b5, accessed on 15.12.2018.

end-users or customers affected by these decisions, but also for society as a whole. Some authors have even suggested that online services which use personalised rating systems are inherently likely to lead to discriminatory practices[24].

3. The question of equality

In order to develop ML process, the computers must be "fed" with huge amount of data consisting in texts, images or recordings of sounds (e.g. human voice) – and then adding a classifier to this data (e.g. The computer is shown an image of a woman working in an office and then labelling this as woman office worker. In time, the computer will learn to recognise similar images and be able to associate these images with women working in an office and eventually make predictions for things such as job candidate screening or making loan approvals[25]).

The platform LinkedIn was reported because highly-paid jobs were not displayed as frequently for searches by women as they were for men, because of the way its algorithms were written. And the algorithms were written that way because, in the beginning, man users of LinkedIn were predominantly looking for the high-paying jobs, so the ML ended up proposing these jobs to men – thus discriminating women and reinforcing the bias against them[26].

Also, automated testing and analysis of Google's advertising system reveals male job seekers are shown far more adverts for high-paying executive jobs[27].

Another research has showed that two prominent research-image collections – including one supported by Microsoft and Facebook – display a predictable gender bias in their depiction of activities such as cooking and sports. Images of shopping and washing are linked to women, for example, while coaching and shooting are tied to men[28]. If a photo set generally associates women with housework, software trained by studying those photos and their labels create an even stronger association with it[29].

The criminal justice system, increasingly relying on risk assessment tools as showed before, makes no exception on the discrimination issue and the breach of equality between citizens, being qualified as "in crisis"[30]. Studies have revealed

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[24] R. Alex, S. Luke, *Algorithmic Labor and Information Asymmetries: A Case Study of Uber's Drivers,* July 30, 2016, International Journal of Communication, 10, p. 3777. Available at https://ssrn.com/abstract=2686227, accessed on 10.12.2018.

[25] B. Büchel, *Artificial intelligence could reinforce society's gender equality problems*, March 1st, 2018, The Conversation UK, http://theconversation.com/artificial-intelligence-could-reinforce-societys-gender-equality-problems-92631, accessed on 12.12.2018.

[26] H. Reese, *Bias in machine learning, and how to stop it*, TechRepublic 18 November 2016, https://www.techrepublic.com/article/bias-in-machine-learning-and-how-to-stop-it/, accessed on 10.12.2018.

[27] S. Gibbs, *Women less likely to be shown ads for high-paid jobs on Google, study shows*, 8 July 2015, The Guardian, https://www.theguardian.com/technology/2015/jul/08/women-less-likely-ads-high-paid-jobs-google-study, accessed on 12.12.2018.

[28] T. Simonite, *Machines Taught by Photos Learn a Sexist View of Women*, Wired, 21.08.2017, https://www.wired.com/story/machines-taught-by-photos-learn-a-sexist-view-of-women/, accessed on 10.12.2018.

[29] B. Büchel, *op. cit.*

[30] V. Southerland, *With AI and Criminal Justice, the Devil is in the Data*, ACLU, 9 April 2018, https://www.aclu.org/issues/privacy-technology/surveillance-technologies/ai-and-criminal-justice-devil-data, accessed on 15.12.2018.

"persistent racial disparities at every stage, a different kind of justice for the haves and the have nots, and a system that neither rehabilitates individuals nor ensures public safety"[31].

When person is arrested in U.S., for example, he or she will be usually subjected to a pre-trial risk assessment tool in order to help the judge decide whether to incarcerate that person pending trial or to release that person. Some U.S. states have used these pre-trial AI tools at the sentencing and parole decision stage, in an attempt to predict the likelihood that someone will commit a new offense if released from prison[32].

But the negative consequences of this use are serious, because of the biases they reinforce and perpetuate. As pointed out by Southerland, "all risk assessment tools generally rely on historical, actuarial data". If the data is not accurate or is obtained due to some illegal or exaggerate conduct (e.g. policemen in a city are usually arresting people from a certain community in a period of time. If that data is fed to the computer, the predictive model will suggest that people from that community are generally more likely to commit crimes so the results of the predictive test will perpetuate the discriminating pattern). If the algorithms are not "cleaned" of the waste (discriminatory patterns), the use of such AI tools will produce more harm than benefit for the justice system.

A study revealed that Black defendants were more likely to be wrongly labelled high risk than white defendants, drawing attention on the perils of AI "scoring"[33]. "In Arizona, Colorado, Delaware, Kentucky, Louisiana, Oklahoma, Virginia, Washington and Wisconsin, the results of such assessments are given to judges during criminal sentencing. Rating a defendant's risk of future crime is often done in conjunction with an evaluation of a defendant's rehabilitation needs. The Justice Department's National Institute of Corrections now encourages the use of such combined assessments at every stage of the criminal justice process"[34].

The study revealed that only 20 percent of the people predicted to commit violent crimes actually reiterated their criminal conduct. Also, in forecasting who would re-offend, the algorithm made mistakes with African-American and white defendants at roughly the same rate but in very different ways. The formula was particularly likely to falsely flag black defendants as future criminals, wrongly labelling them this way at almost twice the rate as white defendants. White defendants were mislabelled as low risk more often than black defendants[35]. As a matter of fact, 23.5% of white people were labelled higher risk, but didn't re-offend in opposition with 44.9% African-American. At the same time, 47.7% of white defendants were mislabelled as lower risk, yet DID re-offend, while 28.0% African-American labelled lower risk actually reiterated their criminal conduct[36].

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[31] *Idem.*

[32] *Idem*.

[33] J. Angwin, J. Larson, S. Mattu, L. Kirchner, *Machine Bias. There's software used across the country to predict future criminals. And it's biased against blacks*, ProPublica, 23 May 2016, Study available on https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing, accessed on 12.12.2018.

[34] *Idem*.

[35] J. Angwin *et al.*, *op. cit.*

[36] *Idem*.

4. What is to be done to preserve the human rights in their everyday confrontation with AI?

In order to determine AI to ensure equality between citizens, the first common-sense suggestions would be[37]:

a) Diverse groups and viewpoints must be represented in all stages of AI development.

b) Data will almost always be skewed, so methods must be developed to detect and correct for bias.

c) Standardization of the human assumptions or rulesets implicit in any AI model is a good start to developing best practices.

Scholars have also proposed other general policy approaches that could reduce risks of AI affecting human rights[38]:

a) Creating a comprehensive data protection legislation which can anticipate and mitigate many human rights risks posed by AI.

b) Imposing high standards for the Government use of AI, including open procurement standards, human rights impact assessments, full transparency, and explainability and accountability processes.

c) Establishing internal ethics policies by the Companies and develop transparency, explainability, and accountability processes.

d) Encouraging research conducted into the potential human rights harms of AI systems and make investments in creating structures to respond to these risks.

The adoption of Toronto Declaration[39] is also an important step in drawing attention on the issue of human rights posed by AI. The act was adopted by a coalition of human rights and technology groups in May 2018 and establishes machine learning standards, calling on both governments and tech companies to ensure that algorithms respect basic principles of equality and non-discrimination. The Toronto declaration focuses on the obligation to prevent machine learning systems from discriminating, and in some cases violating, existing human rights law. The declaration was announced as part of an annual gathering of digital and human rights groups.

The Toronto Declaration uses the concept of "human rights due diligence" and proposes three core steps to be followed by private sector[40]:

1. Identifying potentially adverse outcomes for human rights. Private-sector actors should assess risks an AI system may cause or contribute to human rights violations. In doing this, actors must: identify both direct and indirect harm as well as emotional,

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[37] S. Venkatachalam, *AI and Equality: Let's Get It Right This Time*, Forbes Tchnology Council, 28 July 2017, https://www.forbes.com/sites/forbestechcouncil/2017/07/28/ai-and-equality-lets-get-it-right-this-time/#5c17d8c34de8, accessed on 10.12.2018.

[38] L. Andersen, *Human rights in the Age of Artificial Intelligence*, 2018, Access Now, p. 30, https://www.accessnow.org/cms/assets/uploads/2018/11/AI-and-Human-Rights.pdf, accessed 10.12.2018.

[39] Full text of Toronto Declaration, available at https://www.accessnow.org/cms/assets/uploads/2018/08/The-Toronto-Declaration_ENG_08-2018.pdf, accessed 12.12.2018.

[40] The statement calls on governments and companies to ensure that machine learning applications respect the principles of equality and non-discrimination. The document articulates the human rights norms that the public and private sector should meet to ensure that algorithms used in a wide array of fields – from policing and criminal justice to employment and education – are applied equally and fairly, and that those who believe their rights have been violated have a meaningful avenue to redress.

social, environmental, or other non-financial harm; consult with relevant stakeholders in an inclusive manner, particularly any affected groups, human rights organizations, and independent human rights and AI experts; if the system is intended for use by a government entity, both the public and private actors should conduct an assessment.

2. Taking effective action to prevent and mitigate the harms, as well as track the responses. After identifying human rights risks, private-sector actors must mitigate risks and track them over time.

3. Being transparent about efforts to identify, prevent, and mitigate the harms in AI systems. Transparency to all individuals and groups impacted as well as other relevant stakeholders is a key part of human rights due diligence, and involves communication. In practice, this means that private-sector actors must:

Although states have the primary duty to provide access to formal remedy in the case of human rights violations[41], in order to establish appropriate mechanisms for accountability and remedy, private-sector actors should take additional action to ensure access to meaningful, effective non-judicial remedy and redress including:

• Internal responsibility for development and implementation of an AI system.

• Commitment by third parties developing AI systems for third parties to clearly delineating responsibility and accountability between vendor and client, including the vendor's obligation to ensure proper training of the risks of the system as well as to mitigate the risk of function creep and misuse of an AI system.

• Creation of clear, transparent processes by which an individual can directly submit complaints and seek redress for human rights harms in a timely manner.

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Concept, Criminal Legal Aspects of the Artificial Intelligence and Its Role in Crime Control

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Abstract

In an effort to define the term "artificial intelligence" in a proper way, it is necessary to consider a series of philosophical, sociological, political, psychological, and legal determinations of the term. The legal norming and research of still insufficiently investigated and complex issues requires a starting point based on clearly and precisely defined relevant terms. Hence the conceptual definition of "artificial intelligence" as a complex notion was given, and some dominant conceptual approaches in the understanding of the relevant phenomenon were also considered. The main conclusion of the paper refers to the fact that, inevitably, determinant not only of the human behavior, but also for human being as a person, undoubtedly, besides intelligence, are also identity, experience, integrity, attitudes, morale, creativity, motivation, emotions, habits, obsessions etc. All those characteristics of a human being are not programmable and predictable, according to the current state of science. In regard to that, it can be concluded that artificial intelligence is only a partial humanization of robots and machines, in terms of those characteristics of a human that can be more clearly determined and predicted using inductive and deductive methods, which are mostly based on a rational basis. The issue of legal subjectivity of artificial intelligence units – robots/machines/software – was considered as well. Also a special emphasis is placed on the ability of artificial intelligence units to be subjects to criminal liability. Finally, the role of "intelligent" technology in crime control was also analyzed.

Keywords: *artificial intelligence, robot, machine, legal subjectivity, criminal liability, crime control*

1. Introduction

Is artificial intelligence possible? At the very beginning of the paper, it should be made a brief overview of this question that was posed even in the seventeenth century, by René Descartes[3]. At the time when the famous French philosopher was writing, there were not any of the technological components of the modernity in the form in which we know them

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[3] L. Solum, *Legal Personhood for Artificial Intelligences*, 70N.C. L. Rev.1231. 1231-1287, (1992), p. 1234.

today, but the "technological boom" was leading to the so-called "Industrial Revolution" which we still experience at present times. This is why Descartes, while studying the methods of conclusions and seeking the truth in (of) science, problematized the question of the ability of machines to think and decide exactly like a human being. Considering the issue in question from a hypothetical perspective that proved to be right over the time, he concludes that the machines could indeed be constructed likewise human beings, in the way that it can use words, give answers to certain questions if we "click" on the required button etc. However, he furthermore states that machines will never be able to answer on every question or respond to a situation that can affect them[4], which is the characteristic of every human being, regardless of the quality of the response or the adequacy of the reaction to the concrete situation. This conclusion still remains at the center of discussions about artificial intelligence[5].

The conceptualization of artificial intelligence in a wider sociological context is imposed as the first step in a cognitive process that should lead to a valid legal definition. Nevertheless, all the difficulties, when it comes to the legal defining of social phenomena, have been noticed even in the Ancient Rome, thought embodied in the well-known sentence *Omnis definitio in iure periculosa est.* Having in mind that one of the tasks of this paper is to examine the role of artificial intelligence in crime control, one should bear in mind that the mentioned definition problems are especially related to phenomena such as crime, which, as some criminologists state, rarely affect other emotional states and emotions in the way to influence a public opinion on every issue in the sphere of criminal policy[6]. With taking into consideration that "artificial intelligence" is still insufficiently explored from the social aspects point of view, it is clear how complex and important is to offer certain outlines of the notion that becomes more and more legally relevant.

As one European Union document states: "artificial intelligence has already become part of our lives – this is no longer just a scientific fiction"[7]. The increasing role of artificial intelligence in human everyday life is therefore an important practical and conceptual challenge for the entire legal system. Technological innovations must be taken into account: in time, they will change everyday life and become a *conditio sine qua non* to the modern way of life. The development of artificial intelligence was originally focused on cosmic technologies[8], but after the expansion of the massive application of digitalization in society, the artificial intelligence has been commercialized and expanded into almost all fields of social life. As a practical result of that process, especially in developed countries, one could notice widespread use of autonomous vehicles (so-called *Unmanned vehicles*), robots – surgeons, algorithms used in trade etc.[9].

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[4] M. Wilson, *The essential Descartes*, New York: New American library, 1969, p. 138.

[5] L. Solum, *Legal Personhood for Artificial Intelligences*, 70N.C. L. Rev.1231. 1231-1287, (1992), p. 1235.

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[9] G. Hallevy, *When Robots Kill: Artificial Intelligence under criminal Law*, Northeastern Univerity Press of New England, 2013, p. 171.

With the ubiquity of the high technology it also of great significance to note a kind of technological revolution which implies partial discontinuity with the past, uncertainty for the future, as well as many new possibilities[10]. Due to those consequences, the need for legislative intervention is naturally present, taking into account all the relevant circumstances related to the development of high technology.

Finally, in the case of the role of "artificial intelligence" in crime control, one can recognize all the ambivalence of the massive application of high technology, its possible positive and negative effects, but also the actual way of legal reasoning regarding the matter concerned.

2. A brief overview of the main characteristics of the term "artificial intelligence"

The dominant approach in determining "artificial intelligence" influences further elaboration of all its substantive characteristics, as well as taking a stand point on this issue in terms of creating many unjustified prejudice or glorifying the social capacity of artificial intelligence. Also, one should bear in mind the fact that characterizes determination of all social phenomena, and it refers to the possibility of perceiving a phenomenon from several angles, i.e. a number of scientific disciplines and definitions that, for the purposes of their work or research provided by lawyers, will certainly differ from those created by sociologists or psychologists. Hence, it is important to take into account the various determinants that offer different views from which the phenomenon is considered, i.e. to appreciate the need for interdisciplinary and multidisciplinary observation of a complex and still insufficiently defined and investigated phenomenon such as artificial intelligence.

The term "artificial intelligence" is attributed to John McCharty, who is known as the "Father of Science of artificial intelligence"[11] and its emergence relates to the mid-fifties of the twentieth century. According to McCharty, "artificial intelligence" means the science and the engineering process of creating intelligent machines. More comprehensive, but also the definition of greater cognitive usability suggests that artificial intelligence is part of computer science deals with the creation of such computer systems that are capable of possessing characteristics that associate human behavior[12]. From the ones stated above, it is clear that this is a kind of imitation of human behavior, though such designation is only the basis, but still does not give a clear picture of the concept and all his immanent elements.

The expansion of high technology development constantly contributes to innovation in the field of artificial intelligence, which results are reflected in increasingly complex technological units such as robots and machines at the first place. Consequently with this process, a scientific thought on artificial intelligence developed according to the new technological achievements and offered more comprehensive explanations and definitions of relevant aspects of this issue. Russel and Norvig, two influential authors in this field note that all definitions of artificial intelligence may be grouped into four

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[10] S. Petrović, *Dilema kiber ili sajber*, Strani pravni život 2/2012, str. 368.

[11] M. Scherer, *Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies, and Strategies*, Harvard Journal of Law & Technology, Volume 29, Number 2, 354-398, Spring 2016, p. 360.

[12] S. Russel, P. Norvig, *Artificial Intelligence: A Modern Approach*, second edition, Prentice Hall Series in Artificial Intelligence, 2010, p. 1034.

categories by defining it in the limelight analogy with *human thinking and behavior*, and *rational thinking and behavior*[13]. However, it is important to note that neither human thinking, nor human behavior fully reflect a human beings in terms of the unity of psychic and physical elements. Initially, an approach to defining what is now called "artificial intelligence"[14] was based on the imitation of human actions (eng. *acting humanly approach*) presented in the works of the pioneer of this science Alan Turing[15]. The same author compared artificial intelligence to a "game of imitation", stating that is not the point on how to artificially create the very process of human thinking, but its external manifestations, so that the participant or observer be convinced that they are in a particular interaction with a man, and not with the machine[16].

When it comes to today's dominant approach in determining artificial intelligence and what are the expectations of it, a comparative analysis shows that a teleologically-oriented approach is in place, i.e. machines which falls within the scope of artificial intelligence is expected to fulfill the set objective in the most efficient way[17]. Accepting this concept of artificial intelligence as dominant leads to the commercialization of high technology, including it into every aspect of human life. This definition evolution, that has moved from imitation of reasonable and intelligent behavior to effective and targeted action, has not particularly contributed to a clearer definition of the phenomenon, since the focus on one hard to determined concept (intelligence) moved to another, equally difficult to determine (goal)[18].

Intelligence is a complex psycho-social phenomenon that is difficult to determine. In the broadest sense, intelligence represents the possibility of planning, solving concrete and abstract problems, as well as reasoning and concluding. According to a more illustrative definition it is the ability to make the right decisions and to take appropriate action in the given circumstances[19]. According to a more comprehensive approach, intelligence as a term includes[20]:

- spotting and discovering the world around you, which includes self-knowledge
- securing your own existence and well-being
- respecting given social norms to the extent that allows individuals living in the community
- finding a way to achieve the social goals

In addition to this basic determination of intelligence, it should be noted that it also refers to the perception and harmonization of behavior to the more complex natural, social and spiritual phenomena[21], often beyond the boundaries of the rational. From this concept of intelligence (human) follows that it implies and behavior that is not solely based on logic, algorithms, and other precise mathematical operations, and the types of conclusions.

On the other hand, according to relevant dictionaries (for example: *The American Heritage Dictionary of the English Language*, 4th ed., 2000; *Merriam – Webster's Collegiate*

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[13] *Ibidem.*

[14] This refers to the period before the phrase "artificial intelligence" became a part of the scientific and general discourse, to describe the phenomenon of humanization of robots and machines.

[15] Scherer, M., *op. cit.*, p. 360.

[16] *Ibidem.*

[17] S. Omohundro, *The Basic AI Drives, in Artificial General Intelligence*, 2008, p. 483;

[18] M. Scherer, *op. cit.*, p. 361.

[19] T. Jones, *Artificial Intelligence: A System Approach*, Jones and Bartlett Publishers, 2009, p. 1.

[20] S. Branković, *op. cit.*, p. 2.

[21] *Ibidem.*

Dictionary, 11th ed. 2003), the term "objective" is considered a language synonym of the term "intent". Hence, it is difficult, taking into account the approach that puts the goal and target activity at the forefront, to determine a machine that possesses artificial intelligence beyond self-awareness, self-determination, ethical value etc.

Human behavior, in the broadest sense, is not always the result of logic and regularity that can be established and written using mathematical operations. Identity, experience, integrity, attitudes, morality, creativity, motivation, emotions, habits, obsessions etc. are undoubtedly the determinants of not only human behavior, but also human beings as individuals. All those characteristics of a human being are not programmable and predictable according to the current state of science. The possibility of programmed machines to penetrate into the essence of semantic symbols, or to "read between rows", is still questionable. John George Kemmeny observes that modern machines are doing exactly what they are ordered to do and say, but not what they actually wanted[22]. In light of this, we can say that artificial intelligence is only a partial humanization process of robots and machines, in terms of those human characteristics that could be more clearly defined and predicted using inductive and deductive methods, mostly based on rationality.

2.1. Learning machines – a step closer to humanization

As a possible relativization of the previously stated conclusion, one could point out the increasing "intellectuality" of the machines. Namely, the term "learning machines" entered into the wider discourse to mark machines that possess the ability to learn without special programming[23]. The basic elements of the machine learning process are *experience and interaction* with people.

The best example of this new trend in the world of the science of artificial intelligence is Google Translate. At first, it seemed that the idea of automatic translation of content was unsustainable and unrealistic, due to numerous differences in the languages all over the world, but also with the dialects of the same language, as well as the existence of a multitude of abbreviations and jargon. This problem was overcome just by interacting with platform users ("please rate the translation or Improve version") and experience in terms of memory and learning new things at the previous fault[24]. Slobodan Branković points out that regardless the similar root and language morphology, automatic translation into English from the Russian language is far more successful in comparison to the Serbian language. The author explains this phenomenon by the fact that in Russia there are at least twenty times more people than in Serbia, what means that, statistically considered, the option "please evaluate the translation or improve the translation" was much more used and thus the program was more intensively developed[25].

However, it is obvious that this kind of machine learning requires a lot of time and fulfillment of many different conditions, regardless of the complexity of the content. Hence, it could be concluded that even a man of below-average intelligence has the ability to quickly and efficiently adopt new skills and apply them in the community.

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[22] J.G. Kemeny, *Man and the Computr*, New York, CharlesScribner's Sons, 1972, p. 10.

[23] D. Kamarinou, C. Millard, J. Singh, *Machine Learning with Personal Data*, Legal Studies Research Paper 247/2016, Queen Mary University of London, School of Law, p. 3.

[24] S. Branković, *op. cit.*, p. 7.

[25] *Ibidem.*

Ralf Herbrich, director of the machine learning sector in German Amazon, also gives an important remark regarding the machine learning process. He points out that machine learning consists of a series of algorithms that aim to identify the main variables and the frequency of the data entered, thus predicting the characteristics of new data[26]. However, the problem that arises here relates to the fact that machines do not recognize the reality, but the version of reality formed by the data collecting and processing mechanism, depending on the content and quality of both the algorithm and the entered data. It is similar, of course, to the cognitive process in human being with much more complex and perfect "algorithm" that takes into account emotions, previous experience, intuition, creativity, analogy, prejudice and many other elements that are not typical for the machine learning process. It should also be added that a human can also change the way of thinking and conclusions in relation to different social and organic factors, while for the machines it could be achieved exclusively by writing a new algorithm.

Finally, machines are able to learn the social environment norms imposed by a humans, according to their needs and creativity as well. Scientific analysis and research have shown that creativity is a characteristic of the human brain only[27].

2.2. Moravec's Paradox

Another interesting feature of the relationship between human and machine lies in the fact that although at first glance this may sound surprising, machines that possess artificial intelligence are often unable to successfully perform activities that are considered as a routine when it comes to human. For example, it is easier for a machine or robot to go to Mars than to work like a human in a factory for packaging food in a box.

Hans Peter Moravec offered a unique explanation of this phenomenon. The Austrian author based his explanation essentially on the theory of evolution and states that in order to carry out actions that people act routinely, like face and voice recognition, orientation in space and time, differentiation of simple objects, an enormous number of resources is needed to form an algorithm which could be useful for the machines to perform such activities as a routine[28]. When it comes to the human beings, the intellectual and motor skills necessary for the automatic carrying out of such activities have been developed for hundreds thousands of years, and this is not the case with robots and machines. It takes a long time for artificial intelligence units to increase the level of automation in doing these actions[29].

3. Legal regulation of artificial intelligence

Although there is no generally accepted and complete definition of the law, we could for the purpose of this paper, define the law as a set of rules of conduct that bind members of the state as such[30]. Lawmakers who in various countries adopts and

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[26] D. Kamarinou, C. Millard, J. Singh, *op. cit.*, p. 6.

[27] V.S. Rotenberg, *The asymmetry of the frontal lobe functions and the fundamental problems of mental health and psychotherapy*, Dynamische Psychiatrie/Dynamic Psychiatry, 1-2, 51-68, 2007, p. 59.

[28] V.S. Rotenberg, *Moravec's Paradox: Consideration in the Context of Two Brain Hemisphere Functions*, Activitas Nervosa Superior 2013, 55, No. 3, p. 108.

[29] *Ibidem.*

[30] F. Pollock, *Jurisprudence and Legal Essays*, London: MacMillan and Co. Ltd., 1961,p. 158.

adheres to these rules in different ways, seeks to include all relevant phenomena and relationships in the system of rules that make up the law. From the second half of the twentieth century, artificial intelligence is becoming more and more present in human life, and therefore it is necessary to regulate it to prevent possible legal gaps and the insecurity in the functioning of the social community which, in this case, arises.

From a theoretical point of view, there are several approaches when it comes to the legal regulation of artificial intelligence. Basically, the most important are *legalistic* and *technological*[31]. The first approach is based on the idea that it is first necessary to start from the existing legal institutes and to examine how the rules that they established through the legal system could be applied to artificial intelligence. For example, in the case of civil law, consideration could be given as to how the rules on determining liability for causing damage could be applied to artificial intelligence units – robots/machines. If we take the example of criminal law, one could ask how and under what conditions artificial intelligence units could be liable for the criminal offenses.

The *technological* approach, in contrast to the *legalist*, starts from individual artificial intelligence units and examines the impact they have on existing legal institutes and branches[32]. The most important is that the legislator, as the creator of public policy, determines whether artificial intelligence deserves treatment of legal regulation[33].

Unlike previous technical and technological achievements, artificial intelligence is characterized by the ability to perform activities with a certain level of *autonomy*[34].In literature, this feature is considered as a one of the most important challenges for the legal system as a whole, but also the basis for a discussion on possibility to recognize legal personality to the artificial intelligence units, which is the most controversial aspect of their legal regulation.

The scope of rights and duties mostly depends on the nature of the subject *in concreto*, and the legal subjectivity itself relates mainly to the possibility of being the owner/holder of a right and the right to sue and to be sued. In the past, it was not unusual that many objects such as sacral objects, temples in Ancient Greece and Ancient Rome had legal subjectivity[35].

Nevertheless, the status of a legal entity today is related to *homo sapiens*[36] and this is clearly stated in the most important legal acts, both international and national. Thus, in the General Declaration on Human Rights, in the introduction section was emphasized that the proclaimed and guaranteed rights, among which is the right to

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[31] N. Petit, Law and Regulation of Artificial Intelligence and Robots: Conceptual Framework and Normative Implications, Working paper, 2017, p. 2.

[32] E. Palmerini, The interplay between law and technology, or the RoboLaw project in context, Law and Technology. The Challenge of Regulating Technological Developments (2013): 7-24, p. 15.

[33] N. Petit, *op. cit.*, p. 8.

[34] M. Scherer, *op. cit.*, p. 363. Autonomy as a feature of artificial intelligence is also recognized in the EU document according to which artificial intelligence is a system that reproduces intelligent behavior by analyzing its environment with a certain degree of autonomy in order to achieve a certain goal. See more in Artificial Intelligence for Europe, *Communication from the Commission to the European Parliament, The European Council, The European Economic and Social Committee and the Committee of the Regions*, Brussels, 2018.

[35] L. Solum, *op. cit.*, p. 1239.

[36] Legal subjectivity is also recognized under certain conditions to the organizations. One of the recent tendencies in criminal law is the possibility for "legal persons" to be responsible for criminal offenses. However, it should be noted that "legal entity" is a social construct made up of *people* and *property*.

recognition of legal subjectivity (Article 6), are recognized by all members of the *human* family[37]. Amendment XIV to the Constitution of the United States of America defines who is considered to be a citizen and therefore a legal entity, by stating that the term "citizen" means a person born in the territory of the United States or a person who subsequently acquired US citizenship and is therefore subjected to their jurisdiction[38]. Finally, the language and teleological interpretation of the Constitution of the Republic of Serbia 2006[39] indicates that legal subjectivity in domestic law is intended for people and that only they can be possessors of subjective rights. We should agree with this normative practice, since it is not enough just to imitate rational human behavior in order to acquire the character of legal subjectivity. Even the possession of an above-average level of intelligence *per se* not justify the need to be the possessor of legal rights and obligations. The reason for such a statement is that the law is not just a system of simple logic rules and algorithms. The right is inseparably connected with the issues of morality, feeling, consciousness etc.

We do not think that radical measures should be taken in the efforts to legally regulate artificial intelligence in order to recognize of legal subjectivity to artificial intelligence units and to guarantee individual right of particular race regardless of the fact that some authors advocate for such approach[40]. The right is a *par excellence* human creation and has the primary goal to enable the joint, coordinated and coexisting functioning of the human socio-economic community. This does not mean that artificial intelligence should not be subject of the legal norms and regulate in a proper way, on the contrary, this is an undeniable need of modernity, however the conceptual framework of such regulation should take into account the nature of the law as a human creation. Relation of rights to non-living objects and other living beings that do not fall under the category *homo sapiens* reflects the level of civilization development and humanity, but also the quality of legal norms and the legal system as a whole in terms of the rule of law and justice.

4. Artificial Intelligence and Criminal Law

Criminal law implies the most powerful legal (formal) social control that modern civilization know[41]. According to Lawrence and Solum, people in most cases feel the fear of artificial intelligence because it is not a subject of criminal law norms[42]. It seems that the harmonization of the creation and functioning of artificial intelligence with the norms of criminal law could be regarded as a most important step in legal regulation of the artificial intelligence. In essence, the criminal liability of artificial intelligence units should be considered. Criminal liability is considered to be the backbone of criminal sciences[43]. Therefore, in this particular case, it would be worthwhile to look back at the

[37] The Universal Declaration of Human Rights (UDHR).

[38] Fourteenth Amendment to the US Constitution – Rights Guaranteed Privileges and Immunities of Citizenship, Due Process and Equal Protection.

[39] "Official Gazette of RS", no. 98/2006 The Constitution of the Republic of Serbia.

[40] N. Petit, *op. cit.*, p. 1.

[41] W. Clark, W. Marshall, *A Treatise on the Law on Crimes*, Mundelein, Ill.: Callaghan, 1967, p. 23.

[42] In literature, it is stated that, in the past, people felt similar fear of various forms of organizations and associations that as such were committing criminal offenses, until they became the subject of the criminal law.

[43] W. Clark, W. Marshall, *op. cit.*, p. 23.

question of whether the growing degree of intelligence is sufficient for recognizing the legal subjectivity and subjecting artificial intelligence units to the formal social control[44]. Could artificial intelligence units be dangerous for humans and their living and non-living environment?

Tragic examples of the interaction between intelligent machines and humans are numerous and alarming. At the beginning of the 1980s a case was reported that a robot working in the auto-industry had killed an employee – the man who was working on the factory lane. The robot had a programmed goal to pack as many parts as possible and the unfortunate colleague who found himself next to the robot was understood as an obstruction of robots mission because robot did not have the best access to parts for packing and could not perform its task in the most efficient way. Guided by algorithm, he pushed his fellow human who by circumstances ended up in an open machine which killed him[45]. There is also an example of a robot, in the German company Volkswagen, that killed one of the constructors and the investigation showed that the accident was produced due to human error[46].

One of the pioneers of robotics, Isaac Asimov, in 1950, recognized the danger that intelligent parts of high technology can generate and wrote three laws[47] on robotics stating that:

1) Robot may not hurt a person by its activity or inactivity;

2) Robot must comply with the orders of the human that govern and control them, except in cases where these orders are contrary to the first law;

3) Robot must endeavor to protect its existence until it violates the first and second laws[48].

The author of those three laws, in his subsequent writings, argued that it is necessary to reconceptualize and again carried out the evaluation of the three laws, since there are still numerous contradictions. One of them is certainly a question of how the robot will behave if a controller orders it to kill the third person for his own benefit. Our Criminal Code[49] recognizes this as the criminal offense of murder by compassion (euthanasia) (Article 117 CC). The issue of mercy killing (euthanasia) causes not only serious legal dilemma, but also the moral consequences that machines can not perceive in the same way as human beings. Observed from the purely logical side, from the angle of the robot, in the eventual order of a controller who would require him to kill a third person, there is nothing controversial if it was clearly told that this is for the benefit of that person. A similar contradiction can be observed in the question of what would happen if a robot really obey the order, but not in adequate time and space?

The guiltiness is the basis and the condition for criminal responsibility[50]. Criminal liability is determined by a verdict when all the elements of the offense are fulfilled, and

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[44] G. Hallevy, *op. cit.*, p. 172.

[45] *Ibidem.*

[46] Available at: https://www.theguardian.com/world/2015/jul/02/robot-kills-worker-at-volkswagen-plant-in-germany, accessed on 22.11.2018.

[47] These "scientific-humanistic" laws were given their legalistic form in 2017, since the EU document calls for them, stating that these laws must be adhered to by designers and users of robots. See: European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics [2015/2103 (INL)].

[48] G. Hallevy, *op. cit.*, p. 172.

[49] "Fig. Gazette", Nos. 85/2005, 88/2005 - corr ., 107/2005 - corr ., 72/2009, 111/2009, 12s1/2012, 104/2013, 108/2014 and 94 / 2016.

[50] Z. Stojanović, *Krivično pravo – opšti deo*, Pravni fakultet Univerziteta u Beogradu, 2013, p. 163.

the guiltiness is one of them. The guiltiness could not exist without *accountability* which, for the purpose of this issue, should be understood as a test that artificial intelligence cannot pass when it comes to the possibility of being considered liable in the criminal sense. It is the similar situation in terms of Anglo-Saxon law (eng. *Common law*) when it comes to the existence of criminal liability. There are necessary elements of *actus reus* as an external manifestation of the conduct and its factual aspect, while the element of consciousness – the *mens rea*, is required cumulatively.

Newer legislation, among the others the Criminal Code of the Republic of Serbia, foresees a threefold structure of guiltiness, which, in addition to *accountability*, requires an *intent/negligence* and *awareness of the unlawfulness*[51]. If we consider that both will and consciousness are necessary and constitutive elements of intent, and in the previous consideration we pointed out that the units of artificial intelligence do not possess neither will nor consciousness, it follows that on the question of whether intelligent machines can be subjected to the criminal liability we should basically respond negatively.

As a confirmation of the previously stated thesis, the following example could be given. How would a possible fine be imposed on a robot if having in mind that it is not a legal entity and that it cannot have assets or regular income. In this context, it is also interesting to indicate the hypothetical execution of the prison sentence of robot/ machine. Taking into account that the general purpose of punishment, depending on the legislator, cumulative or alternative is socialization, raises the question of how the general purpose could be achieved when it comes to the artificial intelligence unit. We saw in the previous part, on the example of the Google translate program how artificial intelligence units "learn from their mistakes".

Artificial intelligence, however, is not without criminal justice relevance. First of all, we could think of the criminal liability of a person who, when committing a criminal offense, used some kind of instrument, which in the broadest sense can be machines and robots. All artificial intelligence products come from a man. Someone had to construct and design algorithms for intelligent machines to function. Also, one should bear in mind the fact that autonomy in carrying out robot activities due to exposed aspects in terms of will, consciousness, self-awareness, emotions etc. could not lead to complete identification with human in terms of establishing criminal liability. This principle is expressed in the model – *Perpetration via Another Liability*[52]. There, artificial intelligence is identified with an *innocent* agent (a child, an insensitive person), practically with the instrument. The liability of the perpetrator is based on what the instrument/agent did and possible awareness of its conduct. Who should be held liable under the *Perpetration via Another Liability Model*? Logically, there are two possibilities. In the first case, it is a constructor[53], while in the other it could be the user of artificial intelligence.

However, as it was stated in a recent EU document[54], a higher degree of robot autonomy could less often be considered as a mere instrument of carrying out the activity. In addition, the question that arises is who will be liable and how to determine the responsibility when the artificial intelligence unit commits a criminal offense only on

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[51] *Ibidem.*

[52] G. Hallevy, *op. cit.*, p. 179.

[53] In the matter of civil law – liability for damages –, the responsibility of the manufacturer, importer, distributor etc. is also possible.

[54] European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics [2015/2103 (INL)].

the basis of accumulated experience and knowledge. Problems in the application of this model also occur when a robot/machine is not created to commit crimes that are contrary to the laws of Asimov, but in certain circumstances it can still do so. In literature, when such cases occur, the units of artificial intelligence should be regarded as *semi-innocent agents*. Let's take as an example an aircraft crew. Let's assume that, as part of its equipment, the plane has an auto-pilot, which we can consider as an artificial intelligence unit with the purpose of operating the aircraft. However, let's imagine that a plane approaching a sudden storm and a pilot – human, a crew member – decides to turn off the auto-pilot option and "manually" control the plane's flight through the storm[55]. The question arises, who would be responsible in the criminal law sense if the auto-pilot interprets such a move as a danger for the execution of its task and catapults a human crew member or otherwise executes him by stopping the flow of oxygen for example. Would it be justly, in such a case, to punish the auto-pilot designer?

The solution to this situation has led to the *Natural – Probable – Consequence Liability Model*. According to it, responsibility is established when the conduct, according to the known features of the program, could be expected, regardless of the attitude of the will to that part. In the present example, the creator of auto-pilot program would be held responsible if the auto-pilot was programmed to complete the task regardless of the circumstances and at the same time did not provide the safeguards or adequately pointed out the warning. Moreover, for the responsibility according to this model is sufficient negligence and no more detailed knowledge of possible implications is required, but the awareness of it is also sufficient[56].

5. The role of artificial intelligence in crime control

The application of technological achievements has long been ubiquitous in modern policies for crime control[57]. As a positive influence of technology on control and suppression of crime, we can point out faster cars that increase the police mobility. However, artificial intelligence offers a number of more sophisticated options, with the remark that it should be used cautiously, without leaving it the role of the decision maker, but should be used as a kind of support and complement to the human factor.

It is stated in literature that the area of crime control, through history, was one of the largest generators of the development of modern technologies. This is why the field of application of technology in crime control is diversified and refers to human resources management, control of communication and information, supervision, punishment, criminal administration etc.

Regarding the crime control policy itself, two contradictory approaches are possible. One is based on the so-called "Populist punishment". This is essentially characteristic for a country that generally exaggerates the danger of crime, creating its own enemies and leading fictional struggles in order to justify huge investments in crime control. Such a seemingly sharp attitude towards criminality is often used both in the purpose of raising political popularity. However, this kind of government's

[55] G. Hallevy, *op. cit.*, p. 182.

[56] *Ibidem.*

[57] P. Grabosky, Technology & Crime Control, *Trends and Issues in Crime and Criminal Justice* (Australian Institute of Criminology); *Criminal Justice Matters*, special issue (58) on Crime and Technology, 1998, p. 58

involvement is negative for the society, it can sometimes affect a strong takeoff when the technology is in question due to large investments. Such a "technological boom" has made it possible to modify the paradigm of crime control and to base the strategies on prevention, or risk assessment for each issue in the sphere of criminal policy.

Specialized robots/machines/computer programs can be of particular benefit if their role is retained in helping humans. In particular, their role is significant in a situation when, according to relevant research, the amount of all kinds of information in the world annually increases at a rate of 40% annually[58]. This hyperproduction of information is certainly maintained in the field of crime control. For these reasons, a police district of the United Kingdom implemented in mid-2016, a robotic police officer named HART (*Harm Assessment Risk Tool)*[59]. Its main task is to assist police/prosecutors/judges in deciding on the detention or release of suspects from custody. The number of necessary information to be considered is huge, and when it is multiplied by several thousand items, how much it is necessary to process on an annual basis, the engagement of artificial intelligence is imposed as a rational solution. HART specifically grouped suspects into groups formed at the risk of repeating a punishable act. The decision is nevertheless made by a human – the competent person relying on the "opinion" of HART, but not leaving it the role of the final decision maker. This should be considered as an adequate solution, as it has now been shown that the percentage of robot performance is around 60%, and there is still a lot of work to improve software in order to increase the percentage itself[60].

There is an opinion in the scientific and general public that the inconsistency of judicial practice in sentencing is one of the main negative causes of deterring potential criminals from their intent. That's why a system which contains over 40,000 court decisions from the past few years has been created in one of the Canadian provinces, British Columbia. A simple interactive interface requires the judge to enter, in the appropriate fields, information about: the parts in question, the age of the defendant, the marital status and the previous conviction[61].

However, as in the case of HART robots, this program cannot be attributed to an absolute superiority over human. The question arises whether these variables are sufficient to consider absolutely every crime and how the program has shown itself in solving atypical, borderline cases that change and establish judicial practice.

6. Conclusion

Artificial intelligence has long ago became an important issue not only when researchers in the field of robotics are inspired, but also when it comes to a wider social debate. Technological progress and constant development of the state of science requires caution from the legislator who should regulate this increasingly significant social phenomenon, taking into account all innovations and achievements, as well as new opportunities. The development of artificial intelligence should not be directed at anything other than the development of the economy and helping a person in carrying

[58] S. Branković, *op. cit.*, p. 2.

[59] I. Nikolić, *Elementi – časopis za promociju nauke* 2018, p. 36.

[60] *Ibidem.*

[61] This platform is part of a project that is being implemented by the University of British Columbia.

out everyday life activities. Hence, the latest normative trend in the determination of artificial intelligence, which is market-oriented and commercially oriented, should be commended. On the contrary, if the goal is to create a new "race" of intelligent machines equal to humans, such a super-intelligent artificial should be impeccable from the moral point, because if such superhuman machines were not behaving better than us, the issue of conflict and the struggle for supremacy on the planet between the two species, artificial and natural, would become more and more current in time.

