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The future issue of the magazine appears at the end of July 2020. The main topic of the future issue is: **New Technologies and the Criminal Justice System.**

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Legal Thinking for The Lenient System for Admission of Guilt and Acceptance of Punishment in China: From the Perspective of the Accused's Right to Repent

Prof. dr. Wang Enhai*

Abstract

The accused has the right to repent in application of the Lenient System for Admission of Guilt and Acceptance of Punishment. The procuratorial organs and courts do not need to separately examine the reasons for repentance, but these reasons can be used as basis for convicting and sentencing. The problem issue is an eternal theme—fairness and efficiency. The author holds that the Lenient System for Admission of Guilt and Acceptance of Punishment does not apply to cases of statutory sentence for life imprisonment or death penalty. At the same time, the court should issue the sentencing standards for relevant crimes as soon as possible. In addition, in cases where the procuratorial organs recommend applying to the system, the court has the power to decide not to apply.

Keywords: *Lenient System for Admission of Guilt and Acceptance of Punishment, repentance, appeal, protest*

I. Context

On November 16th, 2016, the Supreme People's Court of the People's Republic of China, Supreme People's Procuratorate, Ministry of Public Security, Ministry of State Security and Ministry of Justice have published the *Measures for Piloting the Lenient System for the Admission of Guilt and Acceptance of Punishment in Criminal Cases in Some Areas*. The Lenient System for Admission of Guilt and Acceptance of Punishment (hereinafter referred to as the System) has been piloted in 18 cities in China since its publication. Based on the pilot, the Standing Committee of the National People's Congress deliberated and passed the *Draft Amendment to the Criminal Procedure Law* in October, 2018 and formally established the System. It stipulates the lenient principle for admission of guilt and acceptance of punishment in accordance with law. It improves the criminal procedural rules for the lenient system. It increases fast-track sentencing procedure. It enhances the protection for the rights of the parties. During the pilot program, the author holds views that China still lacks the judicial environment for plea-bargain. To promote it for relative egalitarian, long-term

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planning and exploration must be carried out from both the legislative and judicial levels.[1] The following will be focused on new problems arising from the implementation of the System.

II. The accused has right to repent in the phase of examination and prosecution

In the Lenient System for Admission of Guilt and Acceptance of Punishment, cases that the suspect or the defendant repent after signing a recognizance often happen. There are different opinions between theory and practice on how to deal with the problem. Zhu Xiaoqing, former deputy procurator of the Supreme People's Procuratorate, has long been concerned about the prosecution system. He states that "Differences should be told from whether there is justification for the accused's repentance for signing a recognizance to admit guilt and accept punishment. If there are justifications, the judiciary should support the act of repentance and then are responsible for finding out the reasons why the accused will repent. If there are no justifications, the judiciary shall restrain the accused's action. Besides the invalidation of the recognizance, the System shall not apply. In case where repentance is made before prosecution, the procuratorial organs shall make sentencing recommendation in accordance with the facts and evidence on the basis of the repentance; In case where repentance is made in court of trial, the court decides whether to swift procedure based on the situation after repentance, and render a ruling according to the facts ascertained; If an appeal is filed after the judgment and no new facts or evidence are presented, the procuratorial organs shall file an appeal."[2] The author here holds that this view is debatable.

The main intentions of advancing the System are (1) to punish crimes timely and effectively and to maintain social stability; (2) to carry out a criminal policy of "punishment combined with Lenient" in order to strengthen judicial protection of human rights; (3) to optimize judicial resources allocation and to improve justice fairness and efficiency; (4) to deepen the reform of the criminal litigation system in order to construct a scientific criminal litigation system.[3] Despite the fact that all these four points are important, the public and the judiciary generally believe that the primary intention of the system is to improve litigation efficiency.

A party to the System is the accused, and the other is the investigative organ, the procuratorial organ responsible for reviewing and making a decision for prosecution, or the judicial organ. In practice, it is mainly based on an agreement between the procuratorial organ and the accused. The general mode of operation is that where both agree on the application of the System, the procuratorial organ produces

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[1] Wang Enhai, *Reflections on Lenient System for Admission of Guilt and Acceptance of Punishment – A Comment on the Related Provisions Under the Draft Amendment Criminal Procedures Amendment*, Journal of Oriental Law, No. 5, 2018.

[2] Zhu Xiaoqing, *How to Treat the Accused who Repent After Signing the Recognizance to Admit Guilt and Accept Punishment*, Procuratorial Daily, the third edition, 28 August, 2019.

[3] According to Zhou Qiang, President of the Supreme People's Court, *the Draft Interpretation to the Decision on the Authorization of Some Areas to Initiate the Pilot Program of The Lenient System for Admission of Guilt and Acceptance of Punishment,* on the 29th meeting of the Standing Committee of the 12th National People's Congress on 29 August, 2016.

recognizance for guilt admission and punishment acceptance. The accused signs it in the presence of a lawyer. In trial of court, the trial will focus on examining whether guilt and punishment are admitted and accepted voluntarily, thereby improving the efficiency of the trial, which is also the focus of media coverage during the initial pilot of the System.

Among the above mentioned three organs, the investigative organ is not much affected by whether the System is applied, because the rules of evidence of the two are not different. For the judicial organs, the System indeed improves the case-handling efficiency, especially in fast-track sentencing procedure that can be ended in a few minutes. However, as for the procuratorial organ who is also responsible for the procedure for the accused's signing the recognizance, the application of the System increases the workload to a certain extent and in turn reduces the efficiency of the examination and prosecution.

As the trial time is compressed, the workload of the public prosecutor in the court has decreased, but the workload throughout the whole stages of the prosecutor does not, or to some extent increased. It mainly lies in that:

(1) The application of the System requires the public procuratorial organ to offer a concrete sentencing recommendation, which requires the public prosecutor to be familiar with the case file before the trial, to determine the facts of a case, to clarify the standard of sentencing, and to add the rule of "Lenient" in the recognizance;

(2) The public prosecutor should explain sentencing recommendation, hear the accused's opinion, and explain the doubts of the accused;

(3) The lawyer must be present when signing the recognizance, which requires the public prosecutor to negotiate the time of signing with the lawyer and get the lawyer's approval of the recognizance. From this point of view, the work of the procuratorial organ in trial of court is just transferred to the pre-trial stage. For the public prosecutor, the workload is more and more cumbersome and demanding to some extent.

The foregoing arguments claim that if the accused repents, the public prosecutor and the judge shall identify the reasons for repentance and treat them differently. The author holds the opinion as follows.

First, the exploration on reasons for the repentance of the accused will inevitably increase the workload of the public prosecutor and the judge. "Repentance" is the subjective mentality of the accused. The repentance of the accused is mostly made after deliberation and comprehensive consideration. In the phase of reviewing and making a decision for prosecution, the public prosecutor and the accused are in the opposite position, which naturally causes the latter to have self-protection consciousness. Therefore, it is not easy for the public prosecutor to explore reasons to repent. This will inevitably increase the workload of the public prosecutor, which also explains why they are not keen on the application of the Lenient System for Admission of Guilt and Acceptance of Punishment. It is the same for judges who have no opportunity to communicate with the accused before trial. Thus, it is even more difficult to judge whether the reasons for the repentance are justified.

Second, exploration on the reasons for repentance will reduce the efficiency of litigation. As can be seen, exploration on the reasons for repentance increases the workload of public prosecutors and judges, and naturally reduces the efficiency of examination, prosecution and trials. This is contrary to the original intention of

introducing the System. In this regard, the public prosecutor may fully make statement on the fact, in court of trial, that the accused has repented. The judges may suspend the application of the System and transfer procedure. Reasons may be investigated in the converted procedure and be used as a basis for convicting and sentencing, which has little effect on the efficiency of litigation.

Third, the right of the accused to repent is the legal right. As mentioned above, the main intention of the System – to improve the efficiency of litigation – does not make much sense to the accused because the term of pre-trial custody shall decrease the term of punishment. The main difference in efficiency lies in the ratio of the time in jail and in the prison. It is due to this reason that if guilt and punishment are admitted and accepted by the accused, preferential treatment on sentencing shall be given. If this preferential treatment is not accepted, the most ideal state is to refuse to apply to the system at the early stage, but this does not mean that the right of the accused to repent is deprived of once the System is chosen. What may bring to the accused are unfavorable consequences, even though the accused is voluntary. There is no need for the public prosecutor to identify the reasons,[4] but to prosecute according to the provisions of the Criminal Procedure Law. The judge then renders a sentence based on the ascertained facts, evidence and in accordance with relevant provisions. The accused may present a statement in court, which may be decided as the basis of the judgment. In conclusion, there is no need to make special provisions on the issue.

Another reason for supporting estoppel is that repentance, if made casually, will undermine solemnity of the signed recognizance. However, this doubt may be solved from another point of view: if the accused denies the truth of the statement after signing, while the procuratorial organ opposed, which leads to the failure to reach an agreement again, the recognizance is invalid. In other words, the doubt may be solved if "repentance" is deemed as that no agreement is reached again. The key to this issue is, of course, whether the accused has the right to propose changing opinion. The author holds the opinion that whether to exercise or to give up the rights of the System depends on the accused. Any denials can be made on the accused's own will. The procuratorial organ shall identify the reasons for modification before "repentance" are made.

III. The motive to admit guilt and accept punishment shall not be used as reasons for the procuratorial organ's protest

Recently, attention has been drawn on the practices of courts and procuratorates across the country: Can the defendant appeal against the excessive punishment after the court makes a first-instance judgment in application of the System? Can the procuratorial organ protest against the accused's appeal to reflect the impureness of his guilty plea? The People's Procuratorate of Tianhe District of Guangzhou protested against Jiang in a drug trafficking case, saying that "without any change in the evidence, Jiang's appeal was based on excessive punishment. He intended to take the advantage of Lenient punishment system in exchange for lighter punishment, and then use the principle of no-adding penalty in appealing. His motive for pleading guilty is not pure. The Lenient punishment for guilt admission and punishment acceptance

[4] Of course, if the reason for repentance involves the exclusion of illegal evidence and other matters clearly stipulated by law, the judiciary should review the reasons.

applied in the first instance should not be applied herein. The accused shall be sentenced to a heavier penalty." The people's court of second instance upheld the appeal, and modified a sentence of imprisonment of 9 months in addition to a fine of 2,000 yuan to a fixed-term of one year and three months in addition to a fine of 10,000 yuan.[5] The People's Procuratorate of Bao'an District, Shenzhen Municipality, Guangdong Province filed an appeal almost on the same ground against the respondent Cheng charged with a crime for establishing or running casino. The people's court of second instance held that the grounds for the appellate case against the sentence of a people's court of first instance were not established. The appeal was dismissed and the original judgment was upheld.[6] In addition, there was a report that the people's court of second instance remanded the case to the original court for retrial, which resulted in the accused being sentenced to a heavier penalty, because the procuratorate held that the defendant's appeal showed "his refusion to plead guilty, so the System was not applicable."[7]

The aforementioned viewpoint advocates that "the appeal is filed after the judgment, and if no new facts or evidence are presented, the procuratorial organ shall file an appeal". How to correctly understand this issue involves not only the recognition and understanding of guilt-admission and punishment-acceptance, but also the procuratorial organs' right to appeal.