It is therefore important to have adequate legal regulations that would be sufficiently clear, but on the other hand, sufficiently flexible and adaptable to the needs of continuous high-tech innovation. This does not mean that, in accordance with the current state of science, artificial intelligence units should be recognize any legal subjectivity. This stems from the fact that the complete identification, i.e. the humanization of machines has not yet been reached, which does not mean that mankind will develop at a that stage. However, smart machines, beside a high degree of intelligence, have no other features such as identity, experience, integrity and attitudes, morale and creativity, motivation, emotions, habits, obsessions etc. in order to justify the recognition of legal subjectivity, i.e. legal equalization with human. The right, as we have pointed out in the paper, is the human creation and has the primary goal to enable the joint, coordinated and coexisting functioning of the human socio-economic community. This does not mean that artificial intelligence should not be subject to legal norms, on the contrary, this is imposed as an undeniable need of today, however the conceptual framework of such regulation should take into account the nature of the law as a human creation. Relation of rights to non-living objects and other living beings that do not fall under the *homo* category *Sapiens* reflects the level of civilization development and humanity, but also the quality of legal norms and the legal system as a whole in terms of the rule of law and justice.

It seems that criminal law is under the greatest pressure when it comes to the need for legal regulation of artificial intelligence and the harmonization of the creation and functioning of artificial intelligence with norms of criminal law imposes itself as the most important step in its legal regulation. The central issue that should be answered in this context is the ability of artificial intelligence to be liable in the criminal justice sense. Analogously to the explanation of which artificial intelligence units should not recognize legal subjectivity, we find that they should not be held accountable in the criminal sense in the same way as in the case of a human. This does not, however, diminish the need to reconceptualize rules of responsibility and adapt to an increasing social significance and application of artificial intelligence.

Finally, with privatized robots/machines/computer programs can positively influence the effectiveness of crime control but with special cautious, because of the possibility of creating the effect of Pandora's box and the negative implications of the *corpus* of the proclaimed human rights and freedoms.

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Involving of Artificial Intelligence in committing a crime as a challenge to the Criminal Law of the Republic of Serbia

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Abstract

The present study emphasizes the question of the involvement of artificial intelligence in the commission of the criminal offense and the establishment of criminal responsibility as a challenge for the criminal parasite of the Republic of Serbia in these situations. Namely, first an explanation of the notion of artificial intelligence is given followed by an overview of the basic models of these systems. After that, possible abuses of the Artificial Intelligence systems are presented, as well as the involvement of the artificial intelligence system in the commission of a criminal offense. In the second part of the article, the attention is drown to the basic principles of criminal responsibility under the current provisions of the criminal law of the Republic of Serbia, in order to point out, at the end of his work, the possible links between the human actions and the actions of artificial intelligence in the commission of the criminal offense, as well as the possible ways of establishing criminal responsibility in situations in which the acting of artificial intelligence systems resulted with causing of criminal consequence.

Keywords: *artificial intelligence, criminal law, criminal responsibility, criminal liability, criminal law of Republic of Serbia*

1. Introduction

Artificial intelligence can help in making our life simpler not only for taking decisions, but also for the other aspects. Thus, artificial intelligence is slowly becoming a part of our day-to-day life and an essential part of all modern equipment as well. Whether it is automated climate control in the car or an automated manufacturing unit in industry. Whether it is a washing machine or microwave oven, artificial intelligence is everywhere (Kulkarni & Joshi, 2015:2). The same artificial intelligence can appear as a

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mean of committing a criminal offense in the case of an artificial intelligence system being under the control of people. It can also be a direct cause of criminal consequences in situations in which the behavior of artificial intelligence system is out of the control of people. In this regard, the question of criminal responsibility and the application of the provisions of the Criminal Code of the Republic of Serbia[3] on the issue of artificial intelligence involvement in the commission of a crime is raised.

2. Definition and understanding of artificial intelligence

Artificial intelligence is the science of making intelligent machines that perform task as well as, or better and faster than, humans can. Artificial intelligence is not really about intelligence, though. It is about solving problems. But the solutions in artificial intelligence are always math- and computer-based (Harris, 2011:6). We should first underline that it is difficult to give unique and precise definition of artificial intelligence, because of exist of so many different approaches to this issue. But, on the base of analyzing available literature which has been dealing with the issue of artificial intelligence we can conclude that all those various definitions of artificial intelligence can be classified into four categories (Nath, 2009:22):

1) Systems that act like humans;
2) Systems that think like humans;
3) Systems that think rationally;
4) System that act rationally;

2.1. Systems that act like humans

Under this first approach, artificial intelligence systems that think like humans are facing the so called "Total Turing test". This model is named by Alan Turing, British mathematician and logician, who has defined intelligent behavior as the ability to achieve human-level performance in all cognitive task to fool an interrogator. Namely, Turing maintains that attempting to distinguish people form machines on the basis of thought would be a mistake. According to him, the question "Can machines think?" is an unanswerable one, because the meaning of the word "think" is excessively ambiguous. Instead of struggling with such an unanswerable question, Turing suggests that computes be involved in an imitation game (Moor, 2003:xx). In this game, a human interrogator asks questions of two respondents: (A) a computer imitating a person, and (B) a genuine person. The interrogator then uses the respondent's typewritten answers to figure out which is the computer and which is the genuine person. Sensible questions about the computer's performance in the imitation game then replace the original, unanswerable query, "Can machine think?" (Turing, 1950:433). The Turing test shows that machines can interact with human beings the way human beings interact amongst themselves. Which, in a nutshell, means that machines can behave the way the human beings do (Nath, 2009:24). In this concept, artificial intelligence systems are acting humanly and it includes physical interactions with environment such as: speech recognition, computer vision or robotics and similar.

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

2.2. Systems that think like humans

In this concept of artificial (machine) intelligence, the scientists from the field of cognitive psychology are bringing in the connection human and machine intelligence. According to them, the aim of artificial intelligence is to develop and test computer programs that exhibit characteristic human intelligence. We may argue that the class of systems acting humanly is a super set of the class of the systems thinking humanly. This is because the action is normally the final result of a thinking process (Yao, Zhong, Liu & Ohsuga, 2001:5). In the concept of cognitive modeling approach, scientists start from hypothesis that some machines have the capacity of intelligence and the essence of human cognitions. Namely, if the program's input/output and timing behavior matches human behavior, that is evidence that some of the program's mechanisms may also be operating in humans. So, this means that some machines have cognitive capacity like the human beings. In the cognitive modelling approach, thus, human beings and machines show the property of being intelligent. So, from this concept we have definitions of intelligence such as the definition of John McCharty, who say that: "Intelligence is the computational part of the ability to achieve goals in the world. Varying kinds and degrees of intelligence occur in people, many animals and some machines (artificial intelligence)" (Legg & Hutter, 2007:22). Also, representative for this group of definitions of artificial intelligence is Peter Voss, who says that: "the essential, domain-independent skills necessary for acquiring a wide range of domain – specific knowledge – the ability to learn anything. Achieving this with "artificial general intelligence" (AGI) requires a highly adaptive, general-purpose system that can autonomously acquire an extremely wide range of specific knowledge and skills and can improve its own cognitive ability though self-directed learning" (Voss, 2005:136). Those systems of artificial intelligence are especially development in the areas of vision, natural language, and learning.

2.3. Systems that think rationally

This group of definitions represents prescriptive and normative view of artificial intelligence. Definitions, or approaches from this group deals with theoretical principles and normative that artificial intelligence system must follow, instead of intimating humans. Namely, the rationalist approach deals with an ideal concept of intelligence, which may be independent of human problem solving. For artificial intelligence system we can say that it is rational if it does the right thing and makes the right decision. In the sense of normative approach, it is based on the well-established disciplines such as mathematic, logic and engineering (Yao, Zhong, Liu & Ohsuga, 2001:6). In this concept, behaviors of artificial intelligence system are based on the rules of inference. In this approach, emphasis is on the logical inference of a conclusion from the premises. In the artificial intelligence programme, this type of logical inference is of much use, since this programme provides a variety of logical reasoning. In an inference, a set of variables, a set of constant terms, a set of functions, the set of connectives if, and or, and, not, the quantifiers "exists" and "for all" are the most important symbols to build an artificial intelligence program. All these constants and variables are the arbitrary representations of the word. With the help of these symbols, the so-called logistic tradition within artificial intelligence helps to build on such programs to create intelligent systems (Nath, 2009:26). In connection to everything above mentioned, an example of an artificial intelligence definition, from this approach, is the one of Douglas Lenant and Edward Feigenbaum, according to which: "Intelligence is the power to rapidly find an adequate

solution in what appears *a priori* (to observers) to be an immense search space (Lenant & Feigenbaum, 1991:186).

2.4. Systems that act rationally

Acting rationally consists in acting so as to achieve one's goals, given one's beliefs. So, in this group of approach in defining artificial intelligence, artificial intelligence is viewed as the study and construction of rational agents. In this context, the "agent" notion is related to the mechanical agent or computer. So, under the "agent" notion is considered mechanical machine that perceives and acts.

Artificial intelligent systems can act rationally only after acquiring adequate knowledge from the real world. So, perception that stands for building up of knowledge from real world information is a prerequisite feature for rational actions. Also, a further step of thinking envisages that a machine without learning capability cannot possess perception. The rational action of an agent, thus, calls for possession of all the elementary characteristics of intelligence. Relating artificial intelligence with the computational models capable of thinking and acting rationally, therefore, has a pragmatic significance (Konar, 2000:3). In that sense, the agent is autonomous to the extent that its behavior is determined by its own experience. A truly autonomous intelligent agent should be able to operate successful in a wide variety of environments, given sufficient time and scope. In connection to this one of the representatives of definition of artificial intelligence from this approach is definition of Ray Kurzweil, who say that: "Intelligence is the ability to use optimally limited resources – including time – to achieve goals" (Kurzweil, 2000:24). Also, Ricardo Ribeiro Gudwin argues that: "Intelligent systems are expected to work, and work well, in many different environments. Their property of intelligence allows them to maximize the probability of success even if full knowledge of the situation is not available. Functioning of intelligent systems cannot be considered separately from the environment and the concrete situation including the goal" (Gudwin, 2000:2081).

2.5. Three consecutive generations of artificial intelligence

There is one additional distinction which is particular useful when thinking about the sequence and speed with which progress on artificial intelligence will unfold. In this sense, in literature there are generally three types of artificial intelligence (De Spiegelierie, Mass & Sweijs, 2017:30):

• *Artificial narrow intelligence* – which consists in machine intelligence that equals or exceeds human intelligence for specific tasks (for example Google Translate);

• *Artificial General Intelligence* – which consists in machine intelligence meeting the full range of human performance across any task;

• *Artificial Superintelligence* – which consists in machine intelligence that exceeds human intelligence across any task.

3. Artificial intelligence causing negative consequences ("committing criminal act")

Taking in consideration that artificial intelligence system which are developed to perform a certain task can cause problem in the sense of harming some values protected by law or of causing negative consequences, there is need for criminal law protection

from these systems. So, before we address issues regarding criminal liability of artificial intelligence according to the actual provision of criminal law or Republic of Serbia, we should first represent some of possible situations in which artificial intelligence system could commit the criminal act. In that purpose, in this paper we will use same methodology which is implemented by Matilda Claussén-Karlsson in her Final Thesis for the Law Program, entitled "Artificial Intelligence and the External Element of the Crime: An Analysis of Liability Problem". Namely, in her work she has pointed out on some already existing illustrative examples where artificial intelligence can endanger some values protected by law, such as: bots, autonomous cars and drones, high frequency trading artificial intelligences, autonomous weapon systems and military robotics, artificial intelligences in health and medical services. So, with the aim to represent how artificial intelligence could be challenge for criminal law of Republic of Serbia, we will first point out on the same artificial intelligence systems as possible "perpetrators" of crime.

The first system of artificial intelligence who can be a potential "perpetrator" of crime consists of bots. Bots, short from "robots", are neutral entities. At a very basic level, bots are a new user's interface. This new user interface lets users interact with services and brands using their favorite messaging apps. Bots are the contemporary way to expose software services through a conversational interface. Unlike most users, they are powered by a software rather than by a human, and they bring a product, a service, or a brand into a given messaging product via conversation (Shevat, 2017:2). Bot is a shortened name for a software robot, or an intelligent software agent. Bots often include elements of artificial intelligence. The Internet bot are integrated on websites, behaving as if it were a man itself. It is most commonly used for advertising or spam, but also for useful things such as technical support for the user, distance learning assistance etc. For instance, through its interactions with other people online, on the basis of its artificial intelligence, these systems can learn and adopt in his interaction some criminal behavior such as insulting, make a threat, or promoting a hate speech, despite a good intent from the producer and developer, because of its autonomous intelligence system it can act unforeseeable and not as intended. This was the case with the so-called Tay, the chatbot Microsoft unleashed on Twitter and other social platforms two years ago that quickly turned into a racist, sex-crazed neo-Nazi (Claussén-Karlsson, 2017:18).

A second system which is based on artificial intelligence that can be involved in committing criminal acts represents autonomous, or driverless vehicles and drones which' use in various aspects of society in previous years became very popular. For example, autonomous, or driverless, vehicles can be used by criminals to deliver drugs and weapons, or by hackers and terrorists for causing accidents. Drones can also be used in the same way. There are a lot of examples from practice where criminals are using drones to livestream and surveil law enforcement officials, and even to "flush them out" of hiding. Also, some smuggler groups allegedly use drone-based livestreams to monitor the movements of security forces, and can trigger a fire alarm to draw security away if they get too close to one of their members. Drug cartel smugglers, in a wide range, also use drones to avoid border control forces when smuggling drugs over the border.

The third system of artificial intelligence which can be used in a criminal purpose is high frequency trading artificial intelligences. High frequency trading (HFT) is an umbrella term comprising several groups of strategies. Given the breadth of High frequency trading, various market participants have somewhat divergent opinions of

what it actually stands for. So, for instance, the Technology Subcommittee of the U.S. Commodity Futures Trading Commission (CFTC), tasked with compiling a working definition of HFT, came back with the following draft definition in June 2010: "High frequency trading is a form of automated trading that employs:

• algorithms for decision making, order initiation, generation, routing, or execution, for each individual transaction without human direction;

• low-latency technology that is designed to minimize response times, including proximity and co-location services;

• high message rates (orders, quotes or cancellations) (Aldridge, 2013:13).

These systems can be used for market manipulation. For example, there is a case of market manipulation committed by an individual in Singapore who engaged in spoofing using algorithms as a tool. This case is called the "JGB Futures Case". In this case, the individual in Singapore used an algorithm to place small orders at the best bid (ask) (all on a scale around JPY 400 million), while placing large spoofing orders at the opposite best ask (bid) (from JPY several hundred million to several billion), which he never intended to execute, in order to induce others in the market to place orders that would match with the Singapore trader's small order to his benefit. The tool also allowed the trader to complete one trading cycle in an incredibly short period of time (the average time elapsed from the placement of the spoofing order and the cancellation was less than a mere 300 milliseconds) and accumulate profits by repeating such trading cycles multiple times (Niwa, 2016:39).

A fourth system of artificial intelligence which is also potential challenge for criminal law regulation is autonomous weapon systems and military robotics. Autonomous weapons or autonomous military robot is the autonomous weapon system that can independently search and engage targets based on programmed constraints and descriptions. This mean that it can acquire targets and initiate force without human intervention or supervision. Delegation of life-or-death decision making to nonhuman agents is a recurring concern of those who oppose autonomous weapon systems. The most obvious manifestation of this concern relates to systems that are capable of choosing their own targets. Regarding that, highly appreciated computer scientist Noel Sharkey has called for a ban on "lethal autonomous targeting", because it violates the Principle of Distinction, considered one of the most important rules of armed conflict – autonomous weapons systems will find it very hard to determine who is a civilian and who is a combatant, which is difficult even for humans (Sharkey, 2010:370). So, there is concern that allowing artificial intelligence system to make decisions about targeting can result in civilian casualties and unacceptable collateral damage, which means a crime against civilians.

The fifth system, or group of system of artificial intelligence which has been identified as potential criminal problem is artificial intelligences in health and medical services. Healthcare like many industries have been disrupted by the influx of new technologies in the Information Age. Particularly in the case of automation, machine learning, and artificial intelligence, doctors, hospitals, insurance companies, and industries with ties to healthcare have all been impacted – in many cases in more positive, substantial ways than other industries. Such in other fields, also in health and medical services it is possible that happened error in providing of medical services by artificial intelligence system. Everything foregoing mentioned concerns especially when the issue of legal liability is in the question. For example, in the last group of artificial intelligence system, field of health or medical care, if mistakes occur, who is to be held

liable, because a robot surgeon is not a legal entity, should the patient sue, or public prosecutor prosecute the owner, the programmer, the manufacturer or someone else? (Loh, 2018:61).

4. Criminal liability under provisions of criminal law of Republic of Serbia

Criminal liability, unlike some other types of legal liability, is purely personal, i.e. individual and subjective responsibility, responsibility based on the guilt of the perpetrators of the crime. Bearing in mind this nature of criminal responsibility, then it is completely clear that contemporary criminal law of Republic of Serbia has accepted the principle of individual and subjective responsibility. Otherwise, the principle of individual subjective liability in criminal matters means that everyone is responsible only for their actions (i.e. for his/her behavior), as well as to be responsible for the criminal offense under which he has a certain psychological relationship which may be subject to interruption by the social community – the state. Therefore, the essence of this criminal law principle is to exclude responsibility for the other (i.e. for other actions) and liability without guilt.

From the above it follows that this principle has its own two aspects. The first aspect, as we have seen, refers to the fact that everyone is responsible only for their actions, which means that the committed crime corresponds personally to its actor, not someone else (individual responsibility). The second aspect is that one can answer only if he/she is guilty, which means that the offender will be criminally responsible if the offense is hidden or if on his part there is a psychological attitude towards work as his own achievements (subjective responsibility) (Jović, 2011:202).

An active subject is, above all, a human being, that is, a physical person who, by his actions, achieves the consequence of a criminal offense, but it can also be a legal person. Namely that in our criminal theory and legislation the opinion was that the legal person could not be an active subject of the criminal offense and, therefore, cannot be criminally liable. In other words, a legal entity can only be an active entity of a commercial offense or offense, i.e. it was possible to respond to economic offenses and misdemeanors (criminal liability in the wider sense), but that person could not answer for criminal offenses (criminal liability). However, by passing the Law on Liability of Legal Persons for Criminal Offenses in 2008[4], the situation is, not only in our legislation, but also in the criminal-law theory of changes. Namely, from the wording of the provision of Article 6 Paragraph 1 and 2 of the Law on Liability of Legal Persons for Criminal Offenses, it follows that the criminal liability of legal persons includes liability: legal person, responsible person and natural person acting, i.e. performs certain activities under the supervision and control of the responsible person. The law, therefore, in principle, envisages two subjects of this specific criminal responsibility - a legal entity and a natural person.

It is justifiably considered that the act is the most important element of the criminal offense and therefore it attaches special significance to it in domestic and foreign criminal justice and literatures. The act causing harmful consequences is, in fact, the act

[4] Law on Liability of Legal Persons for Criminal Offenses ("Official Gazette of the Republic of Serbia", No. 97/2008).

by which the crime is committed. The criminal act is still defined and defined as taking actions in order to cause forbidden consequences. And the result is forbidden because it is harmful. It further states that this first element in the general notion of a criminal offense consists of the effects and consequences as well as the causal link between the actions of a particular person and the prohibited consequences that appear as a product of that crime. Therefore, if there was a criminal offense, it is necessary that there is a human action, a human action. In other words, something that becomes a criminal offense under certain conditions is a human act. Without human action, therefore, there is no criminal offense, since certain harmful effects can also be caused by animals or natural (higher) forces, but such consequences, since they are not the result of human activity, cannot be treated as a consequence of a criminal offense.

Therefore, for criminal justice evaluation only human action is relevant, because only such an action (due to some properties and under certain conditions) can constitute the act of a criminal offense.

5. Challenges of criminal law of Republic of Serbia in the sense of involving artificial intelligence in committing criminal offences

Based on all of the above mentioned, according to Criminal Law of Republic of Serbia, only human acts constitute the ground for imposing a criminal liability. An artificial intelligence act must be in connection with some human actions, that can fulfil the elements for criminal liability, *actus reus* and *mens rea*.

Considering that the *actus reus* can be expressed in acts and omissions, in the next section of the paper we will present the possible situations of artificial intelligence involvement in causing of the criminal consequence.

When it comes to acts, we have a situation where the artificial intelligence system is controlled by a person completely (example Drone via a remote control) in order to cause them a negative consequence. Thus, in this way, the user of the artificial intelligence system will actually use this system as a means of committing the crime. For this situation we can say that it is crystal clear, i.e. that the guilt for the resulting consequence is reflected in the fault of the user who misused the artificial intelligence system. For the existence of this situation, the necessary condition is that the system is completely under the control of the user, i.e. that it is governed by user. Here we should point out that by system user we understand a person who uses the artificial intelligence system at the time of committing the crime, that is, it manages with its acting. It may be the owner of the system, but also some other side person, for example, a hacker who breaks the code and takes control of the operation of such a system.

In terms of omissions, the situation is much more complicated. Namely, it is mainly about the situations in which there is a smaller or larger extent the autonomy of artificial intelligence. So, here we distinguish two situations. The first one reffers to a completely independent system, while the second refers to a system not *completely* under the control of the user. In both of these situations, in order for a person to be responsible for omission he must be obligated to act on his part. The question arising is who is the potential subject who can be responsible for omission or doing nothing in criminal situations where an artificial intelligence system, which is only partially or not at all under their control, is involved in causing criminal consequences. These subjects, or potential liable persons are the user, supervisor, owner and producer.

When it comes to the user and his responsibility for omission, one can work, for example, about the situation in which a user uses autopilot to drive his vehicle. At that moment, he has no control over the vehicle's handling, but he has the ability and also duty to intervene at any moment, if there is a serious risk of a negative consequence. In this regard, if the user behaved too irresponsible without taking into account the manner in which the autopilot manages his vehicle, and due to the errors in algorithm counting, the car pilot makes a mistake and traffic accident occurs, then that person may be summoned for criminal responsibility for failing to perform the necessary act or intervention with the aim of the prevention of danger.

With regard to the so-called supervisor, that is, the persons who foreshadow the work of some artificial intelligence system, his duty of attention and intervention is even greater, and therefore the responsibility. Such situations are, for example, in artificial intelligence systems that have a higher degree of autonomy, e.g. a drone that transports certain goods from one point to another, completely autonomous, but it is still under surveillance of the supervisor, whose duty is to oversee this process and possibly intervene in the path of moving the drone if something goes wrong or if for some reason it turn off with from the path. In this case, the supervisor would be criminally responsible, who failed to exercise control and prevent the occurrence of a negative consequence.

When it comes to the owner, it can appear in the role of the user and in the role of the supervisor, therefore, in the case of his criminal responsibility, in these cases, everything that has already been said for these two categories of persons applies. However, there is possibility that owner let some person, for example child to use system of artificial intelligence, even he realizes that although he is aware that there may be a possibility that due to ignorance and lack of necessary skills, the child may have causes negative consequences by use of that system. In such a situation, he will be held criminally accountable because he has failed to exercise control over the use of such a system by a person who is not competent to do so.

When it comes to the manufacturer and the issue of his criminal responsibility for the involvement of artificial intelligence in the commission of the criminal offense, we can say that the situation is the most complicated. First, we can have a situation in which due to the algorithmic error in the software, the system of artificial intelligence has been misplaced and caused a negative consequence. In such situations, criminal liability will exist only if there was an intent or negligence on the part of the manufacturer. So, the manufacturer was aware of this mistake and despite that he agreed to the possibility of having a negative effect, that is, that he acted out of negligence, i.e. that he was aware of these mistakes and the risk of occurrence of some danger or damage, but that he easily held that it will not have happened, that is, that he would be able to prevent it, and that such a product (artificial intelligence system) was put into the selling and using.

The second situation will exist when the manufacturer was obliged to upgrade certain information in the artificial intelligence system software, and he failed to do so, resulting in an error in his work and causing of the negative consequences. In such a situation, the manufacturer may be held criminally liable for the resulting negative effect due to his failure to act.

And the third situation is that in which a completely autonomous system, which has the ability to learn and acquire new knowledge, has caused a criminal consequence by its behavior. The issue of producer responsibility in this situation arises. On this issue, we think that there is no place for criminal liability of the manufacturer, because the

behavior of the artificial intelligence system is completely beyond its control. In such situations, it may be possible to speak out of civil liability for damage incurred.

6. Conclusion

On the basis of all of the above, we can conclude that it is quite justified to fear that in the future the number of crimes in which the systems of artificial intelligence are somehow involved will increase. Fear of the increasing involvement of artificial intelligence in the commission of criminal offenses, is primarily based on the fact of the increasing presence of such systems in the everyday life of human, almost in all spheres of his life. In addition, such systems are suitable for manipulation or abuse, since they are primarily intended to serve to humans. This refers primarily to artificial intelligence systems that are completely under the control of users of this system. Then, some types of these systems have a lower or higher degree of autonomy, which means that their functioning does not require human engagement. This refers primarily to systems that are, to a lesser extent or completely, out of control of the human, that is, in part, or completely autonomous. Also, these systems are unpredictable, because they have the possibility of self-learning and acquiring new knowledge, which can cause problems in the processing of a large amount of data and therefore unpredictable behavior. In addition to this, due to lack of awareness, such systems are unaccountable, like an animal. This is what makes them more suitable for misuse for criminal purposes. This is why the issue of criminal responsibility in situations in which these systems have caused the criminal consequences of great importance and the challenge for contemporary domestic criminal legislation.

Criminal liability for the commission of a criminal offense under the provisions of the current Criminal Code of the Republic of Serbia is prescribed only for people. This further means that in situations where artificial intelligence is somehow involved in the commission of a criminal offense, it can be said about criminal responsibility and punishments by sanctions of criminal law only if the functioning of the artificial intelligence system can be linked to a certain human behavior. In this sense, users of these systems, supervisors, owners or manufacturers appear primarily as entities that can be linked to the operation of these systems and whose guilt can be attributed to their criminal behavior.

And, at the end, we can say that biggest challenge for criminal substantive law, as well as for criminal procedural law regarding these cases, will be bringing in connection certain persons with acting of some systems of artificial intelligence and its causing of criminal consequences.

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Compliance Activities against Fraud and Corruption in Hungary

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Abstract

The risk of corporate wrongdoing in Central and in Eastern Europe – mainly of fraud and corruption – is considerably higher than in the West. To prevent, uncover, and handle such deeds, corporate compliance activities offer an effective solution in the most general respects. It is already evident that the handling of such activities within the traditional national criminal framework (investigative authority, prosecution, and criminal court) is becoming a less and less reassuring prospect. Accordingly, this study offers an overview of compliance activities such as forensic data analytics and whistleblowing systems.

Keywords: *compliance, corruption, fraud, forensic data analytics, whistleblowing*

1. Introduction

Due to the unique features of the market environment, the risk of corporate wrongdoing in Central and in Eastern Europe – mainly of *fraud and corruption* – is considerably higher than in the West. According to estimates by corporate wrongdoing experts, the damage caused by corporate crime on the global level reaches 5% of companies' revenue[1]. This number on its own should justify that companies undertake effective countermeasures against wrongdoings, whether using the instruments of criminal law or otherwise. According to a recent Hungarian survey, however, 94% of responding companies had no "ethical infractions" in the last 5 years. Only of 53.9% of participating Hungarian corporations had a so-called Code of Ethics, though the international rate for this is 81%. 28.5% have a dedicated channel (ethics hotline), while globally this index is at 60%. Only 18% of companies check for conflicts of interest. The risk of data loss, which is made increasingly dire by technological development, is recognized less and less by Hungarian companies each year. While in 2012 36.4% of

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[1] See Association of Certified Fraud Examiners: Report to the Nations on Fraud and Abuse. 2016 Global Fraud Story (source: http://www.acfe.com/rttn2016/about/executive-summary.aspx).

corporate chiefs thought that an existing employee will never leave with the company's data assets, this same metric in 2016 was 61.3%. This change goes against formal logic. The numbers above show that the standards for combating corporate wrongdoing in Hungarian-owned companies do not correspond with international norms. It would then logically follow that there is a distinct possibility that the relative loss in turnover due to these abuses also exceeds the global average. This would indicate the presence of a whole host of disadvantages, the identification of these, however, is beyond the scope of our present effort.

Taking into account the facts above, companies operating in our geographic region should pay special attention to the creation and operation of efficacious compliance control environments and frameworks, and to the implementation of these into their corporate cultures[2]. This is a challenge for companies, because owners and upper management are, according to the axioms of economics, of a profit-oriented persuasion[3]. The positive effects of compliance controls (including whistleblowing regimes) on profitability, however, can only be felt in the medium and long term, and it is very difficult to measure them (how can something which has not occurred be measured?). The introduction of compliance controls could potentially have a negative effect on corporate productivity, because it requires expertise, human resources, technical support, and training – and these have significant costs. Besides, it is quite probable that a company suffers a competitive disadvantage due to its ethical operation as the controls introduced make it stiffer, more bureaucratic, and slower to react. A company's functioning, due to these very measures, can become more expensive, while its competitors are unburdened by these added encumbrances. An even more difficult scenario involves the loss of business opportunities due to ethical functioning – for example, if a company is no longer willing to engage in bribery or offer its potential business partners lavish gifts or luxurious trips.

2. The use of compliance devices

Fundamentally, the academic consensus is that in a globalized world ethical business operation and the development of an effective corporate culture against fraud, bribery, and other corrupt activities will eventually lead to a competitive advantage, because these nurture trust in third-parties – and even in partners who, as a result of globalization, function in completely different geographic or social milieus[4]. As a result, external trust can be described as a corporate *value* which is difficult to cultivate but easy to destroy with any acts which raise questions about a company's general ethical approach.

It is counter-intuitive for the upper management to admit that, on the long term, it is practical to conduct business in an ethical mode, as they have their performance evaluated based on profit obtained on short periods. It is thus unsurprising that 42% of

[2] For a more detailed account, see W. Brammertz, *Risk and Regulation*, Journal of Financial Regulation and Compliance, 2010/1, pp. 46-55.

[3] It may be said that the economic sector can be described along the lines of a binary value system of profitability or unprofitability.

[4] Cf. J.A. Petrick, J.F. Quinn, *The Challenge of Leadership Accountability for Integrity Capacity as a Strategic Asset*, Journal of Business Ethics 2001/3, pp. 331-343. P. Verhezen, P. Morse, *Consensus on Global Governance Principles?* Journal of Business Ethics, 2009/1, pp. 84-101.

financial leaders believe unethical business conduct is acceptable to reach targets[5]. Explaining clearly these complicated correlations to senior executives and getting them to commit to and maintain corporate compliance even under considerable daily pressure are the greatest challenges for compliance professionals.

Encouraging and conserving commitment among senior leadership, hiring compliance experts, creating and operating internal regulatory environments, periodical risk analysis, implementing whistleblowing systems, and appropriately training staff are all traditional *compliance tools*. Though these are effective instruments on their own, *IT support* plays an increasingly essential role in the field. Without proper IT support for compliance processes, companies' complex business processes are more and more difficult to oversee. This boosts the odds of abuse. It should be noted at this point that a well-constructed compliance control environment with apt IT support helps a company protect its financial assets and data, as well as safeguard its operational continuity against *external* (cyber-attacks) and *internal threats* (employee data theft).

3. Forensic data analytics (FDA) tools as compliance activity

So-called *forensic data analytics* (FDA) tools are able to process enormous quantities of information from multiple sources. They can reveal and display patterns and trends that hint at suspicious activities or indicate abuse, and which would remain concealed if we could only rely on human expertise or analytical ability[6]. Even the very existence of such systems can have a *general preventive effect*, because they can dissuade external or internal perpetrators from executing their plans. Simultaneously, early detection in the initial stages of abuse is likewise an important element of prevention, as it can minimize damage. FDA systems allow the documentation of misconduct in a manner that can later aid legal (even criminal) proceedings. Optimally, an effective corporate compliance environment can discourage wrongdoing in a general preventive manner, or abuses can be discovered early, e.g. via whistleblowing or FDA instruments. This is followed by a professional *internal investigation*, the goal of which is to process the affair and document evidence (perhaps with the use of FDA) in a manner that preserves evidential force. When a criminal complaint is made, the authorities can essentially receive a complete case, and this can already be observed at today's more mature organizations. Presenting such a complete portfolio can make criminal proceedings faster, more effective, and, notably, more prolific. It also minimizes the strain on authorities' resources.

A well-functioning compliance environment amplifies the general preventive character of criminal law, and it aids in the timely discovery of criminal activities. What is more, it can facilitate internal investigations, as well as the preservation and use of evidence for criminal proceedings. This is possible if companies, at least on the middle-management level,

1. acting on their own initiative or perhaps at the behest of some additional legislative encouragement, invest in compliance functions, including FDA tools;

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[5] EY Global Fraud Survey 2016 (source: http://www.ey.com/gl/en/services/assurance/fraud-investigation---dispute-services/ey-global-fraud-survey-2016).

[6] EY Global Forensic Data Analyitics Survey 2016 (source: http://www.ey.com/gl/en/services/assurance/fraud-investigation-dispute-services/ey-shifting-into-high-gear-mitigating-risks-and-demonstrating-returns).

2. establish clear whistleblowing rules within the legal framework, encourage the use of the system, evaluate risk regularly (including through the use of data-based and FDA assessments);

3. invest in both human and technological resources to combat cyber-attacks;

4. carry out due diligence prior to establishing business relationships; and

5. establish and maintain compliance awareness at all levels of the company through uniquely-tailored training.

4. Compliance and Criminal Law

In a point of view of Criminal Law, we have to say, that misconduct committed within and for the benefit or detriment of a company or (public) institution, though it often falls under one of the offenses contained in Act C of 2012 on the Hungarian Criminal Code ("Criminal Code"), rarely results in criminal proceedings. This does not mean that such forms of conduct occur only sporadically. Investigating and proving these crimes, however, is unusually difficult[7], and, as such, latency in this area is especially high[8].

Nonetheless, these activities' global pervasiveness and the social and economic damage they cause justify why some of the issue's legal ramifications and its institutional framework should be explored, along with certain expected (or, at least, desirable) developmental trends. An outcome of globalization is that companies operate across borders. This means that the foundations of a Hungarian approach cannot be established without analyzing foreign legal instruments (mainly from the English-speaking world) or literature concerned with the practical and academic aspects of the topic.

It is already evident that the handling of such activities within the traditional national criminal framework (investigative authority, prosecution, and criminal court) is becoming a less and less reassuring prospect. The causes for this can be found in the previously-mentioned interdisciplinary nature, the axioms of the globalized economic system, and the phenomenon of a quasi-permanently unfolding digital revolution. In today's so-called Big Data Era, when neither borders nor technology can block the flow of data or halt its processing, it is difficult to fight crime with traditional tools. That in increasingly information-based societies a company's greatest assets are information and data – which, due to the digital revolution, can be easily appropriated using illegal tools – only expands this problem.

We agree that corporations' interests are threatened not just by behaviors that fall within the scope of criminal law but also by those in the purview of other legal fields, as well as potentially lawful but morally objectionable acts. To prevent, uncover, and handle such deeds, *corporate compliance activities* offer an effective solution in the most general respects. In the interest of brevity, this study will concentrate on wrongdoing that can be classified as criminal, a preventive strategy that is a subcategory of compliance known as *whistleblowing*, and possible reactions to misconduct.

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[7] J. Pascoe, M. Welsh, *Whistleblowing, Ethics and Corporate Culture: Theory and Practice in Australia*, Common Law World Review, 2011/2, p. 146.

[8] D. Lewis, A.J. Brown, R. Moberly, *Whistleblowing, its Importance, and the State of Research.* In: D. Lewis, A.J. Brown, R. Moberly, W. Vandekerckhove (eds): *International Handbook on Whistleblowing Research*, Edward Elgar Publishing, Cheltenham, 2014. p. 33.

Today, corporate *internal investigations* or the Hungarian *employers' whistleblowing system* may be placed among the traditional institutions of criminal law or, if viewed chronologically, *before* these. We will examine how general prevention strategies can succeed within a company through responsible corporate governance and the establishment and operation of an appropriate compliance control environment, and what responsibilities corporate leadership has to owners and, potentially, other stakeholders[9] in this respect.

5. The concept and types of whistleblowing as a compliance activity

In 2014, a cross-continental group of researchers released the *International Handbook on Whistleblowing Research.* It defines a whistleblower as "an organizational or institutional 'insider' who reveals wrongdoing within or by that organization or institution, to someone else, with the intention or effect that action should then be taken to address it"[10]. However, this general definition, according to many, could require further categorization. It could also potentially be amended with several substantive elements.

For instance, Daniel Westman delineated three subcategories: active, passive, and embryonic whistleblowing. *Active* whistleblowing refers to individuals who make an actual disclosure, while *passive* covers employees who refuse to carry out their employer's orders when they believe these to be illegal. *Embryonic* whistleblowing can be both active and passive, though the individual is removed from his or her position prior to disclosure due to a lack of trust[11].

Robert Vaughn distinguishes between *legal* and *illegal* whistleblowing[12]. The basis of this differentiation – less candidly referred to as *direct* or *indirect* whistleblowing – is whether the addressee of the disclosure has a right to initiate proceedings or sanction. An example of a situation where this is not the case occurs when whistleblowing is conducted through the media[13].

Amanda Leiter divides whistleblowing into *hard* and *soft* variants. Under the second category she includes employee declarations which do not conflict with any company rules, legal or moral, though, according to the discloser's position, they refer to arbitrary or reckless activities[14].

Finally, the most commonly used categorization fits whistleblowing into *internal* and *external* forms. The former contains the case of when the disclosure takes place within one of the company's internal forums. The external whistleblower, however, divulges to an entity independent from the company. We can also speak of a *mixed* whistleblowing system if the announcer can turn to both internal and external forums[15].

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[9] In the English-speaking world, stakeholders are persons or groups to whom a company owes responsibility, though they cannot be regarded as owners.

[10] D. Lewis, A.J. Brown, R. Moberly, *op. cit.*, p. 33.

[11] D.P. Westman, *Whistleblowing: The Law of Retaliatory Discharge*, The Bureau of National Affairs, Washington DC, 1991. pp. 19-20.

[12] R.G. Vaughn, *The Successes and Failures of Whistleblower Laws,* Elgar Publishing, Cheltenham, 2012. p. 11.

[13] J. Fisher, E. Harshman, W. Gillespie, H. Ordower, L. Ware, F. Yeager, *Privatizing Regulation: Whistleblowing and Bounty Hunting in the Financial Services Industries*, Dickinson Journal of International Law, 2000/3, p. 128.

[14] A.C. Leiter, *Soft Whistleblowing*, Georgia Law Review, 2014/2, p. 436.

[15] S.M. Kohn, *Concepts and Procedures in Whistleblower Law,* Quorum Books, Wesport, Connecticut, 2001. p. 23.

The cradle of (modern) whistleblowing is undoubtedly the United States. The construction of a veritably modern federal whistleblowing regime was initiated by the 1978 Civil Service Reform Act (CSRA) and the Whistleblower Protection Act (WPA) from 1989[16]. Following the Enron and WorldCom scandals, a new milestone was reached with the Sarbanes-Oxley Act of 2002 (SOX)[17]. The Dodd-Frank Wall Street Reform and Consumer Protection Act (commonly referred to as the Dodd-Frank Act), which amended the SOX Act, was passed in 2010 following the 2007 start and 2008 global deepening of the Great Recession. After this, finally the Council of Europe began planning whistleblowing recommendations in 2010 too. As a part of this effort, a commission explored the subject, chiefly by reviewing US regulations. Based on the commission's report – which gave a concrete definition of whistleblowing – the Committee of Ministers passed Recommendation CM/Rec(2014)7. This document called for the creation of relevant regulations within member states, and it noted that these regulations should give due consideration to human rights. After this, especially due to the Edward Snowden affair, events started to speed up. Two reports were completed in January and May 2015, respectively, to facilitate safeguards for whistleblowers. These recommended setting up whistleblowing regimes in both the public and private sectors, the establishment of independent authorities to monitor these regimes, and taking steps to ensure the protection of whistleblowers who are exposed to domestic persecution[18].

The European Court of Human Rights (ECtHR), too, had to address issues related to whistleblowing, albeit in an employment law context. In *Heinrich v Germany*, the applicant worked in a nursing home of which the Berlin government was a majority owner. Downsizing caused the staff to be overwhelmed, and the proper quality of care could no longer be maintained. In 2004, the discloser, via a legal adviser, notified the management in writing that this was the case and called on them to remedy the situation. The leadership refused, and in December 2004 the lawyer made a criminal complaint against the company. In January 2005, the nurse was laid off – supposedly due to a periodically recurring illness. The nurse attacked the dismissal in a labor court. The investigation of the nursing home was restarted in February 2005 and the caretaker cited as a witness, but the probe was halted in May. The Berlin Labor Court ruled that employment could not be considered terminated, because it was ended illegally. The appellate court, however, struck down the first instance decision because it viewed the employee's reaction as disproportionate vis-à-vis the harm which effected it. Thus, the nurse was not exercising a constitutional right but breaching a duty arising from employment. The Federal Labor Court similarly rejected the appeal, as did the Federal Constitutional Court. Subsequently, the nurse turned to the ECtHR, which ultimately validated her claim and stated that the discloser utilized a constitutional right when reporting misconduct at her place of employment (and acted, fundamentally, as a whistleblower would). Based on this decision, public interest disclosures can now be fitted into the catalog of human rights[19].

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[16] N. Keith, S. Todd, C. Oliver, *An International Perspective on Whistleblowing* Criminal Justice, 2016/3, p. 15.

[17] For a Hungarian account of the Enron scandal, see A. Kecskés, *Az Enron botrány és az üzleti jog rohadt almái,* [The Enron scandal and the rotten apples of business law] Magyar Jog, 2008/6, pp. 429-440.

[18] G. Schirmer, S. Coliver, *Resolution 2060 on Improving the Protection of Whistle-blowers*, International Legal Materials, 2015/6, p. 1131.

[19] *Heinrich v. Germany*, Application No. 28274/08, 21 July 2011.

4. The Example of Hungary

While examining the relevant Hungarian rules, it becomes evident that its roots reach back to the middle of the socialist period – to the time of the so-called "soft dictatorship." Then, after a brief legislative detour, the lawmaking initiatives of the most recent period opened a fundamentally new chapter in the story of reporting abuses.

The nearly analogous – although not entirely accurate – Hungarian terminology for whistleblowing may be the categories of *public interest discloser* or *company discloser* (*közérdekű bejelentő* and *vállalati bejelentő,* respectively*).* The first appearance of these was a legislation in effect from 1977 until Hungary's 2004 EU accession: *Act I of 1977 on Public Interest Disclosures, Recommendations, and Complaints*. According to § 4(1) of this law, "a public interest disclosure highlights circumstances, errors, or deficiencies the remedying of which serves the interests of the community or society as a whole. It draws attention to behaviors or facts which are illegal, contrary to socialist morals or the principles of socialist economy, or otherwise offend or endanger the interests of society." The addressee can be a state agency, a company, an institution, an association, an oversight body etc. (Act I of 1977, § 2). It must be highlighted that this law already emphasized the protection of the discloser, and, as such, allowed anonymous reports. If, however, it became clear that the discloser acted in bad faith, his or her identity had to be revealed [Act I of 1977, § 15(3)].

The next stop was *Act CLXIII of 2009 on the Protection of Fair Procedure and Related Amendments*. This was not at all akin to the previous regulation, but, as the relevant parliamentary memorandum states, it utilized certain solutions from the US. It can be emphasized, that the law's general Explanatory Memorandum referred to, on the one hand, the Hungarian Constitutional Court's position on fair trial [primarily to decisions 6/1998. (III. 11.) and 14/2004. (V. 7.)]. On the other, it mentioned *expressis verbis* the *whistleblowing phenomenon*, which it defined as "an employee of an organization, who sets aside his/her personal interests, acts to avert harm (prevention) threatening others (the community in a narrow or broad sense) by revealing an irregularity (misconduct) detected at his/her place of employment". The law prescribed a procedural fine ranging from 50,000 to 500,000 HUF for offenders (or, in the case of legal persons, from 100,000 to 5 million HUF) [Act CLXIII of 2009 § 11(1)]. For a person making an unfounded claim, the sanction may be between 50,000 and 300,000 HUF (a falsely disclosing organization can receive a charge stretching from 200,000 to 1 million HUF). Furthermore, echoing its American forerunner, § 16(1) of the 2009 Act states that "if the Authority imposed a fine due to a failure to fulfill the requirement of fair procedure, the Authority's president may award the discloser 10% of the fine". As it can be discerned from the quote above, § 4 of the law intended to establish a Public Procurement and Advocacy Authority (according to the preamble to increase efficiency in combating corruption), but this never materialized.

Primarily because of the legal guarantee it offers, it is necessary to highlight Article XXV of the Fundamental Law of Hungary, according to which "everyone shall have the right to submit, either individually or jointly with others, written applications, complaints or proposals to any organ exercising public power."

The current legal environment was created by *Act CLXV of 2013 on Complaints and Public Interest Disclosures* ("the complaint law"), which came into force on 1 January 2014. This law can be described as one enabling disclosures in both the state and private sectors. According to the definition in § 1(3), a disclosure "calls attention to a

circumstance the remedying or discontinuation of which is in the interest of the community or the whole society. A public interest disclosure may also contain a proposal." The public interest disclosure must be evaluated within thirty days [complaint law, § 2(1)].

Moreover, the general Explanatory Memorandum – in addition to referring to the above-quoted passage from the Fundamental Law – also notes that "[a] characteristic of the new regulation is that it supports anti-corruption measures in the private sector in addition to those in the public sector, and thus it allows organizations to formulate distinct procedures for handling disclosures and to enter into agency contracts with lawyers for the receipt of disclosures (discloser protection lawyer)." The goal of this legal institution is for "the principal (typically a business organization) to engage the discloser protection lawyer within a tripartite legal relationship to receive in its name disclosures relating to the principal either from its employees or external partners" (detailed Explanatory Memorandum).

A similarly novel solution is the creation of w*histleblowing systems* sketched out in §§ 13-16, in connection with which the law "records the most important guarantees for the operation of the system (finality, entry into a data protection register, the prohibition on processing of special personal data, the requirements for terminating data handling, notification of employees, and containment of misuse). That legal persons in a contractual relationship with the employer (subcontractors, suppliers) can also make reports in the whistleblowing system is an important requirement, as this aids the more comprehensive information of management" (detailed Explanatory Memorandum). What is more, § 14(6) decrees that "persons having a legitimate interest in making a whistleblower report or in remedying the conduct concerned" may also make reports.

5. Significant theoretical and practical issues in whistleblowing

In this section, we will highlight the most notable characteristics that must be considered during the legal regulation of whistleblowing and the creation of whistleblowing systems. Our primary aim is not to evaluate the Hungarian legal environment, however, but to present common questions within a broader perspective.

5.1. The first obvious question which may arise concerns *who* is entitled to make a disclosure. According to the main rule, natural persons (or the representatives of legal persons) employed or in other employment-oriented legal relationships with the company have standing. Thus, according to general opinion, a personal qualification is necessary. In addition to the above-referenced § 14(6), a clause which expands the category of qualified persons, it may also be possible to make an exception based on *chronology:* On the basis of an overriding interest, it is possible for a person previously employed by the company to disclose, too, though his or her legal relationship might have been terminated already at the time of the disclosure.

5.2. Dividing whistleblowing according to its object is primarily based on whether the misconduct to be disclosed is legally or morally objectionable. If the issue in question happens to be unlawful, it must be decided whether the given activity or omission violates or compromises criminal law rules or, perhaps, another field of law (e.g. regulatory offences). According to the correct position, which we already quoted, public interest disclosures may also play a role in the previously-mentioned cases, as well as in civil law-related detriments such as negligence or violations of personal rights (e.g.

those concerning reputation). Nonetheless, the most common forms of misconduct pertain to malfeasance in connection with financially valuable data. The future of whistleblowing will, increasingly, lie in criminality of this nature[20].

5.3. The establishment of a whistleblowing system, as demonstrated by the effective Hungarian legal environment, can occur within both the private and public sector. In connection with the latter, the only criteria that must be noted is that such a system, due to parallelism, may sometimes conflict with disciplinary regulations in a given field, thus special attention must be paid to harmonization[21]. This can be particularly relevant in policing[22].

5.4. When speaking of the direction of disclosure, we intend to differentiate between whether it should occur internally within the company's own regime or if it is to be targeted towards an external forum. Academic literature indicates that both solutions can have drawbacks. If the only available option is external whistleblowing, this can easily turn into fertile ground for retaliation against the discloser. On the other hand, if the opportunity is exclusively external, it can serve as a path for a disappointed employee's vendetta, perhaps after failing to receive a much-anticipated promotion. This can result in a damaged reputation, which is an essential factor in determining a company's competitiveness[23]. Keeping this in mind, our position is that a combination of internal and external whistleblowing may be the most effective solution. The Hungarian complaint law is thus especially forward-thinking in its introduction of a "middle man", the discloser protection lawyer.

5.5. If the internal investigation conducted as a result of whistleblowing yields suspicions of a crime, the question arises whether the company has a *duty to make a criminal complaint*. § 16(3) of the complaint law states a fairly clear rule pertaining to this point: "If the investigation of the conduct reported by the whistleblower warrants the initiation of criminal proceedings, arrangements shall be taken to ensure that the case is reported to the police". Our attitude in relation to the appropriateness of this solution is highly skeptical. Although § 171(1) of Act XIX of 1998 on Criminal Procedure states that "[a]nyone may lodge a complaint concerning a criminal offence," the main rule in Hungary's system of criminal law is that an absolute duty to this effect only exists under exceptional circumstances. Consequently, establishing this duty in connection with misconduct of *any severity* hardly seems justified. On our part, to increase the efficiency of investigations, *we would endorse legislative amendments that would allow exceptions from the ex officio principle by considering it an impediment to punishability if a lesser non-violent offence was uncovered through an employer's whistleblowing system, if it can be handled "in-house", and if a criminal procedure in connection with the matter does not serve a pressing social interest.* It should be noted that the timeliness of criminal proceedings would also improve if, for example, a small-scale workplace embezzlement did not necessarily warrant the use of the state's punitive powers.

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[20] E.S. Callahan, T.M. Dworkin, D. Lewis, *Whistleblowing: Australian, U.K., and U.S. Approaches to Disclosure in the Public Interest*, Virginia Journal of International Law, 2004/3, pp. 903-904.

[21] Cf. e.g. Act CXCIX of 2011 on Public Officials §§ 155-159

[22] E.g. chapter 15 of Act XLII of 2015 on the Service Status of Professional Members of Law Enforcement Agencies ("Hszt.")

[23] M.E. King, *Blowing the Whistle on the Dodd-Frank Amendments: the Case Against the New Amendments to Whistleblower Protection in Section 806 of Sarbanes-Oxley*, American Criminal Law Review, 2011/3, p. 1483.

5.6. The complaint law states already in its preamble that the protection of public interest disclosers must be ensured as much as possible. Furthermore, § 11 includes the guarantee that all measures disadvantageous for the whistleblower and arising as a result of the disclosure will be unlawful (notwithstanding cases of bad faith), even if they would otherwise be legal. § 12(3) extends forms of assistance contained in Act LXXX of 2003 on Legal Aid to whistleblowers as well.

It must be noted that § 257 of Act IV of 1978 (the previous Criminal Code) criminalized the initiation of any disadvantageous measures against a person making a public interest disclosure up until 31 January 2013 (the offence of "persecution of a public interest discloser"). This act is now only a regulatory offence (as per § 206/A of Act II of 2012 on Regulatory Offences, Regulatory Offences' Procedure and the Regulatory Offence Registry System). Determining which field of law should criminalize an act dangerous to a given society is fundamentally a legislative prerogative. Instead of undertaking such an endeavor, our position is that it is efficiency which must be increased in relation to both criminal and petty offenses.

5.7. This is a widespread solution in English-speaking countries, and, as we have seen, Hungarian lawmakers have also toyed with the idea of introducing whistleblower rewards in 2009, thus providing motivation for disclosures[24]. Due to present circumstances in Hungary, however, the introduction of such a system presumably will be delayed – at least until whistleblowing regimes are so common and developed that it can be assumed that the majority of claims are authentic reports of abuse and not simply venal and baseless allegations.

5.8. To conclude this section, we may declare that a position, which would not only support penalizing courses of action against whistleblowers (either with tools meant for felonious or petty offenses) but would also create the possibility – if a *sui generis* case is established and in addition to liability for damages – of sanctioning bad-faith whistleblowers involved in severe instances of abuse, would be a respectable one to hold.

6. Summary and final recommendations

Our present study offered guidance on how to counter corporate wrongdoing more effectively. Finally, we must attempt, as completely as possible, to answer our initial question: How can corporate compliance activities be made more effective?

1. Our position is that the proposition, which states that at least some companies must be *legally required* to set up and run whistleblowing systems, needs to be considered and debated carefully. It is possible that a threshold could be established based on revenue or the number of employees, and the establishment of a system could be mandated once this threshold is reached. Another workable approach would be to compel all businesses that do not have SME status[25].

2. It is also worth considering making certain *benefits* conditional on the establishment of control systems, such as tax breaks (e.g. on corporate and dividend tax) or more lenient legal consequences if a wrongdoing done for the company's benefit (or in its name) is uncovered.

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[24] For the latest American solutions, see K. Hastings, *Keeping Whistleblowers Quiet: Addressing Employer Agreements To Discourage Whistleblowing*, Tulane Law Review 2015/2, pp. 497-500.

[25] SMEs are micro, small and medium-sized enterprises. Support for their development is detailed in § 2 of Act XXXIV of 2004.

3. It seems unavoidable to have to contemplate the popularization of disclosure and *best practices from the United States or Western Europe.* Even the best-constructed whistleblowing system will remain ineffective if it is not used by the employees.

4. To provide legal guarantees, it is necessary to legally prescribe an internal regulatory requirement relating to internal investigations[26].

5. Furthermore, we recommend that if an internal investigation leads to suspicions of illegal activity, *it should not be generally mandatory to make a criminal complaint.* In practice, it is often the difficulties associated with criminal proceedings (witness duty, legal and travel costs) that deter corporate leadership from establishing a whistleblowing system. The desired goal of legal policy would be advanced if managements could decide freely whether to report certain crimes – though, naturally, such liberties would solely exist in relation to non-violent offenses and only below a certain monetary threshold. Nonetheless, such a measure would increase the number of companies operating control mechanisms, and these companies would be more likely to communicate the regime's usefulness to their employees.

6. Today, rules of criminal law and procedure allow for more exceptions from the principle of *ex officio.* Keeping this in mind, it would not be unreasonable to suggest that punishment for certain low-value financial misdeeds by an employee at the expense of the company should be *conditional* on a criminal complaint being made by the company[27]. For example, it would be practically convenient for both companies and the authorities to avoid prosecuting a minor embezzlement case uncovered by an internal investigation to which an employee confessed and for which he or she perhaps even already compensated for.

7. Finally, our stance is that the key to all problems arising in connection with whistleblowing systems is *the individual*. Therefore, it is useful for increasing awareness and developing conscious employee behaviors to have annually recurring and mandatory training sessions, as these can provide up-to-date information on the current legal environment and continuously-changing corporate mechanisms.

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5. Kecskés, A., *Az Enron botrány és az üzleti jog rohadt almái* [T*he Enron scandal and the rotten apples of business law*] Magyar Jog, 2008/6.

[26] E.g. in a manner analogous with § 24(3) of Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information

[27] For a high number of crimes, this possibility would be automatically precluded due to the communal nature of the legal object. Such would be the case for the offence of corruption.

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The criminal response to the terrorist phenomenon. Critical paradigms for the Rule of Law

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Abstract

In this article we try to analyze various aspects relating to the topic of terrorism. We start by exploring the old form of terrorism, up to its modern form, transition within which some issues of particular relevance are highlighted: the evanescence of the subjects and targets involved with terrorist attacks; the transformation and extension of the object of interest to terrorism; the admixture between the political and religious nature of the attacks. In the same way, we try to show the change in the architecture of terrorist organizations. This global evolution of the phenomenon leads to feelings of insecurity and emergency on which new paradigms of power of the State and Law are founded. On that basis we focus on the possible collapse of the Rule of law which, with the justification to wage a war on terror and respond to the new security emergencies, turns into a State of Exception and Penal State, punitive and repressive, compressing the guaranteed legal and inalienable rights of each human being[3].

Keywords: *Terrorism, Rule of Law, emergency, State of exception, criminal Law of the enemy*

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1. Terrorism in the first decades of the XXI century

Terrorism is not a modern issue. If we define terrorism in general terms, as the recurring and organized use of violence designed to produce widespread fear among subjects and/or dismay for the object[4], then terrorism is a very ancient practice indeed.

Terrorist events and terrorist groups, both politically and religiously motivated, have been present throughout history, albeit in a great variety of forms and modalities, within every kind of political regimes[5].

Then, during the modern era and up until the end of the last century, terrorist organizations and terrorist acts developed a rough uniformity of organizational structures, aims and execution procedures.

Considering the most recently active terrorist groups of the last decades we could mention, for example, Tupamaros in Uruguay, Brigate Rosse and Nuclei Armati Rivoluzionari in Italy, Forças Populares 25 de Abril in Portugal, Euskadi Ta Askatasuna in Spain, Baader e Meinhof's Rote Armée Fraction in Germany etc.

As said, this kind of terrorism developed a deeply centralized and territorial-based structure, and acted according to rather specific and uniform standards, such as: carefully considering the choice of targets, selecting subjects with highly symbolic value, aiming to subvert the constitutional apparatus of the State.

Nevertheless, starting from the September 11 attacks, we have witnessed a decisive paradigm shift.

As a matter of fact, in the last two decades terrorism has undoubtedly evolved[6], transitioning from what we could define as its 'classic' form to a new, much more

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[4] For a clear understanding of the terms involved in the discussion, it is useful to clarify from the outset what we mean when we use the words *target*, *subject* and *object*. The *target* is the direct, material asset that the act of violence hits or aims to hit. The *subject* is the individual (or the group of individuals) directly struck by the terrorist attack. The *object* is the (indirect) purpose that the criminal action aims to achieve. In the case of an incendiary attack against the headquarters of a Party seat during a meeting, for example, the seat is the target, those who are present in the meeting are the subjects and the (democratic) Constitutional State, which is being attacked in its fundamental principle of freedom of political expression, is the objective.

[5] For instance, we could mention the Sicarii Jewish sect (1st century B.C.), which was the extremist political faction of the Zealots; this nationalist and religious fundamentalist group fought against the Roman occupation of the Land of Israel and all the Jews who were willing to tolerate it. Sicarii treated submissive Jews the same way they treated the enemy invaders. In order to pursue their political and religious agenda, they systematically resorted to the strategy of terror: murder, pillage and arson. "At that time, the Sicarii engaged in a conspiracy against those who were willing to accept the submission to the Romans and they fought them in every way, as enemies, robbing their belongings, stealing their cattle and burning their houses."; "They claim that there was no difference between them and the enemies, as they had dishonorably renounced their freedom for which the Jews had fought so hard and they would rather be slaves under the Romans." Cfr. F. Giuseppe, *La guerra giudaica*, 6th ed., Milan: Mondadori, 2000, Book VII, Ch. 8.1., pp. 254-255. Other precedents we could cite are the political conspiracies in the Roman Empire (see V.A Sirago, *Trecentomila croci. Banditi e terroristi nell'Impero romano*, Como: New press, 2017) or in Renaissance Principalities; the various plots against all kind of despots throughout history are yet another example. The rise of the Modern State itself was accompanied by terrorist groups and acts. For a historical analysis of the evolution of terrorism, see G. Chaliand, A. Blin, *Storia del terrorismo. Dall'antichità ad Al Qaeda*, 1st ed., Turin: UTET, 2007.

[6] Here, the term *evolution* doesn't refer to a causal and linear development process which is implemented in order to meet specific goals, but rather to a random process of transformation, which is driven by purely accidental factors. For further details, see N. Luhmann, R. de Giorgi, *Teoria della società*, 11th ed., Milan: Franco Angeli, 2007, pp. 169 *et seq.*

complex[7] and articulated one. Such an evolution can be better understood through the analysis of a few crucial steps.

Among these there's the '*evanescence of the targets and subjects involved with terrorist attacks*', which is characterized by a high level of social perceptibility.

Of course, contemporary terrorist groups still have preferential targets and subjects that they would rather hit, even only in order to ensure a stronger media resonance. We are not trying to question the fact that a terrorist action would try to explicitly undermine its object, whatever that is, by directly hitting them. Instead, the term *evanescence* is meant to highlight the fact that we have witnessed a critical evolution: terrorists used to attack their object by choosing specific and highly symbolic targets and/or subjects (e.g. attacking the State by hitting an institution, the figure of the sovereign, the ruling party's historical seat or its leaders; attacking the Church by hitting its representatives or the most important places of worship), while nowadays they opt for targets and subjects whose profile is much more indefinite and evanescent. In other words, considering the functional link between criminal behavior and destabilizing intents, there has been a transition from attacks on targets and objects which were somehow linked to the subversive purposes, to attacks on unpredictable targets, against common people and against qualitatively and quantitatively undetermined subjects.

Therefore targets and subjects no longer play the key role that they used to hold until the end of the last century as they have taken on the connotation of mere moving or sitting targets.

Another crucial aspect in the evolution of terrorism involves the '*transformation and extension of the object*'.

As pointed out above, the main goal of the terrorist organized groups of the XXth century was political subversion. Namely, the State with its apparatus, in all its facets, was the object of all their efforts. However the wave of jihadist terrorist attacks, from New York, in 2001, to London, in 2017[8], has made very clear to anyone that terrorism has assumed a new international dimension[9]; that is the metamorphosis of the State object into a supranational object. As a matter of fact, current terrorism is no longer containable within the boundaries of a defined national or territorial frame of reference, but it has identified his new, more general object with the western World as a whole.

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[7] The word *complexity* is not intended as a synonym for complicated or difficult to understand, but is defined in Luhmann's terms, as the compound set of possibilities which produce meaning through communication. Therefore complexity as an excess of possibilities as compared to those which actualize. In this perspective the concept of meaning is closely connected to that of selection, which is the fundamental process needed to reduce complexity and to find your bearings in the endless range of possibilities. In order to attain meaning it is necessary to select some possibilities from the infinite set of those available. Once selected, possibilities can actualize. The concept of complexity is also tightly related to that of contingency, which refers to the possibility to choose differently among the endless array of possibilities.

[8] Including those of Madrid, London, Instanbul, Paris, Nice, Bruxelles, Manchester, Barcelona etc.

[9] It is possible to trace the evolution of terrorism by looking at its official definitions. In 1937 the League of Nation defined terrorism as all the "*criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public*"; but it should be noted that later, in its Common Position of 2001 (931/PESC), the Council of the European Union defined terrorist acts as "*intentional acts, which, given their nature or their context, may seriously damage a country or an international organization, as defined as an offence under national law, where committed with the aim of: seriously intimidating a population, or unduly compelling a Government or an international organization to perform or abstain from performing any act, or seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization*".

A further element in this evolution of terrorism is the '*admixture between religious ideology and political purpose*'.

The success of jihadist terrorism has shown the indivisible contiguity and the interdependence between religious ideology and political purpose in fundamentalist organizations[10]. The classic and rigid differentiation between the two is simply no longer a useful key of interpretation for current terrorism. The rise of ISIS and the establishment of the Caliphate (June 2014), have brought fundamentalists closer to the objective of realizing an Islamic State based on the model of Mohammed and his successors, sclerotizing and unifying religious ideology and political purpose. In fact the aim of ISIS is to "*bring back Islam to its imaginary ideal of original purity*" and to "*establish a worldwide Caliphate, eliminating all those who disagree with its ideology*"[11].

The evolution of terrorism is also characterized by the '*morphological mutation of terrorist organizations*.

In fact, traditional rigidly centralized and hierarchically organized structures have given way to a new, decentralized, light, and horizontal kind of structure; flexible formations that proselytize and exchange information through the web. The terrorist organizations went from a unicellular structural dimension to a pluri-cellular dimension. In this kind of structure small groups and individuals (foreign fighters or lone wolves) play a key role.

However, this new fugitive and globalized version of terrorism poses a serious threat to the legal and political apparatus as a whole. If, in fact, as has been pointed out, a conflict between the need for social defense and the safeguard of the rights of individuals arises even when facing common criminal activity, that same conflict approaches a breaking point when terrorism is involved[12]. More specifically, on the one hand a State threatened by terrorism has the obligation to punish and prevent crimes which undermine its basic principles and the security of innocent citizens. On the other hand, it is aware that the fight against terrorism cannot justify the repression of those rights, Civil Liberties, values and principles which it is its own duty to protect (not only against terrorism) and which are the very foundation of its own existence.

Nevertheless, the high dangerousness and the absolute unpredictability of the current terrorist threat amplify the need for social defense to such an extent that new counter-measures, disguised as simple changes of law models related to the transformation of the phenomenon, may be introduced and undermine the principles underpinning the liberal model of the Rule of law.

2. Distinctive traits of a Rule of law

Many law history and constitutional theory books emphasize that the establishment of the Rule of law coincides with the French Revolution, even though in contemporary

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[10] The different terrorist groups linked to the Jihad have many points of contention, but they all agree on the objective to reinstate an Islamic Caliphate, which should serve as a reference point for the whole Ummah. Their disagreements are mainly about modalities and timescales of implementation of said project.

[11] J. Stern, J.M. Berger, *Estado Islâmico. Estado de Terror*,1st Ed. Amadora: Vogais, 2015, p. 269.

[12] R. Bartoli, *Legislazione e prassi in tema di contrasto al terrorismo internazionale: un nuovo paradigma emergenziale?*, in Diritto penale contemporaneo, Milan, 30 March 2017, p. 2. Accessible at: https://www.penalecontemporaneo.it/d/5312-legislazione-e-prassi-in-tema-di-contrasto-al-terrorismo-internazionale-un-nuovo-paradigma-emergenz.

documents, as well as on the doctrinal and political front, there is no evidence of such term[13].

Apart from some doubts and fleeting prior use, this term emerges at the beginning of the nineteenth century along with the literature of early German liberalism[14]. More precisely, the first use of this term is attributed to the jurist Robert von Mohl, who, with a work published in 1832, coined the expression Rechtsstaat[15], later incorporated into European statutory laws with the formulas: *Rule of law, Estado de derecho, État de droit, Stato di diritto.*

In this regard, from a general point of view, Pietro Costa's approach heralds a distinction between history and prehistory of the Rule of law which is more faithful and respectful of the historical data.

In his view, history starts from the moment this lexical term becomes known. In contrast, prehistory refers to contexts and times in which "*even if it does not yet have a name, it already exists*"[16], namely, the time periods and spaces in which the basic outlines of a principle that will be later defined arise, are consolidated and made more explicit throughout Europe in the process which will lead the model known as the Rule of law. In other words, in keeping with this approach, there is the need to temporally place the French revolution (and even earlier the English one) within the prehistory period of the Rule of law model, in finding in the French revolution only its point of origin and not that of arrival.

As noted above, the term Rule of law seems rather vague and devoid of content and it reveals nothing, or almost nothing, to us about this model and the traits that distinguish it.

In fact, it only sketches a "*direction*" and, at most, a "*value*". This direction is opposite to that of the Machtsstaat and the Polizeistaat, and results "*in the reversal of the relationship between power and law*"[17]. The value, instead, consists in the suppression of all arbitrary activities attributable to the State and capable of affecting citizens.

These are the only indications that such term allows us to derive. If we want to find out more, we need to seamlessly look at the prehistory and history of the Rule of law.

Sovereignty, individual rights, principle of equality, are the traits that characterize such model and that political philosophy and jurists of the time considered and regarded as 'held together' by the concept of *state law*. The latter, in fact, becomes at the same time expression of sovereignty (no longer *rex facit legem*, but *lex facit regem*) and guarantee of equality towards recognition and access to rights. In effect, by breaking the tralatitious model, the French revolution "*frees the two fundamental sides*" of the new juridical-political model, i.e., sovereign law, on the one hand, and individual rights[18] on the other hand.

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[13] See, for example, R. Carré de Malberg, *Contribution à la Théorie générale de l'État*, 1st ed., Paris: Sirey, 1920, p. 489 (in the notes) and G. Burdeau, *Traité de science politique*, 1st ed., Paris: L.G.D.J, 1964, IV, p. 88. Both trace back the introduction of the Rule of law to the theory of the constitution adopted by the National Constituent Assembly of 1789.

[14] R. Bin, *Stato di diritto*, in Enciclopedia del diritto, Annali. Milan: Giuffrè, vol. 4, 2011, pp. 1149-1162.

[15] The original title of R. Von Mohl's work is: *Die Polizei-Wissenschaftnachden Grundsätzendes Rechtsstaat.*

[16] P. Costa, D. Zolo, *Lo stato di diritto, storia, teoria, critica*, 1st ed., Milan: Feltrinelli, 2002, p. 91.

[17] G. Zagrebelsky, *Il diritto mite*, 1st ed., Turin: Einaudi, 1992, p. 20.

[18] M. Fioravanti, *Lo stato moderno in Europa*, 1st ed., Rome: Editori Laterza, 2002, p. 18.

The first, replaces the multiplicity of powers typical of the *ancien régime*, while the second, equal for all people, oppose the historically privileges related to the condition and social class to which the citizens belong.

Thus, if on the one hand, the Declaration of Human Rights and Citizens of 1789 states in its Article 1 that "*men are born and remain free and equal in rights*", on the other hand, in full harmony with the enlightenment philosophy, the law establishes itself as an indispensable instrument for freedom and, progressively more, for rights.

Article 1 sets out what already exists and for which, a few decades later, a name would be found: Rule of law. It is from here that this model takes on its regulatory role. Starting from it, the law in a positivized form becomes the distinctive character of such model. Thus, a positive law that finds its starting point in individual freedom and (natural) rights.

Indeed, against all rules, the law is reworked in the enlightenment political philosophy in close relation with the freedom that Montesquieu defines as the "*(...) the right to do all that the laws permit; and if a citizen were allowed to do what they forbid, he would no longer have any liberty, because the others would all have the same power*"[19]. The individual is free because he is being guided by law within the space that the same law reserves to him. To this effect, freedom is not the absence of boundaries, but the pursuit of one's happiness in the best way possible, in the awareness that limits to our freedom are set by the boundaries *of the freedom of others*. Through the (natural) law, the individual is an entity capable of natural rights and, first of all, of a right to *freedom*. Precisely for this dominant philosophical view, in the 18th century the law began to be perceived as a means of safeguarding and consolidating the natural rights of freedom, equality and property. The promotion and strengthening of those rights, that with the Declaration of Human Rights and Citizens of 1789 are positivized, ensure that during the 19th and 20th centuries they are recognized in the various European constitutions.

Therefore, the revolutionary climate does not affect the perception of law in the enlightenment sense, but it endorses it. In fact, with the Declaration mentioned above, the law definitively abandons the key logic of revelation, based on the idea of a harmonious complex of facts, rules and principles existing before the legislator and from which the prince/ruler/lord is released and mere depositary, to embrace the logic of creation. Indeed, from then on, medieval law is superseded by the concept and image of law in the modern sense, i.e. law conceived as an act of sovereign will, aimed at the implementation of individual (natural) rights and to which the State sovereignty is submitted.

This modern concept of law allows to better substantiate the "*direction*" and "*value*" referred to above and which the term 'Rule of law' suggests, and that this model proposes to pursue and guarantee. The direction, diametrically opposed to the Machtsstaat and the Polizeistaat, consists in the principle that sovereignty is not an end in itself but finds its existence and purpose solely in the function of creating a law capable of guaranteeing rights to the individuals on terms of complete equality. It is therefore obvious that this represent an inversion of the power-right relationship with regard to past forms of State. The centrality of sovereign power is now replaced by the centrality of individual rights recognized by the State through the law.

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[19] C.L. Montesquieu, *Lo spirito delle leggi*, 1st ed., Milan: Biblioteca Universale Rizzoli, 1989, Vol. I, Book XI, p. 308.

As to the value of the abolition of the State's arbitrariness on citizens, this is made possible by submitting sovereignty to the law itself through the *principle of legality*. To this effect, the principle of legality expresses a concept of law as "*supreme irresistible regulatory act*" against which no other stronger right can be invoked, whatever the form and foundation. Namely, it expresses a concept of law understood as supreme regulatory act which cannot be prevailed "*neither by the power of exception of the King and his administration, even if justified by higher reasons of State, or by the disapplication by the courts or the opposition by individuals in the name of a higher right or special rights*"[20].

Today, the Rule of law, in its current formulation, is called to face the terrorist emergency, or rather to write a new page of its history. The answer to this threat can be adequate if and only if it respects the paradigms peculiar to this model, briefly outlined above.

On this basis, it is clear that if the emergency response to terrorism, justified as a result of changes to paradigms due to the evolution of the phenomenon, is too pervasive in terms of sovereignty[21] (hence in terms of law and principle of legality) and above all restrictive of individual rights and principle of equality, not only does it distort the original Rule of law model by corrupting the direction and value mentioned above, but it puts at risk the entire system.

3. War on terror

In 1748 about the conditions where political freedom realizes Montesquieu, upheld that it "*consists in the security, or at least in the opinion that everyone has got of his/her security*"[22]. And as the threats to security come from public and private charges, citizen's freedom depends on the quality of the penal laws[23].

Many years later, in 1789, The Declaration of Rights recognizes the right of security among the natural inalienable rights. In 2000, The European Union rules the Union citizenship in the Charter of Fundamental Rights, emphasizing the individual as the center of its action and building up around him/her a space of freedom, security and justice.

Therefore, security has deeply marked the analysis and drawn jurists' attention on western juridical progress, until on 11th of September 2001, this big structure of guarantees and freedom rights (at security level) collapses, likewise The Twin Towers in New York. On September 11 the West enters a new historical-political modern phase. From that date onwards, you can assume easily the beginning of what some authors call "*the century of insecurity*"[24]. And if insecurity becomes an intrinsic element of our society, all what we have theorized until now about law and about state, will falter. The fear of the present and the total impossibility to build a 'safe' future refer to extant juridical categories of uncertainty in a pre-state phase and they falter the firm

[20] G. Zagreblesky, *op. cit.*, p. 24.

[21] In being possible in extreme cases to recognize the legal sovereignty of the security policies.

[22] C.L. Montesquieu, *op. cit.*, vol. II, Book XII, Ch. II, p. 5.

[23] *Ibidem.*

[24] A. Baldassarre, *Diritti Umani, Biopolitica e Globalizzazione*, 1st ed., Milan: Giuffré Editore, 2006, p. 7 *et seq.*

foundations of the rule and of the fundamental rights, that, up to now, had stood for both a not to be ignored juridical horizon to build up a Rule of law and the only prospect to which political power was linked in order to limit the consequences.

Thus, the cornerstone principles of Constitutional State and of pluralist and representative democracy are called upon a new challenge: to go over and to make relevant again the general theory of law and of state.

On September 11th 2001, the global disaster comes to life in a spectacular and sensational way that nobody would have ever been able to imagine. It's hard to remember an image of the same incisiveness and immediacy to point out an epochal change of the world history. In a few seconds one of the tallest buildings built by man, a giant with a height of over one hundred floors collapses, submerging the streets with a mound of rubble and clouds of dust.

The collapse of The World Trade Center denounces to Americans and to the whole world a clear reality: nobody is out of danger in the world society of risks.

Nothing real or symbolic could have been more sensational than what they have planned that evil day. Two civilian airplanes were turned into weapons of mass destruction and weapons of symbolic one: the pulverization of The Twin Towers kills thousands of lives, brings the nation to its knees and stucks the whole world on television.

That terrorist attack was the beginning of a new page of history, whose first lines tell us about the collapse of the capitalism icons and, more generally, of the hard and fast cultural and juridical basis until then unquestioned on which U.S.A. and the whole western world was based. The strongest military power of the world had been hurt and slumped into a deep distressed on its own ruins. Since that moment, a new feeling is born: the expectation of terrorism.

After that attack, the Congress of The United States of America authorizes the President Bush to use: "*all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons*"[25]. Thus, war on terrorism began.

With a deep sense of insecurity and fear for the future, already present in modern society and sharpened by terrorist attacks of new generation, war re-emerges as a possibility of acting daily at social and political level. And it's a war that involves everybody both because it has been promoted by U.S.A. that is at the head of a coalition made up by NATO state members or not NATO ones and also because this war has got undetermined borders and actions not planned beforehand; so, it involves all of us because everyone could be under attack. You can fight war on terrorism on a global front that affects and orients choices, attitudes, personal and social behaviors and it reintroduces in everyday speech the distinction between *we* and *they;* all this stokes up suspicions and feeds wariness of what is different from our own religion and culture.

The globalization of terrorist danger is the globalization of the expectation of terror, of the attack everywhere you are. This expectation affects the relationship both of the individual and of the community with law and brings forward the stability of the public order and destroys the guarantees of security, freedom and justice on which Constitutional State is built up.

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[25] Authorization for Use of Military Force, Pub. L. N. 107-40, 115 Stat. 224, 2001.

War on terrorism is the answer that this century of insecurity offers in order to isolate or to eliminate the expectation of terror and the danger of terrorist attacks. It is an answer that is full of the features of emergency and of 'despair'; it is an attempt to check both the danger of new terrorist wounds, and also the danger of a drift of the west juridical-political cornerstones.

But what kind of war is war on terrorism?

Since the Second World War, war has made up part of everyone's lives either because people experienced it or because people spoke of it. Thus, it has become part of everyday life and you can live it as a probable possibility that marks the changes of the world. By this time, it is common to listen to people speaking about 'war on poverty', 'war to hunger', 'war on criminality'. The substantive war, therefore, with an adjective that defines the scope, reveals not only an occasional political choice of action, but also a real model of government. Therefore, war becomes the means that governors of different States use to justify and legitimate their *governance*[26].

So, after The Twin Towers attack, terrorism and war on terrorism are included in the emergency issues, and politics and its choices of governance justify their actions on the base of 'security question' to face. And the government actions are authorized in order to limit the consequences of the expectations of terror.

Now let's try to understand better what are the characteristics and the limits of this war.

The terrible massacre gave rise to this 'new war'; first, the American Administration and then the Member States of the coalition take sides against the Islamic State (ISIS) in order to defeat terrorism. The result so far has been the death of tens of thousands of civilians and the beginning of a never-ending escalation of terrorist attacks causing as a consequence the increase of hate, suspicion, violence and fanaticism.

But has it been the clearest and the most far-seeing move or has it been a sign of weakness from the West? Or has it been a sign of surrender as regards the values of rationality and civilization on which its juridical-political tradition is based and that should have been safeguarded from terrorist barbarism?

In fact, the war on terror no longer sees a state-centric security paradigm in which country threatens country, we have today taken a different step towards a post-state security paradigm, leaving behind the once typical belligerent state centric intimidations which we were once accustomed to.

The terrorist catastrophes are neither locatable nor they can be ascribed to a specific person that acts.

They are either predictable, or manageable temporally, nor at spatial level and they can't entail a determined and planned action of a targeted attack. The terrorist danger is indirect and uncertain as well as the response that the fight against terrorism will use to seek its achievements. In fact, fear and anxiety caused by the terrorist attack of 2001 is based on its absolute spatial and temporal unforeseeability and on the sensation that your neighbor could be your enemy. From that moment, the presence of many Muslim migrants in our cities has been considered as 'a home threat'. Since then war originated from this indeterminable situation shows no borders both because it doesn't recognize state sovereignties to fight and because you can fight everywhere inside or outside the State without any distinction. The new war on terror is therefore different from those of

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[26] J. Simon, *Il governo della paura. Guerra alla criminalità e democrazia in America*, 1st ed., Milan: Raffaello Cortina Editore, 2008, p. 343 *et seq.*

the first modernity because it is accepted by the lack of knowledge. Nowadays, in the century of insecurity, that is called the second modernity[27] by some critics, war on terrorism sees the idea of security losing its ontological meaning and it has forced to look for new ways to restore the lost order. This order can't have classic patterns of attack and defense because it is threatened by the expectancy of terror and it moves in a limbo of uncertainty[28].

So, the massacre of September 11th 2001 and its worldwide consequences have caused a strong shock to the strongholds of the west classic thought, letting the weakness of security emerge as it has been stated until that moment.

The first result of the reactive war on terrorism and the limit of this perspective has been the decline of the international relations that has produced three substantial changes linked each other inside the birth and the evolution of the war on terrorism: 1. Failure to comply with the international law and its denial, as well as sanctioned by the ONU Charter (come into force on October 24th 1945), where the prohibition of war gathers prominence of fundamental rule; 2. The reconsideration of war as a means to solve international controversies in order to guarantee and defend the order of the world security; 3. The boundless feature and the terrorist connotations of the new wars[29].

According to the first bullet point, war on terrorism becomes the only practical way. It legitimates itself as lawful and just in contrast with a kind of utopian vision of the international juridical text that, on the contrary, considers war as a kind of *extrema ratio* to use only in self-defense cases.

In the second point, war becomes a means of law and of guarantee of order above the same law and of its uncritical implementation. Then, war should overcome the juridical form and should stand with strength for the substance of security.

In the third point war should aim at contrasting the terrorist act, but, assuming itself the boundless and never-ending feature of violence, as well as the terrorist act that should aim at destroying it.

These three characteristics of the war on terrorism show the limits of the choice made by the states in order to solve 'the expectancy of terror'.

On these terms, war on terrorism denounces its failure, because it seems to be the right answer terrorism was waiting for. It increases the problems it claims to solve, because every act of war will foment hatred of the terrorist organizations that will exploit those attacks to recruit new followers ready to fight the west.

Abu Bakr al Baghdali the new leader of ISIS, considered died in a raid of 2016, in a recent audio file broadcasted worldwide, incites his followers to "*destroy every tyrant*" that is "*inside and outside the territories of the Islamic State*", because "*the blood of the killed militiamen in Siria and in Iraq couldn't have been shed in vain*"[30].

Thus, the *new* war is neither a war of conquest any more nor of defense; it is neither oriented to the invasion or to the colonization of new territories, nor to a real prevention

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[27] U. Beck, *Conditio Humana. Il rischio nell'età globale*, 1st ed., Bari: Editori Laterza, 2008.