Article 216 of the Criminal Procedure Law stipulates that the defendant's ground for appeal is "Against a sentence or ruling of a local people's court at any level as a court of first instance." Article 217 thereof stipulates that the reason for the procuratorate's appeal is "Deeming that there is any definite error in a sentence or ruling of a people's court at the same level as a court of first instance." The two are detailed in *Rules of Criminal Procedure of the People's Procuratorate (for Trial Implementation)* published by the Supreme People's Procuratorate (hereinafter referred to as *the Supreme People's Procuratorate's Rules*). Six circumstances are stipulated in Article 584:

(1) Where the facts are unclear and the evidence is insufficient;

(2) Where the accused is acquitted even with hard and sufficient evidence to prove guilty, and vice versa;

(3) Where application of penalty is inappropriate as a lighter sentence for a serious crime or a heavy sentence for a minor crime;

(4) Where the charges are erroneously determined where a person convicted of more than one crime is convicted of one crime, and vice versa, which affect sentencing or cause serious social impact;

(5) Where exemption from criminal punishment or application of probation, prohibition order, or limiting commutation is wrong;

(6) Where the people's court seriously violates the legal procedures prescribed in the trial process.

From this point of view, the defendant does not need any reason in the initiation of the second instance. To guarantee the defendant's right to appeal, Article 226 of the

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[5] Zhang Chen, *Repent the Confession of a Drug Trafficking? Add to Another Six Months in Prison!*, Guangzhou Daily, the fifth edition, 9 April, 2019.

[6] Zhang wei, Li Lei, *Limitation of Appeal Right in Cases of Lenient Punishment for Guilty Plea*, People's Court Daily, 7th edition, 19 July, 2018.

[7] Wu Sunlin, *Multi-site Prosecutors Protested for the Accused's Appeal After Repentance for Pleading Guilty! Result is Either another Sentence or a Maintenance of the original judgment,* available at https://www.sohu.com/a/306231261_161795, accessed on 01.08.2019.

Criminal Procedure Law also establishes the principle of no aggravation of criminal punishment on the defendant, which can be regarded as a supplementary to the principle that a case is closed, after trial by a people's court of second instance. In contrast, the procuratorial organ shall protest based on hard evidence. This may explain why Article 223 thereof provides that where a case appealed by the people's procuratorate, people's court of second instance shall form a collegial panel to hear the following case in a court session. While cases appealed by defendant may not hold a court session to hear a case, unless a defendant thereof has raised any objection to the facts and evidence determined in the trial at first instance, which may affect conviction and sentencing. At the same time, Section 3, Article 216 thereof provides that a defendant shall not be deprived of the right to appeal under any pretext. In this way, regardless of application of the System, during the trial of a case in the court of first instance, the defendant has the right to appeal with excessive punishment.

As the case of Jiang mentioned in the preceding paragraph, the procuratorial organ protested in accordance with Item 3, Article 584 of *the Supreme People's Procuratorate's Rules* that "Where application of penalty is inappropriate as a lighter sentence for a serious crime or a heavy sentence for a minor crime". The reason is that the defendant's appeal reflected that the motive for pleading guilty is not pure, and the Lenient System for Admission of Guilt and Acceptance of Punishment is no longer applicable. The issue on whether the sentencing of the court of first instance is "evidently inappropriate" is not considered here, because the key point is whether the procuratorial organ's reasons for the conclusion are justified and can be inferred from this provision.

The author holds that whether a reason for appeal or protest is required, it shows any of parties' opposition to the first-instance judgment. The court of first instance renders a judgment based on the facts, evidence, relevant laws and regulations, and the guilty plea agreement reached between the procuratorial organ and the defendant. Whether the motive of the defendant and the procuratorial organ when the agreement is reached can influence the sentencing is not considered. Furthermore, as for the court of first instance, unless the defendant expressly states that his motive is not pure, the sentencing cannot be affected by sentencing, which is generally reached within the scope of sentencing agreed. That is the embodiment of the principle— to judge based on facts and guided by law. The original intention of the System is to improve the efficiency of litigation. Thus, it is obviously beyond judges' power to find out the impurity of the defendant's motive in such a short trial time.

Besides, if the accused's motive to admit guilt and accept punishment is considered to influence the sentencing, it is the procuratorial organ that is responsible for reviewing motive rather than the court of first instance. The defendant has no obligation to report his or her motive to the procuratorial organ. After all, this obligation violates common sense. Since the procuratorial organ believes that the motive to admit guilt and accept punishment influence the sentencing, it has the obligation to prove that the defendant's motive. In Jiang's case and Cheng's case, reasons are that the procuratorial organ is negligent in performing its duties. It is unfair if the legal consequences caused by the negligence were borne by the defendant and the court of first instance.

Furthermore, it is evidently inappropriate to deduce that the motive of the accused to sign the recognizance to admit guilt and accept punishment is not pure from his or

her post-act to appeal, without the support of related stipulation of law and judicial interpretation. Any modern society ruled by law advocates the determination of the criminal liability based on the causation, which means one's accused behavior should match with his/her liability. That is to say, the *mens rea* can only be determined by *actus reus* at that time, unless otherwise specified in laws or judicial interpretations that subjective fault can be inferred from subsequent conduct. Such exceptional circumstances are that the judicial interpretations specify that the defendant's squandering the victim's property can be used to determine that the defendant has the purpose of illegal possession. Therefore, if laws or judicial interpretations are not specified, it is obviously not appropriate to deduce that the motive to sign the recognizance is not pure only from the defendant' appeal after signing.

Finally, the premise and core of the System is to guarantee the voluntariness of the accused when signing the recognizance. However, in practices, whether the voluntariness can be effectively guaranteed remains to be seen. The difficulty to exclude that the accused will appeal with excessive punishment implies the possibility that the voluntariness to admit guilt and accept punishment will not be guaranteed.

On this basis, to better understand Item 3, Article 584 of *the Supreme People's Procuratorate's Rules*, that "Where application of penalty is inappropriate as a lighter sentence for a serious crime or a heavy sentence for a minor crime", the sentencing should be compared with the evidence on which the first-instance court judged, which means the defendant's action after the first-instance judgment cannot be used as the basis for protest. Otherwise, it will not only reduce the scope of application of the appeal without aggravated penalty, but also undermine the principle of the second instance as the ending instance. Most importantly, it will cause the court of first instance to be overcautious and indecisive in making a fair judgement.

In the process of drafting opinion and piloting the System, there is a view that the accused shall not appeal and the trial of first instance is the closed trial. At last, the opinion is not adopted. It reflects the intent of the legislator to guarantee the defendant's rights through the trial of second instance. *The Interim Report of the Supreme People's Court and the Supreme People's Procuratorate on the Pilot Program of the Lenient System for Guilt-Admission and Punishment-Acceptance in Criminal Cases in Some Areas* shows that the national defendant's appeal rate was 3.6% during the pilot program. It is understood that there is a considerable amount of the accused whose reasons for appeal was the delay of being sent to serve in prison because they are kept at the detention center. Some refer to it as a "technical appeal", which can be solved by speeding up the progress of the trial of the second instance. But the appeal of the defendant shall not be protested on the grounds that his or her motive is not pure. Otherwise, this practice will largely shake the foundation of the System.

IV. The elaboration on the lenient system for admission of guilt and acceptance of punishment

The Lenient System for Admission of Guilt and Acceptance of Punishment has been piloted with a term for 2 years since November 16th, 2016, but soon is coded into the Criminal Procedure Law on October 26, 2018. Various disputes on the System have been generated so far due to not full attention was paid to during the pilot and the failure to hear the both parties' opinions on the System. The author holds that all

these disputes are carried out around the key issues – justice and efficiency. Therefore, justice should be given priority and efficiency shall not be neglected. As everyone intends to avoid disadvantages, as the core that runs through the essay, the accused repentance on the signed recognizance is purely out of instinct. The accused shall not be deprived of the right to repent in pursuit of litigation efficiency.

The Criminal Procedure Law has expressly stipulated the Lenient System for Admission of Guilt and Acceptance of Punishment. Considering many disputes that exist at this stage, the author suggests refining the System in the following aspects.

Firstly, the aim of the System is to give preferential sentencing, one that the accused is more concerned about than convicting and sentencing. There are 469 charges in China's criminal law, but the Supreme People's Court has only carried out the reform of standardized sentencing for 23 common crimes in judicial practice.[8] This may be one of the most important reasons for repentance. Although the public prosecutor can elaborate the contents of the "preferential" sentencing to the accused, it is possible that even the prosecutor has no idea on how to apply the other crimes to the "preferential" sentencing, and fails to explain to the accused that the sentencing recommendations listed in the recognizance are "preferential" or beneficial. Thus, it is imperative that the Supreme People's Court introduce the guidelines for sentencing standardization of other common crimes as soon as possible. Before that, the local courts should enact guidelines for the sentencing of common crimes in accordance with the sentencing habits of the court and the tradition. This may help the public prosecutor to effectively explain to the accused in order to reduce the times of repentance.

Secondly, the System shall not apply in cases where the legally prescribed punishment is death penalty or life imprisonment. The standardized reform of sentencing mainly focuses on control, criminal detention, fixed-term imprisonment. It does not involve life imprisonment and death penalty. Although it would be easier and more direct for the accused to perceive how the System works out, it would also bring confusion to the public that it is a society where no matter how much danger was caused, the accused could escape any felony so long as they perform well in pleading guilty. For example, the public may believe that under the System, life-imprisonment could be modified to fixed-term imprisonment. The immediate execution of death penalty could be modified to death penalty with a reprieve or they may take it for granted that under the System, death penalty could be modified to life imprisonment. The author holds that this concept does no good to the rule of law. Based on the principle that justice must not only be realized, but also be realized in a visible way, a new mode is suggested by the author here. First, the accused shall be allowed to make statement in court even if guilty has been plead. Then, public prosecutor makes recommendations on sentencing to the court in its procuratorial opinion based on the

[8] There are 23 kinds of crimes determined by the Supreme People's Court's standardized reform of sentencing: crime of causing traffic casualties, crime of intentionally injuring another, crime of rape, crime of unlawful detention, crime of pillage, crime of theft, crime of swindling, crime of forcible seizure, duty embezzlement, crime of extortion, crime of disrupting public service, crime of affray, crime of picking quarrels and provoking troubles, crime of disguising and concealing the income or the proceeds generated from crimes, crime of smuggling, trafficking, transporting, and manufacturing drugs, crime of dangerous driving, crime of fraudulent and illegal fundraising, crime of credit cards fraud, crime of contractual fraud, crime of illegal possession of drugs, crime of harboring others who take or inject drugs, crime of seducing, harboring, or introducing prostitution.

accused's performance in the trial of the court. At last, it is the judge's job to decide the use of sentencing. This mode not only embodies the concept of judicial reform centered on trial, but also contributes to the formation of the rule of law in the public, and is of great significance to the rule of law in China.

Third, the status of duty lawyers shall be changed practically under the stipulated law. If the accused retains a defender, the defender shall be present when signing the recognizance.[9] Considering the duties of the defender, the prosecutor shall leave enough time for reading records and meeting the accused before signing, and hear the opinions of the defender or duty lawyer when submitting the opinion for recognizance. All of these are to ensure that the recognizance can stand the test.[10] If the accused does not appoint a defender, the recognizance shall be signed in the presence of the duty lawyer. However, compared with the appointed lawyer, the duty lawyers only "provide the criminal suspect or defendant with legal assistance including but not limited to legal advice, recommendations on the selection of procedures, application for the modification of compulsory measures, and offering opinions on the handling of the case." (According to Article 36 of the Criminal Procedure Law). They do not have the right to read records and meet the accused[11], which makes the duty lawyer become a "witness" to sign the recognizance. In a sense, the recognizance can be signed, even if the duty lawyer is not present. The court will also approve it, because the duty lawyer has no power to provide effective and practical legal services to the accused.[12]

Fourth, the relationship between the court and the procuratorate shall be dealt with properly in the Lenient System for Admission of Guilt and Acceptance of Punishment. As mentioned above, the System increases the workload of the public prosecutor, while the workload of the judge is relatively reduced. Some judges support this, but some hold that the public prosecutor's sentencing recommendation has reduced the judicial discretion to sentencing. Thus, the author suggests that the sentencing recommendations of the procuratorate should be enacted as a range of sentencing rather than a fixed point. Then, conviction and sentence will be made by judges within the range of sentencing in accordance with the facts and provisions. In this way, the exercise of the discretion of the judge can be guaranteed to some extent.

In addition, the question whether the judge could refuse the application of the System after the procuratorial organ and the accused reach an agreement on

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[9] In practices, there are cases in which the public prosecutor asks the accused to sign a recognizance in the presence of duty lawyers, even though knowing that a defender is retained. This practice severely deprived the accused of the right to defend and did not meet the position of the duty lawyer. The recognizance shall be invalid.

[10] Specified in Article 173 under the Criminal Procedure Law

[11] The right to read records and the right to meet the accused of a duty lawyer are deduced from the provisions of Article 36 under the Criminal Procedure Law. Otherwise, a duty lawyer cannot " offer opinions on the handling of the case " Article 173 thereof also stipulates that "Where the people's procuratorate hear the opinion of the duty lawyer under the preceding two paragraphs, it shall make necessary arrangements in advance to facilitate the duty lawyer's access to relevant case information." However, the duty lawyer did not have these rights during the pilot program. Even after the amendment of the Criminal Procedure Law, there is no relevant supporting measures, which results in duty lawyer not having these rights.

[12] Words came that, according to the author, the public prosecutor may gather defendant of different cases and then ask them to sign recognizances in the presence of one duty lawyer who may not know about the accused at all.

recognizance to admit guilt and accept punishment needs to be cleared. In the judicial practice, there are cases in which the court sent a letter to the procuratorate recommending that the relevant case is not applicable to the System. The author holds as follows.

Firstly, so long as the criminal suspect admits guilt and accept punishment at the stage of examination and prosecution, the procuratorial organ should initiate the System, which is both the right of the accused and the duty of the procuratorial organ.[13] This is in accordance with Paragraph 2, Article 173 of the Criminal Procedure Law stipulates that " Where the criminal suspect admits guilt and accepts punishment, the people's procuratorate shall inform the criminal suspect of his or her procedural rights and the provisions of law on admission of guilt and acceptance of punishment, " and Paragraph 2, Article 176 thereof that " Where a criminal suspect admits guilt and accepts punishment, the people's procuratorate shall offer a sentencing recommendation on the principal penalty, accessory penalty, and whether probation applies, among others, and transfer the recognizance to admit guilt and accept punishment and other materials along with the case."

Secondly, if the court doubts the authenticity and legality of the recognizance, the System shall not apply. This is in accordance with Paragraph 2, Article 190 of the Criminal Procedure Law that "Where a defendant admits guilt and accepts punishment, the presiding judge shall inform the defendant of his or her procedural rights and the provisions of law on the admission of guilt and acceptance of punishment, and examine the voluntariness of the admission of guilt and acceptance of punishment and the authenticity and legality of the recognizance to admit guilt and accept punishment. " This can also be inferred from Paragraph 1, Article 201 thereof.[14]

Thirdly, if the court has sufficient grounds to believe that the case does not meet the conditions for the System, it may not apply. This is in accordance with Article 226 thereof that " Where, during the trial of a case, a people's court discovers that the defendant's conduct does not constitute a crime or the defendant shall not be held criminally liable, the defendant admits guilt and accepts punishment against his or her will, the defendant denies the facts of the crime which he or she is charged with or the application of the fast-track sentencing procedure to the trial of the case is otherwise inappropriate, the people's court shall try the case anew in accordance with the provisions of Section 1 or Section 3 of this Chapter." The fast-track sentencing procedure is a newly set procedure at first instance for the System. This Article is

[13] Whether the procuratorate has the obligation to examine the authenticity of admission of guilt and acceptance of punishment, the criminal procedure law has not yet expressly stipulate, but Paragraph 2, Article 190 thereof stipulates that where a defendant admits guilt and accepts punishment, the presiding judge shall "examine the voluntariness of the admission of guilt and acceptance of punishment and the authenticity and legality of the recognizance to admit guilt and accept punishment." The author holds that it can be concluded that the procuratorate has this obligation.

[14] According to Paragraph 1, Article 201 thereof. For a case where the defendant admits guilt and accepts punishment, the people's court shall, when rendering a judgment in accordance with the law, generally adopt the charges filed by and sentencing recommendation from the people's procuratorate, except under any of the following circumstances: (1) The conduct of the defendant does not constitute a crime or the defendant shall not be held criminally liable. (2) The defendant admits guilt and accepts punishment against his or her will. (3) The defendant denies the facts of the crime which he or she is charged with. (4) The charges filed are inconsistent with those determined at trial. (5) The fair trial of the case may be otherwise affected.

shown up in Section 4 “Fast-Track Sentencing Procedure” of Chapter 2 “Procedures at First Instance”. Section 1, among Chapter 2, is about general procedure “Cases of Public Prosecution”. Section 3 is “Summary Procedures”.

To sum up, where the court believes that the case in trial shall not apply to the System, it has the right to decide not to apply. The procuratorial organs and the defenders have no right to question this. They can only file an appeal against the judgment of the first instance. In judicial practice, the court will generally notify the procuratorial organ in advance. The procuratorial organ should initiate consultations on disputes between the two parties. If it is impossible to negotiate, the opinions of the court shall prevail.

The implementation of the Lenient System for Admission of Guilt and Acceptance of Punishment lacks theoretical research, because the Criminal Procedure Law was revised before the ending of pilot of System, which was planned for two years. Thus, it results in a number of problems in judicial practice. How to treat these problems properly is an important issue in both field of theory and practice. Only through efforts can the original intention of launching the System be achieved and the strategy of "rule of law" be realized.

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On the Specialization of Criminal Procedure of Duty Crime in China

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Abstract

The unique content of the criminal procedure of duty crimes in China is constituted by the personal coercive measures, the use of audio and video recordings, the lawyer's defense, the internal supervision and the legal supervision of the procuratorial organ in investigating duty crimes, as well as the procuratorial organ's discretion of public prosecution, trial by default, which distinguishes from that of ordinary crimes. There are many disputes about the specialization of procedure of duty crimes in China, such as the imbalance of rights protection and power restriction, the limitation of public prosecution discretion and the constraints on international criminal justice cooperation. However, its contribution to China's anti-corruption should not be underestimated, and its experience in strengthening the centralized and unified exercise of anti-corruption power, reducing the procedural confrontation of the suspects and expanding criminal judicial cooperation deserves attention.

Keywords: c*riminal procedure of duty crime; specialization; disputes and contributions*

I. Context

Since 2012, China has comprehensively strengthened the strength and scope of fighting against corruption and achieved good results. In order to establish a long-term anti-corruption mechanism, China has deepened and solidified the practical experience of anti-corruption, and gradually formed a relatively complete anti-corruption system. Among them, the criminal procedure of punishing duty crimes is gradually distinguished from that of ordinary crimes, forming a special situation of criminal procedure of duty crimes with Chinese characteristics.[1]

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[1] In China, supervisory organs and procuratorial organs are responsible for the investigation of duty crimes. According to the Criminal Procedure law and the Supervision Law, the procuratorate is responsible for the 14 crimes of false imprisonment, extortion of a confession by torture, and illegal search or any other crimes that infringes upon a citizen's rights or damages the fair administration of justice by taking advantage of his or her functions. And the other duty crimes are investigated by

As a contracting state to the United Nations Convention against Corruption, China has actively formulated various anti-corruption policies and measures. Strengthening the norms of criminal procedures is an important aspect, which is also a manifestation of China's active commitment to the Convention and being a responsible country. However, in recent years, China's criminal procedure norms have also been questioned: whether the special provisions on duty crime can play their due role? Whether it is in line with the basic requirements of power restriction and right protection? How much room for improvement is there for specialization of criminal procedure of duty crime in China? How much can it be used for reference to other countries in the world? With the continuous development of China, these problems are not only of positive significance to China, but also the spillover effect to all countries in the world that should not be ignored.

II. The manifestation of the specialization of criminal procedure of duty crime in China

Duty crime has particularity. Duty crime has great social impact because the subject of it is mainly the staff of state organs, and the object is mainly the integrity of state organs. In China, the fight against corruption in punishing duty crimes is considered to be a major political issue related to the life and death of the ruling party and the state. Therefore, we must firmly fight against corruption and promote the construction of the system of punishing and preventing corruption,[2] which is manifested by the specialization of criminal procedure of duty crimes.

According to the provisions of the Criminal Procedure Law of China, the basic structure of the criminal procedure mainly includes the investigation procedure, the examination and prosecution procedure and the trial procedure. However, according to the Supervision Law enacted in 2018, most of the duty crimes originally investigated by the procuratorial organ are transferred to the supervisory organ for investigation, and the Criminal Procedure Law is not applicable. Considering the integrity of criminal procedure, we hereby include the investigation procedure of this part of crimes into the scope of criminal procedure investigation, so as to fully reflect the differences between the procedure of duty crimes and ordinary crimes.

(I) Investigation procedure of duty crime

According to the provisions of the Supervision Law, there are great differences in the investigation procedure between duty crimes and common crimes, which are mainly manifested in the following aspects:

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supervisory organs. The criminal procedure of the duty crimes investigated by procuratorial organs is different from that of the ordinary crimes, but the difference between them is small and the scope of the duty crimes involved is also narrow. Considering the reasons above, this article mainly discusses the difference of criminal procedure between duty crimes investigated by supervisory organs and ordinary crimes and the influence of criminal procedure of duty crimes investigated by supervisory organs.

[2] Zeng Wei, Shu Jie, Xi Jinping's, *Speech on Anti-corruption: Zero Tolerance for Corruption*. Available: http://politics.people.com.cn/n/2014/0730/c1001-25372496. html accessed on Oct.6, 2019.

1. Personal coercive measures

Based on Doctrine of the Presumption of Innocence, the personal freedom of the suspect should be guaranteed except that he or she interferes with the investigation of the crime. Personal coercive measures in the investigation of ordinary crimes include compelling the appearance, bail, residential surveillance, detention and arrest. The arrest shall be approved by the procuratorial organ, and other enforcement measures can be decided by the investigation organ itself. Considering the complex nature of the criminal case, the period of custody during criminal investigation after a criminal suspect is arrested cannot exceed two months in general; with the approval of Procuratorate at a higher level, the arrest can be extended three times,[3] with a time limit of seven months. Because the arrest is a deprivation of the personal freedom of the criminal suspect for a long time, it can only be taken when other measures still cannot prevent the personal danger of the criminal suspect.