[28] *Ibidem.*

[29] L. Ferrajoli, *Guerra e terrorismo internazionale. Un'analisi del linguaggio politico*, in *Potere e Violenza. Guerra, terrorismo e diritti*, Edited by F. Ruggeri, V. Ruggiero, Milan: Franco Angeli, 2009, p. 78 *et seq.*

[30] Website: *Isis diffonde nuovo audio di Al Baghdadi: "Parla anche di Corea del Nord"*. [Consulted on 28.09.2017]. Accessible at: http://www.repubblica.it/esteri/2017/09/28/news/isis_nuovo_audio_al_baghdadi_corea_nord-176773197.

of enemies' attacks. It seems to have only one aim: to justify the existing power even overcoming the rule. In fact, it gets profits from the consolidation of inequality. Under this aspect you can consider it as a preventive war or as a preventive strategy of political and economic self-determination that could bring forward the supremacy of the West Powers. The criterion that it follows seems to be the protection of reality that considers the West Power above every other power; and this protection is realized using violence, the *bellum omnium*, retaliations and the overcoming of any normative text which is respectful to the foundations of Constitutional State.

War on terrorism, so, legitimizing and expressing of its own as just has taken on some particular features that are very similar to those that characterized the war against criminality in America in the sixties. It seems as if criminality, politics and governance are intertwined giving rise to the skeleton of the new war. Based its legitimation on fear and uncertainty, it proceeds towards undiscovered routes by law, which becomes an instrument at the service of fight action and loses the force of the principle and of the fundamental rule that leads the activities of State Administrations.

We are talking about a war that, besides having the characteristics of what we have inferred so far, has a deep feature of emergency and exception.

In other words, on behalf of emergency and exceptional situations, State Administrations are called to take decisions beyond law, or rather, they are called to write a new chapter of Law: 'the law of emergency', applicable in the state of exception.

In this contest of alert and panic, any decision that answers the supposed criterion of effectiveness with regard to the fight against terrorism, is presented as a necessary thing, beyond the fact that it is juridical legitimate and, as such, law conforms with the conflict.

From this viewpoint, arrests, detentions, the dead, retaliations, sweeps and the violations of the fundamental human rights are justified in the name of security and justice.

Military missions and the Al Qaeda chase and the war against ISIS are the deepest representations of a war which is not fought using airplanes and weapons any more by now, but it uses new punishment instruments and fight ones to divert the juridical rule for specific scopes; law is called to force itself in response to the State's needs. Consequently, there is not a Rule of law but the law of State.

A lot of these straining and juridical changes caused by war on terrorism undoubtedly are making our society less democratic and less safe. Probably after the terrorist attacks, it would have been better taking the opportunity to do a global police operation in collaboration with the police of different countries and world secret services in order to find out the culprits, arrest them, define a map of terrorist organizations and cut themselves off. Nevertheless, they have chosen another method that overlooks the limits and the risks that a drift of law and order should protect.

4. State of exception

A saying goes: 'too many times the urgent doesn't leave time to the important'.

So 'the urgent called terrorism' justifies and keeps on justifying the decisions of the Administrations that outclass the importance of positive law.

At the time when governments, by virtue of severe and serious contingencies, take political decisions without any support by a principle or an existing legal system, we face a particular nuance of political power known as state of exception.

It allows 'to rise up' above the law and to act to overcome the emergency. But a governor should be allowed to act in the best interest of the country even if this had to constitute a breach or infringement of rights laid down specifically.

Carl Schmitt (1888-1985), a jurist and German political philosopher, was among the first that examined state of exception[31] and pointed out a clear distinction between legality and legitimacy; this distinction is strictly connected to the sovereign's political decisional autonomy, concerning the possibility to declare it.

In fact, state of exception represents a kind of possible parallel reality as to the Constitutional State; according to Schmitt[32], it is a miraculous evidence that could reside in a space between natural law and positive law, acquiring a connotation which is not juridical but pre-juridical. In this perspective, Schmitt even denies the phrase 'rule of law', because it should be an obstacle to the complete realization of the "*miracle of exception*" by means of the sovereign power/will.

But, at this point, having regard to the recognized prevalence of state of exception on law, whenever the existence of an emergency to solve occurs, it is questionable whether it can substitute its character of exception with that of normality, proper of positive law. That is, if state of exception can substitute the rule of law in a certain way. According to Schmitt this possibility could happen. It could happen that exception became normality and as a consequence, rule.

Thus, state of exception recognizes full powers to the Sovereign (or to the governor) who can state the existence of itself and carry out all the acts he thinks right to overcome it. So, he has got full decisional margin. In fact, the sovereign choices can't be obstructed either at political level (because they are the expression of the highest political organ), or at juridical level. So, there is an interval of law suspension, a kind of *vacuum* that, having the character of exception and, consequently, beyond the scheme of order and predictable and foreseen law, enables the Sovereign a very extended margin of discretion to the point that he can decide what will be suspended and what will be saved in the given order; and he can do this because the same law recognizes this power.

Therefore, emergency and exception speak out the possibility of an excessive political power compared to the juridical one. For this reason, as already stated, exception brings the State back to a pre-juridical dimension, where law doesn't determine the social order but the sovereign's power and authority that acts in order to preserve and maintain itself and its people.

Thus, exception creates the paradox according to which "*authority shows it doesn't need law to create law*"[33]; moreover, it can't be obstructed in its acting, because it is independent and falling in the political sphere which is different from the juridical one; and finally, because its power is always legitimized and recognized by law. For this reason, exception is lawlessness which is after all law.

Santi Romano (1875-1947), a jurist, magistrate and Italian politician, questioning on the application of the military Criminal Code in cases of sieges and recognizing them as a condition of necessity, so of exception and emergency, stated that necessity: "*acts precisely at this point: changing the regular order of competencies, giving governmental powers that didn't fall under its authority otherwise. There will be a governmental*

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[31] C. Schmitt, *Teologia politica*, in *Le categorie del 'politico'*, edited by G. Miglio, P. Schiera, 1st ed., Bologna: Il Mulino, 1972. Italian translation of *Politische Theologie. Vier Kapitel zur Lehre von der Souveränität*, München-Leipzig: Duncker & Humblot, 1934.

[32] *Ivi*, p. 61 *et seq.*

[33] *Ivi*, p. 40.

competence of its own, which is extraordinary and exceptional, but it is always given by a source of law, and as a consequence, it is not an actually unlawful invention of others' competences"[34].

Today, emergency, of which state of exception is the result, is often one of the most common practices used by political power to justify its control and its authority at decisional level.

Giorgio Agamben, an Italian philosopher, declares that we have got to the ultimate expression of state of exception on a global scale. This determines that law and, in the specific, juridical norm can be contradicted through the (violent) practice of the governmental power, which is always represented as an advocate for law even if it fails internationally, externally, and it maintains a state of permanent exception, internally[35].

Nowadays state of exception is a dominant political instrument that governments attempt to address the emergencies that they have to face. From this point of view, it is an exemplary example the enactment of the Patriot Act on November 13th 2001after the Twin Towers attack by the President of The United States of America George W. Bush. In it is applied the infinite detention and the submission to trial by military commissions of the suspects of terrorist actions. Guantanamo, a prison built up in the military base, is still the effect of the exceptional 'juridical' consequences of the *military order.* Inside the prison there are in detention alleged terrorists, the so-called 'the fighting enemies', in total encroachment of International Law, who have never been brought to regular and fair trial.

Judith Butler, an American philosopher, examines this aberrant reality and the new methods of control and detention that spread out from Guantanamo[36]. According to Butler, this kind of models of detention and control reproduce the developing of power strategies at a global scale. So, they, are the celebration of the exercise of official authority through the total control, management and submission of individuals or people, considered dangerous on the basis of criteria of presumption and prevention, as well as on economic and ethnic considerations. It would be a new form of totalitarianism, which the western countries would be inclined to and it is manifested through preventive criminalization of any individual or ethnic groups considered potential and alleged advocates of social disorder. In this regard, Bauman, a Polish sociologist and philosopher, develops the concept of "totalitarian solutions" in cases where some human beings are classified in redundancy or unnecessary[37]. The first example that comes to mind are the policies of treatment and containment of migration flows, where the exceptions applied to individuals to whom is recognized the status of not-citizen, become rules that are accepted and shared.

In Italy, the Identification and Expulsion Centers (CIE), established by Turco Napolitano Act on immigration in 1998 are centers of detention where subjects without residence permits live. When they were established (at first called CPT), they were considered a 'novelty', an innovation in political and legislative scene. In fact, any form of detention hadn't ever been previously covered towards individuals till after they have

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[34] S. Romano, *Sui decreti legge e lo stato d'assedio in occasione del terremoto di Messina e Reggio Calabria* (1909), in Id., *Scritti minori*, 1st ed., vol. I, Milan: Giuffrè, 1990, p. 367.

[35] G. Agamben, *Stato d'eccezione*, 1st ed., Turin: Bollati Bornghieri, 2003, p. 111.

[36] J. Butler, *Vite precarie. Contro l'uso della violenza in risposta al lutto collettivo*, 1st ed., Rome: Meltemi, 2004, p. 73 *et seq.*

[37] Z. Bauman, *I campi: Oriente, Occidente, Modernità*, Edited by M. Flores, *Nazismo, fascismo, comunismo. Totalitarismi a confront*, 1st ed., Milan: Bruno Mondadori, 1998, pp. 15-35.

committed a crime. In the centers CIE, instead, subjects are actual prisoners, even though legal obligations that fall likewise within the emergency and security polices for the treatment of migration flows, classify them as guests.

In France, just over a year ago, former president François Hollande proposed to introduce into the French Constitution the state of emergency and the possibility to revoke the citizenship to people condemned for terrorism. On the one hand, such a proposal – subsequently withdrawn following a no consensus and numerous differences in the House – aimed at developing government powers as regards state of emergency and as a result an increase in the powers of police in case of 'strong threat' for national security; on the other hand, it aimed at revoking the French citizenship to whoever had been convicted for crime constituting a serious attack against the life of nation.

Thus, the new security measures about terrorism, and the urgent decreeing on immigration and more generally, the policies of dealing with emergency determine new forms of power and control and new procedures for exemptions and exceptions of the positive law, in particular, of criminal law. Then, in some cases as Guantanamo, they have accepted that prisoners were judged by military commissions, making completely inconsistent the role of the ordinary judiciary.

The preventive and presumptive decision on the danger of some subjects or ethnic groups primarily from police loses its provisional measure to become rule. Moreover, the powers of police are proceeding with a recognized autonomy that let them circumvent the intervention of the body in charge that is responsible for those statements and the following measures to apply: the judiciary. The *longa manus* of government's executive power, that's the police, strengthens while jurisdiction and law weaken.

Emergency makes its own way; it becomes law.

So, in the contemporary world, governmental power frequently issues laws of 'emergency' legitimizing and immunizing itself, through the instrument of exception. Such an instrument let the administrations confine themselves in a space of autonomy that enables the political sphere to act without considering what has been established by legal obligations. In addition, as government power is the expression of legal recognition, state of exception seems to be a paradox: it is law that is not law.

Schmitt, for his part, as seen, solves this paradox and this coexistence, treating the coexistence law/exception inside the same juridical ambit, considering the exception an integral part of rules, where the rule is called to govern the predictability of events while exception the unexpectedness of the same ones.

But this analysis finds some opponents who think emergency, through state of exception, can be transformed in the decision-making excessive power of the governments at the expense of legislative power and defense of fundamental rights, namely that state of exception can suffocate the rule of law, breaching its guarantees. War on terrorism has introduced and justified stricter criminal measures against 'enemies'. Several exceptional practices of control outside the law have stabilized as a rule, "*the opportunity and the means, through which the extralegal exercise of the state power justifies itself indefinitely, setting itself as a more or less permanent factor in the political life (...)*"[38].

It seems that in emergency, guarantees and fundamental rights have been suspended in the name of a sovereign and authoritative authority that punishes any

[38] J. Butler, *op. cit.*, p. 90.

person who may oppose it. Thus, more and more oppressive criminal measures and the limitation of civil rights are the combination on which state of emergency is based. In the insecurity century, they cling on the miracle of exception.

The emergency policy, in response to widespread sense of fear and uncertainty for future, strengthens the powers of governmental administrations.

They ask for protection, certainty that specifically don't seem even to come through the application of punitive and securitarian regimes. Constitutional state will be replaced with punitive state that through the means of punishment refers to *extra legem* authoritative legitimations. But now the result doesn't seem to be that hoped. The level of distrust in the political action and fear towards any threats to the order both inside and outside don't seem to derive benefit from this new governmental set-up, which however, doesn't seem to be able to guarantee the institutional order. Fear asks for security, but fear policies, instead of activating right means of answer, denounce their crisis, they look like destabilized by a short circuit trigged off between legislative power and executive one, between rule of law and state of exception. In that way, fear amplifies as well as mistrust and violence; it becomes widespread common fear which has lost the role to unify people and address the State towards forms of rational order and opportunities of freedom inside law (guarantor of security). Nowadays, common fear becomes the herald of passions, tensions, feelings which haven't anything to do with the enlightenment reason that is the base of the modern rule of law. They are feelings that 'they can be tricked easier' and for this reason they can deal with them not so much through the legitimation of order as originally conceived but through new policy needs of democracies. After all, not to soothe this fear is useful to political power in order to get much more authority and exercise an unlimited control.

Maybe it would be necessary a reconsideration of these forms of government. Politics of today establishes itself through the instrument of exception which becomes repression, but any punitive rush failed to demonstrate the invulnerability of institutions, the first and fundamental element to build a social stability again.

5. The criminal law of the enemy

In times of crisis, where the terrorist threat is in ambush, everyone is called to prevention. The bigger the treat is the more anyone is called to react and the action has a preventive and presumptive character (as above-said). On the basis of this reasoning, governments work to increase the approval of a majority so that everybody accepts the restrictions of personal freedoms and in some cases, the clear breaches of international law, on behalf of a higher interest of protecting the country. The infinite and indefinite expectancy of a terrorist attack supports the *governance* of the 'state of prevention', apparently addressed to protect the foundations of the Rule of law. Prevention means anticipating at the present the possibility that something will happen in future without having the certainty of it. Preventively the powers of police increase out of all proportion. Controls, searches, interceptions, the mapping of web researches, security cameras and detentions in cases of alleged affiliation with terrorist organizations increase; the gap friend/enemy foments suspect again. With the expression *Racial profiling* they mean that some subjects of the same ethnic group or religion are highly suspected and, therefore, a greater control is required for them. The necessity of a greater attention pushes exception beyond the limits of law and justifies the restriction of freedom on the basis of the presumption of guilt whose research is sometimes prejudicial and indiscriminate.

But it often happened that the terrorist profile didn't correspond to what one could have expected after the distorted mass media communication. He wasn't an irregular immigrant, without residence permit, he wasn't a refugee in need or a poor needy person. Most of times these individuals have citizenship and regular residence permits of the country where they live (their families are sometimes settled down from generations).

Then, it was a neighbor, in some cases as it would say 'of good family'. All these increases on the one hand, mistrust and on the other, it strengthens the necessity to be all controlled[39]. In a kind of a modern Big Brother, everyone accepts to be watched because among all people a threat could hide. And everyone accepts that the guarantees of law, first of all the presumption of innocence, as defined in Article 11 of the Universal Declaration of Human Rights of 1948, as the right to be given a fair trial (think of juridical and human aberrations committed in Guantanamo) change into the direct opposite, that is, into the presumption of innocence and into the restrictions of fundamental freedoms and into trials without any guarantees for the accused person, waiting for the indefinite frantic searches can support or rebut the presumption itself.

Perhaps in the end, in the society of 'could be' it's only necessary to demonstrate the possibility of a terrorist attack – whatever this would mean – to justify a conviction[40].

So, in times of emergency as repeatedly stressed, Rule of law denounces its legal incapacity for managing terrorist threats and it is forced to draw back distributing its powers in different fields, as politics, accepting they are almost completely subverted as well as enforced in exploiting modality and highly repressive one. In the new political economic emergency dimension Constitutional State[41] plays the role which constitutes more an obstacle than an incentive, that's the reason why its powers are subjected to a fast and continuous erosion.

In fact, the insecurity society reconsiders and weakens the old sovereignty: international, transnational, intermediate, supranational bodies wear away and hoard the spaces of traditional governmental institutions, foreshadowing the image of a State that becomes a simple institutional order of security[42].

Then, administrative-governmental structures are born; they are in power. It seems to die, instead, the State-identity incapable of keeping step with a completely different world that isn't built on the rational-economic-juridical-political scheme anymore.

Forms of social 'counter-power' are established and the primary form of political-juridical organization plays the role of mere complementarity and subsidy of administrations.

Constitution state that is State-identity changes into State of exception that is State-function, promoting the decline and the crisis of the old form of social regulation, making still more problematic both the democratic national self-government and the protection of the fundamental rights as well as they were defined at the dawn of modern society.

Thus, global changes cause a decline of the old Constitutional State seen as the set of state machinery and institutions that guarantee order, control and protection of rights

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[39] U. Beck, *Conditio Humana. Il rischio nell'età globale*, *op. cit.*, p. 170 *et seq.*

[40] *Ivi*, p. 173.

[41] In this regard, the Constitutional State is to be understood as the highest expression, as well as the modern evolution, of the Rule of Law.

[42] J.C. Paye, *La fine dello stato di diritto*, 1st ed., Rome: Manifestolibri, 2005, p. 42 *et seq.*

of those people who are new modern free rational independent citizens. Nowadays, the rights guaranteed are emptied and reduced as a mere legacy of the past.

In this scene, State is powerless to a frantic reversal of roles and the right, which it exercised and which constituted its power and control instrument, loses its function of guarantee. State right moves towards new juridical forms, mainly case-law, administrative or private ones that reflect the decay of State. Constitutional State that is depersonalized, delocalized and shattered, now changes into internal administration then international body. It is a fact that it sees the increase of power of technical bodies for managing and monitoring inside, *authorities*, and the increase of judicial and parajudicial powers which represent new forms of neo corporate control of global society.

The old combination of Constitutional State and law with which it was in power and it administered the law, goes down; so, a new phase of managing the order through Administrations is born.

The supremacy of law that is the expression of the abstract general will be enough to answer to emergencies of modernity. In fact, it is important that the normative abstractness has an 'operating arm' that supports and satisfies citizens 'needs.

In fact, the new challenges of the globalized world and the new tasks to which the State is called to act, need a functional and organizational system that characterizes its 'activities on the ground'.

The governmental Administration therefore, becomes the State itself whose operativeness and decision-making ability substitutes law and they become necessary in order to suddenly cover up the breaches of a system which can't respond to the ongoing changes any more. Thus, it becomes a direct projection of what in the past was the sovereignty force.

There is more. State-function, by virtue of the key role that governments recognize it and reckoning that the best answer to threats is repression, is tending to become criminal State.

Loic Wacquant, a French sociologist, as regards security policies, observes that through them punishment policies are taken into account. They are fomented by: "*an alarmist speech unless catastrophist about insecurity, fostered by war images and broadcasted until the saturation of commercial media of big political parties and by professionals of maintaining order*"[43].

To this end, war on terrorism is the slogan that anticipates the governmental choices of exception and opens its way to criminal State and to that form of right known as *criminal law of the enemy*.

Günther Jakobs, a German jurist, has been the first who theorized this specific branch in 1985. According to Jakobs, the entire criminal justice system is subdivided into rules referring to the "*traditional*" criminal law, that is, that one enforceable to offenders and the "*not-traditional*" system where there are dispositions that should be legitimized only in case of "*legal necessity*"[44]. From his point of view, two different forms

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[43] L. Wacquant, *Punire i poveri. Il nuovo governo dell'insicurezza sociale*, 1st ed., Rome: DeriveApprodi, 2006, p. 18. Original book title: *Punir les pauvres. Le nouveau gouvernment de l'insécurité sociale*. Marseille: Agone, 2004.

[44] G. Jakobs, *Kriminalisierung im Vorfeld einer Rechtsgutverletzung*, in "ZstW", 97, 1985, p. 751 *et seq.* See A. Gamberini, R. Orlandi, *Diritto penale del nemico? Una analisi sulle condizioni della giuridicità*, in *Introduzione a Delitto politico e diritto penale del nemico. Nuovo revisionismo penale*, 1st ed., Bologna: Monduzzi, 2007, pp. 109-129.

of criminal law should coexist, on the one hand, the *Bürgerstrafrecht*, the criminal law of the citizen, on the other hand, the *Feindstrafrecht*, the criminal law of the enemy; they provide for two different sanction levels because they are addressed to two different subjects: the citizen and the not citizen, lumped together only because they have broken the rules of criminal law. The first one is guilty of having breaking the rules of criminal law but without disowning the state power which is the source and as a consequence, without intentions of subversion of the established order; the second one is guilty not only of having breaking the criminal law but also not to recognize the sovereignty of the state order and so, he 'deserves' to be 'pilloried' in order that he can't undermine the State any more.

The repressive system should be different in this last case as regards the 'ordinary' cases, because it hasn't the function to restore the broken order with crime commission, but to protect the social order and the internal security of State. For this reason, it can be an element of prevention. Therefore, the State could act against its 'enemies' through repressive preventive instruments in order to wipe out those who are not only 'traditional offenders' but also some 'subverters of order', some 'enemies', precisely.

Then, Jakobs keeps on his analysis through a clear distinction between what is inside and outside the established order and consequently between citizen and not citizen. The last assumes the shape of an *alien*, outside the order, and as such, he should be pursued as an enemy[45].

By virtue of this opposition, a new figure emerges; this is recognized or not by law at the same time. It is recognized because it can be the target of repression forms that can get to also to war actions; it is not recognized because the subject is considered 'something else' from the recognition of the principle that whoever, in virtue of the intrinsic quality of human being, is a bearer of fundamental and inalienable rights.

The distinction is not only about legal status but also about punishments inflicted. For the citizen, they will inflict punishments that are in proportion to the crime itself, as a reintegration for the damage suffered by society and its consociates. For the enemy, punishment will have a preventive exemplary function that protects the state order; for this reason, they will be able to inflict it even before the real crime was committed in order to guarantee the established order.

Protective custody, deprivation of freedom and whatever is necessary to prevent and punish subversive endeavors will be instruments which the penal system can use in order to eradicate any terrorist and subversive attempt[46].

In the condition of a state of necessity at legal level, the State will be able to enact all the appropriate security measures in order to protect its internal order and beat the enemy threat. Before the State there is a subject, an offender to whom no forms of protection and no rights will be recognized. The reason of an unlimited punitive action is recognized not only in the necessity to neutralize the enemy but also to prevent the national legislation falters as regards its stability and sovereignty[47].

Although Jakobs theorized the penal law of the enemy much earlier than the outbreak of the war on terrorism, his analysis is now taken in great consideration and it is at the root of the continued self-legitimization of repressive policies that are peculiar of the penal State.

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[45] *Ibidem*.

[46] *Ivi*, p. 123.

[47] A. Caputo, *Introduzione, Verso un diritto penale del nemico?*, in *Questione Giustizia*, Fascicolo Quarto, Milan: Franco Angeli Editore, 2006, pp. 623 *et seq.*

In fact, one of the most characteristic elements of this war is the strengthening of the repressive and punitive methods. In the aftermath of the massacre of the Twin Towers and under the excessive power recognized against terrorism, the President of the United States of America, George W. Bush was given the opportunity to jail any subjects suspected to be an *enemy combatant*.

According to Jakobs's theory, here is one of the cases where the respect for the rights guaranteed can be evaded during a trial. The prime concern to defend the legal system and its social order oversteps the right. The government claims its autonomy and puts into operation a set of strategies for their implementation. Public prosecutors see their role extended by virtue of emergency and not by rule, despite the application of criminal law doesn't cover the allocation of the emergency powers to a person who is called upon to implement it.

The showmanship of violence, crisis, emotivity, emergency become a single body throughout the exception that allows the issuing of acts by government bodies which replace the law in force.

The *Declaration of National Emergency by Reason of Certain Terroristic Attacks* is the result of emergency that allows G.W. Bush to issue the *Patriot Act* on November 11th, 2001, and the *President Issues Military Order*, Order and Instructions for the military Commissions asked to judge the suspects of terrorist activities or of activities that are against national order. So, emergency becomes law.

From that moment on, the extraordinary production of instruments to prevent, block, punish the enemies, *the foreign fighters*, the terrorists or whoever threats the order has multiplied worldwide. The governments have pushed for a legal production of emergency that felt outside the criteria of judicial production, which are the holders and the guarantors of the absolute principles to protect human beings[48].

Therefore, they try to legitimize the war as a model of production of order and the criminal law of the enemy, as a necessary instrument to face up the threat that comes from 'criminal enemies' whose crimes or presumptions of crime have to call the governments to a severe answer, regardless of the rules of national and international law. War and war criminal justice replace the Constitutional State and they wear new forms where the political power substantiates. We are witnessing the new political system that through external pressures which don't come from the established order, takes on itself the possibility to delete the legal status of the individual and to act by virtue of its authority. The result is a deep vacuum, a blackout of the establishment plan of the allocations of power inside the State that determines a deep crisis of the Constitutional State and the blind rise of a State of exception that has not solved the emergencies for which it has been imposed.

6. Conclusions

In this article we tried to analyze various aspects relating to the topic of terrorism. We started by exploring the old form of terrorism up to its modern form, transition within which some issues of particular relevance were highlighted:

[48] For example, the new Italian anti-mafia code equalizes mafia men, stalkers, swindlers to terrorists. It has a vast discretional and preventive character, giving to Prosecutors the possibility of actions not on the basis of an unappealable judgement but on the basis of preliminary measures for the protection of goods of Public Administrations.

1. the current 'evanescence' of the subjects and targets involved with terrorist attacks, with consequent little interest on the part of the bodies responsible for responding to the emergency, compared to those who will commit the terrorist act, and the impossibility of knowing where the attack will take place; in the 'first-generation' terrorism both the subjects and targets held symbolic and strategic importance;

2. the transformation and extension of the object of interest to terrorism: it go from a national, delimited, governmental form of terrorism, to an object that takes the forms of undefined, supranational territory, not containable within the boundaries of a State, but excessive with respect to them; a terrorism that, just like the society within which it develops, assumes global and all-encompassing connotations from both the space-time and cultural point of view;

3. the admixture between the political and religious nature of the terrorist attacks represents a 'novelty' in today's terrorism, which involves an overlapping of these two purposes of claim that did not exist in the past;

4. the terrorist organization goes from a verticality of power and execution, generally unicellular, to a mainly horizontal, flexible and multi-cellular organization, within which is no longer important the role of the organization considered in its entirety, but that of the individuals, of the fighters, of those who, after having been trained for the purpose, spread all over the world, disseminating terror;

In the light of this summary, it is worth underlining:

5. the existence of two emerging needs in relation to the evident social insecurity: on the one hand, the need to defend the individual and his fundamental rights, even though he himself may be regarded a terrorist, and, on the other hand, the need to protect the established order. In fact, the terrorist emergency pushes the request for resolution as far as justifying some paradigms of order which strain the principles underpinning the Rule of law;

6. we have thus analyzed the evolution of the Rule of law and the elements upon which it is founded: sovereignty, individual rights and principle of equality, held together by the concept of State law. The issue that arose next was to understand that the response to terrorism can be valid only if conducted within the bounds of these paradigms, so as not to risk the collapse of the Rule of law;

7. finally, we focused on the possible collapse of the Rule of law which, with the justification to wage a war on terror and respond to the new security emergencies, turns into a State of Exception and Penal State, punitive and repressive, with no regard for the guaranteed legal and inalienable rights of each human being.

At the end of this work, we would like to emphasize the risks that can be expected if the emergency response continues to be implemented as it has been up to now.

Following the attack on the Twin Towers (11/09/2001), the terrorist emergency reappeared, highlighting the incapacity of government administrations to permanently and radically deal with it.

In this 'managerial confusion', law becomes the experimentation field for politics, and the expectations placed in it that were once certainties, have now become instability certainties that elicit fear responses.

Politics thus directs its attention towards the indefinite and contingencies, shedding its image of instrument of order through the application of statutory rights, which survive time and guarantee inalienable spaces for the protection of the individual. Politics, like the uncertainties that it is called upon to manage, seems unstable and

produces and uses legal – not legal instruments where what was originally lawful can become unlawful in the temporal space of a future open to every possibility.

In the world society, namely, that in which the law loses its role as protector of the rights and liberties of citizens, politics becomes the place where any decision can be made at any time with global repercussions. Moreover, it becomes the ground for applying the administrative powers for handling emergencies.

The politics system, therefore, develops security projects and mandates to the law, or rather, to the law enforcement agencies, the application of these projects.

The demands for treating fear are addressed to politics, which in an act of prevarication and in order to overcome the paradigms of the Rule of law, mandates the tasks of preventive policing and order maintenance to the functional areas of its governing bodies. These tasks are achieved through the use of the law, which has thus become the legal arm of the exercising-State. The old idea of sovereignty now survives in the governmentality technique[49], no longer in the hands of the sovereign State, of the law-State, but of governors, bureaucrats and police. However, the law, even though in the hands of the new policing arbiters takes on a violent and repressive role against social disorder, is nonetheless unable to respond to the renewed stability requirements of the new global community and generates a regulatory chaos unable to subdue the feelings of fear, precariousness and insecurity.

The law, therefore, is replaced by politics which, in turn, is strengthened through the police; a stage that reveals the final collapse of sovereignty as we know it and its definitive fall into the hands of the new 'security managers'. The old concept of Rule of law is thus renewed through police practices that are often violent practices applied without a clear legal agenda, for the sole (infective) purpose of pulling the wool over the eyes of the new global individual hungry for security.

Consequently, the community's fear of terrorism is being used to justify the purposely orchestrated 'technique of repression' and the administration of the emergency. The State-entity, which has already become exercising-State, now becomes, in a society of insecurity, State of exception and the exception turns into forms of administration of human existence which violate the absolute human rights.

The violence generated in this shift does not create security, but merely reports the failure of the premises of modernity.

In fact, the ideas for dealing with the emergency do nothing more than show the semantic emptiness of the concept of security. The security policies that then arise from this illusion are nothing more than 'unfeasible' policies and generate 'the new enemy'.

In the light of this final stage, we will now try to understand what is the impending 'emergency risk'.

In the name of security are construed events and situations represented as *emergency*. Politics then determines what is to be considered an emergency, urgent, extraordinary, exceptional, and which is not. Once established what 'is not part of the order', emergency measures to avert the threat will be issued and legitimized and the law will be called to legally manage the emergency.

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[49] Governmentality is the name given by Michel Foucault to the form that power assumes when it begins to be largely involved in activities of social control. On this point, see M. Foucault, *Poteri e strategie. L'assoggettamento dei corpi e l'elemento sfuggente*, edited by P. Dalla Vigna, 1st ed., Milan: Mimesis, 1994, p. 75 *et seq.*

Deciding on an event and construe it as an emergency becomes a dangerous instrument of power for new administrations. Representing a situation as an emergency outlines the emergency itself and justifies decisions and emergency measures; but the decision is political.

In this way, a circular relationship is established between decision and event (safe, unsafe, exceptional, and ordinary etc.), legitimizing policy measures and practices to channel the event.

The risk of the emergency is that the law loses its hold, becoming in turn a mere emergency executive of political decisions.

The security policy introduces the enemy, outlines his features, draws the emergency, construes the exception and uses the law as an instrument to deal with it. In this way, the law loses its role of guarantor and sees thwarted, nullified and dismissed all the principles of public policy, State sovereignty and individual freedom.

Consequently, the law risks turning into security law, or the law of the enemy, namely, a law that directly takes on the political task of the emergency defense against the threat, the enemy. A law that becomes political, a policy that becomes police force.

But the emergency decided outside the law is politics. In this way, the law becomes an instrument (of power) for organizing and legitimizing a new order. A security order that imposes violence, repression and prevention on blind basis.

Social complexity is filtered through the easy, hasty, dichotomous distinction of safe/unsafe, friend/enemy, inside/outside the order, citizen/immigrant, Christian/non-Christian. This excludes the possibility of a useful and radical political construction of problems, leading to a drastic and barbaric reduction of the legal and cultural complexity, thus reducing the chances to act, choose, and social development.

In the background remain the human rights, which become a mixture of fear, precariousness and instability.

The fight against terrorism becomes itself terrorism, in contempt of the basic principles of the Rule of law and of the basic principles ensuring individual fundamental rights.

Arundhati Roy, a female Indian author, declares:

"*I know perfectly well that on 11 September 2001 something terrible happened, which changes the definition of war, development, wealth, and happiness. Something of which all countries in the world are hostages. But we must try to understand why this happened. I see that there is an increasingly scary gap between the first and the third world. I see that there is greater resentment. I also see that from this gulf between the two worlds and from this planetary injustice, the Taliban and people like them (...) draw their strength. But if Bush says that 'if you're not with us, you are with the terrorists' it does not solve anything (...). And all the beauty of human civilization lies between these two fundamentalisms. And yes, I think they are two forms of terrorism*[50]".

It would perhaps be the case of rereading recent history, not on the basis of emotional response, which all too often is at the root of new forms of political policing, but on the basis of rationality that would perhaps lead us not to deny absolute and essential rights which are the ID of human civilization.

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[50] M. Moncada Di Monforte, (extract from) *Guerra al terrorismo? Dalle utopie umanistiche al razionalismo tecnologico*, 1st ed., Rome: Armando Editore, 2003, p. 202.

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Production and smuggling of synthetic narcotics by organized criminal groups in the Republic of Serbia[1]

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Abstract

Production and smuggling of synthetic narcotics are ranked among the five most profitable businesses of today, dealing with highly organized criminal groups characterized by tightness, hierarchical and strict division of roles and activity in international frameworks. Production of synthetic narcotics in relation to other types of narcotics is not geographically limited since the process does not involve the extraction of active ingredients from plants which must be grown under certain natural conditions. Though any analysis of synthetic narcotics in the market complicates the situation with the fact that the exact data of synthetic substances and precursors is limited, which prevents the assessment of the scope of such substances and precursors produced around the world. The Internet plays an increasing role in the process of production, smuggling and illegal trade in synthetic narcotics, which contributes to the usage of sophisticated methods by organized criminal groups. The long process of transition and socio-economic recovery, as well as the legacy of circumstances that prevailed during the conflicts in the territory of the former Yugoslavia, has influenced the development of certain forms of organized criminal activities and the strengthening of their ties in the Balkan region. In addition to Bulgaria, which represents a leader in the production of synthetic narcotics in the Balkans, Serbia is the only country in the Western Balkans where a case of synthetic narcotics production of the amphetamine and methamphetamine team was recorded, as well as the attempt of methaqualone production, which puts Serbia on a high scale of potential risks and threats from the emergence of new psychoactive substances.

Keywords: *synthetic narcotics, production, smuggling, illegal trade, precursors, narcotics*

1. Introductory remarks

At the end of the sixties, in Belgrade and then in other big cities, the first opioid addiction cases were reported. Initially, the users were from higher socials classes – young intellectuals who were educated in West European and American Universities or

[1] This work is a result of NARCO-MAP project; HOME/2015/ISFP/AG/TDFX/8742; Improving knowledge on NPS and opiates trafficking in Europe; Project developed with the financial support of the European Commission – Transnational initiatives to fight trafficking in drugs and firearms – DG Justice/DG Migrations and Home Affairs – The Narco-Map project is co-financed by the European Union under the ISF Instrument of Justice programme. This work is also result of achievement of scientific-research project „*Crime in Serbia and Tools of state's reaction*", which is financed and realized by the Academy of Criminalistics and Police Studies in Belgrade, round of scientific research 2015 to 2019.

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who traveled abroad and brought some new forms of entertainment. In time, the number of drug users rapidly increased, which led to the establishing of the first Counseling Center in the Belgrade Mental Health Institute in 1968. In 1971, the Institute for Alcoholism and Narcotics organized the first Symposium on problems of narcotics addiction. The massive use of heroin was gaining the importance during the 1980s, which in addition to marijuana and synthetic narcotics, today represents the most frequently used narcotics in our region[4]. The first register of drug users was established in 1980 in Belgrade within the Secretariat of Interior so the number of registered drug users was 726 during the following year.

Due to influence of the West and frequent departure of adolescents for education in the West European countries, including technological development, there has been a continuing increase in the number of drug users. Social crisis during 1990s, as well as the consequences of war events, have contributed to an increase in the number of criminal offences committed in the area of homicide crimes, where one of the causes appears to be market dominance between rival criminal groups dealt with the sale of narcotics and the theft of vehicles[5]. In the beginning, there was a small number of organized criminal groups involved in the sale of narcotics but, due to the large profits, their criminal activity was reoriented from the theft of vehicles to smuggling and sale of narcotics. Along with the formation of the first such organized criminal groups, their friendly ties have spread in the area of Western Balkans and Europe, which also had influence on formation of an "Albanian mafia" and Balkan organized criminal groups, which nowadays have the main primacy in the smuggling of cocaine from the area of South America to the area of Western Europe.

2. National picture of narcotics in the Republic of Serbia

Over the past two decades, the countries of the Western Balkans faced with significant security issues, including smuggling and sale of narcotics, which continue to be one of the most dangerous and profitable forms of organized crime[6]. One of the reasons is the constant demand for narcotics in the Western European market, which additionally encourages organized criminal groups whose members are citizens from Serbia, to continue or to intensify the intensity of criminal activity of smuggling and selling narcotics, both at international and local market. The money acquired through smuggling and sale of narcotics, organized criminal groups are placing them in legal cash flows by corruptive actions and thus mentioned groups damage the financial system. On the other hand, the profitability of narcotics related activities motivates new members of organized criminal groups to engage in these criminal activities[7].

The policy aimed at reducing the supply and demand of narcotics in Serbia is manifested by the adoption of a strategic, legal and institutional framework. In addition to criminal offences related to the production and smuggling of narcotics, their misuse may, directly or indirectly, affect the occurrence of the commission of property crimes and criminal offences with elements of violence. Based on smuggling of narcotics,

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[4] T. Vasić, *Narcotic smuggling and narcotic addiction in Serbia*, magazine Security, 2001, 482-524 p.

[5] V. Delibašić, *Suppression of misuse of narcotics from the point of view of Criminal Law*, Belgrade: Official Gazette, 2014.

[6] UNODC, World Drug Report, 2017.

[7] European Police Office, *The EU Serious and Organized Crime Threat Assessment (SOCTA)*, The Hague, 2017.

organized criminal groups generates huge profits, leading to a great competence and conflicts, which may result in the killing of members of competing organized criminal groups[8]. In the territory of Serbia, the competition of opposing organized criminal groups, in order to conquer the narcotics market, leads to the killing of its members. In addition to the security, implications arise in the areas of social and healthcare through increased treatment costs, as well as social care of a user.

The arrest of some members of organized criminal groups engaged in unauthorized placing narcotics on the market is not a guarantee for the cessation of their criminal activities, because the structure of organized criminal groups is such that they in the prison are still actively coordinating and organizing the production and smuggling of narcotics, which is characteristic of the production and smuggling of synthetic narcotics.

Rapid technological development, the application of modern technologies in communication and transport, has created greater opportunities for better cooperation with a lesser risk of detecting organized criminal groups. The number of potential opportunities for smuggling of narcotics has increased. Mentioned trends do not follow the speed of unification of legal framework which represents a major obstacle to cooperation and the degree of efficiency of police and judicial authorities. The main routes for smuggling of narcotics are permanently changed by adapting to the law enforcement activities, as well as by more intensive usage of new transport infrastructure. Distribution and sale of narcotics in the territory of Serbia gravitate towards major cities where a third of population is concentrated: Belgrade, Novi Sad and Niš[9].

3. Production and smuggling of narcotics in the Republic of Serbia

Production and smuggling of narcotics in Serbia is one of the most common forms of organized criminal activity. The primary impact on the production and smuggling of narcotics is the fact the Serbia is located in the central geo-strategic position in the region of the Western Balkans, as well as on the part of the external borders of Schengen and they are partly surrounded by the countries of the European Union. Other important factors are a long process of transition and socio-economic recovery but also the legacy of opportunities that prevailed during the conflicts in the former Yugoslavia, which had influenced the development of certain forms of organized criminal activity and the strengthening of its ties in the Balkan region[10]. The causes of such enormous increase in the number of users of narcotics in the last ten years should be sought in the great social changes occurring due to the dissolution of the country, war in the neighboring countries, the destruction during the 1999 bombing, the events that followed the end of NATO's aggression in Kosovo and Metohija – migration of the Serbian population from that area and others. All this had led to drastic social, economic, ethical changes and multiplication of all existing risk factors and the creation of new ones. Changes and demolitions of the previous traditional social, ethnical, cultural and family values and norms led to the escalation of feelings of isolation, insecurity, hopelessness, disorientation, especially in the younger generation. A value system disorder, general apathy, economic impoverishment are a natural consequence of the

[8] The Ministry of Interior of the Republic of Serbia, *Serious and organized crime Threat Assessment*, 2015.

[9] MoI of the Republic of Serbia, *Strategic assessment of public security*, Belgrade, 2017.

[10] EMCDDA – European Monitoring Centre for Drugs and Drug addiction, 2017.

situation in which we find ourselves and it is conducive to the emergence of social pathology. Old models of behavior and relationships become inadequate and overcome and the new ones are not built.