In contrast, in the duty crimes investigated by the supervisory organ, there is only one kind of personal coercive measure, which is, directly depriving the investigated person of personal freedom. The detention shall be decided by the leaders of the supervisory organ collectively. Generally, the time is not more than 3 months, but it can be extended once, and the time is also not more than 3 months. Detention is taken when the supervisory organ has some facts and evidence of illicit or criminal acts, but there are still important issues to be further investigated.

2. Audio and video recording

In the stage of investigation of crime, it is necessary to restrict the rights of citizens directly by the state organs; considering that confidentiality is in need in this stage, the supervision through the whole process by recording and videoing has become an important measure in modern society, which has been widely applied.

In China, it is not necessary to record or video the interrogation of the suspect in the ordinary criminal investigation, while it is necessary for the interrogation of the suspect in the case that may be sentenced to life imprisonment, death penalty or other major criminal cases. These recordings are generally transferred with the case for the examination of the procuratorial organ, the judicial organ and the defender.

In the investigation of duty crimes by supervisory organs, investigators are required to record and video the whole process of interrogation, search, sequestration, seizure and other important evidence collection work, and keep them for future reference. However, supervisory organs often refuse or limit the lawyer, the prosecutors and the judges to consult the audio and video recording, because there are many contents such as violations of discipline and law, even crimes in it which are not permitted to consult according to the law.

3. Counsel for the defense

In the face of serious state accusations, complex legal issues and the limited knowledge, retaining a lawyer as a defender is an important guarantee of the suspect's rights, which has been expanded from trial stage to criminal investigation stage in China's criminal procedure. According to the Criminal Procedure Law, from the day when the suspect in a common criminal case is first interrogated or taken coercive measures by the investigation organ, he or she has the right to entrust a lawyer as a

[3] See Articles 156-159 of Criminal Procedure Law.

defender, who can provide legal assistance, file petitions and accusations on behalf of him or her, apply for changing the coercive measures, learn the charges against a criminal suspect and relevant case information from the criminal investigation authority, and offer opinions.

In the process of investigating the duty crime by the supervisory organ, the investigated person can't hire a lawyer because it is not considered as a procedure of the proceedings, let alone defending with the help of a lawyer.

4. Internal supervision

For the investigation subject of ordinary crime, whether it is the public security organ, the state security organ or other investigating subjects, the relationship between the superior and the subordinate is the hierarchy of leadership, which makes it a common phenomenon for the superior supervising the subordinate in case investigation. However, the investigation organs at all levels still have considerable independence. The investigation organs alone can decide whether to take any coercive measures and investigation means other than arrest without the approval of the superior investigation organ. Only when reconsideration is applied as a way of providing remedies for some cases such as a guarantee or his or her legal representative is not satisfied with the decision of confiscating the deposit and the fine, or some special coercive measures such as residential surveillance of designated residence are taken, will the investigation be intervened by the superior investigation organ.

The relationship between the superior and the subordinate of supervisory organs is also a hierarchy of leadership. However, considering the status of the subject of duty crime and the possible political influence made by the investigation, the supervision of the higher supervisory organ over the lower level is stricter, which restricts the independence of the lower supervisory organ. As for the adoption of detention, the district supervisory organs below the municipal level shall report to the supervisory organs at the higher level for approval, and the provincial supervisory organs shall report to the state supervisory committee for filing. As for cases that the suspects under investigation confess and take punishment voluntarily, or the disclosure of the facts related to the duty crimes is verified, or the important clues provided are helpful for the investigation of other cases, proposals for lenient punishment can be made with the approval of the supervisory organ at the higher level when the case is transferred to the people's Procuratorate for examination and prosecution.

5. Legal supervision of procuratorial organs

In China, the procuratorate is the state legal supervision organ, which is clearly stipulated in the Constitution and the Criminal Procedure Law.[4] Based on the system of people's congresses, the state establishes special legal supervision organs to supervise the implementation and compliance of laws such as whether administrative organs, judicial organs and military organs faithfully perform the functions and powers given by the Constitution and laws, and whether they act within the scope of the Constitution and laws, so as to ensure the uniform implementation of laws.[5]

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[4] See Article 134 of Constitution and Article 8 of Criminal Procedure Law.

[5] Liu Songshan, Xu Anbiao, *General Interpretation of Constitution of the People's Republic of China*, Available:http://www.npc.gov.cn/npc/c13475/201004/a8955b0985204d749ff02f05827e5f47.shtml. accessed on Oct. 5, 2019.

In common criminal cases, the procuratorial organ can supervise the investigation activities of the investigation organ, including whether the case should be filed, whether the adoption of coercive measures is legal, whether the investigation activities are legal etc. Therefore, the law grants the procuratorial organ the power to intervene in the investigation activities in advance, and to provide remedy on the complaints or accusations of the litigants, defenders, litigation representatives and interested parties.

The Constitution and the Supervision Law also clearly stipulate that the supervision organ and the procuratorial organ should cooperate with each other and restrict each other in handling duty crime cases.[6] With the investigation power's transition from the procuratorial organ, the supervisory organ has certain particularity.[7] As a state organ with the separation of power under the system of people's congresses, the relevant power the supervisory organ exercises is still authorized and regulated by the law, and should be supervised by the procuratorial organ, which is the same in specific cases. According to the current laws and regulations, the procuratorial organ has no right to supervise the investigation of duty crime yet.

(II) Examination and prosecution procedure

The common function of procuratorial organs in various countries is to be responsible for the public prosecution of criminal cases. China also clearly stipulates that only procuratorial organs can initiate public prosecution. Under this common premise, there are some differences between the examination and prosecution of duty crimes and ordinary crimes in China.

1. Discretion of public prosecution and its remedy

As for the cases transferred for examination and prosecution, the Chinese procuratorial organs usually conduct examination by means of reading records, interrogating suspects, listening to the opinions of defenders or lawyers on duty, victims and their litigation representives, so as to find out whether the facts and the crime are clear, whether the evidence is accurate and sufficient, whether the nature and accusation of the crime are correct, whether there are omissions of crime and other persons who should be prosecuted for criminal responsibility; whether they are those who should not be investigated for criminal responsibility; whether there are subsidiary civil action and whether the investigation activities are legal or not etc.

Although the examination content of all criminal cases is the same, the procedure of decision-making and the way of remedy are different. For ordinary criminal cases, if it is believed that the facts of the crime have been ascertained, the evidence is accurate and sufficient, and criminal responsibility should be investigated according to the law, the procuratorial organ shall make a decision on prosecution. If a suspect is believed to have no criminal facts or to have any of the circumstances stipulated in Article 16 of the Criminal Procedure Law,[8] the procuratorial organ shall make a decision not to

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[6] See Article 127 of Constitution and Article 4 of Supervision Law.

[7] Yan Ming, *The Supervisory Committee is a Political Organ*. China Discipline Inspection and Supervision Daily, March 8, 2018.

[8] Article 16 of Criminal Procedure Law: Under any of the following circumstances, a person shall not be subject to criminal liability, and if any criminal procedure has been initiated against such a person, the case shall be dismissed, a non-prosecution decision shall be made, the trial shall be

prosecute. Deeming the decision erroneous, the investigation organ shall generally seek remedy from the procuratorial organ which made the original decision (request for reconsideration). If the opinion is not accepted, it may also apply to the procuratorial organ at the next higher level for review.

Different from what has been discussed, if a case investigated by a supervisory organ is in conformity with the situation of non-prosecution, the decision of non-prosecution can be only made after the approval of the procuratorial organ of a higher level and the request of the supervisory organ for reconsideration is only applied to the procuratorial organ of a higher level.

2. Duration of the stage of examination and prosecution

Litigation time reflects the efficiency of state organs in carrying out relevant activities, which also has an impact on the litigation rights of suspects. Too long a duration will lead to the delay of litigation, making the status of suspects uncertain for a long time, or even leaving personal freedom or property restrictions in a unfair state. Too short one may affect state organs' investigation of the fact, and it may also affect the defense right of the accused. Therefore, fair and reasonable limitation of litigation time is also the necessary content of the protection of rights of the suspects.

The duration of the examination and prosecution stage generally includes the time limit for examination and prosecution and other periods that are not included in the time limit, such as the identification period of mental illness etc. The procuratorial organ shall generally make a decision within one month on the transfer of ordinary criminal cases for examination, and may extend 15 days for major and complex cases. When a suspect confesses and takes punishment voluntarily, a decision shall be made within 10 days in the case where the quick judging procedure is applied, and if the possible sentence is more than one year, the duration may be extended to 15 days. In the case of duty crime, if the supervisory organ has taken detention when it is transferred for prosecution, the law allows the procuratorial organ to take an additional 10 days to decide what kind of coercive measures to take, including arrest, bail or residential surveillance; in special circumstances, the duration can be extended for one to four days, which is not included in the time limit for the review of prosecutions. The follow-up review time is consistent with that of ordinary crimes.

(III) Special procedure

There is no difference between duty crimes and ordinary crimes for the trial procedure. Even in the special procedure of trial, the procedure of confiscation of illegal gains and the procedure of trial by default are not just for duty crimes. According to the provisions of the Criminal Procedure Law, the trial procedure by default is applicable to the criminal cases of corruption and bribery, as well as the criminal cases seriously affecting the state security and terrorist activities that need to

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terminated, or the person shall be acquitted: (1) the circumstances of the alleged conduct are obviously minor, causing no serious harm, and the alleged conduct is therefore not deemed a crime; (2) the time limitation for criminal prosecution has expired; (3) exemption of criminal punishment has been granted in a special amnesty decree; (4) the alleged crime is handled only upon a complaint in accordance with the Criminal Law, but there is no such a complaint or the complaint has been withdrawn; (5) the criminal suspect or defendant dies; or (6) the person is otherwise exempted by law from criminal liability.

be tried in a timely manner and approved by the Supreme People's Procuratorate. The procedure of confiscating illegal gains is applicable to major criminal cases such as corruption, bribery and terrorist activity.[9]

However, the main purpose of the original legislation was to fight against corruption, both the procedure of confiscating illegal gains and the procedure of the trial by default.[10] The newly added trial procedure by default in 2018 is the latest manifestation of the specialization of the relevant criminal procedures under the trend of severely cracking down on duty crimes. Compared with other applicable ordinary cases, the trial procedure by default does not need strict approval procedure for corruption and bribery cases, which reflects the uniqueness and flexibility of its application. According to the relevant provisions of the law, China's procedure of trial by default can not only make a ruling on the criminal responsibility of the defendant, but also deal with illegal gains and other property involved in the case. Compared with the general trial procedure, some special requirements of the trial procedure by default include: the people's court shall serve the summons and the copy of the indictment of the People's Procuratorate on the defendant through the way of judicial assistance provided by the relevant international treaties or diplomatic channels, or other ways permitted by the law of the place where the defendant is located; when the defendant and his close relatives have not entrusted a defender, the court shall notify the legal aid agency to assign a lawyer to defend the case; the defendant and his close relatives have the right of appeal; if the defendant voluntarily surrenders to court or is arrested, the ongoing trial procedure shall be resumed; if a criminal objects to the rulings during the time after it comes into force and before it is delivered for execution, the court shall try the case again.

III. Disputes caused by special procedures of duty crimes in China

From 2012 to now, the criminal procedure of duty crimes in China has gradually developed from the special procedure of confiscation of illegal gains to the specialization of the whole procedure, and has formed a relatively independent feature different from the ordinary criminal procedure. China has not been applying special criminal procedure to duty crimes for a long time, and there are still some uncertainties in the relevant theoretical research and practice. The different treatment of suspects and defendants between in the duty crime and in the common crime has also aroused great controversies.

I. The imbalance between right protection and power restriction in the investigation of duty crime

The core of the whole criminal procedure is nothing more than the negotiation of state power and individual rights. Due to certain evidence proving that the investigated person is suspected of committing a crime, his rights need to be subject to the state's

[9] See Articles 291-298 of Criminal Procedure Law.

[10] Huang Taiyun, *Interpretation of the Revision of Criminal Procedure Law,* 8 People's Procuratorate (2012); Shen Chunyao. *Notes on Criminal Procedure Law of People's Republic of China (Revised Draft)*, Available: http://www.npc.gov.cn/npc/c12435/201810/6cda6a2ab98a41268452a87a89e0a0c6.shtml, accessed on Oct.6,2019

restrictions according to the law. However, based on the Doctrine of the Presumption of Innocence, the rights of the investigated should be protected accordingly. A reasonable balance between the rights of the investigated and the power of the supervisory organ should be carefully maintained during the whole investigation procedure, that is, the limitation of the rights of the investigated is necessary, which has the least impact on the suspect, and is balanced with the benefits of the investigation.[11]

It can be seen from the main differences of the five aspects in the investigation procedures of duty crimes that, as a whole system, the supervisory organ has a larger power in the investigation of duty crimes, but it is relatively closed and is not affected by the outside world. Whether from the basic status of state legal supervision organ, or the relations of coordination and check between the procuratorial organ and the supervision organ in handling specific duty crime, the procuratorial organ should be able to actively intervene in the investigation procedure of the supervision organ before the examination and prosecution, but it cannot be the fact. The procuratorial organ has no supervisory power over the detention taken by the supervisory organ even if its time of deprivation of personal freedom is longer than that of arrest, and even the subsequent procedure following the investigation should be limited to different extent. For example, the audio and video recording cannot be directly obtained and made public. At the same time, the independence of each level is relatively low within the supervision organ, and either the adoption of detention- one of the main personal coercive measures, or the suggestion of lenient punishment in the transfer of the investigated case to the procuratorial organ for examination and prosecution needs the consent of the higher level in different degrees.

In contrast, the suspects under investigation are entitled less rights. In the fourth chapter (supervision authority) and the fifth chapter (supervision procedure) of the Supervision Law, which involve the investigation, almost all the subjects of the articles are supervisory organs or investigators, and there is no explicit empowerment of the investigated suspects. The suspect of the ordinary crime in investigation procedure is not only entitled to the key lawyer's defense and the mandatory defense under special circumstances, but also the right to sue, to apply for changing the coercive measures, to refuse to answer the questions irrelevant to the case, to apply for supplementary verification or re-verification etc., while the suspect investigated by the supervisory organ is not entitled to these rights.

Indeed, considering the particularity and serious influence of the duty crime, it is necessary to impose special restrictions on the suspects of the duty crime, so as to prevent them from using the public power and other forces to interfere in the handling of cases. Therefore, through the overall strength of the supervisory organ, the possible interference from the outside world, including the influence on the procedure after investigation, can be eliminated. At the same time, through the supervision between the superior and subordinate supervisory organs, orderly operation of investigation of supervision can be formed. However, this kind of guarantee and balance, mainly based on the authority of the supervisory organ itself, which is more similar to a moral regulation rather than a reasonable legal compulsory arrangement, is likely to be

[11] Hao Yinzhong, Xi Zuoli, *The Principle of Proportionality from the Perspective of Constitutionalism*, 6 Studies in Law and Business (2004).

distorted by the personal power of the subject, because it starts from the assumption of the introspective subject to shape the subject, and ensures the appropriateness of the legal application through the sage (supervisory organ).[12] Under the tradition of bureaucratic system in China, the overall will of the supervisory organ under Responsibility System of the Leading Cadre will still be vulnerable to the interference of individual leaders to a large extent, which will also be sheltered by the will of the organization. Therefore, it is very difficult to place the order of power operation under the supervision of the same body, leaving the protection of the rights of suspects in an insecure position. In the period when the procuratorial organ led the investigation of duty crime, its approval of arrest in duty crime was raised to a higher level, and at the same time, it actively strengthened the supervision from the outside of the legal system – implementing the People's Supervisor System, which embodies the procuratorial organ's full recognition of the necessity and consciousness of external supervision.[13] As the main compulsory power of national supervisory organ, how can the exercise of investigation power be trusted not to be abused and exclude the timely supervision of other state organs in specific cases?

Even if the supervisory organ without the supervision of other state organs can realize the protection of the rights of the investigated suspect, but it may not conform to the status of the investigated person. First of all, from the perspective of the subjectivity of human beings, the suspect of duty crime should be the subject of investigation procedure of the Supervision Law. No matter who, whether at any time, should not regard themselves and others only as tools, but should always regard themselves as the purpose.[14] Man should be not only the aim, but also the tool and means. In the investigation procedure of duty crime, the investigated person is the object of the investigation procedure, and has the obligation to cooperate. At the same time, the respondent should not be completely passive, and an intersubjective relationship should be established between investigators and the investigated. The concept of Scientific Development once proposed by the Communist Party of China is to emphasize "people-oriented", and the core of concept is the confirmation and respect of human subjectivity. At present, the Supervision Law should not only be regarded as a law for punishing the criminal of duty crime, but also reflect and respect the subject status of the criminal.

Secondly, from the perspective of legal provisions, the subject of duty crime should also be the subject of rights. Compared with the clear procedural subject status of suspects in common crime and various procedural rights in criminal proceedings, the respondents in the investigation procedure of the Supervision Law have no clear subject status, so it is impossible to talk about their rights. The Supervision Law is mainly aimed at "strengthening the supervision of all public officials exercising public power" while there are no provisions such as "punishing the criminals, protecting the people" and "respecting and guaranteeing human rights", which is stipulated clearly in

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[12] Chen Haifeng, *Study on the Improvement of the Legitimacy of Criminal Review and Prosecution Process*, Law Press (2014) 130.

[13] See *Provisions of the Supreme People's Procuratorate on the Implementation of the System of people's supervisors* and *Administrative Measures for the Selection and Appointment of People's Supervisors*.

[14] Immanuel Kant, *The Groundwork of the Metaphysics of Morals,* China Renmin University Press (2013), 86.

the Criminal Procedure Law. However, to "maintain the dignity of the Constitution and laws" and to "guarantee the parties' lawful rights and interests" are expressly provided by the Supervision Law. In the process of investigation, it also imposes specific obligations on the supervisory organ to protect the civil rights, such as keeping the secrets of the investigated obtained in the investigation; terminating timely the seizure, impoundment or freezing measure of property and documents unrelated to the case, and returning it; collecting the evidence as to whether the person under investigation has committed any violation or crime, and, if any, the seriousness of circumstances; prohibition of collecting the evidence by threat, enticement, fraud, or any other illegal means, and of insult to, abuse, ill-treatment, physical punishment or physical punishment in any disguised form of the person under investigation and the person involved in the case; guaranteeing the food, drink, rest and security of the detained person, and providing medical services etc.

More importantly, as the subordinate law of the Constitution, the Supervision Law must also implement the provisions of "respecting and guaranteeing human rights" and the protection of the basic rights of citizens stipulated in the Constitution.

Thirdly, compared with the suspects of ordinary crimes, the rights of the investigated of duty crime should be guaranteed. The subject of duty crime is the staff of the state organs who may intervene in the investigation of duty crime. However, once left in a closed space because of detention, he or she is only the investigated who is not familiar with the law, and is in need of the legal help. The lawyer's meeting and defense may bring restrictions to the investigation of the supervisory organ, but the restriction of power itself is an integral part of the national political framework. The fear that supervisory organs can't afford to intervene should be alleviated by strengthening its independence and fight against illegal interference than to restrict the reasonable and necessary procedural rights of the investigated.

Finally, from the trend of human rights protection, more attention should be paid to the rights of the investigated in duty crimes. The provisions of human rights protection stipulated in China's Constitution is respect for the trend of human rights protection in the world and basis of its realization in China. Confirmed by the Criminal Procedure Law in the investigation of duty crimes led by the procuratorial organ in the past, they should be practiced by Supervision Law in today's more developed and progressive China.

(II) The limitation of the procuratorial organ's discretion in public prosecution

The discretion of public prosecution refers to the application of the procuratorial power by the public prosecution organ to decide whether to prosecute or not after examining the cases transferred by the investigation organ. According to the provisions of the Constitution, the Criminal Procedure Law and the Supervision Law, the procuratorial organ exercises its powers independently without interference of administrative organs, social organizations or individuals. At the same time, procuratorial organs, investigation organs, supervision organs and judicial organs shall coordinate and check each other in the process of handling specific cases, which is carried out in accordance with law on the basis of their respective performance of duties.

Seeing from the prosecution procedures of duty crimes investigated by the supervisory organs, the contents and methods of case review in the same procuratorial organ may be the same, but there may be differences in the restrictions

on making non prosecution decisions for cases of different natures. Compared with ordinary crimes, the requirements for decision of non-prosecution and its relief in duty crime cases are higher, that is, the procuratorial organ that accepts a case has no right to decide the case, and the supervisory organ seeks relief directly from a higher level about their disagreement on the decision of non-prosecution. Although, the final decision of prosecuting or not and the relief are still reserved by the procuratorial organs, which is consistent with legal principles of the mutual coordination and check between the procuratorial organs and the supervisory organs, showing the legitimacy and rationality, the kind of application of strict approval procedure and improvement of relief level may erode the discretion of procuratorial organ to a certain extent.

First of all, the strict procedure restriction, which is appropriate for the investigation led by procuratorial organs, is not necessary now. During the investigation of duty crimes by the procuratorial organ, the raising of the decision-making power of non-prosecution to a higher level is mainly to deal with the weak supervision among the internal departments of the procuratorial organ, so as to restrict the discretionary power of public prosecution organ by strengthening the supervision of the upper and lower levels, which is the measure for the procuratorial organ to strengthen self-supervision. However, the current cases are investigated by the supervisory organ, which is not comparable with the previous background.

Secondly, prosecutors are reluctant to make decisions of non-prosecution because of the strict procedures. China's procuratorial organs have a slight power over discretion in public prosecution, which is mainly for minor crimes,[15] and the conditional non-prosecution can be applied to juveniles only. Moreover, the decision of non-prosecution needs to be made by the Prosecutor General or the procuratorial committee, and the undertaking prosecutor has no right to make it. Currently, at the background of strong administrative characteristic in China's procuratorial organs, the non-prosecution of a case must be reported to the Prosecutor General or the procuratorial committee for approval, which means that the prosecutor, who has different opinions from the dean of his department, must adhere to his own opinions, prepare additional reporting materials, wait for the approval from the Prosecutor General or the procuratorial committee etc., i.e. it is a risk because the prosecutor's ability of case-handling is directly examined by the leaders. Different from this, the prosecutor insists on prosecution while the case is minor. On the one hand, there is no problem with the decision because it is within the scope of the prosecutor's discretion. On the other hand, even if there is a certain risk of convicting and sentencing, it is obviously easier to communicate with the judges at the same level with whom the prosecutors have a long-term business relationship than the leaders of the court, and it is also possible to have a certain degree of tacit agreement between the prosecutors and the judges who are familiar with each other.[16] There are many reasons for the low rate of acquittal in China among which the cooperation of police, procuratorial organs and courts is also a possible factor.[17]

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[15] See article 177 paragraph 2 of Criminal Procedure Law: Where the circumstances of a crime are minor and no criminal punishment is necessary or the criminal suspect is exempted from criminal punishment in accordance with the Criminal Law, a people's procuratorate may decide not to initiate a public prosecution.