Local market of synthetic narcotics in Serbia is supplied with illegal production in the country. Production (amphetamine and methamphetamine) is performed in rented residential and commercial buildings and also there is a tendency of relocating to rural areas. Members of organized criminal groups and criminal groups, engaged in the production of synthetic narcotics, skillfully conceal illegal activities – legal production of other goods[11]. Also, they engage specialists in the field of chemistry who are not primarily members of organized criminal group, but persons who, for the purpose of financial compensation, perform production and train members of organized criminal group for the production of synthetic narcotics. People who are not chemists or possess knowledge are very often in the filed of chemistry and they are educated by the members of organized criminal groups. Occasionally, specialists are persons from neighboring countries, mostly from Bulgaria. Serbia is the only country in the Balkans, except Bulgaria, where production of amphetamine and methamphetamine has been recorded. In the production of amphetamine in Serbia, organized criminal groups and criminal groups most often use a method known as "Leuckart", characterized by home-made production (custom made), by producing in the majority of cases "BMK", which is the basic precursor for the production of amphetamine[12]. Illegal laboratories for the production of methamphetamine are most often classified as so-called 'kitchen laboratories' and commonly available equipment, such as refractory dish, heaters, glass kitchenware, plastic cups, buckets and others, are used for the mentioned purpose. Components for the production of methamphetamine are also very affordable and they are generally purchased in pharmacies and shops for paints and varnishes. Family and friends ties of members of organized criminal groups in other countries allow facilitated activity in acquiring new members, forming a network of smuggling and selling. For the period from 2015 to July 2018[13], the increase number in the seizure of synthetic narcotics was continued, which can be seen in Table 1.

	Ecstasy (gr)	Ecstasy (piece)	LSD (gr)	LSD (piece)	Amphetamine (gr)	Amphetamine (piece)
2015	6.263,63	220.974	0	97	25.516,7	13
2016	14.624,56	10.316	0,49	255	23.894,82	77
2017	17.619,03	103.014	0	46	57.551,22	360
I-VI 2018	11.614,81	25.631	0,75	9	35.951,95	57
TOTAL	50.122,03	359.935	1,24	407	142.914,69	507

Table 1. Seizures of synthetic narcotics in Serbia

[11] MoI of Montenegro: *Serious and organized crime Threat Assessment* in Montenegro, Podgorica, 2013.

[12] S. Dresen, *Development and validation of a liquid chromatography. Tandem mass spectrometry method for the quantitation of synthetic cannabinoids of the aminoalkylindole type and methanandamide in serum and its application to forensic samples*, 2011.

[13] Data obtained from the Ministry of Interior.

The tendency of permanent appearance of new synthetic narcotics, so-called 'designer narcotics' and components for their production at the world level, is also present in the local market in Serbia, evidenced by the significant increase in the number of new prohibited synthetic narcotics and precursors in the last five years (from 125 to 558). The poor economic situation, the availability of equipment and materials, leads to engagement of people into production at home, i.e. in illegal laboratories. During 2010, two laboratories for the production of synthetic narcotics (Dimitrovgrad and Niš) were discovered. In one of them, the production of amphetamine sulfate and benzyl methyl ketone (benzyl methyl ketone BMK). Both laboratories were established (installed) in primitive kitchen conditions with low capacities for the local market. As laboratories were close to the border with Bulgaria, the perpetrators planned smuggling from Serbia to Bulgaria. In 2017, the first laboratory for the production of ecstasy in Serbia, which was established (installed) in the surrounding area of Belgrade, was discovered. In this action, the police seized 96.000 ecstasy pills (total weight 42 kg), 10 kg of ecstasy ready for tableting and 80 kg of microwave cellulose intended for the production of ecstasy for the needs of the local market[14].

4. Smuggling routes and frequency of usage of synthetic narcotics in the Republic of Serbia

The geographical position determines that Serbia is, in the most cases, a transit country, because it is located on the so-called central Balkan route for the smuggling of narcotics, which is also used for the smuggling of synthetic narcotics and precursors, both from the west to the east (from the Netherlands, across other countries of the European Union, Serbia to Asia) and from the east to the west (from Asia to the European Union). The position of Serbia allows that one part of the smuggled synthetic narcotics and precursors is kept on the local market, which increase its availability. 70% of the total amount of seized synthetic narcotics originates from the Western European countries, which is smuggled by the route: the Netherlands – Poland – Hungary – Serbia.

As the most common places in Serbia, where the consumption and the usage of synthetic narcotics and precursors are public meetings with musical content, such as: "Exit", "Beer fest" and "Guča", as well as night clubs where electronic music is performed. The purchase price of synthetic narcotics, in comparison with the price of heroin and cocaine, is low so the profit is quite high especially if the narcotics are exported to the countries of the Western Europe. It is very difficult to determine the market scope of the required amount of synthetic narcotics for the local market in Serbia, and therefore the profit which is achieved. Synthetic narcotics are used for street sale for the price that varies from 5 euros in bigger cities (Belgrade and Novi Sad) to 10 euros in smaller areas, while the amount of 3000 euros is required for one kilogram of amphetamine sulphate[15].

During the lifetime, the frequency of using ecstasy and amphetamine in Serbia among people, aged between 18 and 64, is less than 1%, and the frequency of consumption in the previous month was 0.1%.

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[14] MoI – press release dated 28th of May 2018, source: http://www.mup.gov.rs .

[15] MoI of the Republic of Serbia, *Serious and organized crime Threat Assessment*, 2015.

Substance	Usage ever during life	Usage in the previous 12 months	Usage in the previous 30 days
Ecstasy	0.7%	0.1%	0.1%
Amphetamine	0.6%	0.1%	0.1%
New psychoactive substances	0.1%	0.1%	0%

Table 2. Substances with the usage of synthetic narcotics[16]

The easy way of production with minimal investment, as well as the availability and low price on the market, has affected the tendency of the increase in production of synthetic narcotics intended for domestic market. The production of synthetic narcotics is performed in laboratories which do not have to be professional. After the production, the mentioned narcotics are stored in secret apartments, where they are measured, mixed and packaged. It is so-called 'the first hand' consisting of organizers of organized criminal groups. The next step is to engage couriers for transportation and smuggling of synthetic narcotics to smaller dealers. The mode of transport depends mostly on the imagination of courier, secrets cavities in vehicles, international shipments, corruption of civil servants, packaging in food, packaging in furniture etc. The last level is distribution to users through smaller or larger networks of local narcotic dealers on the street.

5. Internet, as a mean of selling synthetic narcotics

Internet plays an increasing role in shaping the way regarding the selling of synthetic narcotics and represents a unique challenge for discovering "new" and "old" synthetic narcotics. Manufacturers, suppliers, traders, websites and processing may be deployed in different countries, which makes it particularly difficult to control them. The growing usage of anonymous networks, so-called "dark web", related to synthetic narcotics sale, allows resellers and users easier access which poses a threat to this challenge[17]. The technology to access these sites is increasingly involved in consumer software solutions, making these markets accessible to more people. In addition, it seems that the sale of "legal highs" is open, so-called "Legality" on the Internet increased their availability. A recent phenomenon of products, based on synthetic cannabinoid, has added a new dimension to the cannabis market. During the last years, more than 130 different synthetic cannabinoids have been discovered[18]. It seems that most of them were produced in China. After the mentioned narcotic arrive in Europe in the form of powder, these chemicals are added to the plant material and packed for sale as "legal products for euphoria" (legal high). Based on technological development and expansion

[16] Institute of Public Health, 'Dr Milan Jovanović Batut', National research on living lifestyles among Serbian population, 2014, pp. 21-22.

[17] M.M. Schmidt, *"Legal highs" on the net – Evaluation of UK – based Websites, products and product information*, 2010.

[18] S. Hudson, *Use of high-Resolution accurate mass spectrometry to detect reported and previously Unreported cannabinomimetics in "herbal high" products*, 2010.

of the Internet network in Serbia, new ways of selling synthetic narcotics and precursors are established by using the "dark net" services through online communication. Reducing the risk of detection: manufacturers, suppliers, merchants, website hosting services and services for payment processing, may be deployed in different countries which makes it particularly difficult to control them. Serbia has a Rulebook on establishing a list of psychoactive controlled substances[19] which regulates the general form of illicit psychoactive controlled substances.

6. Conclusion

Narcotics, as the most negative part of narcotic addiction today, present a major problem, both for developed countries that perform significant measures in order to reduce them, and for those who do not pay too much attention to this problem. The number of fatalities is now increasing, which alerts that adequate measures must be taken to prevent such problems. Bearing in mind trends in Europe, our country is also affected by an increased number of users of synthetic narcotics, due to the availability of equipment and components for production, and in addition to the local market, activity will focus on production and precursors to the countries of the South East Europe and Asia. One of the reasons for this situation is the lack of strategic criminal policy of the country we live in, easy distribution and the poor sanctioning criminal policy. Nevertheless, this applies not only to synthetic narcotics, but to all other psychoactive substances, because the trend of growth of narcotics smuggling is present everywhere, regardless of the type of narcotics, geographical origin, language barrier or criminal background of organized criminal groups. The goal is clear, i.e. an increase in profits.

Taking into account the problem of synthetic narcotics and precursors, and based on the specific cases, it is concluded that modalities and locations for the production and smuggling of this type of narcotics will be established in these areas by organized criminal groups, in the "kitchen type" laboratory conditions. At the same time, illegal laboratories in the territory of Serbia, for the purpose of the production of synthetic narcotics, use chemical smuggled from countries of the Middle East and Western Europe. It is not uncommon to emerge, as a major chemist, persons from neighboring countries, mostly from Bulgaria. With the development of technology, the Internet will play an increasingly important role, as a mean of selling synthetic narcotics.

In order to solve the problem of synthetic narcotics smuggling, it is necessary to increase additional efforts to increase the intensity of targeted data collection and sharing of intelligence, which can be implemented through the full implementation of the Intelligence Led Policing[20] in the Ministry of Interior of the Republic of Serbia. It is necessary to intensify the delivery of intelligence to foreign partner services, which primarily relate to the early warning system and thus, the risks and threats from the emergency of new synthetic narcotics and precursors would reduce. As one of the measures, the strengthening of regional capacities of police and Custom cooperation, including international police organizations, can be applied.

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[19] Official Gazette of the Republic of Serbia, No. 59/17.

[20] Intelligence Led Policing is defined in Article 34 of the Law on Police, as a modern wax of managing police, based on criminal intelligence information.

Law regulation and compliance with international law and conventions play an important role in combating narcotics. In this respect, it is necessary to improve the National Strategy for combating organized crime, to develop Instructions on the conduct of police officers of the Ministry of Interior in combating narcotics, to regularly update and harmonize the list of prohibited psychoactive substances in line with changes in international and European acts and at the national level, and to conduct training for active participation in the national early warning system. Based on the adoption of amendments to the Law on Psychoactive narcotics it will contribute to more efficient prevention of misuse of narcotics and it will improve the early warning system, which will significantly improve the work of police on prevention and suppression of narcotics.

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Intensive supervision and protection of human rights: symptoms of the panopticon

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Abstract

The article provides the analysis of the concept of intensive supervision as one of electronic monitoring forms and as one of the origins of measures of constraint in the Republic of Lithuania, as well as of the problems of its regulation and application. Based on the European Court of Human Rights case law, constitutional jurisprudence, judicial practice and scientific doctrine, the article deals with the compliance of this measure of suppression with the principles of equality of rights, honor and dignity, as well as with the place of intensive supervision in the system of other measures of constraint.

Keywords*: electronic monitoring, procedural coercive measure, measure of constraint, intensive supervision*

1. Introductory remarks

As is provided in Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention), everyone has the right to liberty and personal security. The Convention has been ratified, firmly believing in the fundamental freedoms enshrined therein, which are the basis of justice and peace, and which, as is envisaged in the preamble to the Convention, are best protected by effective political democracy and general understanding and respect for human rights. It is obvious that personal freedom is a constitutional value, which, however, may be restricted in cases provided by law.

The criminal process is one of those areas in which the rights and freedoms of a person may be restricted, but this must be done proportionately and in compliance with other criteria that legitimize such constraints. Nowadays, the measures of constraint, based on information technologies and allowing the remote monitoring of suspects and accused persons in order to ensure the progressiveness of the criminal process, are being implemented in the criminal process. Tracking of a person with the help of electronic means at a distance makes it possible not to restrict personal freedom physically. On the other hand, a glance at the past and the present forces to raise the

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questions whether it is really so that the implementation of information technology innovations in criminal justice in the area of measures of constraint not only strengthens the protection of human rights and modernizes the process, but also creates preconditions for "smart" technologies not to restrict such human rights as the right to be forgotten, the right to be invisible etc. Or, maybe, on the contrary, intensive supervision of a person as a measure of constraint is only seemingly a step forward.

Thus, the relevance of this article is related to the emergence of a comparatively new measure of constraint in Lithuania, i.e. of intensive supervision, in the criminal process. Even then, when the possibility to impose intensive supervision emerged, the courts of the Republic of Lithuania did not apply this measure in practice for more than one year[3]. This encourages to think over and discuss why the innovative tools are being applied reluctantly, perhaps, too cautiously, why they cause doubts and fear. The authors analyze the compatibility of intensive supervision with the principle of equal rights and the principle of protection of honor and dignity.

The purpose of this article is not to provide a complete definition and concept of intensive supervision. The article does not identify all possible problems and shortcomings in the application and regulation of this measure of constraint. The authors are looking for the answers to the questions raised in the article that are related to the compliance of intensive supervision with the aforementioned constitutional principles.

The purpose of the article is to reveal the problems of regulation and application of the procedural coercive measure that is being analyzed. The historical, linguistic, logical and systematic analysis methods of scientific research are used for achieving this purpose.

2. Genesis of intensive supervision: historical retrospective

Relatively recently the legislator of the Republic of Lithuania has made a step that is significant for the criminal process – it supplemented the Code of Criminal Procedure of the Republic of Lithuania (hereinafter – the CCP)[4] with one more measure of constraint, which is attributed to the types of the procedural coercive measure, i.e. intensive supervision, the application of which had to be officially started from the 1st of January 2015[5]. Thus, electronic monitoring of suspects and accused persons, also known as intensive supervision, started to be applied in Lithuania.

When looking from the point of view of the historical perspective, it can be noticed that the sources of electronic monitoring in Lithuania can be found already approximately in the XVth century. Of course, it is not even worth talking about the criminal process ongoing with the help of modern means in those times, however, it is important to note that in some way it is already possible to find the legal provisions,

[3] Data on the persons registered with the pre-trial investigation institutions, who are suspected (charged) with criminal offenses (form_30-itj): https://www.ird.lt/lt/paslaugos/nusikalstamu-veiku-zinybinio-registro-nvzr-paslaugos/ataskaitos-1/nusikalstamumo-ir-ikiteisminiu-tyrimu-statistika-1/view_item_datasource?id=1554&datasource=4665&page=16.

[4] Criminal Code of the Republic of Lithuania. Valstybės žinios (Official Gazette). 2000, Nr. 89-2741.

[5] Law on amending and supplementing Articles 71, 75, 120, 121, 126, 132, 139, 179, 183, 218, 219, 233, 236, 261, 273, 279, 285, 286, 317, 319, 426, 427, 428, 429, 432 of the Code of Criminal Procedure of the Republic of Lithuania and on supplementing the Code with Articles 131-1, 430-1. Valstybės žinios (Official Gazette). 2013, No. 75-3769.

valid at those times, which were directly or indirectly related to tracking of the prosecuted persons in order to ensure their participation in the legal process.

For example, one of the first sources of criminal law and criminal procedure law is in the Lithuanian law, i.e. Kazimieras' Acquis of the year 1468 as the most ancient Acquis of the feudal Lithuanian State, which is hardly accessible for researchers and students[6]. Kazimieras' Acquis, valid throughout the Grand Duchy of Lithuania until the adoption of the first Statute of Lithuania in the year 1529, included criminal, civil, administrative and procedural law[7]. The rudiments of variations of one of the forms of electronic tracking, i.e. intensive supervision, can be found in this source. Article 11 of this Acquis provides: "(...) if any person of the duke, lord or boyar has a matter to people of the duke, lord or boyar, so the one, who is searching for the truth, should go to the lord [of the person being accused] to seek the truth; but if the lord fails to establish the truth, then the common court, setting the deadline for both parties, [will have to] be held and the truth is to be established. If again any of them does not come [wastes the time], then we shall appoint a dietsky[8], whereas if we are absent from the Grand Duchy of Lithuania [at that time], then our voivodes can appoint the dietsky"[9]. This provision suggests that, in cases where the culprit avoided the legal proceedings, the dietsky had to bring such a person to court. This word of Slavic origin does not have a Lithuanian equivalent. The dietsky, when performing his functions to bring a person avoiding the criminal proceedings to court, had to find the latter and track him physically. Kazimieras' Acquis contains a number of provisions allowing to conclude that the persons, spies, whose duty was to find, track a culprit and ensure the participation of such a person in the proceedings, used to be hired in order to ensure the participation of the culprit in the criminal proceedings. Here, Article 16 of Kazimieras' Acquis provides that "If a thief, who was tracked down by spies, is delivered and, being tortured, confesses that he has stolen, has been stealing earlier and paying fines and the neighborhood was aware of it, then such a person should be hanged without a steal"; Article 17 provides that "if a spy tracks down someone, but the steal is missing, and the person has stolen for the first time, whereas the neighborhood has not seen thefts and he has paid no one for theft yet, then he must pay the plaintiff for theft and the fine – to the court, and it is not necessary to sentence him to death"; Article 24 stipulates that "If the one, who takes out the people or constrained family, is caught with a steal [when leading the people], then such one deserves the gallows; whereas if he is tracked down by a spy, he will face such a truth as is above written in this scripture, he will be judged based on it"[10].

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[6] J. Jurginis, *Kazimieras' Acquis (year 1468). Introduction. Kazimieras' Acquis (year 1468)*, prepared by Jurginis, J., Janulaitis, A., Vilnius: Mintis, 1967, pp. 1, 3.

[7] A. Janulaitis, *Basic Knowledge of Acquis. Kazimieras' Acquis (year 1468)*, prepared by Jurginis, J., Janulaitis, A., Vilnius: Mintis, 1967, p. 9.

[8] The Dietsky Institute came into existence in Kievan Rus, after the latter split and the Slavic lands were annexed to Lithuania; the Institute became a part of the feudal state of Lithuania. The term "dietsky" (dieckij, dietskij) of Slavic origin was mentioned in the Grand Duchy of Lithuania in the Land privilage of the year 1447 and in Kazinieras' Acquis in the year 1468. These are the first general State normative acts of the GDL, which refer to the Dietsky Institute. The Dietsky was a court official. By ordinance of the judge, he used to summon a person to court, to arrest the accussed persons and bring them to court, he used to order the lien, to execute court judgments and perform other assignments of the judge. The origin of the Dietsky and Vizh Institutes: http://www.antstoliurumai.lt/index.php?id=1917.

[9] *Kazimieras' Acquis (the year 1468)*, prepared by Jurginis, J., Janulaitis, A., Vilnius: Mintis, 1967, p. 17.

[10] See also 12, pp. 18-19.

Thus, it is obvious that the process of tracking a culprit was taking place already in the fifteenth century, only it was carried out directly by natural persons physically, visually, in a way that was possible in those days. There was a risk of not finding a culprit. Judging from the provision of Article 22 of Kazimieras' Acquis, according to which "(...) If any of those two litigants does not come, he is guilty without any trial, whereas the one, who has come, to adjudge [in his favor] what he is looking for"[11], it can be assumed that, having failed to secure the participation of a culprit in court, he would be acknowledged as guilty without any trial. All this allows to assume that, although electronic monitoring devices were invented in the XXth century, the rudiments of the newest measure of constraint, i.e. of intensive supervision, are rooted much earlier – in the XVth c.

Here, the information, according to which the very idea of electronic monitoring, as we understand it today, was purified for the first time and developed in the XXth c. in the United States of America, can be found in the sources of law history of the latest times. Although the exact date of the emergence of the idea of this monitoring tool is debatable, some authors stick to the position that this tool was developed for the first time in the state of New Mexico in the city of Albuquerque in the year 1977. The judge Jack Love sought to come up with a method to control the persons, who occurred in the field of vision of the prosecuting authorities, in their own homes, not in prisons. The electronic anklet idea occurred to him when watching the Spider-Man comic strip of 1977[12]. The villain followed up the hero using an electronic monitoring bracelet in the aforementioned Spider-Man cartoon[13]. Other sources mention that the first electronic device for tracking offenders remotely was invented in the year 1960 by twin brothers Ralph and Robert Schwitzgebel, who were master students of the Harvard University, who worked with Timothy Leary and BF Skinner. The brothers created a device that was remotely operated by radio waves – a band for monitoring juvenile offenders[14]. A tangible device for electronic monitoring has crystallized out in the United States of America.

Electronic monitoring is a general term covering a number of monitoring technologies and methods available for use in the criminal justice[15]. Electronic monitoring is described in scientific sources as a tape attached to the wrist or ankle that sends signals to the receiver that is in the phone at home[16], as well as a system of home confinement, the purpose of which is to monitor, control and modify the behavior of offenders[17].

L. Zedner calls electronic bracelets and anklets a modern-day electronic equivalent to the ball and chain and the source of stigma in society[18]. One has to admit that this observation is appropriate. As regards the Chatelet legal practice within the years 1755-1785, the exile for the then committed severe crimes made more than half of the

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[11] See also 12, p. 18.

[12] See: https://www.nytimes.com/1984/02/12/us/electronic-monitor-turns-home-into-jail.html.

[13] L. Zedner, *Criminal Justice*, Oxford: Oxford University Press, 2004, p. 220.

[14] M.M. Feeley, *Entrepreneurs of Punishment: How Private Contractors Made and Are Remaking the Modern Criminal Justice System – An Account of Convict Transportation and Electronic Monitoring*, Criminology, Criminal Justice, Law & Society, 2016, p. 12.

[15] See: https://www.iriss.org.uk/sites/default/files/2017-11/insights-40_0.pdf.

[16] See also 13, p. 220.

[17] J. Ardley, *The theory, development and application of electronic monitoring in Britain*, Internet Journal of Criminology, 2005, p. 1.

[18] See also 13, p. 221.

sentences imposed; most of those sentences were accompanied by additional punishment with the torture dimension, i.e. also an iron anklet, which, to a certain extent, reminds of anklets being worn nowadays, was next to the deck, shame pole, stigma and whip[19]. Critics would probably say that a culprit, who is subjected to intensive supervision, is given the opportunity to be free. On the other hand, it is unclear how much a person, who wears a clearly visible electronic device, by which he is monitored not only by officers carrying out intensive supervision, but also by the whole public, is free.

The wearing of anklets or bracelets, when a person is staying under intensive supervision, has certain symptoms of the Panopticon. Let's recall Jeremy Bentham's Panopticon – a perfect prison: "The structure is oval, a tower rises in its center, from which all solitary cells glassed from the outside are visible. Each individual is reliably closed in a solitary cell straight before the supervisor's eyes. The supervisor can watch him constantly, whereas the prisoner sees neither the supervisor, nor his neighbors, because the side walls prevent him from seeing them (Bentham 2003: 4-5)"[20]. Moreover, the public that can easily get there can see individuals (and the supervisor as well) at any time[21]. The authorities start to function automatically in the Panopticon, so that the imprisoned individual would feel being constantly monitored. He does not know at what moment he is being monitored, but he is sure that this can happen at any time[22]. The individuals, who are monitored within twenty-four hours, during day and night, who have no personal space, are dehumanized, by negating any intimacy and personalism[23]. The individual, who is subjected to the measure of constraint, i.e. intensive supervision, becomes visible not only to the supervising officer, but also to the public that sees an electronic monitoring device on his body while the person is wearing it. The individual wearing an anklet or bracelet is always watchable by the public: when resting at the seaside, when searching for the job and, in general, when visiting public places.

3. Concept of the measure of constraint, i.e. of intensive supervision, in Lithuania

As is provided in part 1 of Article 131[1] of the CCP, intensive supervision is considered to be the control of a suspect with the help of electronic monitoring devices. This measure is sanctioned at the pre-trial investigation stage by the pre-trial investigation judge, whereas, after passing the case to the court, intensive supervision is sanctioned by the court hearing the case. The term for the application of this measure is determined by the pre-trial investigation judge or by the court ruling. For the first time, intensive supervision can be imposed maximum for the 6-months' period. Part 4 of Article 131[1] of the CCP provides the possibility to extend the period of application of this measure of constraint up to 3 months and does not limit the number of extensions. The CCP establishes the prohibitions to remove, break or otherwise destroy the electronic

[19] M. Foucault, *The Disciplined and Punished.Birth of a Prison*, Vilnius: Baltos lankos, 1998, p. 42.

[20] J. Barevičiūtė, *Panopticon and Panopticism in the Context of Globalization*, Problemos, 2004, 66:93.

[21] See also 19, p. 245.

[22] See also 19, p. 238.

[23] See also 20, p. 97.

monitoring device (Part 7 of Article 131[1] of the CCP). It also establishes the duties of suspects and accused persons to wear the electronic monitoring device and to comply with the established order of the day (Part 7 of Article 131(1) of the CCP). In the event of breach of these duties, arrest may be imposed, if that is the case.

The whole of the above-mentioned provisions of the CCP makes it possible to conclude that the procedural form of intensive supervision, as an independent measure of constraint, is adopted in Lithuania, though actually there were discussions on the issue of its independence when preparing a draft law on amending and supplementing Articles 71, 75, 120, 121, 126, 132, 139, 179, 183, 218, 219, 233, 236, 261, 273, 279, 285, 286, 317, 319, 426, 427, 428, 429, 432 of the Code of Criminal Procedure of the Republic of Lithuania and on supplementing the Code with Articles 131[1] and 430[1].

Discussions on the aspects of independence of intensive supervision had been going on at the Ministry of Justice of the Republic of Lithuania already in the course of making these amendments. The representatives of one group asserted that intensive supervision should be seen as an independent measure of constraint. According to the representatives of the other group, intensive supervision could only be seen as one of the elements ensuring the application of other existing measures of constraint. As the representatives of this group asserted, currently there is an optimal number of procedural coercive measures (the list) in the Lithuanian criminal procedure, capable of ensuring the purpose of the Institute of measures of constraint. If to optimize and modernize the system of measures of constraint, then this should be done not by increasing the list of these measures, but by improving the conditions, criteria and mechanism of certain already existing measures of constraint. The representatives adhered to the point of view that the provisions of the criminal procedure containing abusive provisions and measures, resemble a model of the etatist State under the rule of law, in which the state-sanctioned supervision and control prevail. Thus, unlike the civil State under the rule of law, the latter is focused not on the content, but on the form. Finally, the representatives of the third group adhered to the interim or, in other words, submissive position. They asserted that intensive supervision can be both an independent measure and a measure helping to ensure the effective realization and observance of the measures that are milder than arrest. Thus, it seems that the legislator accepted the opinion of the representatives of the first group regarding intensive supervision as a measure of constraint, which is independent, autonomous from other coercive measures and significant in the system of these measures. It is also noteworthy that the law does not prohibit to impose intensive supervision together with the other measures of constraint. Article 121 of the CCP, which regulates the general provisions for imposing measures of constraint, provides for that several measures of constraint that are milder than arrest may be simultaneously imposed (Part 3 of Article 121 of the CCP).

Although the list of measures of constraint, based on the stringency scale, is not provided in part 1 of Article 120 of the CCP, but, in terms of the legal technique, one might think that, according to stringency, intensive supervision is singled out as a separate measure of constraint, ranked second after arrest being the most stringent measure of constraint. The legislator attributes it to the similar stringency level as arrest is, because it requires a sanction of the judiciary (Part 1 of Article 121 pf the CCP). Intensive supervision, like other measures of constraint, is regulated by a separate Article 131[1] of the CCP.

One can only guess why intensive supervision has not been imposed by courts for more than 1 year. *Quot capita, tot sensus* ("As many heads, so many minds"), often paraphrased into "as many heads, so many opinions" – a Roman poet Horace would say. If, in general, measures of constraint are imposed in accordance with the CCP in order to ensure the participation of the suspect, accused or convicted person in the process, unhindered pre-trial investigation, court proceedings and execution of the judgment, as well as in order to prevent new criminal offences, so sluggish imposing of intensive supervision may be related to the doubt to ensure an unhindered criminal process. In other words, there may be doubts as to whether a person subjected to electronic monitoring will not escape or hide. In case of arrest, the possibilities for a person to flee and hide are mostly constrained, he is always in sight of law enforcement officers, unlike in case of electronic monitoring. However, custodial measures are the most stringent, and they should be used, if there are respective grounds. As is repeatedly stated in the doctrine of the European Court of Human Rights (hereinafter – the Court), an individual's right to freedom protected by Article 5 of the Convention is an extremely important value in the democratic society (*De Wilde, Ooms and Versyp v. Belgium, 18 June 1971, § 65, Series A No. 12, and Winterwerp v. the Netherlands, 24 October 1979, § 37, Series A No. 33 Medvedyev and others v. France, 29 March 2010, § 76, No. 3394/03*). All persons have the right to protection of this right and no one shall be deprived of his/her liberty in violation of the provisions of the Convention (*Weeks v. the United Kingdom, 2 March 1987, § 40, Series A No. 114*). Electronic monitoring, in contrast to arrest, does not, in the physical sense, take away freedom, although it limits it. Thus, the application of this measure implies a lower degree of limitation of freedom for a person. It may be the case that the new measure of constraint causes doubts as to its effectiveness for law enforcement entities. On the other hand, the provisions of the CCP allow to impose a complex of measures of constraint on a person. Of course, the CPC neither imperatively foresees it, nor consolidates such combinations of complexes. This is left to the law applying entities.

The authors of the article tend to adhere to the position that intensive supervision should have been established in the CCP, not as an independent measure of constraint, but as an integral part of the mechanism of measures of constraint. However, the other way to go was chosen, i.e. to expand the list of sufficiently abundant measures of constraint by supplementing it with one more measure of constraint. In other words, the application of state coercion has been further expanded. The more coercion is, the more you want to expand it. Thus, the preconditions for the "panopticon" syndromes to manifest themselves can be created in the Lithuanian process. If we look at the Court's jurisprudence, we would notice that the Convention obliges the States to seek balance between the ensuring of the public and State security and the use of coercion against persons. As is acknowledged in the Court doctrine, the States have certain obligations regarding the protection of persons' rights. Moreover, the States are responsible for violations of the rights guaranteed by the Convention. The excessive State coercion, overshadowing the rights guaranteed by the Convention, can endanger the democratic State principle[24]. Although the States have discretion as to the use of procedural coercive measures in the national law, nevertheless, they must implement discretion in accordance with the European law[25]. The use of State coercion must be lawful and

[24] *Suheyla Aydin v. Turkey*, 24 August 2005, § 152, 158, 161, No. 25660/94.
[25] *Szabó and Vissy v. Hungary*, 12 January 2016, § 57, No. 37138/14.

proportionate, based on the honest belief that there are appropriate, well-grounded reasons at that time for the use of coercive measures[26], as is thought, among them – also the coercive measures that are introduced and augmented in the national law.

4. Intensive supervision in the context of the principle of respect for human honor and dignity and the principle of equality

A modern-day electronic equivalent to the ball and chain is one of the critical definitions of intensive supervision that is found in science[27]. In addition to the benefits, this measure of constraint causes concern for some scientists because of contradiction of this measure with the constitutional principles. The ball and chain on the human body, as the author L. Zedner says, resembles an iron collar that was worn by offenders in the XVIIIth c[28]. The obvious difference between the ball and chain & iron collar and the anklet worn when staying under intensive supervision is their wearing time. The chain was worn in approximately the XVIIIth c., maybe earlier, whereas anklets are worn in the XXIth c. We write in scientific works in that XXIth c. that the core of constitutionalism of democratic States is the theoretical recognition of the priority of human rights and freedoms and their legal consolidation[29]. A person, wearing such vivid attributes as the chain, anklets and bracelets becomes visible to all people that look at him at that time. Or that do not look at him, but it may seem for the person, who wears a chain or anklet, that all people look at him, that they know for what he wears an anklet, that they evaluate him from the negative side. This constantly accompanying feeling that you are being watched reminds of something. It reminds of what was already before, having perfection and anti-humanity at the same time – the Panopticon.

The Panopticon is defined by scientists, who are interested in this topic, as a perfect prison. As was previously mentioned, it was an oval construction with a tower in the center, from which all solitary cells glassed from the outside were visible. Individuals were reliably closed in solitary cells; they were straight under the supervisor's eyes. He could constantly watch the individuals, whereas the latter could see neither the supervisor, nor their neighbors, because of the side walls, which prevented them from seeing each other[30]. Any member of the public could see the prisoners at any time[31]. "Visible, but does not see; the object of information, but never the subject of communication. Visible from the central tower, but not visible from solitary cells that are strictly separated by partitions"[32]. Perhaps, the Panopticon can be called a perfect prison from the architectural aspect, when the space is planned in the form of such a model, in which solitary cells are perfectly observed from one point, i.e. from the tower, whereas for those, who are located in solitary cells, neighbors remain invisible, except for the tower. On the one hand, although you see a tower, you do not know if you are being watched by the supervisor. You can clearly see only the public that came, as if to

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[26] See also 24.

[27] See also 13, p. 221.

[28] See also 19, p. 42.

[29] A. Taminskas, G. Mesonis, *Human Dignity: Constitutional Reflections*, Jurisprudencija, 2014, 21(4): 970.

[30] See also 20, p. 94.

[31] See also 19, p. 245.

[32] See also 19, pp. 237-238.

the circus, to see the Panopticon and its inhabitants. It should not be forgotten that the inhabitants of cells had to be able to see not the prisoners in close vicinity, but the prisoners staying in cells before their eyes, because the cells were made of glass and the Panopticon was oval. The imprisonment in the Panopticon meant constant tension, whether you are supervised by the supervisor and other prisoners. This, in turn, limited personal space, freedom to stay alone and to behave as you wish, intimacy, and finally – routine life and peace. Therefore, as scientists aptly note, there is no longer a place for the concept of an individual in the Panopticon, only the concepts of a dehumanized individual and transient[33], since the individuals in solitary cells have become, as a matter of fact, mere objects of observation.

These memories encourage the desire to look at the anklet that is worn when staying under intensive supervision. The fact that an anklet is visible, since it is worn on the human body, encourages to discern the similarity. It becomes visible not only to the law enforcement officers, who as if resemble the tower supervisor, but also to the whole community, which could watch the Panopticon at any time. Yet, in the case of the Panopticon, individuals were dehumanized, so there is no background for talking about their dignity. This causes doubts as to whether the anklet that is worn does not violate the person's honor and dignity.

According to Article 3 of the Convention, no one shall be subjected to torture or to inhuman or degrading treatment or punishment. The Court, when developing the doctrine of human dignity, explains that Article 3 of the Convention enshrines one of the most fundamental values of democratic society[34]. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behavior[35]. Ill-treatment must attain a minimum level of severity, if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, and its physical and mental effects and, in some instances, the sex, age and state of health of the victim. Treatment has been held by the Court to be "inhuman", because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering[36]. Treatment has been considered "degrading" when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance[37]. In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment[38].

As is provided for in part 4 of Article 18 of the Constitution of the Republic of Lithuania (hereinafter – the Constitution), the law and courts shall protect everyone from arbitrary or unlawful interference with his private and family life, as well as from

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[33] See also 20, p. 97.

[34] *Labita v. Italy* [GC], No. 26772/95, § 119, ECHR 2000-IV, *Provenzano v. Italy*, No. 55080/13, § 126.

[35] *Iwańczuk v. Poland*, No. 25196/94, § 49, 15 November 2001, and *E. and Others v. the United Kingdom*, No. 33218/96, § 88, 26 November 2002.

[36] *Labita v. Italy* [GC], No. 26772/95, § 120, ECHR 2000-IV.

[37] *Hurtado v. Switzerland*, 28 January 1994, opinion of the Commission, § 67, Series A No. 280, and *Wieser v. Austria*, no. 2293/03, § 36, 22 February 2007, *Durdevic v. Croatia*, 19 July 2011, No. 52442/09.

[38] *V. v. the United Kingdom* [GC], no. 24888/94, § 71, ECHR 1999-IX.

encroachment upon his honor and dignity[39]. The Constitutional Court of the Republic of Lithuania (hereinafter – the Constitutional Court) regards human dignity as a value of particular importance, whereas the purpose of the Constitution in this case is to ensure the protection and respect of this value. These requirements are imposed, first of all, on the state[40]. According to the Constitution, it is possible to restrict constitutional human rights and freedoms, if the following conditions are met: this is done by law; restrictions are necessary in the democratic society in order to protect the rights and freedoms of other persons and the values enshrined in the Constitution, as well as constitutionally important goals; the nature of the rights and freedoms and their essence are not negated by restrictions; the principle of constitutional proportionality is respected[41]. The concept of the democratic State under the rule of law, seeking to preserve and defend as well as capable to protect a person and the society from crimes and other serious violations of the law, which is enshrined in the Constitution, cannot serve as the basis for violating human rights and freedoms, restricting them more than is necessary for the society to achieve important legitimate goals or, by such constraints, to negate the essence of human rights and freedoms[42].

There are authors in the scientific doctrine, who think that electronic monitoring threatens to replace a highly effective form of supervision in the community with technological oversight. The effects of continual surveillance by a remote machine are not yet known, but it may be imagined that this form of observation is ultimately dehumanizing[43]. If we support their point of view, we should say that the devices worn on the legs and arms and meant for electronic monitoring essentially negate the essence of human rights and freedoms. The use of inhuman devices would not be compatible with the above-mentioned jurisprudence, developed by the Court and the Constitutional Court.

According to the authors of this article, it is important to note that there is no list of measures used by the State, which violate the honor and dignity of persons. The clarification of the Constitutional Court that the State, when restricting the rights of a person, must not negate their essence, is important. Also, the Court's clarification that, when assessing the violation of dignity, we must take into account the whole of circumstances, as well as such qualities of a person, to whom the appropriate measures were applied, as the sex, age and state of health of the victim, is very important. The cases, in which the use of electronic monitoring exacerbates the problems with the culprit's health and the courts must decide whether Article 3 of the Convention is violated, occur in practice of the courts. There was a case in the United Kingdom High Court (Administrative), in which the person was suffering from post-traumatic stress disorder and a psychotic illness with auditory hallucinations and paranoid beliefs. Psychiatrists unanimously confirmed in the case that the measures applied by the law enforcement institutions, in particular the monitoring tag, had exacerbated the appellant's symptoms[44]. The court did not establish an infringement of the article in the

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[39] Constitution of the Republic of Lithuania. Valstybės žinios (Official Gazette). 1992, No. 33-1014.

[40] Constitutional Court of the Republic of Lithuania 9 December 1998 ruling, No. 2/98.

[41] Constitutional Court of the Republic of Lithuania 19 September 2002 ruling No. 34/2000-28/01.

[42] Constitutional Court of the Republic of Lithuania 29 December 2004 ruling No. 8/02-16/02-25/02-9/03-10/03-11/03-36/03-37/03-06/04-09/04-20/04-26/04-30/04-31/04-32/04-34/04-41/04.

[43] See also 13, p. 222.

[44] See: https://www.ejiltalk.org/the-role-of-legitimacy-and-proportionality-in-the-supposedly-absolute-prohibition-on-inhuman-and-degrading-treatment-the-united-kingdoms-high-court-decisions-in-dd-v-secretary-of-state/.

mentioned case. This is one of the cases, in which the definite circumstances were assessed and it had to be decided whether the applied State coercive measure negates the essence of the rights and freedoms of a person and thereby violates his honor and dignity. Currently the authors of the article are staying in scientific research, therefore they cannot provide a clear position whether the electronic monitoring measure is inhumane. However, it is to be held that in such cases where the application of the electronic monitoring measure causes harm to a person due to his qualities, such as his health, with taking into account the doctrine that was formed by the Court, one may raise the question on the potential inhumanity of the measure applied to a particular person in that case.

The Convention prohibits discrimination. Article 14 of the Convention provides the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. The Court, when developing the equality doctrine, explains that Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to the "enjoyment of the rights and freedoms" protected by those provisions. The application of Article 14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention. It is necessary, but it is also sufficient for the facts of the case to fall within the ambit of one or more of the relevant provisions. The prohibition of discrimination in Article 14 thus extends beyond the enjoyment of the rights and freedoms, which the Convention and its Protocols require from each State to guarantee. It also applies to those additional rights falling within the general scope of any Article of the Convention, for which the State has voluntarily decided to provide it[45]. Moreover, in order for an issue to arise under Article 14, there must be a difference in the treatment of persons in analogous, or relevantly similar, situations (see D.H. and *Others v. the Czech Republic* [GC], No. 57325/00, § 175, ECHR 2007-IV, and *Burden v. the United Kingdom* [GC], No. 13378/05, § 60, ECHR 2008). Such a difference in treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized[46]. The Court has also held that not every difference in treatment will amount to the violation of Article 14. It must be established that other persons in an analogous or relevantly similar situation enjoy preferential treatment and that this distinction is discriminatory[47]. A difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized[48].

According to Article 29 of the Constitution, all persons shall be equal before the law, courts, and other state institutions and officials. Human rights may not be restricted; no one may be granted any privileges on the grounds of gender, race, nationality, language, origin, social status, belief, convictions, or views. The Constitution Court ruled that the

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[45] *Carson and Others v. the United Kingdom* [GC], No. 42184/05, § 63, ECHR 2010, *Stummer v. Austria*, 7 July 2011, No. 37452/02, § 81.

[46] *Carson and Others v. The United Kingdom*, 16 March 2010, No. 42184/05, § 81.

[47] *Ünal Tekeli v. Turkey*, No. 29865/96, § 49, ECHR 2004-X,

[48] *Konstantin Markin v. Russia*, 22 March 2012, No. 30078/06, § 125.

constitutional principle of equality of all persons, which must be observed both when enacting and applying laws, as well as when applying laws and administering justice, obliges to legally treat the same facts in the same way and prohibits, in principle, to treat arbitrarily the same facts differently. The constitutional principle of equality of all persons means the natural right of a person, who must be treated equally with others, it establishes the formal equality of all persons and that persons cannot be discriminated or that they cannot be granted privileges. The constitutional principle of equality of all persons to the law would be violated, if a certain group of persons, to whom the rule of law is applied, if compared with the other addresses of the same rule of law, would be treated differently, although there is no difference of such nature and scope between those groups, so that such unequal treatment would be objectively justified[49].