[16] Hu Yunteng, *On the People's Court's Difficulty in Acquitting,* People's Court Daily, June 4, 2014.

[17] Li Yang, *On the Key Factors Affecting China's Acquittal: An Empirical Analysis of 100 Cases of Acquittal,* 4 Tribune of Political Science and Law (2013).

Finally, this strict procedure reduces the legitimacy and efficiency of the review procedure, which may not be in line with the trend of judicial reform. China is carrying out the reform of the power list system of procurators, which insists that procuratorial organs exercise procuratorial power independently according to law, and the emphasis is also on the necessity for procurators to enjoy their power at the meantime, thus decentralizing the power of the Prosecutor General. Some of the judicial powers are entrusted to the procurators, and the relevant decisions are made by the procurators independently according to law.[18] The examination and prosecution of a case is a power of adjudicative nature. The process of exercising this power should be judicialized appropriately, and the long-standing "three-level examination and approval system" should be changed, which means that the procurators who undertake specific cases should directly exercise this power and make relevant decisions.[19] The non-prosecution of duty crime cases is decided by the higher level procuratorial organ. Adding more restrictions on the current "three-level examination and approval system" for non-prosecution strengthens the existing chronic problems of judicial administration, which does not accord with the law of power exercise. Not only that, this exercise means that, besides the "three-level examination and approval system", the non-prosecution still needs to wait for the approval from the procuratorate of a higher level. Although the time for the review is not extended by the law, it obviously leads to the extension of the time for the review decision, and the 10-15 review period required in the case of confession and punishment may be broken. Even if it does not break the time limit stipulated by the existing law, this kind of approval procedure makes the process of decision-making longer than that should be, which results in legitimacy of the procedure being questioned.

(III) Constraints of international criminal judicial cooperation on the application of trial by default

The authority of law comes from its enforcement. As an important procedure of tackling corruption, trial by default should be implemented, and its ruling should be implemented to the greatest extent. Otherwise, it will not only be unable to deal with corruption cases under specific circumstances, but also have a negative impact on the implementation of the whole criminal procedure, and even the determination of anti-corruption in China.

Trial procedure by default in China is a special trial procedure when the defendant escapes to other countries. To some extent, the application of the procedure and the enforcement of relevant rulings depend on international cooperation. However, it is mainly applied in anti-corruption cases with the suspects of corruption and bribery fleeing abroad as the main objects in China, which may be hindered by the difficulties in international criminal justice cooperation.

Firstly, it is very difficult to verify the accurate address of the defendant, which may lead to the difficulty of promoting trial procedure by default. The escape of the defendants of corruption and bribery is to avoid criminal prosecution. It is very

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[18] Li Tianhao, Xu Henan, *On the Three-dimensional Connotation of the Power List of Prosecutors,* 7 People's Procuratorate (2018).

[19] Chen Haifeng, *Grading and Classification in the Formulation of the List of Prosecutors' Powers*, 5 Journal of National Prosecutors College (2018).

common to hide their tracks in other countries by ways like using pseudonym, getting across the border, and running away from countries to countries. It is not easy to find out the tracks of these defendants, which may lead to the failure of delivering service and the promoting of the case.[20]

Secondly, even if the address of the defendant is found out, the service to the defendant is rejected by many countries. For example, in the case of a country where Chinese defendants of duty crimes often flee.[21] According to Article 8 of the Agreement between the Government of the People's Republic of China and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters, "the requested party shall not have the obligation to effect service of a document which requires a person to appear in court as the defendant". There are similar provisions in treaty between China and Australia.[22]

Thirdly, since China takes defendants of "corruption and bribery crime" as the main objects of trial by default, the service may be rejected by other countries for reasons that the suspects are possible "political prisoners" or "persecuted people", or reasons in other forms of refusing judicial cooperation. The United Nations Convention against Corruption states clearly that "the crimes established in the Convention shall not be regarded as political prisoners", based on the premise of "the permission of domestic laws of the contracting states". From the perspective of the judicial cooperation practice abroad in China, the defendants of corruption and bribery are mainly government officials at all levels or state-owned enterprise managers appointed by the government, which have certain political attributes. There are many phenomena that they falsely claim to be persecuted or politically attacked, which leads to more difficulties in cooperation or rejection of their requests.[23]

Fourthly, criminal judicial cooperation is also restricted by the current status of the criminal judicial assistance treaties signed by China. By the beginning of 2019, only 77 countries have signed the treaties on bilateral judicial assistance with China, and not all of them have come into force,[24] which mean that many countries have not cooperated with China, and the relevant judicial cooperation will be carried out on a case by case basis, thus increase the difficulty of cooperation. Among the countries favored by corrupt officials, many countries have no assistance treaty with China, such as the Netherlands.

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[20] See Articles 4 and 21of *International Criminal Judicial Assistance Law of the people's Republic of China.*

[21] Research in China shows that the United States, Canada, Australia and the Netherlands are the main places where corrupt officials with high value and high status flee. See Lu Yao, Wang Min. *The Destination of Fleeing Officials: High-ranking Officials often in Europe and the United States and Low-ranking Officials in Neighboring Countries*. Outlook Oriental Weekly, August 19, 2013.

[22] See Article 9(1) of *International Criminal Judicial Assistance Law of the people's Republic of China.*

[23] The latest example is Sweden's refusal to extradite Qiao Jianjun to China on the grounds of "possible persecution". Early typical cases such as Lai Changxing, Yang Xiuzhu and others extradition. See Mo Ran. *Sweden Refuses to Extradite No.3 Fugitive Suspects on Red Notice, China hope Sweden not to be a Paradise for a Criminal*, Global Times, July 10, 2019; *Lai Changxing is Repatriated*, Ningbo Evening News, July 24, 2011; Tian Yi, Tang Changwei. *Dutch Trial Years of Yang Xiuzhu, a Corrupt Female Official*, 13 Law and Life (2015).

[24] Wang Qian, *China's Ratification of the Treaty between the People's Republic of China and Barbados on Criminal Judicial Assistance.* Available: http://www.xinhuanet.com//politics/2019-04/23/c_1124406789.htm accessed on Oct. 27, 2019.

Fifthly, the cases applicable to trial by default in China include serious penalties, which may not be understood by foreign countries. According to the provisions of the Criminal Law of China, the most serious crime related to corruption and bribery can be sentenced to death, while the ruling at this time is made without the participation of the defendant and only the participation of the defender, which is not in line with the minimum criminal guarantees of "the accused has the appropriate time and convenience to prepare the defense, contact with the lawyer, attend the court and defend himself" stipulated in the International Covenant on Civil and Political Rights. In countries where corrupt officials often flee, trials by default are strictly restricted. For example, the trial by default procedure in the United States is mainly applicable to the situation that there is no need to appear in court and the court refuses to continue to appear in court for various reasons; the trial by default in Canada is also mainly aimed at the summary offenses (the maximum penalty is $2000 or six months' imprisonment), and the defendant is required to appear in court for all the actionable offenses; the default judgment in New Zealand is mainly aimed at the situation that there is no imprisonment, and a serious crime requires at least the presence of the defendant.

Finally, it is still difficult to promote the international cooperation in recognition and enforcement of criminal rulings. Although China's International Criminal Judicial Assistance Law clearly defines the content of "transferring the sentenced person", it mainly regulates the procedure of transferring the sentenced person from China to foreign countries or from foreign countries to China. Since it is only a domestic procedure, some specific transfer issues still need to be negotiated between countries. In the treaties of criminal judicial assistance signed between China and the United States, Canada, New Zealand and Australia, which are the main countries favored by defendants, there are no provisions about the implementation of conviction and sentencing decisions, such as transfer of custody,25 which means that the conviction and sentencing of duty crime defendants may be difficult to be implemented, and the relevant criminal decisions are more symbolic and deterrent. As for the lack of legitimacy of the domestic criminal justice process or being questioned by foreign countries, it is also common for relevant decisions to be refused to assist in the execution, 26 and the execution of the decisions under the trial by default will be more difficult.

IV. The influence and value of duty crime special procedure in China

There are some disputes about the duty crime special procedure in China, which is the firm measure taken for internal complicated corruption crimes situation. And now good effect has been achieved. We should pay more attention to the experience of fighting against corruption crimes, which may also be a reasonable reference for some countries.

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[25] The conventions on criminal judicial assistance signed between China and these countries are related to the handling of the property involved in the case to some degree, which is very helpful for the application of procedures for the escape and concealment of criminal suspects and defendants and the confiscation of illegal income in death cases.

[26] Zhang Xiaohai, *Discussion on the Problems of Criminal Trial by Default in China,* 3 Journal of Beijing Vocational College of Political Science and Law (2019).

(I) The effectiveness of anti-corruption under the specialization of criminal procedures for duty crimes in China[27]

The specialization of criminal procedures for duty crimes in China began with confiscation procedure of illegal income in the Criminal Procedure Law of 2012. Since then the discipline inspection and administrative supervision organs strengthen the cooperation with the procuratorial organs in anti-corruption.[28] In December 2016,The reform of National Supervision System in Beijing, Shanxi province and Zhejiang province is authorized to carry out by Standing Committee of the National People's Congress. The original administrative supervisory organ and the branches for investigating duty crimes in procuratorial organs are integrated to form local supervision organizations which worked with the Discipline Supervision Committee to exercise the power of supervision, investigation and disposal of duty crimes. These experiences and measures in anti-corruption were confirmed in Supervision Law enacted in March 2018, and improved in the revision of the Criminal Procedure Law in October 2018. Generally speaking, though the criminal procedure for duty crimes has not been enforced for a long time, the relevant measures and mechanisms have been applied to handle cases for years.

We can see from some relevant data below that remarkable achievements have been made in anti-corruption in China since 2012.According to the working report of the Supreme People's Procuratorate,[29] procuratorial organs investigated 254419 suspects involved into duty crimes with the cooperation of Discipline Inspection and Supervision organs in the past five years (2013-2017). The number of suspects increased 16.4% compared with the previous five years. Among the national staff involved into duty crimes above, there are 15234 in the position of county level, 2405 in the department and bureau level and 122 in the position of provincial and ministerial level. China has taken special actions to fight against duty crimes and strengthened judicial cooperation with relevant countries and regions since October 2014. 222 fugitive suspects were persuaded to return, repatriated and extradited from 42 countries and regions, of which 35 suspects belong to one hundred fugitive suspects on Red Notice. The process of confiscating illegal income in time has been started in 45 duty crime cases which the suspects escaped or died.[30] Criminal

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[27] China's systematic criminal procedures for duty crimes were formed after the enactment of Supervision Law and the amendment of Criminal Procedure Law in 2018.However the discipline inspection and supervision organs have been strengthening cooperation with the procuratorial organs in anti-corruption since 2012, and most of their experiences and practices were adopted in the supervision system reform in 2016 and Supervision Law and Criminal Procedure Law later on. Considering the comparison with the earlier anti-corruption effect, the anti-corruption effect here includes the effect since 2012 and after 2018.

[28] Before the enactment of Supervision Law and the amendment of Criminal Procedure Law in 2018, China's discipline inspection and supervision organs were responsible for corruption cases generally such as violations of laws and disciplines, and the procuratorial organs were responsible for the handling of corruption crimes; if the former find criminal clues in the process of reviewing cases, they will transfer them to the procuratorial organs for investigation, They have a good cooperation in the fight against corruption crimes.

[29] Cao Jianming, *Work Report of the Supreme People's Procuratorate*, Available: https://www.spp.gov.cn/spp/gzbg/ 201803/t20180325_.shtml, accessed on October 30, 2019.

[30] There are some statistics on corruption cases investigated and dealt with by the discipline inspection organs and administrative supervision organs, which shows that from 2012 to January 2017, 240 cadres appointed by the central government of China have been put on file for review, the number of which is 10 times that of 1978 to 2012. Corruption cases investigated and dealt with in

procedure on duty crimes is officially enforced in China in 2018, when procuratorial organs at all levels accepted 16092 people suspected of duty crimes transferred by supervisory organs, of which 9802 people were prosecuted and 250 people were not prosecuted. The rate of non-prosecution decreased by 9.5 percent year on year.[31]

The achievements above have greatly boosted Chinese people's confidence in anti-corruption. The relevant survey shows that about 90% of the surveyed public is very cognizant of the determination of the state to punish corruption and 60.5% of the leading cadres, 54.6% of the ordinary cadres, 35.6% of the professionals and 37.2% of the enterprise managers believe corruption has been effectively curbed in general.[32] More than 5000 national staff involved into corruption across the country turned themselves in from October 2017 to the beginning of 2019 because of feeling a strong deterrent.[33]

Currently the corruption situation has been alleviated from the definition of it by the Communist Party of China. For example, it is pointed out that the phenomenon of corruption takes on a prone situation and the fight against corruption is still grim and complicated in the 2013-2017 Work Plan for Establishing and Improving the System of Punishing and Preventing Corruption issued by the Central Committee of the Communist Party of China in December 2013. In June and October 2014, Comrade Xi Jinping, general secretary of the Communist Party of China, points out that the spread of corruption has not yet been effectively curbed and a high pressure situation must be maintained to resolutely curb it.[34] However Comrade Xi Jinping mentioned it in his speech in December 2018 that the fight against corruption has achieved an overwhelming victory.[35] Obviously, the Communist Party of China has changed its understanding of the current situation of corruption.

(II) Experience in the construction of criminal procedures in response to duty crimes in China

The success of anti-corruption has not only been recognized at home, but also gained international reputation,[36] which obviously is not brought by the controversies

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China in 2014 were twice of that in 2009, which increased significantly in 2015 and 2016. See Guo Yong. *On the situation of Corruption after the Eighteenth National Congress of the CPC*, 3 Cass Journal of Political Science (2017).

[31] Zhang Jun, *Work Report of the Supreme People's Procuratorate*, Available: https://www.spp.gov.cn/spp/gzbg/201903/t20190319_412293.shtml, accessed on Oct.30, 2019.

Compared with the situation of the previous five years, the number of duty crimes transferred in 2018 has declined significantly, which reflects the effect of anti-corruption. But the supervision authorities still accepted 3.44 million reports, in which 638000 cases were filed for review, and 621000 people were punished for administrative sanctions. See Circular on the supervision, inspection and investigation of national discipline inspection and supervision authorities in 2018 by Central Commission for Discipline Inspection and State Supervision Commission, Available: http://www.ccdi.gov.cn/toutiao/201901/t20190108_186570.html, accessed on Nov. 1, 2019.

[32] Liu Shaohua, *Overwhelming Situation on Anti-corruption has Formed in Three Years after the 18th National Congress of the Communist Party of China*, People's Daily Overseas Edition, January. 15, 2016

[33] Sun Ying, *Report card of the State Supervision Commission*, Beijing Evening News, March 24, 2019.

[34] See Xi, *Jinping's Excerpt on the Construction of a Clean and Honest Administration and Anti-corruption Struggle*, Available: http://www.sdjj.gov.cn/channels/ch01179/, accessed on Nov. 1, 2019.

[35] Wang Jun, *Xi Jinping's speech on the Central Party's Major Judgment on the Current Situation of Anti-corruption*, Available: https://www.thepaper.cn/newsDetail_forward_2749646, accessed on Nov. 1, 2019.

[36] Yan Yu, *China's Anti-corruption Achievements Amaze the World*, People's Daily Overseas Edition, June 12, 2017.

of criminal procedure of duty crimes, but by the positive factors, especially the positive role it has played in the severe situation of corruption in China.

1. Strengthening the centralization and unification exercise of anti-corruption power and reducing the constraints on the exercise of power

The particularity of duty crime determines that anti-corruption organs need to have greater power, confidentiality or non-publicity in the process of power exercise, and reduce the involvement of the outside world. There are two main ways in China:

On the one hand, a unified anti-corruption agency has been established. Before the enactment of the Supervision Law of March 2018, state organs with anti-corruption functions included procuratorial organs, administrative supervisory organs and corruption prevention departments. In addition, the Communist Party of China, as the ruling party, has a discipline supervision agency within the party, Commission for Inspecting Discipline, which works jointly with the administrative supervisory organization. The procuratorial organ is responsible for the investigation and prevention of duty crimes, the administrative supervisory organ is responsible for the investigation and punishment of illegal acts of governmental officials, and the corruption prevention department is mainly responsible for the prevention of corruption within the government. These organs or agencies share the responsibilities of anti-corruption, which results in the decentralization of power and the limit of cooperation Theoretically, there is a close relationship among violation of discipline, violation of law and crime, but now the three state organs and one inner-party agency share the responsibilities respectively, resulting in the overlapping of functions and poor convergence. In response to these problems, the relevant functions and departments of the three state organs in China has been integrated, and a supervisory committee, as a special anti-corruption agency, has been set up, cooperating with the discipline supervision agency within the party. In this way, one organ can deal with three kinds of behaviors at the same time, avoiding the possible delay of procedure handover, reducing the duplication of work, and improving the efficiency of anti-corruption.

On the other hand, the power supervision is realized through the supervision between the upper and lower levels. As the sole organ responsible for the function of state supervision, the power of the supervisory organ may be abused, so the supervision of the supervisory power is also an essential part of the power structure. However, the supervision of the procuratorial organ may not be appropriate, because only the criminal behavior has been the object of the supervision of the procuratorial organ while it is the supervisory organ that is responsible for any illegal, disciplinary or criminal act. In the case that the supervisory organ does not distinguish three kinds of acts, the intervention of procuratorial organ in supervision goes beyond the provisions of the Constitution and the law, and may also cause the leakage of the illegal and disciplinary information provided by the investigated person, leaving unnecessary hidden troubles for the investigation of other illegal and disciplinary acts. The supervision between the upper and lower levels can not only prevent the investigated from interfering in the cases handling, but also the possible abusing power of the supervisory organ. For example, currently, the detention shall be decided by the leading group of the supervisory committee, submitted to the supervisory committee at a higher level for approval or filing; and the proposal of lenient punishment shall be approved by the supervisory organ at a higher level.

2. Weakening the procedural protection of the investigated and reducing the possible external restrictions on power exercise

The investigated of duty crime are not only the object of the crime, but also the subject of the procedure, whose corresponding rights should be protected. However, this may result in the restriction or even interference of rights to power. If there is no restriction on personal freedom, the investigated may destroy the evidence, run away etc.; the lawyer's intervention may instigate the investigated to refuse to answer any questions, or even collude in confession etc.

Measures to prevent violations and abuses of the rights of the investigated are taken in China. The first measure is to restrict personal freedom of the investigated, that is to say, as long as the investigation still needs to be continued when there is certain evidence to prove the fact of the crime, the investigated will be retained without external approval no matter whether there is any interference with the investigation. The second one is that lawyers are not allowed to defend, and the investigated is not given corresponding and equal rights against the above restrictions. In this way, the investigated, who have no procedural right to confront directly with the investigation organ, or get help from the outside world, will be in a relatively closed and isolated place, only having the basic rights stipulated by the substantial law (such as food, rest, safety, medical services). Thus, the supervisory organ has a large space to exercise its power under the premise of guaranteeing the basic rights of the investigated.

3. Expanding the cooperation of criminal justice to providing the help for anti-corruption

International criminal judicial assistance is an important part of China's anti-corruption, especially when the criminals of corruption and bribery flee to the countries and regions abroad. So far, there are only more than 70 countries that have signed criminal judicial assistance treaties with China, but China is still committed to expanding cooperation with countries and regions in anti-corruption through various ways.

In December 2018, after the establishment of the State Supervisory Committee of China, the Memorandum of Understanding between the National Supervisory Committee of the People's Republic of China and the Federal Police of Australia on Anti-Corruption Law Enforcement Cooperation was signed successfully with western countries for the first time, which reflects not only the recognition and respect of the Australian for the work of China's new anti-corruption institutions, but also the active cooperation between the supervisory organ of China with overseas countries. In October 2019, the State Supervisory Committee of China and the United Nations (UNODC) signed, for the first time, a document of the mechanism of anti-corruption, namely, the Memorandum of Understanding between the State Supervisory Committee of the People's Republic of China and the United Nations on Anti-Corruption Cooperation, starting the practical cooperation on preventing and punishing corruption, asset recovery, information sharing and exchanging, training and capacity building.

In the short term, it is still difficult for China to sign criminal judicial assistance treaties with more countries and regions, or expand judicial cooperation. However, in addition to the signing of criminal judicial assistance treaties, corruption crimes can be fought by means of diplomacy, persuasion or domestic procedure of the requested state. Even if the trial by default cannot be initiated or the criminal decisions cannot be implemented with the cooperation of foreign countries, such anti-corruption determination and efforts can, to a certain extent, deter criminals for corruption.

IV. Summary

The criminal procedure of duty crimes in China has formed an independent system, and has achieved good results in fighting against corruption. Of course, this does not mean that the current program does not have problems or need to be improved. The criminal procedure of duty crimes in China is an emergency measure taken under the severe situation of corruption in China, which has the characteristics of certain stage. It is based on the consideration of anti-corruption strategy, and is the realistic demand for China to achieve the two centenary goals. In the long run, when the situation of corruption in China has been alleviated to a large extent, the criminal procedure of duty crimes needs to be improved to a certain extent accordingly, such as allowing lawyers to intervene in the later stage of the investigation when the internal organs of the supervisory organ put crimes and violations of laws and disciplines on file for examination; providing relief after the event even if there is no prior approval when deprivation of personal freedom is of a long time. At present, the problems faced by the criminal procedure of duty crimes in China should not be ignored. More importantly, this kind of procedure should not be ignored for the healthy and orderly development of Chinese society and for the reference of other similar countries.

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On the Necessity of Recognizing Artificial Intelligence as Subject to Criminal Law – The Case of Autonomous Vehicles

Dr. Laura Stănilă*

Abstract

Artificial Intelligence (AI) is a fashioned topic nowadays, it's multiple approaches in the field of law in general and in the field of criminal law in particular, becoming the new search for the Sorcerer's Stone for the scholars. The criminal doctrine of AI has already been split into two directions: the pro-recognizing legal personality for AI with the consequence of imposing criminal liability of AI, and the non-recognizing legal personality direction which aims to demonstrate the prematurity of the discussion of this subject due to the lack of theoretical schemes and insufficient knowledge on the evolution of the AI itself.