There are authors in the scientific field who have doubts about the principle of the compliance of electronic monitoring with the principle of equality. Electronic monitoring requires a stable home address, a telephone line, and that the offender can continue to meet the costs of its rental and that of the monitoring device. The author states that for the many offenders who fail to meet these basic criteria, electronic monitoring will not be possible if they are liable to be imprisoned instead, even though to do so breaches the principle of equal treatment[50].

Although intensive supervision in Lithuania is a sufficiently new measure of constraint, it is worth sharing this experience as well. The CCP does not provide that a person, who is subjected to intensive supervision, must have a place of residence or the like. This issue is regulated in detail at the sub-statutory level. The intensive supervision and control rules stipulate that an official of the territorial police institution visits the place of residence of a person, who is being controlled, where he gets convinced whether there are technical possibilities (electricity, mobile communications, etc.) to install a stationary electronic monitoring device and ensure its operation. If follows thereof that the application of the measure of constraint, i.e. of intensive supervision, depends to a certain extent on a person's social status. There is no possibility to control a person, who does not have a permanent place of residence or lives without amenities, such as electricity, when applying intensive supervision. It is worthwhile to draw attention to the fact that the practice of taking into account also the family status of the accused, his permanent place of residence, labor relationships, state of health, previous convictions, contacts abroad, as well as the severity of the crime, the severity of the imminent punishment, is formed in the courts of Lithuania, when imposing intensive supervision[51]. In other words, those circumstances that are usually evaluated when dealing with the issue of imposing the arrest or extending its term are taken into account. It has been mentioned that the CCP does not foresee what circumstances should be considered when imposing intensive supervision, but they are introduced and crystallized in case law. Therefore, we cannot categorically state that the application of this measure of constraint in Lithuania is related exclusively to the social status. However, one must agree that the cases, where the measure of constraint cannot be absolutely applicable to a relevant group of persons solely because of their social status, would cause doubts as to the potential violation of the principle of equality.

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[49] Constitutional Court of the Republic of Lithuania 3 July 2012, No. 54/2010, 13 December 2004, No. 51/01-26/02-19/03-22/03-26/03-27/03.

[50] See also 13, p. 221.

[51] Order of the Court of Appeal as of 14 May 2018 in criminal case No.1S-122-202/2018.

5. Final remarks

1. The sources of law history of modern times testify to the fact that the electronic monitoring measure appeared in the XXth century in the United States of America; however, the rudiments of appearance of this measure are found in the most ancient sources of law of the Grand Duchy of Lithuania of the XVth century.

2. Intensive supervision is established as an independent measure of constraint in the criminal procedure of the Republic of Lithuania. If this this measure has been enshrined as an integral part of the mechanism for imposing measures of constraint, it would be possible to avoid the expansion of State violence as a result of extending the list of measures of constraint, which is detailed enough.

3. Easily noticeable monitoring devices for intensive supervision cause doubts as to their compatibility with the principle of honor and dignity of a person, and also have symptoms of the "Panopticon". The persons who were serving their sentences in the "Panopticon" were the dehumanized individuals, who became the object of monitoring. The question of whether a constantly visible electronic monitoring device, as if "marking" the person and, thus, singling him out of other members of the society, is humane and not undermining the essence of the right of a person to honor and dignity, is debatable. This question can be raised in several aspects. Firstly, whether such an electronic monitoring device that is applied to a person, who is being controlled, in all cases negates the essence of the right to honor and dignity. Secondly, whether such an electronic monitoring device is applied to a person, who is being controlled, in a particular case in the context of the individual circumstances, such as the nature of application, its duration, physical and mental effect of the application of the measure, and, where appropriate, the sex, age and state of health of the person being controlled.

4. In cases, when intensive supervision cannot be absolutely applied to a certain group of socially impecunious persons because of their social status, the question of the potential non-compliance of this measure with the principle of equality may be raised. In cases, when the legal acts provide for the conditions for the application of intensive supervision that are related to the possession of property welfare, and this measure is applied, in the case-law, not only via the prism of the social status, it is believed that this measure should not violate the principle of equality.

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Conduct of courts in south Banat District in criminal cases of medical malpractice from Art. 251 of CriminaL Code of the Republic of Serbia

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Abstract

In this paper, the authors deal with the issue of legal protection provided by criminal law in the Republic of Serbia in regards to the jeopardizing of or causing injury to the health of patients that occur due to doctors' malpractice in conducting their duty. Apart from the overview of the legal provisions regulating this area, by examining the practice of the courts of the Republic of Serbia in South Banat district, we shall see the extent to which criminal law has proven to be efficient in providing basic human rights and the protection of the aforementioned, the right to life, and the right to healthcare. Every person has the right to the protection of their physical and psychological health. That is one of the basic human rights guaranteed by relevant international conventions and the Constitution of the Republic of Serbia. Therefore, it is justifiable to ask the question whether inadequate sanctioning of medical malpractice in the practice of courts in the Republic of Serbia jeopardizes the entitlement to the basic right of every person in need of healthcare, as well as whether the standing opinion that doctors are not responsible for their oversights is valid?

Keywords: *medical malpractice, Criminal Code, court practice, South Banat District*

1. Introduction – Criminal offense of medical malpractice in The Criminal Code of the Republic of Serbia

In the Criminal Code of the Republic of Serbia, the criminal offense of medical malpractice is proscribed by the provisions of Article 251 of the Criminal Code[1]. The execution act of this criminal offense is set alternatively and exists when a doctor, in providing medical assistance, uses an evidently inadequate means or an evidently unsuitable treatment or fails to observe appropriate hygiene standards or evidently proceeds unconscientiously and thereby causes deterioration of a person's health. All forms of the execution act must occur during treatment, or while medical assistance is

[1] Official Gazette of RS, no. 85/2005, 88/2005, amendment 107/2005, am. 72/2009, 121/2012, 104/2013, 108/2014, and 94/2016.

being provided[2]. The basic form of this criminal offense is punishable by imprisonment of three months to three years. A less severe form will exist if this criminal offense is committed due to negligence. Negligence exists when the perpetrator was aware that their actions can cause the criminal offense, but they had taken lightly that this will not occur, or that it can be prevented, or in the case when they were not aware that their action can lead to the criminal offense, even though, due to the circumstances in which the offense was done and according to personal knowledge, the offender was obliged and had to be aware of that possibility. The perpetrator can then be punished by a lesser sentence – a monetary fine or imprisonment of up to a year. It is more difficult to imagine that the action could have been committed with direct intent. In that case, another criminal offense would take place. Even though the law proscribes punishment for possible intent, in practice, the execution act is most often committed due to negligence as a form of guilt. The graver forms of this criminal offense are proscribed by provisions of Art. 259 of the Criminal Code – "Grave Offenses against Health", and depend on the gravity of the occurring consequence, of the severity of bodily harm, death of a person, and a more severe punishment is proscribed in accordance. As an example, it is proscribed that if grievous bodily harm had occurred, or serious injury to the health of a person, the perpetrator is to be punished by imprisonment of one to eight years, or up to three years if the offense was committed due to negligence, and in the case of death of one or more persons, the perpetrator is to be punished by imprisonment of two to twelve years, or up to eight years if the offense was committed due to negligence.

In order for the criminal offense of medical malpractice to exist, the perpetrator must have certain subjective features. The title of the criminal offense itself indicates that the perpetrator must be a doctor. Without deeper analyzing the regulations dealing with the system of medical education, in the sense of these provisions, the term doctor is believed to be any person that has a medical faculty degree and that engages in practice in public or private sector in accordance with the regulations of this field. In regards to the aforementioned, the law presumes the doctor providing assistance, whether they are employed at the moment or not. Also, a dentist is also believed to be a doctor, with a dental faculty degree. The degree of specialization is not of importance. Apart from that, in Art. 251, para. 2 of the Criminal Code, the legislator had in mind that the executive act can also be done by other medical employees, who in providing medical services or care or while conducting other medical activity evidently use unsuitable treatment, and therefore, cause deterioration of a person's health. They are other persons that provide medical assistance or care, or conduct other health related activities, and are not doctors. These are persons who, in the scope of their degree of education and expertise, in providing medical service do not conduct those activities described within the scope of medical malpractice, as they can only be done by doctors. For example, they can be nurses, lab technicians, x-ray technicians, and others. However, in past court practice dealt with by the authors of this paper, this criminal offense most frequently occurs due to evidently inadequate means or evidently unsuitable treatment of the doctors in general, as perpetrators of this criminal offense.

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[2] Z. Stojanović, *Komentar Krivičnog zakonika*, Službeni glasnik RS, Beograd, 2018, pp. 827-830.

2. "Loop holes"

The theory is dominated by the opinion that in order for the essence of this blanket criminal offense to exist, it is necessary for the perpetrator to have acted with a higher degree of negligence. The Criminal code explicitly defines this as *evident*. The term "evident" is interpreted as a noticeable error of a doctor that grossly violates the rules of medical profession and science[3]. *Evidently* can therefore be related to grossly. A gross error is an error that, under no circumstances, should not have occurred as it neglects elementary medical findings and experiences[4]. The existence of obvious, gross violation of rules of medical practice and science that is in causal relation with the harmful consequence to the patient's health is necessary to be determined in each specific case. However, this is where problems occur in practice.

The first problem can be seen in the fact that in the Republic of Serbia there are no general provisions regulating the procedures that doctors are obliged to follow in the widest sense in the process of providing medical care. This includes treatment, diagnostics measures and making the diagnosis, proscribing therapy and prophylaxis. This issue was regulated in Article 197 of the Law on Healthcare[5], where the term "professional misconduct" is used. In court practice of the Republic of Serbia, the usual term is "medical error". Similarly, the Law on the Protection of Patients' Rights[6] also does not contain a closer explanation regarding the duty of doctors to conduct standardized procedures in each specific case. Medicine is by no means an exact science. However, based on the experiences seen in practice, it is justifiable to ask the question whether Hippocratic Oath is sufficient for the doctor to act with full degree of care and expertise required in each specific case? We believe this is not the case. The term medical error describes any action of a doctor during treatment that is against the rules of the profession – *contra legem artis*. In Serbian literature, the definition of Jakov Radišić is relevant, who believes that a medical error is: "Any measure of a physician that is not in accordance with the existing medical standard"[7]. For this reason, taking into consideration that this is an area subjected to general regulations and standards of medicine, unwanted consequences during patient treatment often occur.

The rights and the duties of the members of Serbian Medical Chamber, behavior towards the patients, colleagues, society and the Medical Chamber is regulated by the Code of Medical Ethics of Serbian Medical Chamber[8]. The aim of the Code is to preserve liberty and reputation of medical profession, raise the quality of medical services and strengthen the trust between doctors and patients by respecting the concept of autonomy and the rights of patients. Apart from the general principles in conducting professional duty of doctors, the Code also regulates their medical ethics. Partially, it regulates the duty of providing urgent medical assistance, working in extraordinary circumstances, caring of health education and health culture, continuous expert training, expert proficiency of doctors, independence and autonomy of doctors, and the

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[3] *Ibidem*.

[4] J. Radišić, *Odgovornost lekara u slučaju kad nije dovoljno da je njegova greška nanela štetu pacijentovom zdravlju*, in *Revija za pravo siguranja*, no. 3/2010, pp. 48-54.

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[8] "Official Gazette of RS", no. 104/2016.

relationship with the Serbian Medical Chamber. However, apart from proclaiming the basic principles of medical ethics, this Code does not further regulate the procedure a doctor is obliged to follow while providing medical care to a patient. The same was failed to be done in the provisions of the aforementioned Law on Healthcare that regulates the system of health care, the organization of health services, social care for the health of the population, general interest in healthcare, rights and obligations of patients, health care of foreigners, foundation of Agency for Accreditation of Health Care Institutions of Serbia, supervision of the enforcement of this law, as well as other important issues to the organization and provision of health care. This issue is still regulated by a general principle according to which a doctor is obliged to act in accordance with the rules of medical profession.

Individual acts of healthcare institutions in the Republic of Serbia proscribe the procedure of admission, providing care and treatment of patients. However, this primarily deals with technical procedures related to registering, movement and referral of patients to various levels of health care. Valid medical standards according to which doctors act are general and their suitability must be evaluated in each specific case of a harmful consequence to the patient's health.

Practice indicates that medical error can easily occur. The reasons are various, they cannot be generalized and they depend on the circumstances of each individual case. As an example, in court practice of courts in the territory of South Banat district, it was noted that medical malpractice most often occurs during patient admission in emergency services in hospitals on duty. The nature of activities taking place in emergency services on duty requires, apart from expertise and knowledge, speed and resourcefulness of doctors. Also, in situations with aggravated conditions, where an urgent reaction and a timely response is crucial, it is necessary to analyze the problem in an adequate manner, make the proper diagnosis and provide the necessary help to the patient. From a logical standpoint, providing urgent medical attention is exhausting work for several reasons, it requires the doctor to react in aggregated conditions regardless of their years of experience, and the risk of medical error is significantly higher.

When medical error occurs and there is a consequence to the patient's health, the rules governing medical practice and the norms of criminal law regulating this area collide. Criminal legislature is the *ultima ratio* regarding the protection of human rights and goods. The Law states that the object is only protected from grave medical error, meaning error that is evident as such. In order for the "evident" aspect of the error to be determined, as indicated by the legislator, we must look back on what a doctor is required to do during patient treatment according to the standards and rules of the profession. Considering that the actions a doctor is obliged to take during patient treatment are not standardized, a doctor is required to act in best faith and in accordance with their knowledge, expertise, conscientiousness and experience. In the largest number of cases, a doctor will act in accordance with the rules of their profession regardless of the outcome of the treatment, and they will satisfy the required level of health care protection they are obliged to provide. However, in cases when unwanted consequences to the health or life of the patient do occur, it is necessary to determine whether a line of conscientiousness was crossed in the actions of the said doctor in terms of treatment, meaning, whether the doctor acted with an obvious negligence in conducting of their duty. This is where the rules of medical profession, which are not prescribed, and the rules of criminal law, which is strict and specified in its norms, clash.

Precisely, this theoretical clash creates difficulties to the courts and the procedural parties to provide proof whether the doctor acted with evident negligence in the given case. Providing evidence means giving an answer to a hypothetical question, what the outcome of the treatment would be like if the doctor had acted in the manner they were supposed to[9]. The non-existence of a norm that could classify a certain behavior of doctors as negligence and the lack of standards to compare such behavior to creates a problem in drawing a conclusion regarding the existence of a doctor's guilt for the committed error.

By impartially evaluating the evidence presented by the prosecutor and the defense in the procedure, the court is obliged to determine in each individual case, without any reasonable doubt, the existence of a causal relationship between the doctor's actions and the occurrence of the harmful consequence. Without determining the causal relationship between an evidently inadequate means or an evidently unsuitable treatment or evident malpractice of a certain doctor as a perpetrator, there is no criminal offense of medical malpractice. The court is not in disposal of expert knowledge adequate to determine whether the doctor's actions are the cause of the harmful consequence to the patient's health. This issue is resolved by providing expert knowledge in the criminal proceedings. From experience, the judge will mostly know that the cases of medical malpractice court cases are complex, so taking that as a guide, the judge will apply the provision of Art. 114, para. 4 of the Criminal Proceedings Code[10], and entrust the expert opinion to a competent institution. Competent institutions that provide expert knowledge on the territory of the Republic of Serbia are medical boards of medical faculties in Belgrade, Novi Sad, Kragujevac and Niš. Apart from that, expert opinion can be entrusted to the Military Medical Academy in Belgrade. However, as will be discussed in the continuation of the paper, the issue of expert opinion in these kinds of court cases is particularly intriguing.

3. Court practice

Through practical examples of rulings from the territory of South Banat district (a territory that spans 4245 km, and that has 293.370 inhabitants in total according to the last population census in 2011), we will show that the lack of a fixed procedure in the doctor treatment is one of the main reasons why criminal court cases resulted in an acquittal.

In the observed period, from 1.01.2010 to 1.01.2018, 5 criminal proceedings conducted for this criminal offense were legally completed in the Basic Court in Pančevo and the Basic Court in Vršac, in the jurisdiction of which is the conducting of criminal proceedings for the criminal offense of medical malpractice from Art. 251 of the Criminal Code. This number is more than negligible compared to the total number of cases for which the basic courts have reached a verdict based on the merits – 11.118 legal cases in the Basic Court in Pančevo and 5.388 cases in Basic Court in Vršac. Out of the total number of the 5 legally completed criminal proceedings, all conducted before the Basic Court in Pančevo, only one case has ended in a conviction. Before the Basic Court in Vršac, one court case for the criminal offense from Art. 251 of CC is still in progress, and therefore it was not taken into consideration during the analysis.

[9] Jakov Radišić, *op. cit.*, 2010.

[10] Official Gazette of RS, no. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014.

By analyzing all five cases of the Basic Court in Pančevo, it was determined that criminal proceedings were conducted against 8 doctors. It was noted that the accusation was filed against specialist doctors employed in a hospital, who have been on duty in the admission department of General Hospital at the time the act took place. Furthermore, it was noted that they are all specialist doctors of roughly the same specialization. Most of them are general surgery specialists (five are general surgery specialists from the total number), the other accused are an internist rheumatologist, a radiologist and a neuropsychiatrist. The age structure of the defendants indicates that these are persons of ages 43 to 55, so there is no presumption that these are inexperienced doctors at the beginning of their professional career, but precisely the opposite. Out of the 8 accused doctors, two are women, while the others are men. According to the data from the punitive record, all defendants are persons without prior convictions. Out of all the defendants, only one procedure resulted in a legal conviction of the specialist doctor internist-rheumatologist. For the other defendants, the procedure was concluded with an acquittal. In one case, lead against a general surgery specialist and a radiologist, absolute obsolescence of the criminal case occurred, which resulted in an acquittal.

In the processed cases, it was noted that a silent solidarity in the medical profession is also manifested through concordant depositions of the doctors given as witnesses in the procedure, based on which it was not possible to precisely state whether the defendant was directly in charge of the patient. For example, in a procedure conducted before the Basic Court in Pančevo in case file K.no.399/16, where the defendant was a general surgery specialist employed in General Hospital in Pančevo, and was charged with inadequate treatment of a patient upon reception to the surgical department of the hospital as he failed to medically diagnose acute inflammation of the appendix based on previously done analyses, but instead falsely diagnosed the patient with pulmonary embolism, continued the treatment as such and applied antibiotic and painkillers, which masked the already atypical clinical picture of the inflammatory process, without previously clarifying the reason of painful cramps in the stomach of the aforementioned patient, as well as the reason for heightened bodily temperature of 39.2 degrees, increased number of leukocytes and extremely high sedimentation, all of which resulted in the death of the injured party due to bursting of the appendix and effusion of gangrenous content into the stomach cavity. The first degree ruling of the court sentenced the surgeon doctor to home imprisonment and ordered a ban on performing medical activities. As reasoned by the first instance court, depositions of the examined witnesses – doctors employed in the surgical department in the hospital, could not be accepted as truthful as none of the witnesses could state who was the ordained doctor for the deceased patient, who was directly responsible for her treatment, but instead the witnesses stated that all doctors of the department were in some form in charge of the patient. The defendant had also negated in his defense of being in charge of the patient, even though he was the doctor on duty and admitted the patient into the hospital, as well as the doctor that signed the referral for further treatment of the patient in Clinical Centre in Belgrade. So, the court had deemed the witness testimonies as a form of solidarity with the defendant. However, the decision of the second instance court upon appeal, the Court of Appeal in Belgrade, Kž1.no.1529/16 as of 23.02.2017, the named doctor was acquitted of the charges. According to the statements from the verdict, the second instance court judged that there is insufficient evidence that the defendant as a specialist doctor of general surgery in providing medical assistance proceeded with evident unconscientiousness and therefore caused worsening of the health condition of

the patient, meaning that there were no evidence that the death of the patient was in causal relation to the inadequate treatment by the defendant in the department of general surgery in General Hospital in Pančevo.

The opinion of the Court of Appeal in Belgrade stated in the verdict was explained as follows: "Namely, for the evidently unconscientious treatment to even exist, the execution act can be done by action or non-action. For example, it can be a superficial examination of the patient, due to which the illness was not determined or wrong diagnosis was given. In this specific case, superficial examination of the patient cannot be blamed, as the defendant had performed laboratory analyses during the admission to the hospital, as well as ultrasound examination of the stomach, X-ray of the stomach without contrast, measured the bodily temperature, all of which states that the doctor admitting the patient into hospital had a thorough approach, as stated in the findings and the opinion of the Medical Faculty in Niš. Furthermore, general unconscientious treatment could be taken into consideration as failure to apply examination methods necessary to exclude or confirm certain complications (e.g. testing allergy sensitivity of the patient), failure to apply preventive measure, failure to apply certain control measures, or other actions necessary to determine the health condition of the patient prior to or during the treatment, failure to provide the necessary medication, failure to inform the patient of the possible consequences of refusing certain medical intervention etc. However, considering the fact that the defendant had completed all the necessary analyses during patient admission, he proscribed infusion and antibiotics therapy, there were no signs of acute appendicitis during the examination as this was a case atypical symptoms of appendix inflammation according to findings and expert opinion, the court has determined that the defendant did not act with evident malpractice. Furthermore, we should point out that all findings and opinions of court-medical boards are correct in stating that all the doctors of General Hospital in Pančevo have committed a professional omission by not recognizing the cause as appendix inflammation, but due to the aforementioned facts, such a professional omission related to the defendant cannot be at the level of evident malpractice. Considering the fact several doctors participated in the patient's treatment, the basic medical principle of strict allocation of activities should have been followed, which includes personal responsibility of the doctors for all the tasks they are obliged to independently complete, and the doctor cannot be responsible for unfavorable effects of patient treatment considering the doctor had carried out his duties with due care and following the standards of his profession, and the fact that the defendant had masked the clinical picture by proscribing therapy cannot influence the work and actions of other doctors on duty in that period, as each of them applies their own expertise and knowledge".

By analyzing the reasoning of the second instance court decision, it is clear that the court took as the guideline the legal provision that, in order for medical practice to exist, it is necessary to characterize it as evident according to case circumstances. In the reasoning, the court provides examples where, in the situation when the doctor had applied certain diagnostic methods for the purpose of determining the health condition of the patient during patient admission, evident unconscientious procedure in proving medical assistance cannot be applied.

Similar opinion of the court was presented in the second verdict of the Basic Court in Pančevo – K.no.3471/10 as of 18.02.2014, in which internist – rheumatologist doctor was legally pronounced guilty for the criminal grave offense against health from Art. 259, para. 4, in relation to Art. 251, para. 3 of the CC, and was sentenced to house

arrest of 10 months. In this verdict, the doctor was legally sentenced to have generally and evidently used unconscientious procedure and therefore caused the health worsening of a person, resulting in death of the said person, as the doctor had failed to apply medical measures to make the proper diagnosis when the patient was admitted to the hospital with chest pain and with a referral diagnosis of EKG showing unspecific changes in the heart rate, and had failed to give the order to do further laboratory tests, for the patient to be admitted for observation with a serial repetition of EKG, but instead had proscribed a therapy of diet with certain medication, released the patient to home care, which resulted in worsening of the patient's health. In the finding of the second instance Court of Appellation in Belgrade, in the verdict Kž1.721/14 as of 15.07.2014, the defendant was found to have acted with evident unconsciousness as he failed to undertake the necessary medical measures to make the proper diagnosis. Considering the defendant's profession, he had to have applied more attention and care than is the case with the average person, particularly taking into consideration his life experience of several decades, and therefore predict the consequence.

As previously mentioned, the Court is obliged to determine the existence of a causal relationship between the doctor's actions and the harmful consequence in each specific case and without any reasonable doubt, and considering the Court is not in the disposal of the knowledge adequate to determine such a relationship, this issue is resolved by expert opinion.

In all the observed cases, the expert opinions of the so called medical error were provided by medical boards of medical faculties in Belgrade, Novi Sad, Kragujevac and Niš.

It is the duty of each expert to make an oath before providing the opinion. The oath is used to remind and oblige the expert to provide their opinion in accordance with the rules of science or profession, conscientiously, impartially, and in their own best knowledge, as well as that they will accurately and completely state their findings and opinion. However, when it comes to criminal procedures against doctors, it seems that the content of the oath is forgotten. This is indicated by the fact that in none of the cases before the court that we had insight into was sufficient to get the expert opinion of a medical board of only one faculty. In order to clarify the contested issues and remove any ambiguities and contradictory facts of the given depositions and opinions of a faculty, it was required for the expert opinion to be provided by another or even a third medical board of various faculties. For this reason, it is justified to ask the question whether this indicates solidarity of medical professionals with colleagues who are charged for a criminal offense while performing their duty. There is no need to particularly point out that the repetition of expert opinion also causes a prolonged span of time, which is why the criminal procedure itself is made more complicated and lasts for a long time. In a great number of cases, absolute obsolescence of the criminal proceedings takes place, so the procedure "infamously" results in an acquittal.

The following characteristic of these cases is that the defense used by the defendants during their criminal proceedings is usually the same and comes down to shifting the blame to the injured party. In the stated defenses during the proceedings, all the accused doctors have shifted their blame and the reason of their professional error to the injured party and the members of their families for incompletely or falsely giving the patient's anamnesis. The accused doctors invoked wrongly or incompletely provided information regarding the patient's medical history, both by patients and the members of their families, which, in the opinion of the defendants, was the reason for the falsely

made diagnosis, or the objective impossibility for the doctor to make the correct diagnosis in the given conditions. In the above cited verdict of the Basic Court in Pančevo, K.br.399/16, the defendant stated as his defense that the husband of the deceased patient had not indicated that the issue is the appendix during the initial examination, but instead only held his wife's hand for support. Furthermore, in the verdict of the Basic Court in Pančevo, K.no.671/16 as of 11.05.2018, the defendant, as the surgeon on duty in the General Hospital in Pančevo, stated in her defense that she only learned from the patient and the patient's father that the injury occurred while managing a grinder and a grinder plate, and that she was not notified that the grinder plate had dispersed, or broke up into pieces, which is why she couldn't visually see or presume that a large piece of the grinder plate was left in the wound of the patient, which she later stitched up, leading to worsening of the patient's health condition.

This neglects the fact that a doctor is responsible to take into consideration the wider picture of the clinical anamnesis based on their expert knowledge and in accordance with the rules of the profession, and based on that draws a general conclusion regarding the manner in which the injury or illness in the patient had occurred. The courts have the responsibility to objectively and, in accordance with logic and life experience, analyze whether the doctor had the possibility to properly and completely perceive the patient's condition in the given circumstances.

Finally, in the defenses of the accused doctors, it was noted that harmful consequence is also attributed to objective, technical faults, to the failure of the necessary diagnostic devices of the institution used to conduct proper analyses, which would enable a proper diagnosis of the patient's condition. However, this cannot be treated as a justified and logical defense, as in the case that the institution does not have diagnostic devices necessary to conduct proper analyses available or if the doctor does not have sufficient expert knowledge, it is the doctor's duty to refer the patient to another institution that meets the criteria necessary for the treatment. This is proscribed by the Code of Medical Ethics in Article 12 – that doctors must be aware of the limits of their of their professional abilities and possibilities, and should not overstep those boundaries. In the case that the examinations and treatment are above the expert abilities of the doctor, they must summon another doctor with these necessary abilities.

So, in the verdict of the Basic Court in Pančevo, K.no.631/12, doctors, surgery sub-specialist, and the chief of surgery in the hospital were acquitted of the charges to have committed a criminal offense. The public prosecutor charged the doctors as they, upon admitting the injured party into the hospital with a self-inflicted wound in the chest area, treated the injury as a light bodily injury, failing to determine that this is a grave bodily injury dangerous to the life of the patient, and even though the patient was held at the department, he was left without the necessary psychiatric examination, therapy or supervision, even though they had been informed about the possible suicide attempt and aware that due to the superficial examination of the wound and without a complete diagnosis of the degree of the injury, the condition of the patient can worsen, after which the patient had committed suicide by jumping for the third floor window of the hospital. The courts of the first and second instance did not accept such a charge by the public prosecutor. The court had not found any elements of medical malpractice in such actions of the doctors and had accepted the defense of the doctors that they have acted conscientiously and in accordance with the medical practice, as due to the unclear manner of injury, the patient was retained at the surgical department, that a neuropsychiatrist was notified of the issue, who examined the patient, did not proscribe

any therapy believing one to be unnecessary as the patient was "calm and of cheerful nature".

Without debating any more deeply the reasons used by the court during decision-making, this is one of the examples when, from everyday experience, it seems to a layman that the court had acted unjustly as it acquitted the doctors that had admitted the patient with a wound that was left without a clear reason of how it was inflicted, and that was suspected to be a result of self-harm, that was lightly understood to be, by its own merit, non-life-threatening, but the doctors have also taken lightly that the patient was of no danger to himself, which had proven to be a wrong judgement considering the patient had committed suicide by jumping from the window of the hospital.

A similar situation is with another verdict of the Basic Court in Pančevo K.no.1476/12, where apart from the general surgery doctors in the hospital, neuropsychiatrist specialist was also included in the public charge. In this case, during the hospital treatment a patient had developed organic mental disorder, due to which she was to be supervised 24 hours a day, as risk for irrational behavior of the patient could be presumed, and the doctors were to not leave the patient alone in the room, without bars, unrestrained to the bed, on the ground floor of the hospital, due to the lack of which the patient jumped from the window of the hospital. In this case, the court had also concluded that there is no room for criminal responsibility of the doctors, as there was no causal relation between the action of the criminal offense and the resulting consequence. "In favor of the conclusion that there is no evidence that the defendants have committed a criminal offense they are being charged with, is the content analysis of the report of the general hospital, which clearly states that in the critical period in the aforementioned institution no general or internal act had existed that would proscribe treatment of patients diagnosed with mental disorder"[11].

4. Conclusion

By shortly overviewing the court practice of the South Banat district in the Republic of Serbia, we have seen that the courts are of unified stance when it comes to "medical malpractice".

Criminal-justice responsibility of the defendant will depend firstly on the facts of the situation, but also primarily on the skill of the public prosecutor to prove in the court procedure that the doctor acted with a higher degree of negligence, that their actions roughly violated the rules of medical practice and science[12].

The existence of the evident aspect of the case is always difficult to prove. We have seen that the reasons can be various, and they range from systemic problems, lack of general regulations in this area, to problems that the courts face during evidence presentation. Doctor solidarity is evident at all levels – support to the accused colleague by doctors in witness roles, doctors providing expert opinion upon order of the court, the evidence crucial to determining guilt.

All of this makes the role of the public prosecutor more difficult, it alleviates the position of the accused doctor, and the court is left to apply the law from the standpoint of logic and practice, and to draw the right conclusion regarding the guilt of the perpetrator. When there is insufficient reliable evidence necessary for the court to draw

[11] Verdict of the Court of Appeal in Belgrade, Kž1.no.1196/14, as of 16.09.2014.

[12] Z. Stojanović, *op. cit.*

conclusions on the level of certainty regarding a fact, for the reason of doubt, a doctor or any other defendant must be acquitted of the charge.

The fact is that the largest number of criminal cases dealing with medical malpractice results in an acquittal. From the standpoint of legality, the verdict can be examined before higher instance courts. However, from the standpoint of righteousness, the displeasure of the injured party, the members of their families, as well as the general public regarding the outcome of the procedure where the justice was not met is justified.

Often, law and justice are on opposite sides. The court can be expected, but must not be, to reconcile these two, sometimes conflicting, parties. The aim of the court is to satisfy both justice and law. However, due to the circumstances of the life event, procedural and legal matters presented during the procedure, this ideal is unattainable. Therefore, a judge, with all the effort, cannot create justice for the injured party and adequate social condemnation for the committed medical malpractice.

All the while the issue of medical responsibility is left systematically unresolved, with clearly proscribed procedures, technical actions that are subject to be empirically evaluated and that can be qualitatively and quantitatively compared, a step further cannot be made in providing efficient legal-justice protection of medical malpractice. Apart from that, we can continue to hope that isolated cases of legally convicted verdicts will have a sufficiently strong preventive effect on the conscientiousness of doctors that are responsible for the basic human right – the right to life.

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Criminological and Sociological Aspects of Video Games

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Abstract

The article deals with specific connection of crime and artificial intelligence in context of video games. As a new and developing mean of both entertainment and communication, this mass media tends to mimic older representations of crime, yet offering to consumers unique virtual experiences in this prohibited field. Furthermore, paper tries to show possible connections between narratives about violating the law presented in video games and virtual identities which players are taking in such settings detached from primary social surroundings. By description of different game genders and types of crime present in them, paper tries to go beyond moralistic stigmatization and point out main relevant themes for sociological and criminological inquiry in this field. Comparison between these different prohibited activities and their (re)presentations show deeper cultural causality and raise the question why some kinds of crime are considered to be taboo, while others can be seen as "a mere play"?

Keywords*: video games, crime, artificial intelligence, violence, media, moral panics*

1. Fiction or Reality?

It is well known that crime can sometimes be *ludic* in nature – committed not because of material gain or fulfillment of realistic interests, but for sake of joy of playing. What could motivate people to steal unnecessary objects, possibly without any value, other than feeling of risk, uncertainty, showing courage and determination which most people lack, or power achieved over others using skillful and tactical actions? Same is true for engaging intro fights, dangerous and risky behavior in public traffic, experimenting whit psychoactive substances and many other prohibited activities.

On the other hand, many sports and other legal games have elements which would be considered as braking of the law in different context(s). Range of such phenomena is broad, from children games which include mock-stealing of certain items to boxing and other violent sports, as well as harmful physical attacks in general, stealing and insulting others in theatrical plays etc. Yet, all these examples fall into well explored fields of sociology, while some may be only relevant as interesting contrast of reality in theoretical debates. Still, there is one more, relatively new type of "playing" which is especially interesting from the perspective of artificial intelligence – video games.

The topic of video-games can be studied sociologically in two different ways. The first perspective is based on drawing similarities between games and much older genders of communication between people: songs, stories, literature, theatrical plays, movies etc. In that sense, a video game is a narrative which can be analyzed as any other text, by exploring its content and its connections to social structures and processes. This can be achieved with the application of vast literature about discourse analyses (Fairclough, 1989; van Dijk, 2008, 2009; Wodak, 1996).

Second perspective takes into consideration very specific aspect of video games – their ability to involve living humans into specific actions, which may or may not be part of their everyday experience. Unlike more detached (Elias, 1956) forms of texts, video games seek active participation from humans. That's why they can be also studied from more individual and behaviorist perspective offered by theories of rational choice and game theories in general (Elster, 1989). In both cases, discursive and practical, involvement in such virtual activities certainly has deep connections with real, social world. By being personally engaged in certain activities and by adopting particular identities of played characters, a person's experience and many other mental aspects can change in different ways. In that sense, video games are more profoundly affecting individuals than older mediums of learning (Gee, 2005). Still, what is so specific about video games in both senses, and why they can be important for understanding criminal behavior in general?

2. Crime in Two Dimensions

Although we can recognize some characteristics of modern video games in earlier, pre-digital era, such as different board, card and other social games, development of digital technologies brought enormous changes in this type of entertainment. In the beginning, simple processors and graphical hardware could only mimic already known games, such as chess, ping pong or Nine Man's Morris, which doesn't offer players any chance to introspect their moral actions, or break any norms. Such games had a second described aspect, but lacked the first one – they weren't narratives or texts. Also, they tended to fall into earlier described category of games played together with real people in genuine social context (or mimicked it).

As decades were passing, and closing to the 21st century, video games started to become more complex in all of its aspects. This includes rules of the games, as well as graphics and sound. It all lead to the situation in which video-games started to mimic "real life" in many fields. Some of those fields of social life aren't relevant for this paper, such as sports and other simulations, puzzle and purely logical games, yet other are. Even some early games with crude graphics concerned public with it deviant content, such as *Death Race* from 1976, which was violent in nature, and *Custer's Revenge* from 1982, which was problematic from two points: sexual violence and depiction of Native Americans. Complex video games offered to human players a unique experience by interacting with AI (artificial intelligence) NPCs ("non-player characters"), and such integrations can be aggressive and destructive in their nature. Although not even all of these actions aren't necessarily interesting from and perspective of sociology of deviations or crime (such as games that include aggression towards fantastic creatures) sometimes such games represent different array of criminal behaviors. Also, deviant graphical scenery accompanied by blood, bizarre or grotesque details or occult practices, which is characteristic of some video games, will not be taken here into account. Although it can be relevant from the perspective of this paper, only examples which include player's action will be considered here.

It should be made clear from start that playing video games doesn't include punishable criminal activity[1], because virtual characters don't have a status of legal subjects. On the other hand, they are a medium which transmit certain crime related

[1] Unless in case of unauthorized use of copyrights, games that are actually form of illegal gambling, or different offences which are aimed against real people, such as blackmailing, bulling, hate speech etc.

contents, from practical and factual knowledge (types of firearms and their specifications, tactics and techniques for committing crime) to certain moral values about illegal activities. In this sense, new digital mediums don't differ from older channels of mass communication which have always took keen interest in crime (Ignjatović, 2008:11-12). The main purpose of this article is to give brief resume of gaming genres which are relevant for this topic, together with particular examples. First such described phenomenon will be the broadest one, and probably the most embedded in our culture – physical violence.

3. Fighting Games

Probably the first fighting game that took attention of the public was *Mortal Kombat* in 1992. For the first time, realistic, "movie-like", depictions of humans engaging in very brutal violence and depiction of blood was employed in any video game. Although, from a cultural perspective, the game draws its themes from martial art movies and other media depictions which became very popular in the 1970s and 1980s, it stressed out very essence of what video games meant. Instead of only watching the violent act of fighting[2], game had pushed players to actively participate in literal and repeated bloodshed. On the other hand, while movies could narratively contextualize violence in moral categories, such as "struggle between good and evil", this game has offered players a chance to freely choose their side. Even more so, it didn't allow any other type of behavior for players, because winning of successive series of fights was the only available scenario. In that sense violence was portrayed as a mean by itself. It is also highly estheticized, and fighters are presented as a charismatic character which are possessing superhuman qualities. This gender of video games, and particularly *Mortal Kombat*, had a profound influence on forming *The Entertainment Software Rating Board* (ESRB) in 1994, and although this agency can't enforce its decisions by force of law, game distributors in the USA follow their guidance[3].

Similar type of games, but presented in a different context, are the so called "beat 'em up" gender. They represent situations in which the player is encountering masses of NPCs which are aggressive by default, so violent response is the only valid action, as well as in fighting games. Again, this sub-gender also has roots in cinema and closely resembles martial arts movies in which one particularly competent fighter defeats all the odds, as well as all the opponents. Here also, violence plays a pivotal role, because it is a main motivator of the whole story. Paradoxically, aggressive acts become a form of communication between player and NPS, serving as a main drama plot. Yet, this gender of video games can be interpreted in different manners, because the player doesn't step into the world of voluntary duels, but in a hostile environment where almost any other living creature is depicted both as a threat and as a target. Interpersonal relations are reduced only to antagonisms.

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[2] Particularly, in a martial arts tournament which is implicitly illegal, because matches are fought to the death.

[3] Situation is different in Canada, where ESRB ratings are enforecd by provincial law in some proveinces.

4. Shooting Games

Although essentially similarly to the previous category, games containing violence committed using firearms have many peculiarities. First of all, they are more detached from the everyday reality of an ordinary person. While bare hand fighting can be performed at any time, and is very common among children (Collins, 2001), because harm done by such assaults is usually expected to be minimal, shooting at someone is a very different thing. It is a rare event because of two reasons: lack of access to firearms and serious consequences it can bring. This fact probably is a part of the allure shooting games has on players – this is something that they never experienced in their life, and probably they won't try it ever. Still, because of the developing nature of gaming software, shooting simulations became so realistic that they can be considered as some sort of training material for firearm use. Such practices are even employed by professional armies and police, yet they can't be considered as reliable method. First of all, considerable weight and recoil of gun is neglected, and even more importantly, games lack psychical and mental aspects of a real shooting: fatigue, loss of breath, anxiety, fear, adrenaline rush and many other processes which occupy the body and mind of people employed in combat.

What shooting games certainly don't lack is an encyclopedic *corpus* of facts about different types of firearms and their characteristics. Presented in an engaging way, such knowledge can be easily acquired by the player. Other important aspect are elements of firearm combat tactics and other skills, such as moving true space, taking cover, making ambushes and so on. Although it is clear that it is very unlikely that someone will become professional hitman or an armed robber by being game influenced, yet they show lot of resemblance with one peculiar type of crime, especially feared in the USA – mass shootings (and particularly school shootings).

A strong link between such crimes and the playing of video games was sometimes even stressed by perpetrators, their defense and relatives in order to minimize their guilt and accuse game producers. Such was the case of infamous school shooting in Columbine, in 1999, in which attackers were partially influenced by the *Doom* (Ferguson, 2009), considering other students as monsters from that game. The scenario looks similar, because shooting at unarmed people put attackers in the same role of omnipotent characters from the game. Still, the long lasting and primal cause of this crime was school bulling, and the obsession with shooting games seems to be a consequence of this type of social isolation, and not the cause of the massacre.

5. Role-playing Games

This particular genre of video games is much broader and diverse than the previous two ones. Their plots are ranging from fantasy, fairy or epic narratives, to SF fantasies and even contemporary, realistic settings. On the one hand, such games can be totally deprived of any criminal activity, or can encompass all of the previous phenomena and even more. Such games are rich in narrative, and are offering players the liberty to choose between many actions. Concerning all of this, this gender is basically considered as some sort of simulation of real life, where contents of the game interact with values and norms of the player in a creative way, developing his fictional character.

Drawing from more recently popular quasi-medieval epic fantasy literary and cinematic genders which saw its proliferation beginning with the early 2000s, many

titles are combining morally virtuous decisions with ones that are questionable. The example here will be the *Elder Scrolls* series[4], probably the most popular of the whole sub-gender. The latest title from this series, *Skyrim* (2011), allows players to choose from a plethora of activities. Some of them are non-problematic, such are collecting raw materials, crafting and selling items, eliminating dangerous animals etc. Others are partially problematic from a criminological perspective, because they represent actions the legality of which is contested from different historical and cultural perspectives – such as killing people in self-defense, attacking brigands and participating in a civil war. The third case is the most interesting, because it allows player to engage in criminal activities to a various degree: from casual theft and pickpocketing to professional burglaries or even paid assassinations. Some of those activities are represented as "skills", which can be further developed by practicing them (pickpocketing, lockpicking, sneaking, killing unaware targets etc.).

Depiction of violence in role-playing games is also different than in the previous two genders. While some NPCs are again aggressive by default, so fighting them can be considered as self-defense, others are peaceful and acting in a socially acceptable manner. This difference can be interpreted both optimistically and in more misanthropic way, because players can decide to act in benign patterns, or to take part in predatory activities against virtual characters which pose no threat. Besides the thrill of doing something unusual and forbidden – stealing or murdering –, such actions can bring benefits to the player's character as well. Not only that he will gain material recourses in the game, but he will also become more proficient in sneaking, stealing, or the use of certain weapons. Still, such actions won't go unchecked by the other NPCs which act as police in virtual world, so one may be punished for certain crimes committed in the game. It is also worth mentioning that on all of the *Elder Scrolls* series, as well as in many other open world role-playing games, players can choose to follow different in-game scenarios and storylines which aren't necessary to complete the game, but can prolong his playing time and experience. Some of them, in this particular case, can represent participating in organized crime associations, such as thieves and assassins "guilds". Again, such narratives usually mimic older forms of non-digital entertainment, such as romanticized stories about life of criminals and social bandits (Bulatović, Pavićević: 2017). This area will be covered in the next part of the paper.

6. Simulations of Professional Crime

This example is specific, because it doesn't represent any particular gender of games. Sometimes they can be described as cross-gender, combining shooting, driving, role-playing, fighting aspects. Still, some features that bound all these titles in the same category is their common theme – simulation of participating in professional crime. Some of these games are adaptations of movies, such as *The Warriors*, *Dirty Harry*, *Reservoir Dogs* and *The Godfather*, even thou basically the whole group is inspired and

[4] Imagined and fantastic world in which this series take place is inspired by the Roman Empire and the medieval Europe and Japan. This somewhat reduces contemporary criminological relevance, because attacking someone with and bow and arrows is very rare in XXI century, and doing crime with help of magic is even more redundant. Yet, it is very interesting to analyse fantastic and quasi-historical narrative from pro-chronistic perspective, particularly how modern conceptions about crime affect even our imagination of unexciting, fairy tale-like worlds.

has lot in common with crime movies. Because the topic of this gender and this paper is very broad and diversified, these games can include many particular activities: stealing, murdering, organizing prostitution, drug dealing, collecting protection money etc.

An example of a specialized game series which was very controversial from the date it started is *Hitman*. This game series looks like a James Bond movie at the first glance, although the main protagonist, agent 47, lacks social charisma of 007 and has different goal than saving the world – he is as professional assassin. Players can usually choose one among few methods of killing the target, from straight gunfight to more clandestine and cunning methods. Later, such as poisoning, garroting, sniper targeting or causing a heart attack in sauna are better rewarded by in-game mechanics. This also means that killing of non-targeted NPCs is considered as a bad achievement. Every assassination must be strategically planned by taking into account location, measures of security, preferable method, and escape route, which can include evading metal detectors, hiding dead bodies, accessing restricted areas and masking. Although the topic of this franchise is one of the most serious crimes, fate and life of professional assassin is portrayed romantically and with sympathy.

An example of series which are less specialized and morally more ambiguous than *Hitman* is famous *GTA: Grand Theft Auto*. Although the very name of the series suggests that this game series is all about stealing cars and violating the traffic code, it includes a wide variety of criminal activities in open worlds which are depicting great cities in the USA (New York, Miami and Los Angeles). Every title in this commercially extremely successful series caused lot of controversies, because it simulates real life crime in contemporary great cities, and was generally considered to be a bad model for players worldwide. A prominent feature of this series is that it lacks heroic depiction of criminal activities which was present in many games mentioned before. Players assume the role of a petty criminal which doesn't have any other motives than to climb up criminal hierarchy by completing missions given by local "bosses", as their client. The public was especially concerned by the appearance of highly controversial themes, such as driving under the influence of alcohol, drug dealing, killing of police officers and torturing captured targets.

7. Crimes of the State

After discussing some of the more apparent examples of crime portrayal in video games, we will consider one less likely candidate for analyses. While before mentioned crimes were the ones committed by an individual person, now the focus of this paper will change to crimes which include misuse of political power and position in the state apparatus. This sounds marginal at the first glance, yet it must be taken into account in order to have an all-encompassing description of the topic. So, why portrayal of individual murders and theft are considered to be so problematic, while declaration of war, ethnic cleansing, war crimes and different severe breaking of international law and human rights is neglected? The reason is clear – while public imagination is prone to be occupied by fantasies of problematic youth committing violence under the influence of the video game, no one will seriously ever claim that teenagers can perform any of these actions which demand control over one political subject.

Also, genders of video games in which such actions are possible usually don't portray gore, blood or physical violence at the level of the previous titles. These are mostly strategy games, which simulate governing over one state, or an army, and are

more elaborated versions of traditional board games such as chess or *Risk*. Development of software made them so complex that certain title can be considered as a learning material in fields of geography and history. Example that will be presented here is composed from series of grand historical strategy games produced by *Paradox Entertainment*, which cover three different eras: medieval (*Crusader Kings I* and *II*), early modern (*Europa Universalis I* to *IV*), XIXth century, WWI and inter-war period (*Victoria I* and *II*) and WWII (*Hearts of Iron I* to *IV*). Two aspects of crime representations can be noted in these games. First, there are actions which are now considered to be illegal, but were accepted in the referred era, such as religious conversions, slavery or planed cultural assimilation. Second, actions that were generally prohibited, sanctioned or considered as a breaking of laws or customs throughout the history are also available for player to recreate. For example, in *Crusader Kings*, one may assassinate his rivals, even family members, mutilate or sacrifice prisoners or expel Jewish population from his realm; *Europa Universalis* allows players to raze whole cities, commit genocide on native populations or engage in espionage or piracy, while *Victoria* and *Hearts of Iron* can be played from the perspective of fascist states.

8. Sexual Violence in Video Games

This topic is left for the very end, because it is peculiar in many ways. First of all, while all other types of violence and other illegal activities saw its proliferation in the last 30 years or so, sexually themed games remain a taboo, at least in Westerner, or more specifically, non-Japanese culture. Because minors are considered to form great part of games market, large companies are censoring even nudity in order to make their products available worldwide and evade being labeled as pornography. Even thou games depicting sexual intercourse remain on margins of publicity – which is even more true for games covering rape themes – occasionally, some cases stir public attention. Such was the fate of the Japanese game *RapeLay* (2006), which although never meant to be distributed outside Japan sparked controversies in UK, US, Australia and Argentina, subsequently making it impossible to be obtained and, in the end, withdrawing the title even in the country of its origin.

The main problem here, of course, isn't the question why games which include explicit sexual violence should be censored. The problem is why other types of violence are considered to be appropriate (for at least adult population)? There are probably at least two answers. First, violence is morally ambiguous, and is usually still divided in categories of legitimate and illegitimate behavior. Historically, it tended to be more accepted in the past (Elijas, 2001), yet we still keep the memories of these times in heroic narratives which are transmitting or mimicking epic stories about violent individuals. In the end, aggression can be instrumental, and sometimes used to ward of attacks and sustain very preservation of one's life, or even the survival of the entire community. On the other hand, sexual violence is always motivated by asocial drives, so it lacks even the thinnest base to be considered legitimate. Also, it can be associated with pornography which leads to outright censorship.

9. Conclusion

Video games tend to fall into category of "folk devils" (Cohen, 1972) which cause moral panic. As Norbert Elias rightly stressed out, important aspect of civilization is a

slow movement from tactile and gustative impressions to visual and auditive (Elijas, 2001). It means that civilized man will not "enjoy" in violence with his hands, but with his eyes and ears. By only watching and listening about violent and other criminalized acts, civilized man knows that he will not cause any harm, nor even more importantly, suffer any.

This brings us to a second aspect, that is that video games (single player at least) lack genuine social aspects. They are played in an artificial, digital environment, and consequences of decisions taken in such a context are detached from "real" social world. Yes, one may be thrilled by fantasies about stealing or committing burglary in a game, or estheticizing or glorifying violence, but this will hardly make a thief or are murdered out of him. If a crucial element, a micro situation for committing such acts lacks, anything like it won't happened. Even thou there is a lot of physiological research (Barlett *et al.*, 2008; Anderson *et al.*, 1997) which shows that participating in violent games can cause aggressive behavior, this is only true under laboratory conditions. Real life, where one is confronted with danger of both corporal suffering and enduring shame, is a different thing. Skills, emotional management, attitudes and (quasi)moral "values" must be learnt from real people in a real social context of crime.

Finally, while it is impossible to draw a strong conclusion about video games being the cause of criminal behavior, they offer an intriguing filed for research on its own, at least in two already mentioned topics. First, how crime is depicted in the contemporary culture? Is it glorified and romanticized, or shunned? And second, maybe even more important, how people morally behave in a "social vacuum", while interacting with virtual characters? Are they choosing to break the everyday routine and laws which govern it for the sake of fun, or are they projecting their morality even into temporal virtual identity during the game? This question can have many furthers repercussions, concerning that we can expect AI to be even more involved in real social lives of humans in the near future.

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How to guarantee the realibility of expert testimony – reality in China

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Abstract

High technology plays an increasingly important role in criminal lawsuits, however, the high-tech information must be presented in front of the judge who normally is a layman. As a consequence, the expert could exert so great influence on court that whose knowledge must be presented in an understandable way. Or, otherwise the expert instead of the judge would be the master of the court. In China, the implementation of the new Criminal Procedure Law fails to improve the present situation of an extremely low expert's court appearance rate, which seriously hinder the judgment to the expert testimony. It is because there is no restriction to the judges' discretion to decide whether the attendance is necessary. Due to the extremely high caseload, the judge tends to solve the case as soon as possible without asking the attendance of the expert. Hearsay rules based on their stern exclusion and the operability of perfecting details can solve this problem significantly.

Keywords: *forensic science, expert, hearsay rule, experts' appearance in court*

1. Why is the attendance of the expert so important?

A. *To Make the Trial Substantive*

With the development of science and technology, high technology facilitates the case investigation profoundly. Expert testimony as the most important forms of testimony in criminal trial of forensic science is playing an increasingly important role. But in China, expert witnesses rarely testify in court, while the judges lacking the relevant professional knowledge tend to be difficult to review and judge expert testimony, which makes the expert testimony become a kind of indisputable evidences, and the judges have no choice but admit its probative value. Thus, the court cannot effectively question the expert testimony at all, and the court trial descents to be an affirmation procedure of the expert testimony produced in investigation stage. In this case, it is the police who dominates the trial but not the judges. It is very dangerous that the trial procedure become a mere formality, because the whole criminal lawsuit is likely to become a punishment procedure dominated by investigation organ. Especially in China, expert testimony of the criminal case is mainly produced by the internal certifying agency of the police station, and often is presumed to be with high probative force. However, in the United States, judges have already realized their power and flexibility when evaluating expert testimony. In order to make the judge better exercise this power but with appropriate constraints on its flexibility, expert witnesses to appear

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in court is important, because paper expert testimony are more likely to offer expert the power to determine the case facts, and makes it hard for the judge's power being transparent[1].

B. *For the Authenticity of Expert Testimony*

The science is developing and progressing constantly, and the scientific conclusion is always under self-correcting that is to say the only accurate and correct identification result is often just an ideal state. Every decision of judges, as the dominator in criminal cases, often affects the defendants' liberty and even their lives. Therefore, every judge should play the role of "gatekeeper" and exclude the so-called "junk science"[2]. The April 18th report on Washington Post, alleging that America's Justice Department and FBI admitted that during the past 20 years almost all judicial forensic staffs of FBI have made flawed expert opinions. In another word, one possibility is that those unreliable expert testimonies have resulted in so many wrongful convictions that hundreds of innocent people were sent into prison for wrong.

But it is impossible that each judge is an all-powerful scientist who has the ability to find defects of expert testimony at a glance so that expert witness appearance in court is needed to demonstrate the scientific principles of expert testimony[3]. Moreover, the authentication is processed secretly, which makes the paper expert testimony difficult for showing careless omission and error, while the cross-examination in court can make unilateral conclusion be questioned by parties of prosecution and defense. In addition, due to lake of relevant professional knowledge, rare others except experts in court can come up with proper questioning opinions so that the judge tends to be affected by expert witnesses. The 192th regulation of *"Criminal Procedural Law", therefore, stipulates* the expert auxiliary system: auxiliary experts can be hired by both the prosecution and the accused in order to question or further evidence the scientificity of the expert testimony.

The expert witnesses and auxiliary experts' appearance in court can strengthen the effect of cross-examination to the expert testimony. A collegial bench can make scientific judgment to special issues involved in the case, and get rid of its excessive dependency on expert testimony or even credulity through demonstrating the special issues involved in the case in court and effective cross-examination of both parties of prosecution and defense to clarify.

2. Low percentage of experts' Court attendance

Low expert witnesses' appearance rate in court has always been one of the main reasons for impacting cross-examination to expert testimony effectively. "In Shanghai, Qingdao and Hohhot cities, which are there big cities in China, after random retrieval of

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[1] See H. Stewart, R. Murphy, M. Pilkington, S. Penney, J. Stribopoulos, *Evidence: A Canadian Casebook* (Toronto: Emond Montgomery Publication, 3rd ed., 2011), 8.

[2] See F. Schauer, B.A. Spellman, *Is Expert Evidence Really Different*, (Notre Dame L Rev. Press, 1st ed., 2013), 89.

[3] See H.W. Rogers, *Expert Testimony* (Fred B. Rothman＆Co Press, 2nd ed., 1991), 4.

all court files from the intermediate people's court, we found there is no one case with record of expert witnesses appearing in court to accept cross-examination"[4].

In 2012, the new criminal litigation law made significant amendments in terms of judicial authentication, mainly including renaming expert conclusion as expert testimony; stipulating expert witnesses must appear in court under particular conditions; increasing the protection measures for the expert witnesses and their families etc. These series of modification mainly aim to increase the expert witnesses' appearance rate in court and guarantee for expert testimony are reviewed materially by court. But judging from the results of empirical research, achievements are few. We selected three provinces in west, south and center of China respectively in this research that represent different economic levels, degree of openness and geographical environment so as to the result can have certain representativeness. Specific data are shown in the table below.

Table 1

	In 2012		In 2013		In 2014	
	The number of concluded cases	The number of expert witnesses in court	The number of concluded cases	The number of expert witnesses in court	The number of concluded cases	The number of expert witnesses in court
D district people' court in C City, S Province	454	0	380	3	373	1
X district people' court in C City, S Province	233	0	219	0	232	1
R district people' court in S City, H Province	246	2	256	3	274	4
M district people' court in S City, H Province	182	0	180	0	153	0
Intermediate court in K City, Y Province	262	0	215	0	234	10
Y district people' court in K City, Y Province	138	0	170	0	153	0

[4] 汪建成 [W. Jiancheng], 《中国刑事司法鉴定制度实证调研报告》 [The Chinese Criminal Expert Testimony Empirical Research Report] (2010) 14(3) 中外法学 *Chinese and Foreign Law* 67, 72.

Results show that after the implementation of new criminal litigation law the expert witness appearance rate in court stayed the same to the before, still maintaining at a fairly low range.

3. Analysis of causes

This research mainly adopts questionnaire survey to study the reasons why expert witnesses' appearance in court is too low. We issued 450 questionnaires to the judges, lawyers and expert witnesses of the three provinces and cities mentioned above respectively, and effectively withdrew 450 questionnaires. (The research team entrusted local courts and judicial bureaus with the distribution job.) Specific results are as follows:

Table 2

Profession	Main reason for a low expert witness appearance rate in court					amount
	Expert witnesses were unwilling to appear.	The judge did not want them to appear.	Parties did not understand.	Expert testimony without dispute.	others	
The judge	65	56	5	17	7	150
Lawyer	56	63	8	19	4	150
Expert witness	53	69	2	23	3	150
Amount	174	188	15	59	14	450

Results showed that there are many reasons that cause expert witnesses' absence in court, but the uppermost two reasons are that expert witnesses were unwilling to attend and the judges did not hope them appear. Then, research group made a questionnaire about the deeper reasons.

Table 3

Profession	The main reasons for expert witnesses' reluctance to appear in court					amount
	Fear of retaliation	There is no need to attendance for having given a clear expert testimony.	Considerations of transpor-tation, practice, energy and financial condition	Fear of unable to explain clearly for lack of ability.	others	
Expert witness	51	30	24	38	7	150

Table 4

Profession	The main reasons for expecting expert witnesses absent					amount
	it will consume too much judicial resources, and reduce the efficiency of lawsuit	Trust expert testimony	to avoid embarrassment for being unable to understand	to take account of the investigation organ	others	
Judge	72	13	5	53	7	150

Through the analysis of research results, we can own the failure of the new criminal litigation law amendment on expert witness appearance in court to its partial cognition of this issue in that most modification of the criminal litigation law was to deny the effectiveness of the paper expert witnesses, protect the safety of expert witnesses and their families, and ensure economic compensation. However, these measures are aimed at only expert witnesses' subjective reluctance to appear in court, but ignore another reason leading to expert witnesses' general absence from court which is the reluctance of the court to have the expert attending the trial[5]. Instead, the new law also grants the court final right to decide the expert witnesses' attendance in court that is to say without the necessary condition considered by the court, expert witnesses have on obligations to appear in court. Therefore, the court can exclude the need of expert witnesses' appearance in court and hold the right of treating the expert testimony as the judicial basis. Therefore, at present stage, to increase expert witnesses' appearance rate in court must limit the discretionary power of the court.

4. Solutions – Hearsay rule

A. *The Overview of Hearsay Evidence Rule*

Hearsay evidence rule is the most distinctive rules on evidence acts of common-law countries, which is also a great contribution of the outstanding judicial system to judicial procedure[6]. According to the "*Federal Rules of Evidence*" of the U.S., hearsay evidence refers to a statement that: the declarant does not make while testifying at the current trial or hearing; and a party offers in evidence to prove the truth of the matter asserted in the statement. In accordance with the hearsay rule, the evidence with the feature of hearsay must be excluded from the court strictly. Consequently, if an expert testimony is produced in investigation phase, and no expert witness appears in court to testify, then this expert testimony, which is certainly within the scope of the adjustment of the hearsay evidence rules, will be excluded from the court.

[5] According to the research, the judges' unwillingness about the attendance of expert witnesses are mainly because they tend to trust the expert testimony which is mainly provided by the prosecution and what's more questioning the testimony in court will take too much time.

[6] See Wigmore, *Treaties on Evidence*, (Chadburn Press, 5th ed., 2009) 28.

B. *Value of Hearsay Evidence Rules*

As stated above, the main reason for a low expert witness appearance rate that has not been resolved by the new criminal litigation law is that no limit is given to the judges' discretionary power of determining whether the expert witnesses need to appear in court. Why hearsay evidence rules can guarantee expert witnesses to appear in court? First of all, it eliminates the absoluteness of hearsay evidence. In another word, evidence with hearsay attributes can be excluded as long as it is not within the exceptional reserve range, even the judge does not have any discretionary power[7]. In accordance with the "*Federal Rules of Evidence*" of the U.S., a declarant is considered to be unavailable to attend the trial and the testimony obtained before trial is admissible only if the declarant: firstly, is exempted from testifying about the subject because the court rules that a privilege applies; the second, refuses to testify about the subject matter despite a court order to do so; thirdly, testifies to not remembering the subject matter; the last, cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness. Consequently, the specific situations under which the judge can deny the necessity of witnesses' attendance are stipulated so clearly that the court can't exempt expert witnesses' duties from appearing in court just because of its subjective preferences in that it has no discretionary power.

Secondly, the hearsay evidence rules are not hollow doctrines with no content. Instead, it is an evidence rule that contains rich contents and is operated extremely easily, including the definition of hearsay evidence; the applicable scope of hearsay evidence rules; specific programs of the rules applied in court, like proposing program of motion, pleading program, reviewing program; and all exceptions of the hearsay evidence rules[8]. "*Criminal Procedural Law*" focuses more on the practical procedures, one of whose values lies in insuring the smooth running of judicial proceedings. However, if judges were only empower to exclude the application of hearsay evidence but without clear using regulations, then, as for the power, there would be only two results: abuse or abandonment, and both cause related procedure useless[9]. Introducing the hearsay evidence rule is equivalent to the introduction of a set of operating mechanism, by which the judges can learn every steps about excluding hearsay evidence, so the corresponding judicial procedures can go smoothly.

In China, the absence of evidence rules with strong operability contributes to a number of problems in judicial practice. According to the 187th clause of "*Criminal Procedural Law*", the attendance of the witnesses in court has a precondition, which is that judges consider expert witnesses' appearance in court to be necessary. Then, what are the necessary conditions? If it is necessary to ask expert witnesses to appear in court, then how to fulfill the specific judicial proceeding? And if the expert witnesses refuse to appear in court, whether are there any other measures to compel them appear in addition to generally excluding the application of the expert testimony, especially in some cases where authentication can't be made again? These problems are unable to

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[7] See R.J. Allen, R.B. Kuhns and E. Swift, *Evidence: Text, Cases, and Problems*, (Modern Press, 3rd ed., 2002) 109.

[8] *The Federal Rules of Evidence*, 3 USC §§ 801 (2011).

[9] See D.H Kaye, D.E. Bernstein and J.L. Mnookin, *The New Wigmore: Expert Evidence*, (Aspen Publishers, 7th ed., 2003) 105-113.

solve in the concrete implementation process, as well as obstacles to restrict the smooth running of program.

C. *The Appropriate Way to Apply Hearsay Evidence Rule in Practice*

The application of hearsay evidence rules is costly. First of all, it may exclude evidences collected by investigation organ out of the court, which could eventually lead to ill-founded accusation, and then all pretrial judicial investment is in vain; Secondly, the hearsay attribute of evidence need to be confirmed in court, and every procedure such as motion proposing, debate between parties of prosecution and defense, and judgment from the judge cost a lot of judicial resources. While China faces a serious shortage of judicial resources, especially the number of criminal trial judges. If every case is tried strictly in accordance with the requirements of hearsay evidence rules, it is inevitable to cause a long trial for each case and then a backlog of cases; at last, the hearsay evidence rules have not any foundation in criminal trials in China, as we all know, the absorption of every new system often inevitably suffer intermittent pain during the adjustment period theoretically, whether the effectiveness in practice can reach theoretic prospection needs the test of time. So a new system should be applied in a smaller range:

First, the application of hearsay evidence rules is limited to ordinary procedure of first instance. The value of hearsay evidence rules lies in the guarantee for the cross-examination rights of the parties of prosecution and defense so that it can prevent false evidence that is difficult to distinguish to disturb the case facts[10]. As prescribed in paragraph 3 of clause 225 of the "*Criminal Procedure Law*" in our country, if the people's court for the second instance consider that the facts of the original judgment are not clear or lack of evidence, the court can amend the judgment of the first instance after ascertaining the facts; or can cancel the original judgment, and require the people's court of first instance to rehear. Therefore, in the procedure of second instance, only under the condition of finding out the facts and amending judgment of the first instance the application of hearsay evidence rules can realize its value. But even under this condition, the evidence has already experienced the cross-examined in the first instance, so its hearsay attribute has been ruled out. And in other kinds of second instances, there is no involvement of finding the facts, so the application of hearsay evidence rules is unnecessary.

As prescribed in clause 208 of the "*Criminal Procedure Law*", the applicable conditions of summary criminal procedure include: case fact is clear with complete evidence; the defendant admits his crimes, and has no objection to charges of criminal facts. Since the case fact does not exist controversy, there is no need to apply hearsay evidence rules. In addition, the hearsay evidence rules run counter to the purpose of summary procedure, because the rules will make the process more complicated and time-consuming.

Second, motion of excluding hearsay evidence from either of the parties is indispensable. In common-law countries, motion of excluding hearsay evidence proposed by prosecution or defense should be the premise of hearsay evidence

[10] See C.B Mueller and L.C. Kirkpatrick, *Evidence: practice under the rules*, (Law&Business 6th ed., 1999) 490-510.

exclusion. Even if the evidence has obvious hearsay attributes, but without present of motive, the judges have no right to exclude, which in addition to emphasizing the dominating role of both the prosecution and the accused in criminal trial, also take account of saving the cost and improving the efficiency of fact finding, especially for expert testimony which itself has certain scientificity. If both parties of prosecution and defense have no objection, there is no need to spend too much resource of litigation. So, although in China the judge plays a much more important role than both the prosecution and the accused, in order to more effectively find the case reality, as long as there is no question of evidence from parties of prosecution and defense, even the judge should admit the probative force of evidence with the most obvious hearsay attribution. But an exception must be specified – as the hearsay evidence rules are strongly theoretical rules, it is difficult for people except judicial and other legal professionals to know the content clear, so the discrimination to hearsay evidence mainly depend on the judges, public prosecutors and lawyers. But, based on the results of empirical research of Prof. Gu Yongzhong, criminal defense rate has still been at a very low rate[11]. It is difficult for the defendant to judge the hearsay attribute of the hearsay evidence without lawyers' help. So, if the defender is absent, the judge shall explain the potential hearsay attribute of an evidence for the defendant and inquire whether he needs to apply to exclude.

D. *Rebuttal to the Idea of Denying Hearsay Evidence Rules*

There is a view in academia that the hearsay rule is not suitable for the criminal proceedings in China for its occurrence and development is to meet the needs of jury system litigation model of common-law countries. The jury consists of citizens in social without any legal expertise basically, and the establishment of the hearsay evidence rules is to provide the jury with a good judging environment, eliminating the improper influence of inadequate evidence to the jury, but in our country, there is no such concern, because we follow the litigation mode of continental-law system, and the judges, who can hardly be misled by the hearsay evidences because they are all elites and familiar with law and evidence, dominates the trial in court and is responsible for the cognizance of the case facts. Moreover, hearsay evidence rules will limit the judge' ability to find the case facts from the hearsay evidences, and be not conducive to find case reality[12].

However, the research results show that the current situation of China is that lower courts occur a widespread problem of insufficient number of criminal justices, and a collegial panel basically consists of a judge with two people's assessors in practice. (For specific data, see Table 5) Based on years of experience in the trial and profound legal literacy, a judge can naturally avoid the misleading by hearsay evidences and form accurate judgement. Compared to the judges, people's assessors have the same decision-making power to the case facts, but because of the lack of legal professional quality, it is difficult for them to consciously shield misleading from false evidences. Therefore, the most important thing is how to ensure that people's assessors in court can cognize

[11] 顾永忠 [G. Yongzhong], 《中国司法实践与国际标准》 [International Standard and the Practice of China], （北京大学出版社 [Peking University Press], 2012, 47.

[12] 汪蓉 [Wang Rong], 传闻证据规则若干基本问题研究》[Research on Basic Issues of Hearsay Rule] (2005) 11(2) 中国刑事法杂志 *Criminal Science* 90, 103.

accurately the case facts for the widespread collegial panel system of our country in the judicial practice. Although, to some extent, hearsay evidence rules may hinder the formation of the judge's judgment, whose effect is indispensable for the jurors and the jury court. In addition, only in terms of expert testimony, no matter how many experiences the judge has, he/she has no ability to judge the scientificity and authenticity of evidence independently. So, hearsay evidence rules are indispensable for the comprehensive cognition of an expert testimony.

E. *Some Detailed Measures*

The expert rarely appearance in court which always puzzles how to examine expert testimony in both criminal and civil procedure. The introduction of the hearsay rule offers a practical solution, however, in order to well implement the rule some detailed procedural rights and measures to assist the expert witnesses' attendance are indispensable, such as, to strengthen litigant's relevant procedure-choosing right, endow them reward-requiring right and security-requiring right. At the same time, we should define the contents of appearance in court, perfect expert auxiliary system and testification system of two-way audio-visual transmission technology and so on by detailing the regulation which appraiser appearance in court and the appraisal opinion admission standard.

It is clear that the application of forensic science will reach historically high levels in the coming years with pros and cons. Given these trends, how to make a good use of modern technology and avoid its misleading risk will almost certainly become increasingly prominent, with the emerging legal issues outlined in this article requiring the introduction of the Hearsay Rule into Chinese criminal procedure. With both the general hearsay rule and the detailed implementary procedures, we cherish the hope that the attendance of expert witnesses can be improved significantly.

Table 5

	The number of judges	The number of officers working in criminal justice	The number of concluded criminal cases in 2014
D district people' court in C City, S Province	51	3	373
X district people' court in C City, S Province	18	3	232
R district people' court in S	14	3	274

	The number of judges	The number of officers working in criminal justice	The number of concluded criminal cases in 2014
City, H Province			
M district people' court in S City, H Province	36	3	153
intermediate court in K City, Y Province	60	8（distributed in 2 courts）	234
Y district people' court in K City, Y Province	40	3	142

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Tax evasion in Bosnia and Herzegovina

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Abstract

Tax evasion and other prescribed fees constitute a harmful, illegal and dangerous activity of the individuals and groups that undermine the basic fiscal interests of the society. In addition, tax evasion directly affects many state functions and therefore all contemporary states impose very strict sanctions to natural and legal persons who are the perpetrators of tax-related offences. By having strict sanctions for tax-related offences prescribed, one aims to provide a lawful and efficient criminal liability of the tax-related offenders on one hand, and to act preventively with the aim to raise the general tax discipline in the society on the other hand. Nevertheless, if citizens in one country can be imposed different sanctions for the same criminal offense, it is their legal security and equality that is under the question. This is exactly the case with citizens in Bosnia and Herzegovina. For this reason, the aim of this paper is to point out the differences in existing criminal legislation at different levels of authority in Bosnia and Herzegovina. The author's position is that these offences cannot be considered only by the increase in penal sanctions, but it requires a wider approach of a combination of criminal and other measures, such as information, education etc.

Keywords: *tax evasion, tax fraud, criminal penalties*

1. Introductory remarks

There are two forms of tax evasion, lawful and unlawful[4]. A lawful tax evasion is when individuals as taxpayers stay within general terms set by law or other general regulations of fiscal or taxation system, but in various ways try to avoid the full or partial payment of taxes and other prescribed fees. Practically speaking, these represent different forms of using tax incentives (exemptions from or advantages), or when existing legal gaps in tax and other laws and regulations are used precisely due to high level of abstraction, generalization or inconsistency of the used words, expressions or concepts or the imperfections of the language used by the legislator. This is especially the case in those systems where, due to rapid and sudden radical changes in business in the country or abroad, tax regulations themselves are being changed in order to adapt to

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new social, legal and economic framework. Namely, lawful or permitted tax evasion, as it is called by some authors[5], includes procedures by which a taxpayer avoids paying taxes in whole or in part in one of the following ways: 1. changing the place of permanent residence or place of temporary residence, 2. reducing or abandoning the consumption of taxable products or services and 3. finding the gaps in the law. A taxpayer gets into tax debt at the moment of the debt maturity. And this maturity refers to the final payment date of a tax debt – which is otherwise determined by the law and is harmful and unlawful if missed[6].

Another form of tax evasion is an unlawful or illicit evasion. In an unlawful evasion, an individual as a taxpayer comes under the law and penal repression. Namely, in this case, there is a more or less significant violation of regulations, whereby immediate and direct damage is inflicted to the community. These constitute unlawful, illegal, illicit and punishable activities aimed against the tax (fiscal) system of the country. This unlawful tax evasion can occur in two forms the most prominent of modern legal and social systems. The first form of this unlawful tax evasion is tax evasion, tax fraud, that is, the avoidance to pay taxes. The other form of unlawful tax evasion is the smuggling or contraband of various goods, products or services across the borders of one or more states.

Unlawful tax evasion is punishable. Tax-related offences and tax evasion in particular, are extremely serious, unlawful and dangerous behavior of individuals and groups, or legal entities, which directly or indirectly threatens the financial interests of the entire community, primarily through the infliction of large damage to the fiscal system and the public revenue system in general, and through direct or indirect damage to all the budget users[7].

Over the past five centuries, three main views have emerged on the ethics of tax evasion. One view, which might be called the absolutist view, holds that tax evasion is always, or almost always, unethical. At the other extreme is what might be called the anarchist view, that tax evasion is always ethical. The third view takes a middle position, that tax evasion might be ethical in some cases and unethical in others. It is this third view that has been the most prevalent in the literature. The survey conducted among the students at the University of Sarajevo in Bosnia and Herzegovina from 2009[8] indicate that the majority of respondents do not believe that tax evasion is ethical. However, the ethical attitude toward tax evasion is more complicated than that. The responses to the survey indicate that tax evasion is frowned upon in some cases more than others and that the attitude toward tax evasion differs depending on the issue. The strongest arguments justifying tax evasion occur in cases where the government is perceived as being corrupt or when the tax system is seen as unfair or even when tax funds are spent on projects that the respondent does not approve of. There is a higher probability that tax evasion will be seen as unethical when a taxpayer evades taxes for selfish reasons.

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[5] See: B. Jelčić, *Nauka o finansijama i finansijsko parvo*, Zagreb, 1990, str. 183-184.

[6] O. Buhler, G. Strickdrodt, *Steurrrecht, Band 1, Allgemeiner Steurrecht*, Wiesbaden, 1960, p. 365. According to: D. Jovašević, Z. Nikolić, *op. cit.*, p. 129.

[7] D. Jovašević, Z. Nikolić, *op. cit.*, pp. 129-130.

[8] W. Mcgee, R. Bašić, M. Tyler, *Tax evasion in Bosnia*, in Journal of Balkan and Near Eastern Studies, vol. 11, No. 2, 2009, pp. 197-207.

2. Unlawful tax evasion

Among criminal offenses against the economy, the nature and character of tax crimes distinguishes them from the others. There are several types of tax crimes. The basic crime of this kind is tax evasion. In other words, this crime implies providing false information about one's legally acquired income, objects or other facts relevant to incurring tax obligations, or failure to declare tax when it is compulsory, or concealing information related to the tax liability in order to completely or partially evades payment of taxes, contributions or other prescribed fees[9]. It turns out that this is a *sui generis* criminal case, but the criminal law theory also claims that this is a specific form of fraud, where the fraudulent act is damaging to the society as a whole[10]. The thing that needs to be protected with this criminal offence is tax, fiscal system, a system of public revenues, which is a foundation of the country's economic system. The thing that needs to be tackled is being alternatively determined. It can be: a tax, a contribution and other prescribed fees (which represent public revenue). In doing so, it is irrelevant whether these obligations relate to natural or legal persons.

There are three types of activities that can be undertaken: 1) giving false or incomplete data, 2) failure to declare revenue when it is compulsory, and 3) the use of tax relief contrary to the conditions under which it was granted. Considering that this is a specific form of fraud, it can often be found in the criminal justice theory that this criminal act is a fraudulent activity. It can be manifested in two ways: as an active, positive activity (doing) - *delicta comissiva* and as a passive, negative activity (omission, failure to act) – *delicta omissiva*. In doing so, giving false revenue data is considered an active form of this criminal offence, and failure to declare revenue as the passive form[11].

In order to say that a criminal offense of tax evasion exists, it is necessary to fulfill a few more cumulatively conditions in addition to the offence itself being committed. Firstly, the act is committed only in respect of proceeds and objects legally acquired. This is logical since unlawfully, illegally acquired assets and other objects or revenues cannot be taxed. Secondly, the perpetrator must act with a certain subjective element - that is there should be an intention that he or another person evades the payment of taxes, contributions or other prescribed fees in whole or in part. Therefore, there should exist this intention, as a subjective element, of the perpetrator at the time of committing a crime. And finally, thirdly, it is necessary that the amount of the obligation failed to be paid exceeds the amount of law-prescribed 10,000 BAM. This represents an objective condition of incrimination, that is, the legislative motive for punishment. The person performing the offence can be any person[12].

3. Tax evasion or fraud in Criminal Codes of BiH

Bosnia and Herzegovina is a complex state union, composed of two entities and one district and in which state functions are divided among 4 different levels of authority. In

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[9] D. Jovašević, Lj. Mitrović, V. Ikanović, *Krivično pravo Republike Srpske, Posebni deo*. Banjaluka, 2017, str. 186.

[10] Z. Stojanović, O. Perić, *Krivično pravo, Posebni deo*, Beograd, 2000, str. 244.

[11] D. Jovašević, *Komentar Krivičnog zakona Republike Srbije sa sudskom praksom*, Beograd, 2003, str. 556.

[12] D. Jovašević, *Leksikon krivičnog prava*, Beograd, 2006, str. 469.

this regard, there are four independent criminal legislations in Bosnia and Herzegovina as they follow:

- criminal law at the level of Bosnia and Herzegovina[13]/state level,
- criminal code at the level of the Republic of Srpska[14]/entity level,
- criminal law of Federation BiH[15]/another entity level and
- criminal law at the level of the Brčko District of BiH[16]/district level.

Criminal law, at the level of Bosnia and Herzegovina, in the Chapter XVIII "Criminal Offences Against Economy and Market Integrity, and Customs Crimes", in Article 210 prescribes criminal offense of Tax Evasion or Fraud[17]. For this criminal offense, whoever evades the payment of duties required under the tax legislation of Bosnia and Herzegovina by not submitting the required information, or by submitting false information on the acquired taxable income or on other facts which may affect the determination of the amount of such liability, if the amount evaded exceeds the sum of BAM 10,000, shall be punished by imprisonment for a term of between six months and five years. Also, this punishment shall also be imposed on whoever, with the aim of exercising the right to tax refund or indirect tax credit provided under the tax legislation of Bosnia and Herzegovina, files a false tax return with the amount of the presented tax refund or indirect tax credit exceeding the sum of BAM 10,000. At the other hand, whoever perpetrates these two criminal offences and if the evaded liability exceeds the amount of the sum of BAM 50,000 or indirect tax credit exceeds the sum of BAM 50,000, shall be punished by imprisonment for a term of between one and ten years. Whoever perpetrates this criminal offence and if the evaded liability exceeds the amount of the sum of BAM 200,000 or indirect tax credit exceeds the sum of BAM 200,000, shall be punished by imprisonment for a term of not less than three years.

On the other hand, sanctions for this criminal offence in the new Criminal Code of the Republic of Srpska are prescribed in Chapter XXI „Criminal Offenses Against Economy and Payments" in Article 264 named "Evasion of Taxes and Contributions". It is set out that whoever, in the intent of him or any other person, in whole or in part, avoids payment of taxes prescribed by the acts regulating the tax area of the Republic of Srpska, or the contribution of health or pension insurance, gives inaccurate or incomplete data on income, objects or other facts that influence the determination of the amount of tax liability or the contribution of health or pension insurance or who in the case of a compulsory application does not report revenue, object or other facts that

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[13] Criminal Law of Bosnia and Herzegovina (Official Gazette of BiH, 3/2003, 32/2003 - 37/2003, 54/2004, 61/2004, 30/2005, 53/2006, 55/2006, 8/2010, 47/2014, 22/2015, 40/2015 and 35/2018).

[14] Criminal Code of the Republic of Srpska (Official Gazette of the Republic of Srpska, 64/2017).

[15] Criminal Law of Federation of Bosnia and Herzegovina (Official Gazette of the FBiH, 36/2003, 21/2004 - 69/2004, 18/2005, 42/2010, 42/2011, 59/2014, 76/2014, 46/2016 and 75/2017).

[16] Criminal Law of Brčko District of Bosnia and Herzegovina (Official Gazette of the Brčko distrikt BiH, 33/2013 – revised text, 47/2014 - 26/2016 i 13/2017).

[17] When people knowingly or purposely give false details, it may be considered tax fraud. Those are situations when people provide incorrect information on their tax returns. This includes preparing their records to overstate their expenses, neglecting to report their full income, failure to file tax returns altogether or claiming to live in one state while residing in another. On the other hand, it is generally okay for people to reduce or otherwise limit their obligations through legitimate means. However, they may be charged with tax evasion if they use deceit, concealment or other affirmative acts to dodge or defeat their taxes. For example, intentionally understating income, claiming fake or inappropriate deductions, or concealing their assets may be considered forms of tax evasion.

influence the determination of the tax liability or contribution of health or pension insurance, and therefore deduction or failure to determine of tax obligations or contributions of health or pension insurance exceeding the sum of BAM 10,000 occurs, shall be punished by imprisonment for a term between one and five years and a fine. The same punishment is prescribed for whoever uses tax relief in the amount of more than the sum of BAM 10,000 contrary to the conditions under which the tax relief was granted. And whoever commits these criminal offenses and if the amount of the avoided obligation exceeds the sum of BAM 50.000, shall be punished by imprisonment of two to ten years and a fine, and if that amount exceeds the sum of BAM 200.000, it shall be punished by imprisonment for not less than three years and a fine.

Regarding the criminal law of Federation of Bosnia and Herzegovina, in the Chapter XXIII "Tax Related Criminal Offences", Article 273 prescribes the criminal offence of Tax Evasion. It sets out that whoever evades the payment of duties or contributions to pension schemes or health insurance required under the tax legislation in the Federation of Bosnia and Herzegovina, by failing to submit the required information, or by submitting false information on the acquired taxable income or on other facts affecting the determination of the amount of such liability, and where the liability evaded exceeds the sum of BAM 10,000.00, shall be punished by imprisonment from six months to five years. Also, whoever perpetrates this criminal offence and where the liability evaded exceeds the sum of BAM 50,000.00 shall be punished by imprisonment for a term of between one and ten years, and where the liability evaded exceeds the sum of BAM 200,000.00, he/she shall be punished by imprisonment for a minimum term of three years. On the other hand, whoever issues a false document required under the tax legislation in the Federation of Bosnia and Herzegovina or whoever fails to issue any document required under the tax legislation in the Federation of Bosnia and Herzegovina, shall be punished by a fine or imprisonment for a maximum term of one year, and who commits this criminal offence involving multiple documents, or if his offence results in the loss of substantial public revenue, shall be punished by a fine or imprisonment for a maximum term of three years (Article 274). Also, a responsible person in a legal entity, who is particularly responsible for the tax liabilities of that legal entity under the tax legislation in the Federation of Bosnia and Herzegovina and who approves the appropriation of funds for purposes other than the payment of tax liabilities of that legal entity, thereby rendering that legal person insolvent and is unable to pay his tax liabilities on time, shall be punished by a fine or imprisonment for a maximum term of three years (Article 275). Article 276 prescribes that whoever files a false tax return or other false information required under the tax legislation in the Federation of Bosnia and Herzegovina, shall be punished by a fine or imprisonment for a maximum term of three years.

Criminal code of Brčko District of Bosnia and Herzegovina in Chapter XXIII "Criminal Offences Involving Taxes" prescribes criminal offence of Tax Evasion in Article 267. A person who himself or on behalf of other person, evades payment of amounts required under the tax legislation of the Brčko District, or social contributions prescribed by the Brčko District legislation, by not submitting required information or by submitting false information on acquired taxable income or on other facts which may affect the determination of the amount of such taxes, and the obligation that is evaded exceeds the amount of the sum of BAM 10,000, shall be fined or sentenced to up to three years in prison. Also, if a person perpetrates this offence and the evaded obligation exceeds the amount of the sum of BAM 50,000, he shall be sentenced to prison from one

to ten years and where the evaded obligation exceeds the amount of the sum of BAM 200,000, he shall be sentenced up to three years in prison. In Article 267a it is prescribed that whoever prevents the collection of declared taxes prescribed under the tax legislation of the Brčko District with transfer or alienation of property, shutting down the economic entity or otherwise, and the evaded obligation exceeds the sum of BAM 50.000, shall be fined or sentenced up to three years in prison. Also, if a person perpetrates this offence and the evaded obligation exceeds the amount of BAM 100,000, he shall be sentenced to prison from one to ten years and where the obligation exceeds the amount of the sum of BAM 200,000, he shall be sentenced to prison at least three years. At the other hand, a person who issues a false document which is to be submitted under the tax legislation of the Brčko District, or a person who fails to issue a document the issuance of which is required under the tax legislation of the Brčko District, shall be fined or sentenced up to one year in prison. If this criminal offence involves a large number of documents, or the collection of large amounts of public revenues is brought into question, the perpetrator shall be fined or sentenced up to three years in prison (article 268). If a responsible person within a legal person, who is personally responsible for tax obligations of the legal person under the Brčko District tax legislation, approved allocation of the legal person's funds for the purposes other than tax obligations thereby causing legal person's incapacity to settle its tax obligations timely, he shall be fined or sentenced to up to three years in prison (Article 269). In Article 270 it is prescribed that whoever submits to a tax authority a false tax report or other false information required under the Brčko District tax legislation shall be fined or sentenced to up to three years in prison.

4. Conclusions

Legislators in Bosnia and Herzegovina, at different levels of authority, anticipate different penalties for the same criminal offence. The criminal codes of the state level and the level of Federation of BiH have the same criminal sanctions, while the Republic of Srpska regulations are stricter than those in terms of imprisonment and fines. Brčko District of BiH criminal sanctions differ from the other criminal codes. So, it is possible for citizens to be punished in a different manner for the same criminal offences. Regarding this, it is necessary to point out that all four laws should be mutually consistent, even they are not, in order to have legal security and equality of citizens in Bosnia and Herzegovina at place.

The other issue we wanted to draw the attention to is whether the criminal sanctions themselves are enough to prevent the committing of this criminal act. In those terms, some recent research has suggested that penalties and sanctions can only be an effective deterrent to the extent that offenders believe they can be caught and successfully prosecuted. The rational choice view of deterrence suggests that compliance will increase to the extent to which the costs of offending outweigh the benefits. But there is little evidence to support the view that increasing the levels of sentences will deter an individual from becoming an offender in general. Especially there is no proof that harsh penalties for tax offences increase compliance.

Prevention of these offences in the form of repression should be accompanied by an increase in general tax discipline with taxpayers on one hand and with social community authorities such as tax authorities, internal affairs authorities etc. on the other hand. The

latter should employ a variety of general and specific preventive measures to prevent this kind of behavior. Better economic and social circumstances in a society would also to a great extent contribute to the better environment where tax evasion offences and the number of the offenders would decrease.

Herewith, one can make a conclusion that sanctions should be used in conjunction with other deterrence measures to improve overall compliance.

However, it was the exposure of the sanction for noncompliance throughout the taxpaying community that was emphasized in particular. That is, in eliminating the current vagueness and misunderstanding about sanctions, taxpayers should be better informed as to the consequences of any non-compliance when carrying out their tax obligations. This appears to be an option for increasing deterrence that is feasible and affordable. On the other hand, the strategies required to chase those taxpayers who operate outside the system are more difficult, and could become a resource issue.

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Notion and characteristics of the tax evasion in Criminal Law of Republic of Serbia after 2016

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Abstract

Since ancient times and up to the present, the matter of securing an orderly, lawful, well-timed and flawless functioning of the system of public revenues and expenditures has been rather significant for the State. Its basis is rooted in the fiscal system. As a matter of fact, the fiscal system and its orderly, well-timed, complete and flawless realization has a great impact on existence, survival and even development of the State itself. Consequently, it is understandable how important and necessary is for the State to oppose, by applying a wide range of various measures, as well as procedures, at all levels, the various kinds and types of failing to pay, concealing, failing to report or avoiding the payment of taxes, contributions and other dues that make the system of public tributes.

Violating the regulations in the fiscal system area may entail various damaging consequences. Depending on the kind of violation and/or damage caused in terms of its scope and intensity, or putting in danger protected social values, the law has provided different sanctions while distinguishing between criminal offences or certain other kinds of violation. The most dangerous and most serious forms of transgressing tax laws, apt to inflict most serious consequences, i.e. considerable damage to the society as a whole, make the category of tax criminal offences, or criminal offences in the area of taxes. Specific among these offences in terms of its significance, scope and characteristics is the act of tax embezzlement as the most serious form of expression of tax evasion threatened in criminal legislation by prescribed penalties and other criminal sanctions. Consequently, the present article is dedicated to elaboration of the criminal offence of tax embezzlement and description of efforts of the Republic of Serbia aimed at efficient suppression of various forms and types of that criminal offence.

Keywords*: taxation system, taxes, evasion, criminal offence, liability, sanction, Serbia*

1. Introductory considerations

Criminal offences and, more particularly, tax embezzlement (*evasion, fraude fiscal, omesso versamento di imposte, Steuerbetrug*) amounts to exceptionally serious unlawful and dangerous conduct committed by individuals or groups and/or legal entities (companies, institutions or other organizations) by which, through violation of regulations, financial interests of the entire social community are put in danger, which is primarily expressed in inflicting considerable damage to the fiscal system and the public revenues system in general, including also direct or indirect losses to all budgetary beneficiaries. These unlawful acts make a particular kind of commercial criminal

offences that may be classified as a sub-group of offences against public, i.e. State finances. Such offences are often also called financial criminal offences.

Considering the enormous significance of fiscal system, its orderly, well-timed, complete and efficient realization for the existence, survival and even development of the State and/or society, it is perfectly clear that it has to oppose, through various institutions, at all levels, and by applying wide range of various measures, ways and procedures, all forms and kinds of failure to pay, concealing, failure to report or avoiding of payment of taxes, contributions and other prescribed dues that make the system of public tributes and/or public revenues.

It goes without saying that the violation of regulations in the area of fiscal system may entail various damaging consequences. Depending on the kind of violation and/or damage caused in terms of scope and intensity or endangering the protected social values, the law provides various sanctions that depend on the type of offence or unlawful act committed in a particular case[1]. The most dangerous and serious forms of violating the tax laws, by which serious consequences are entailed and/or extreme damage inflicted against the society as a whole, are the criminal offences in the area of taxes[2].

2. Forms of expression of tax evasion

The ground of criminal offences in the area of taxes[3], regardless of the form of their expression in the specific case, is found in various kinds of tax evasion, particularly considering the fact that such evasion is at the same time one of the most frequent forms of black market. Such kind of market may take place practically in rather different areas of activity, such as: manufacturing and trade of goods and services, labor market and employment relations, building industry, housing and municipal services, real estate etc.[4].

However, most important in the optics of interest of the State are those black-market forms of that are particularly manifested in the sphere of disturbing, putting in danger or violating the fiscal (taxation) system[5]. Evasion or various forms and types, i.e. ways of avoiding reports and deciding on the amount of prescribed taxes and other dues and of their collection, amount to a damaging, unlawful and dangerous activity on the part of individuals and groups, by which fundamental fiscal interest of society are jeopardized[6].

The fact is that tax payers experience the tax as a specific expenditure which only makes worse their material situation, because payment of taxes and other dues has a direct impact on decreasing their economic power and purchasing capacity. Consequently, they avoid the payment of taxes or avoid it in various degrees, or at least try to do that in an attempt to make easier that burden. All these forms of payment avoidance amount in fact only to most serious and dangerous forms and types of

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[1] D. Jovašević, *Poreska krivična dela*, Beograd, 2015, pp. 135-148.

[2] D. Jovašević, T. Hašimbegović, *Sistem poreskih delikata*, Beograd, 2004, pp. 68-81.

[3] D. Jovašević, M. Gajić Glamočlija, *Poreska utaja – oblici ispoljavanja i mere zaštite*, Beograd, 2008, pp. 189-216.

[4] D. Jovašević, *Krivično pravo, Posebni deo*, Beograd, 2017, pp. 141-147.

[5] D. Jovašević, Lj. Mitrović, V. Ikanović, *Krivično pravo Republike Srpske, Posebni deo*, Banja Luka, 2017, pp. 281-285.

[6] B. Petrović, D. Jovašević, A. Ferhatović, *Krivično pravo 1*, Sarajevo, 2015, pp. 139-141.

expressing the tax evasion. A particular form of such evasion is the avoidance of income tax levied on unlawful activities.

Inclination of tax payers to completely or partially avoid payment of taxes and other dues depends primarily on the intensity of resistance toward such payment. This resistance intensity, on its part, depends on several elements that may be classified in the following manner: 1) the amount of tax burden, 2) the purpose of spending resources obtained through tax, 3) tax form, 4) public opinion regarding the justification of tax[7]. Consequently, one may distinguish between two forms of tax evasion – the lawful and the unlawful one. The lawful evasion exists where individual tax payers in fact respect the frameworks set on the ground of law or other general regulations in the area of fiscal or tax system, but still attempt, in various ways, to avoid totally or partially the payment of taxes and other prescribed dues.

Practically speaking, at issue here are various forms of use of tax incentives (in the form of exemption or tax relief in fixing the amount of taxes, tax assessing of payment of taxes). These forms include also using a gap in the law in tax or other laws and regulations, which is enhanced by the high degree of abstract notions, imprecision and generality of wording applied by the lawmaker. This is particularly the case in those systems where, due to speedy and abrupt changes in the economic sphere in the country and abroad, the very tax regulations had to be amended rather often in order to adapt to new social, legal and economic frameworks.

Furthermore, the lawful or – as some authors call it – permitted tax evasion[8] includes procedures resorted to by tax payers in order to totally or partially avoid the payment of taxes in one of the following ways: 1) change of stay or residence, 2) reducing or giving up the consumption of taxed products or services, and 3) finding the gaps in the law. The very moment of maturity means that the tax payer comes into debtor's delay regarding the payment of his/her tax debt, while this maturity means the feature of the tax debt according to which it has become due in terms of law. Missing the deadline for fulfillment of the relevant obligation materializes the fact of damaging and unlawful conduct.

The second form of tax evasion concerns an unlawful or prohibited evasion. Unlawful evasion means that an individual as a tax payer becomes exposed to the severity of law and penal repression. In this case, the regulations are violated in various degrees of intensity. This again means inflicting direct damage to social community. Such illegal acts are, as already said, aimed against the tax, i.e. fiscal system of the country. This unlawful evasion may take two forms which otherwise are most characteristic of modern legal and social systems.

The first mentioned form of avoidance of tax payment included tax evasion, tax embezzlement, i.e. avoiding of payment of taxes and other dues – which is the topic to be considered later on in this text. The second form of tax evasion is smuggling or cross-border contraband of various goods, products or services involving a single or several countries. These types of unlawful tax evasion are rarely undertaken independently from other illegal activities of their perpetrators. Most often they are but a stage in committing other punishable acts done on a permanent basis by individuals or, as the case may be, groups, which acts are otherwise specified as criminal offence, commercial violations or misdemeanors.

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[7] D. Popović, *Nauka o porezima i poresko pravo*, Beograd, 1997, pp. 450-451.

[8] B. Jelčić, *Nauka o finansijama i finansijsko pravo*, Zagreb, 1990, pp. 183-184.

Unlawful evasion includes various steps of law violation, taken by tax payers aimed at avoiding the payment of taxes. In order to evade the payment in a non-permitted way, the tax payers conceal, totally or partially their property subject to taxes. The aim of such embezzlement is to decrease the tax debt and, in this respect, depending on the object involved in the unlawful act, the theory knows of complete or incomplete embezzlement. Unlawful evasion of these types is punishable. All contemporary states as well as the states in the past have always taken various measures to oppose such punishable activities. Various preventive but also repressive measures are applied in this process in order to strengthen tax discipline. Considerable role in the prevention of unlawful tax evasion relates also to the reducing of tax burden into reasonable frameworks helping to attenuate the factors that contribute to higher intensity of resistance against payment of taxes.

According to some authors, the unlawful tax evasion is one of the key causes of existence of the black market. Indeed, this concept includes all illegal commercial activities aimed at acquiring economic gains for an individual and at the detriment of the State and persons engaged in lawful commercial activities. The former illegal activities are affected by avoiding or violating of relevant regulations. Some authors call this black-market economy also – non-taxed, informal, underground, black, informal or unofficial economy. But, regardless of the variety of terms, almost all authors do agree in looking at these unlawful activities as improper or as the ones imprecisely or wrongly interpreted in the media.

3. Characteristics of the criminal offence of embezzlement

Criminal offences in the area of taxation are distinguished from other criminal offences by their nature and character. There are several kinds of such offences. The basic one of the kinds is tax evasion specified in art. 225 of the Criminal Code of the Republic of Serbia (past of Novel this Code from 2016.). This was the way, after entering into force of this Law on 1 January 2006, of replacing the offence "Avoidance of tax payment" formerly provided for in art. 172 of the Law on Tax Procedure and Tax Administration (which abolished on 1 January 2003 the provision of article 154 of the Criminal Law of the Republic of Serbia covering the act of embezzlement). The mentioned Law on Tax Procedure and Tax Administration, as a secondary law in this matter, still includes certain other offences in the sphere of taxes.

As already said, avoiding of legal duty of payment of specific amounts of money to the benefit of the State, is an act of damaging the interest of society, entailing also negative consequences for the social security funds and institutions, hampering as well the functioning of all budgetary institutions and affairs. However, only where such avoidance amounts to a wider scope or assumes more serious forms, one may speak of taking place of the criminal offence in the area of taxes. All other less important and different cases of lack of tax discipline and tax embezzlement, although certainly unlawful and punishable conduct, belong to the category of commercial violations and/or misdemeanors.

3.1. The Concept of Criminal Offence of Embezzlement

The basic criminal offence in the legal system of the Republic of Serbia is the tax embezzlement. In some legal systems, this offence goes under the term tax evasion" or

"tax and other dues evasion", and the like. In our system, it is provided for, after 2016, in article 225 of the Criminal Code of the Republic of Serbia. Its elements include disclosing of false information on one's legally acquired revenues, objects of property or other facts relevant in assessing the tax duty, or the failure to report these where submission of tax form is prescribed, as well as concealing of data important in assessing the tax duty with the aim of totally or partially avoiding the payment of taxes and other prescribed dues and contributions for oneself or for others, where the amount of avoided obligation exceeds 500,000 RSD.

The title of this offence derives from its element expressed in committing an unlawful acquisition by the perpetrator of that number of dues whose payment is avoided by such an act. In this way, the mentioned criminal offence formerly specified in article 172 of the Law on Tax Procedure and Tax Administration has ceased to exist.

3.2. The Object of Protection

According to statutory description of the criminal offence of embezzlement, one may conclude that this is an offence of a *sui generis* nature. However, according to some authors, this is a specific form of criminal offence of fraud, although, to be true, the one inflicting damage to the society as a whole[9]. This offence is characterized also by the blank, disposition, meaning that completing its content depends on other regulations in the area of fiscal and tax systems that have to determine the concept, the kind and the content of individual taxes and other public dues (contributions and public duties), the tax payers of these duties as well as the payment time limits[10]. Such kind of disposition allows that the nature and content of fiscal duties, in terms of the object of protection by this criminal offence, be determined on the ground of regulations outside of the criminal law sphere[11].

The object of protection by prescribing this criminal offence is the fiscal system, the public revenues system that makes the foundation of the economic order of the country. There are also conceptions[12] in the theory according to which the object of protection in this case is the duty of payment of taxes, contributions and other dues. Public duties include taxes, customs duties, fees and contributions. The object protected is determined in an alternative way. It may include the following categories: taxes, contributions and other duties specified by law and included in public revenues. The treatment is the same, regardless of whether these duties refer to natural persons or legal entities. It is a matter of factual case to determine, according to relevant regulations, the kind of fiscal duty.

Since our fiscal system acknowledges several kinds of taxes, this conception includes, in any case, the part of income or property taken by the social community from natural persons and legal entities (companies, institutions, and other organizations) and/or entrepreneurs to cover the corresponding public expenditures without giving to tax payers any direct counter favor or counter service. The State, in fact, does the above by taking a part of income or property from its citizens, on the ground of government authority, without countering with some direct counter action. Consequently, taxes are a

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[9] Z. Stojanović, O. Perić, *Krivično pravo, Posebni deo*, Beograd, 2000, p. 244.
[10] Lj. Lazarević, *Krivično pravo, Posebni deo*, Beograd, 1993, p. 229.
[11] D. Jovašević, *Krivično pravo, Posebni deo*, Beograd, 2017, pp. 256 - 258.
[12] B. Pavišić, V. Grozdanić, P. Veić, *Komentar kaznenog zakona*, Zagreb, 2007, p. 636.

rather important category from several points of view[13], since they serve as an instrument of realization of further and higher objectives in the name and for the satisfaction of needs of the entire social community and at the same time represents a strongly efficient mechanism of social policy[14]. On the other hand, taxes may be defined also as benefits in terms of money, or revenues calculated on the income of tax payers, used for covering public expenditures. Taxes are thus the part of property or income taken from natural persons and legal entities with the purpose of covering the expenses of social and political community[15].

Similar is the function and role of contributions and other prescribed dues which fall also in the category of revenue in our legal system. These benefits as well serve for satisfying common and general social needs[16].

Contributions[17] are also benefits to be calculated according to law and other regulations from the income of natural persons or legal entities and/or entrepreneurs. Their purpose is meeting the needs of various social institutions and services in the following areas: social security for children and other categories of population, health care, education, culture, science, temporary unemployment or inability for work, etc.

According to some authors, contribution may also be treated as pecuniary prestations to be paid to compensate for specific services or in order to exercise certain rights[18]. They may also be a category of benefits to be levied on the ground of law and other regulations from personal incomes, in order to cover the common needs in various areas of social activity.

Especially conspicuous in the present practice are social security contributions. One has to note that the failure to pay them is a criminal offence, which (in terms of protected object) applies also to other dues entering in the sphere of public revenues. This very fact is a basis of the claim that in this case it is possible to speak of blank subject-matter of the criminal offence. Such formulation of blank disposition characteristic of the criminal offence of embezzlement has been introduced in our legislation as well during the legislative reform in 1977.

However, at that time the concept of contribution, in terms of the object of protection, included numerous and different public dues, in addition to those in the sphere of social insurance – which is the case in the present legislation. After the introduction of new fiscal system in our Republic in 1992, the concept of contributions includes only those social security contributions that, together with taxes and other dues representing public revenues category. Consequently, avoiding of payment of other public revenues, such as fees, customs duties, dues related to various other purposes, do not amount to the object of protection in terms of this criminal offence, so that, in a concrete case, depending on the action taken by the perpetrator and other relevant circumstances, another criminal offence maybe at issue or another kind of unlawful conduct (commercial violation or misdemeanors).

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[13] B. Petrović, D. Jovašević, A. Ferhatović, *Krivično pravo 2*, Sarajevo, 2016, pp. 252-255.

[14] K.Turković *et al.*, *Komentar Kaznenog zakona*, Zagreb, 2011, pp. 225-231.

[15] Lj. Lazarević, B. Vučković, V. Vučković, *Komentar Krivićnog zakonika Crne Gore*, Cetinje, 2004, p. 660.

[16] D. Jovašević, Lj. Mitrović, V. Ikanović, *Komentar Krivičnog zakonika Republike Srpske*, Banja Luka, 2018, pp. 698-700.

[17] *Contributions are all kinds of duties toward social community. Verdict of the Supreme Court of Serbia*, Ki. No. 32/78.

[18] B. Pavišić, V. Grozdanić, P. Veić, *Komentar Kaznenog zakona*, *op. cit.*, p. 636.

The court practice supports the above-mentioned conception[19], meaning that the concept of other prescribed contributions includes all kinds of duties toward social community. According to another standpoint of the Supreme Court of Serbia, in deciding on arraignment due to a criminal offence of tax embezzlement it is not necessary that the amount of the embezzled tax be determined in advance by the tax authority in the administrative proceedings. The area of fiscal law and the public revenues law informs us on the plurality of statutory substantive law provisions serving in determination of individual types and forms of taxes and other public benefits depending on the kind of activity and/or other type of taxation source as well as on the status of the tax payer.

In any case, it is important to particularly point out that correct application of the criminal law provisions and the qualification of the concrete state of facts are much helped also by the decision of the Supreme Court of Serbia according to which there is no criminal offence of tax embezzlement where the administrative agency in charge of taxes was in possession of valid data at the moment of rendering the decision, which information indicated the falsity of data reported in the tax return submitted by the tax paver, but in spite of that still founds its decision on such (false) tax return[20].

3.3. The Perpetration of Criminal Offence

According to statutory definition of the criminal offence of embezzlement that offence may appear in two forms. These are the basic and the serious, i.e. qualified form. The basic form of this criminal offence, depending on the criminal action taken, may appear in three separate kinds[21]. These include: 1) disclosing of false revenue data, 2) failure to report revenues in case the report is compulsory, and 3) concealment of data in some other way[22].

Since at issue here is a specific form of criminal offence of fraud[23], according to some authors the unlawful action in the case of this offence, general by speaking, may be said to be the fraudulent activity. In its becoming concrete, it may be manifested in two ways alternatively: as an active and positive act – *delicta commissiva,* and as a passive, i.e. negative act (failure to act, missing of one's duty) – *delicta omissiva*. In this respect, disclosing false data regarding the revenues is considered as a positive action of perpetration of this criminal offence, while failure to report – as a passive activity committed by the perpetrator, while the action of concealment may be undertaken both by acting or failure to act[24].

a) Disclosing of false data on lawfully acquired revenue, objects of property or other facts relevant in assessing tax duties exists as an offence if facts regarding the lawfully acquired revenues, objects of property and other facts have been untruly and incorrectly reported as compared to the really existing state of affairs; it is essential here that these have to be data concerning revenues or objects of property that are acquired in lawful way. In case of this form of criminal offence, to be true, the perpetrator formally acts

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[19] *Verdict of the Supreme Court of Serbia*, Kž. No. I 32/78.

[20] G. Mršić, *Kaznena djela protiv sigurnosti platnog prometa i poslovanja – poseban osvrt na kazneno djelo utaje poreza i drugih davanja*, Hrvatska pravna revija, Zagreb, no. 10/2006, pp. 89-96.

[21] D. Jovašević, *Komentar Krivičnog zakona SR Jugoslavie*, Beograd, 2002, pp. 34-37.

[22] M. Simović, D. Jovašević, *Leksikon krivičnog prava Bosne i Hercegovine*, Sarajevo, 2018, pp. 637-638.

[23] D. Jovašević, *Leksikon krivičnog prava*, Beograd, 2011, p. 689.

[24] D. Jovašević, *Komentar Krivičnog zakona Republike Srbije sa sudskom praksom*, Beograd, 2003, p. 556.

according to prescribed requirements for disclosing the facts that are important in assessing the amount of duty, but he still fails to respect the substantive law requirements by failing to report the facts as they really are[25]. This criminal offence does exist regardless of whether the amount of the embezzled tax has been previously assessed in the administrative proceedings conducted by competent tax authority[26].

Other elements of unlawful action in this offence include the following: reporting revenues in amounts lower than they really are, i.e. reporting the lesser value or lesser scope of objects of property for the tax reporting period, or reporting incorrectly and untruly other facts and data relevant for assessing the amount of legally prescribed taxes, social security contributions or other prescribed contributions (these other facts and data may refer to the failure to report the exact number of employed persons or the number of family members, or the number of school children as well as the fact of employment status of the spouse, and all that at the time of maturity and place of effecting a given tax duty, and the like)[27].

The ways of such false reporting of relevant facts may be rather different in real life. Thus, it is possible to reduce in the tax return the revenues realized in their totality or partially, or to report only some items of the revenues or those from some of the sources or, as the case may be, those realized in a certain period and at a certain place or in another geographic area; financial results may also be reported in smaller amount, while business expenditure may be raised contrary to the real state of affairs, and the like. It is essential that this false disclosing of data, as far as the action of perpetrating the criminal offence of tax embezzlement is concerned, involves decisive facts that are significant in assessing the amount of tax and other duties. Disclosing of false data regarding the facts having no relevance in assessing the tax duty or its amount, and/or in determining other prescribed dues or contributions or their amounts is not qualified as unlawful action in committing this criminal offence.

The way and form of submitting to the tax authority the tax return with falsely reported data and facts are totally irrelevant for this offence to take place. Such tax return may be submitted either orally or in writing (which is a more frequent case), but this may be done also by just presenting for inspection to the tax authority relevant documents, accountancy records and other documentation related to business activity, which documents are false, purposely changed, forged etc., regardless of whether they are presented for inspection to tax authorities at their request or at the initiative of the tax payer.

There shall be a criminal offence of tax embezzlement also should false data be presented, either at the request of tax authorities or at the tax payer's initiative, only subsequently as a supplement to an already submitted tax return, or, as the case may be[28], in the revenue of controlling procedure (regular or extraordinary inspection), or even if these false data and facts are presented as a supplement to the enclosed documentation that has to be submitted together with the tax return. There shall be no criminal offence of tax embezzlement[29] where the administration agency in charge of

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[25] Lj. Lazarević, *Krivično pravo, Posebni deo*, Beograd, 1993, p. 229.

[26] *Verdict of the Supreme Court of Serbia*, Kž. 1815/73.

[27] M. Lerković, *Kaznena odgovornost za povrede poreznih propisa, Porezni vjesnik*, Zagreb, no. 5/2000.

[28] I. Simić, M. Petrović, *Krivični zakon Republikc Srbije – praktična primena*, Beograd, 2002, pp. 154- 156

[29] A group of authors, *Komentar Krivičnog zakona Republike Srbije*, Beograd, 1995, p. 553.

social revenues, at the moment of rendering the decision on assessing tax duty has been in possession of reliable data that indicated the falsity of such data in the tax return submitted by the tax payer, while in spite of that the agency founds its decision on such tax return[30].

A tax embezzlement[31] may be committed only by disclosing false data regarding the acquired revenues and objects of property, meaning that a person failing to submit a tax return to report revenues originating from committing criminal offences, commercial violations, misdemeanors or other unlawful acts (for instance, engaging in intended to avoid payment of just one or more dues specified in the law or other regulations. The embezzled amount of tax in prosecuting for the criminal offence of tax embezzlement may not be considered as damage caused through commission of the criminal offence, nor the accused may be ordered by the court to repay the embezzled tax on the ground of the property law claim motioned by the municipal assembly.

The consequence of the criminal offence of tax embezzlement consists, according to one conception, in causing damage to institutions, services and affairs that are in the interest of the entire social community, because timely, efficient and complete collection of taxes, contributions and other prescribed dues which make the public revenues are the essential sources of financing of these institutions and services. According to another view, the consequence of this offence consists in the very failure of payment on time and in legally specified amount of taxes, contributions and other prescribed public duties for the benefit of social community.

The offence is completed by committing the act of reporting false data regarding the facts, or with concealing of data at the time the decision of the competent public revenue agency on assessing the tax or contribution has become final. Until that moment, there is just an attempt which, depending on the amount of the penalty threatened for the basic criminal offence, may be not punishable. However, there is a conception in legal theory according to which this offence is deemed completed by disclosing false data and/or by failing to file the tax return or, as the case may be, by omitting to indicate in the tax return of all legally relevant data, including the concealment of specific facts.

In case of taxes and contributions to be collected after deduction, the offence is deemed completed at the moment of maturity of the tax debt, while in case of taxes for which the law itself specifies the payment time limit, the offence is completed with the expiration of the legally specified deadline. Where this offence is committed by omitting to file the tax return, it is deemed completed after the competent tax authority, within the time limit prescribed for assessing the given kind of taxes, has failed to render the corresponding decision.

As far as answering the question of completion of criminal offence of tax embezzlement is concerned, one finds in the criminal law literature different standpoints as well[32]. According to some authors, namely, this offence is deemed completed after the perpetrator has reported false data regarding his/her lawfully acquired income, objects of property and other facts and/or after he/she failed to report the lawfully acquired income, objects of property and other facts within the prescribed

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[30] Verdict of the Supreme Court of Serbia, Kž. I 1196/85.

[32] Lj. Jovanović, D. Jovašević, *Krivično pravo, Posebni deo*, Beograd, 2002, p. 212.

[32] Z. Stojanović, O. Perić, *Komentar Krivičnog zakona*, *op. cit.*, p. 245.

time limit[33]. Consequently, in this case, it is not required that the perpetrator has avoided (completely or partially) the payment of taxes and other corresponding contributions. Therefore, the facts that the competent tax authority, not believing in the authenticity of the filed tax return, finds for itself the real situation and, on the ground of such finding, assesses the tax, are not apt to have a bearing on individualization of penalty as well as on the existence of the criminal offence. On the other hand, this criminal offence may not exist where the agency in charge, at the moment of rendering the decision on assessing the tax or other duty, was in possession of reliable data and, in spite of that, founds its decision on the untrue tax return filed by the tax payer[34].

The perpetrator of the criminal offence of tax embezzlement is any person who reports false data or conceals such data and/or fails to file on time the tax return, while being bound by law to act accordingly. This role is most frequently taken by the tax payer, but by other persons as well; these may be: legal representative or proxy of such person or the person filing the tax return on his/her behalf and for his/her account, a person in charge of accountancy and other documentation, the one making final and preliminary balances of payment of an enterprise, or another legal entity. This may also be a person who only formally, and under another person's name, is engaged in some business activity imposing on him/her the duty of filing tax returns and of payment of corresponding contributions to the social community. But in committing this criminal offence characterized by specific form of taking the act of commission, it is possible that the perpetrator is not only a direct actor engaged in one or several activities specified by law, but other persons as well who take part in these activities by rendering help to such person or making some other contribution to him/her, creating in this way favorable conditions to completely realize his/her intention, or realize it as soon as possible, more efficiently and in a simpler way.

If we have a situation in which a legal entity (an enterprise, company, institution or other organization), by way of an activity effected by its responsible or official person, is successful in avoiding the payment of taxes or other prescribed contributions – meaning that requirements are met for this criminal offence to be materialized – such legal entity shall be liable for the commercial infraction committed (entailing the imposition of fines and protective measures), while the person in charge or the official person appear as the concrete perpetrator of the offence of tax embezzlement.

An owner of a private company (enterprise) purchasing and putting in market various goods without prescribed documentation and, by doing that, fails to pay in the retail sale tax – if this is done with the aim of avoiding the payment of taxes due – commits the criminal offence of tax embezzlement. As far as criminal liability is concerned, the law requires the existence of direct criminal intent on the part of the perpetrator of the criminal offence.

Such criminal intent includes the following elements: 1) the awareness of the perpetrator that he/she gives false data or conceals real data and/or the awareness of his/her failure to file the tax return within the prescribed time limit; 2) volition to undertake concretely these positive or, as the case may be, negative activities; 3) intention of the perpetrator to avoid in this way, for him or some other person, entirely or partially, the payment of taxes and other prescribed duties[35].

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[33] D. Jovašević, *Poreska evazija i poreska krivična dela*, Bezbednost, Beograd, no. 4/2005, pp. 541-561.

[34] R. Sokolović, D. Jovašević, *Poreski delikti*, Beograd, 2015, pp. 96-105.

[35] M. Simović, D. Jovašević, M. Simović, *Politika suzbijanja kriminaliteta*, Istočno Sarajevo, 2016, pp. 213-219.

This criminal offence is threatened by a cumulative penalty of six months to five years of imprisonment and a fine. This is an exception from the rule according to which the law-maker prescribes for each particular criminal offence alternatively one or several penalties[36]. In addition to punishments, some other criminal sanctions may be imposed against the perpetrator[37]; these are: security measure of ban on being engaged in a specific profession, activity and duty (specified in article 85 of the Criminal Code of the Republic of Serbia), and 3) property law measure in terms of articles 91 through 93 of the Criminal Code of the Republic of Serbia, enabling the imposition penalty of confiscation of property benefit that is acquired through the commission of a criminal offence (this is a *sui generis* criminal law measure)[38].

4. More serious form of manifestation of tax embezzlement

In addition to basic types of the criminal offence of tax embezzlement, the law-maker has provided for a more serious, i.e. qualified offence. This offence is specified in article 225, paragraphs 1 and 2 of the Criminal Code of the Republic of Serbia. This more serious offence, threatened by law with stricter punishment, may appear in two forms:

The first more serious form of this criminal offence, threatened by the penalty of one to eight years of imprisonment and, cumulatively, with a fine, exists where the amount of tax duty to be paid, in terms of laws covering specific business activities, exceeds 1.500,000 RSD.

The most serious criminal offence exists if the perpetrator, by any kind of his activity or activities, is successful in avoiding the payment of taxes in the amount exceeding 7.500,000 RSD. This offence is threatened by the penalty of from two to ten years of imprisonment and by a fine.

The qualifying circumstance for taking place of this more serious form of criminal offence of tax embezzlement concerns the amount of avoided duty and/or the amount of damage inflicted to agencies and services that are financed if collected public revenue. Finally, that qualifying circumstance must be included in the criminal intent of the perpetrator. In other words, since at issue here is a criminal offence qualified by a more serious consequence, its existence must depend on the fact that the perpetrator is aware that his/her action is aimed at embezzlement of tax and other duties in large amount. There is, however, no requirement that he/she is entirely aware of some specific amount of the tax embezzled, which applies also to other contributions and dues entering in the area of public revenues.

We have to say that, in addition to the mentioned conception, there is still no complete agreement in the criminal law theory regarding the issue of determination of the nature and character of the criminal offence of tax embezzlement. Thus, according to one conception, this is a criminal offence qualified by a particular circumstance (as already elaborated in this text). The perpetrator, namely, has to be aware of his committing a large-size tax embezzlement, but in a concrete case it is not required that he/she is aware of the exact amount of tax to be avoided in this way. However, we still claim that at issue here is an offence qualified with a more serious consequence, because the amount of the avoided tax is a decisive factor for indicating the scope and intensity

[36] D. Jovašević, *Korporativno krivično pravo*, Niš, 2012, pp. 99-107.
[37] M. Simović, D. Jovašević, V. Simović, *Privredno kazneno pravo*, Banja Luka, 2016, pp. 221-234.
[38] D. Jovašević, *Praktikum za krivično pravo*, Opšti deo, Niš, 2014, pp. 189-191.

of the consequence damaging public finances, and/or the system of regular, unimpeded and legal financing of budgetary beneficiaries and other public services.

On the other hand, the court practice regarding this qualification of unlawful conduct of the perpetrator has not always been uniform. At the beginning, it has hesitated with its approach, while in recent years the conception has taken root according to which there is no genuine difference between the basic and the qualified form of the offence of tax embezzlement, since both forms indeed include identical characteristics of its subject-matter. The difference between these two forms of this offence is found, in fact, in the sphere of quantity, i.e. in the amount of the tax and other kinds of prescribed dues and contributions embezzlement.

At the symposium of judges of criminal chambers of the Supreme Court of Yugoslavia and the representatives of criminal chambers of republic supreme courts, held in Belgrade on 7th through 9th December 1965, the opinions were divided regarding determination of difference between the basic and the qualified form of this criminal offence. Later on, as already stated, the courts have accepted the conception according to which there was no qualitative difference between the basic and the qualified criminal offence of tax embezzlement. The point at issue here is that both forms of this criminal offence include one and the same statutory definition as well as all relevant identical elements, so that the only difference is a quantitative one (expressed in the amount of avoided duty of payment), and not of the qualitative nature. Such conception has also been accepted at the symposium of judges of criminal chambers of the Supreme Court of Yugoslavia and representatives of republic supreme courts, held also in Belgrade on 26th and 27th December 1968.

Court practice, as well as legal theory engaged in discussing the matter of qualification of the serious form of offence of tax embezzlement seriously consider whether this offence may exist if the perpetrator is committing tax embezzlement in course of several years by the same or various activities. In other words, whether individually avoided payment amounts for every tax year determine each particular yearly qualification of the criminal offence of tax embezzlement so that in this case it would be appropriate, depending on the amount of totally avoided tax, contributions or other dues prescribed, to qualify this offence as a serious form of tax embezzlement.

The issue is even more complex if considered from the aspect of whether in mentioned cases the continuing tax embezzlement (for many years), involving also avoiding of payment of contributions and other dues prescribed by law, may be qualified as an extended criminal offence (that is committed within a given period of time in the same manner, by the same means and/or by applying the same permanent relationship situation or circumstance and with the single intention and the same form of guilt), or as a real accumulation. In answering this question both legal theory and court practice are in favor of the concepts in in terms of which it is possible to apply the construction of extended criminal, but with applying in every concrete instance the statutory requirements provided for the existence of the tax embezzlement (and more particularly the one regarding the amount of avoided tax as an objective condition for incrimination).

5. Conclusions

Even from ancient times and up to the present it has been particularly important for every State to ensure an orderly, efficient, lawful, well-timed and flawless functioning of the public revenues and expenditures system. Its foundation is the

country's fiscal system. Indeed, the fiscal system, i.e. its flawless, well-timed, complete and efficient realization has an impact on the existence, survival and even development of the State itself. It is therefore understandable how important is for the State to apply a whole spectrum of measures, means, ways and procedures at all levels in order to resist various forms and types of concealment, failure to report and avoidance of payment of taxes, contributions and other prescribed duties which represent public tributes and/or public revenues.

The violation of regulations in the area of fiscal system may entail various consequences. Depending on the kind of violation, and/or ensued consequences in terms of the scope and intensity of endangering of protected social values, the law-maker has provided various sanctions as well, distinguishing in his approach between criminal offences and other kinds of unlawful act. The most dangerous and most serious forms of tax laws violation, apt to entail most serious consequences and/or inflict considerable damage to social community, are the criminal offences in the area of taxes. Conspicuous among them, due to its significance, scope, characteristics, nature and effect, is the tax embezzlement as the most serious manifestation of tax evasion which is threatened in criminal legislation with prescribed penalties and other kinds of criminal sanctions.

The basic fiscal criminal offence in the legal system of the Republic of Serbia is at present the tax embezzlement specified in article 225 of the Criminal code of the Republic of Serbia. In some legal systems this offence is called also – "tax evasion" or "evasion of taxes and other dues", and the like. Otherwise, this offences consists of reporting false data on one's lawfully acquired income, objects of property or other facts relevant in assessing of duties, or in the failure to report these where reporting is an obligation, or, as the case may be, it consists of concealing of data regarding assessment of tax duty with the purpose of avoiding, totally or partially, for oneself or others, the payment of taxes, contributions and other prescribed dues, where the amount of the avoided duty exceeds 500,000 RSD. This offence owes its name to the fact of committing, on the part of perpetrator, an unlawful acquisition of that number of dues the payment

This criminal offence – which may take place in three different types and in two serious forms – is threatened by the Criminal Code with cumulative penalties: penalty of imprisonment and fine. However, in addition and parallel to penalties, the court may impose against the perpetrator of the offence other criminal sanctions as well. These include: security measures and the measure of confiscation of property benefit obtained by committing the criminal offence.

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