The analysis of the legal doctrine in this field has revealed the fact that the majority of the scholars had approached the issue from the perspective of the possibility of imposing criminal liability of the AI. But, in fact, the first logical step in a scientific approach is to determine the necessity of discussing the issue. In other words, we must answer to the question if we need a legal institution of criminal liability of AI in the first place, and only after we find the right answer, we may be preoccupied on how are we going to impose criminal liability for AI. The study aims to approach the question of AI criminal liability from the perspective of autonomous vehicles, which tend to increase on the public roads and to rise a lot of questions form de legal framework perspective.

In the article the author tries to find logical, ethical and social arguments addressing the issue of necessity of imposing criminal liability for AI in the case of autonomous vehicles, from the perspective of the level of AV technology development.

Keywords*: Artificial Intelligence (AI), legal personality, criminal liability, anthropomorphic model, social risk, autonomous vehicles*

Abbreviations

AI – Artificial Intelligence
RCC – Romanian Criminal Code adopted by Law nr. 286/2009[1]
Art. – article
Autonomous vehicles – AV

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[1] Published in the Official Monitor no. 510/24 July 2009.

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Summary

I. Addressing the issue of AI in the legal criminal field
II. AI as subject for criminal law. Between necessity and possibility
III. The unmanned vehicle issue: whom to blame for the collisions occurred?
IV. Talking about the AI AV legal regulation necessity. Standards, expectations and conclusions

I. Addressing the issue of AI in the legal criminal field

When we say „Artificial Intelligence" (AI), we usually think of SF movies and latest discoveries of the technology. But it is a fact that lately, AI has begun the favorite topic of the scholars in the legal sciences field, too.

The issue of AI and the criminal legal field may be addressed from three different points of view: AI as a tool for criminal justice, AI as means for committing crimes and offenses and AI as perpetrator, or in other words, AI as subject of criminal law.

a) AI as a tool for criminal justice

In the field of criminal justice AI has gained increasing importance becoming an important means for assessing criminal risk in areas such as parole, probation or preventive measures, USA, Canada and even European countries like UK and France using it in the criminal trial in its different stages.[3]

b) AI as means for committing crimes and offenses

AI has also become the only or the main tool for committing specific crimes and offenses (for a whole group of *mala prohibita* offenses) such as Computer fraud (art. 249 RCC), Making fraudulent financial operations (art. 250 RCC), Illegal access to a computer system (art. 360 RCC), Illegal interception of computer data transmissions (art. 361 RCC), Altering computer data integrity (art. 362 RCC), Disruption of the operation of computer systems (art. 363 RCC), Unauthorized transfer of computer data (art. 364 RCC) or Illegal operations with devices or software (art. 365 RCC)[4].

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[3] On the algorithmic risk assessment tools see Laura Stănilă, *Artificial Intelligence and Human Rights. Evolution or involution?* in Conference proceedings: Towards a Beter Future: Democracy, EU Integration and Criminal Justice, Vol. I, Bitola 2019, p. 211-222; Laura Stănilă, *Artificial intelligence and Human Rights. A challenging Approach,* Journal of Eastern European Criminal Law, Issue 2/2018, p. 19-30.

[4] Art. 249 RCC - Computer fraud: *„Entering, altering or deleting computer data, restricting access to such data or hindering in any way the operation of a computer system in order to obtain a benefit for oneself or another, if it has caused damage to a person, shall be punishable by no less than 2 and no more than 7 years of imprisonment."*

Art. 250 RCC - Making fraudulent financial operations: *„(1) Making cash withdrawal operations, loading or unloading of an electronic money instrument or a fund transfer instrument, by using, without the consent of the owner, an electronic payment instrument or the identification information that allow its use, shall be punishable by no less than 2 and no more than 7 years of imprisonment. (2) The same penalty is applicable to the operations referred to in par. (1), performed by means of the unauthorized use of any identification information or by using fictitious identification data. (3) The unauthorized transmission to another person of any identification information, in order to perform one of the operations referred to in par. (1), shall be punishable by no less than 1 and no more than 5 years of imprisonment."*

c) AI as subject of criminal law

If AI is generally accepted as a tool of increasing importance in the field of criminal justice, and also as means of committing specific crimes and offenses, unfortunately there is a general opposition to AI as subject of law in general and criminal law in particular. The causes of this opposition are:

1. Insufficient development of AI towards self-conscious machines – it would be almost impossible to impose criminal liability due to lack of conscience.

2. Insufficient knowledge and understanding on how exactly AI works – transdisciplinary research approaches (juridical and technical) are inexistent.

3. Traditional models for imposing criminal liability have a long existence and strong jurisprudence.

4. Insufficient preoccupation for assessing societal impact of AI – a certain preoccupation in this area would lead to the conclusion that there is a certain societal risk in creating and operating AI.

A common-sense view on the contemporary society would provide us with the following truths:

- everyday life is dramatically influenced by AI;
- there is constant demand for better and faster decisions and for objectivity;
- we must be aware that if we overuse AI, there will be a weakening in our capacity of questioning;

Art. 360 RCC - Illegal access to a computer system: *„(1) Unlawful access to a computer system shall be punishable by no less than 3 months and no more than 3 years of imprisonment or by a fine. (2) The act set out in par. (1), committed in order to obtain computer data, shall be punishable by no less than 6 months and no more than 5 years of imprisonment. (3) If the act set out in par. (1) was committed on a computer system to which, through processes, devices or specialized programs, access is restricted or prohibited for certain categories of users, it shall be punishable by no less than 2 and no more than 7 years of imprisonment."*

Art. 361 RCC - Illegal interception of computer data transmissions: *„(1) The unlawful interception of a computer data transmission which is not public and which is intended for a computer system, originates from such a computer system or is carried out within a computer system shall be punishable by no less than 1 and no more than 5 years of imprisonment.(2) The same penalty shall apply to the unlawful interception of electromagnetic emissions from a computer system that contains computer data which is not public information."*

Art. 362 RCC - Altering computer data integrity: *„Unlawful altering, deleting or corrupting of computer data or restricting access to such data shall be punishable by no less than 1 and no more than 5 years of imprisonment."*

Art. 363 RCC - Disruption of the operation of computer systems: *„The act of unlawfully seriously disrupting the operation of a computer system by inputting, transmitting, modifying, deleting or corrupting data or by restricting access to data, shall be punishable by no less than 2 and no more than 7 years of imprisonment."*

Art. 364 RCC - Unauthorized transfer of computer data: *„The unauthorized transfer of computer data from a computer system or from a data storage device shall be punishable by no less than 1 and no more than 5 years of imprisonment."*

Art. 365 RCC - Illegal operations with devices or software: *„(1) Whoever unlawfully produces, imports, distributes, or makes available in any form: a) devices or software designed or adapted for the purpose of perpetrating any of the offenses referred to in art. 360 - 364; b) passwords, access codes or other such computer data allowing full or partial access to a computer system for the purpose of perpetrating any of the offenses referred to in Art. 360-364, shall be punishable by no less than 6 months and no more than 3 years of imprisonment or by a fine. (2) Unlawfully owning a device, a piece of software, a password, access code or other data as mentioned in par. (1) with the purpose of perpetrating any of the offenses referred to in Art. 360-364, shall be punishable by no less than 3 months and no more than 2 years of imprisonment or by a fine."*

- on the long term, using AI will determine the changing of our way of working and approaching different tasks;
- the only responsible actors for constructing, monitoring or misusing AI are us, humans.

It is obvious that we need to adapt our lives and our legal frameworks in order to keep up with the technology, we need to find the best legal solutions in order to proper respond to any harms or perils of the social values that may occur in our coexistence with AI.

II. AI as subject for criminal law. Between necessity and possibility

The issue of recognizing AI as subject to criminal law in particular arose with the increasing number of traffic incidents involving AV. And because AI is the core of technological systems which AV operate, the link between criminal liability and AI became obvious. „Machine-learning is what powers autonomous vehicle systems, and they must be trained on lots of real-world data to be able to operate in real-world environments. They need to be able to recognize all the features of the road environment including roads, curbs, traffic control signals, signs, as well as all the potential hazards they can encounter including other vehicles, pedestrians, and other potential obstructions. Not only do they need to be able to recognize the world around them, but they need to act on that recognition"[5]. Regarding all these, public opinion stated that there is a „technology immaturity" and, due to this immaturity, legal amendments and interventions are to be carefully analyzed[6].

However, the sine qua non condition for an entity to become subject of law is to be provided with legal personhood. As the contemporary legal framework does not allow legal personhood for AI, even if we are talking about advanced systems – neuronal networks which are capable of learning from their own experiences and develop new „conducts" – the current discussion is superfluous. However, there is a certain effervescence in the doctrine wondering „What if?". The scholars have been preoccupied in analyzing advantages and disadvantages of AI personhood[7]. Legal personhood of AI would benefit because it would allow to pool resources and centralize risks, it would allow artificial agents to be held liable for harms without the need to identify a responsible individual, thus avoiding a lengthy expensive and arduous process of identifying specific individuals. Also, it was stated that if, in the future, a general AI system will be developed indistinguishable from a person, by what argument would we deny that system the same rights as a human?

On the contrary, there are voices[8] that state we should act carefully in this field. The European Parliament suggests creating a collective insurance fund to cover

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[5] Ron Schmelzer, *What Happens When Self-Driving Cars Kill People?*, Forbes, 26 September 2019, https://www.forbes.com/sites/cognitiveworld/2019/09/26/what-happens-with-self-driving-cars-kill-people/, accessed on 10.01.2020.

[6] Ibidem.

[7] Zevenbergen B., Kortz M., Schaich Borg J., Finlayson M.A., Pagallo U., Zapušek T., *Appropriateness and Feasibility of Legal Personhood for AI Systems*, in Bringsjord S., Tokhi M.O., Aldinas Ferreira M.I., Govindarajulu N.S. (eds.): *Hybrid Worlds: Societal and Ethical Challenges*, ICRES 2018 Proceedings, New York, USA 20-21 August 2018, CLAWAR Association Ltd, UK, pp. 62-63.

[8] Ibidem.

damages arising from AI systems. This is a short-term solution meant to satisfy victims and cover damages produced by accidents involving AV. But does not solve neither the issue of legal personhood nor the question of recognizing AI as subject of law. It is only an „in-between" tool meant to calm down spirits. However, as the technological trajectory of the AI is uncertain and unpredictable, it would be unwise to construct a financial compensation resources today to meet as yet unknown future needs. Also, recognizing AI personhood would allow producers and owners of AI systems to shift liability to the artifact itself. This will disincentivize investment in adequate testing before deployment. AI personhood could thus result in an unsafe environment. Another true fact is that it will be difficult to bring proceedings against AI or hold it to account. An AI system has not yet the capacity to argue its case in court, appoint a lawyer to defend it or engage to reach a settlement with a plaintiff. Since AI does not have the capacity to suffer, nor have empathy, it is unclear how it would understand the suffering of others.

Even if we admit AI legal personhood, the question of how should we impose criminal liability to it still remains. Contemporary framework provides two models of criminal liability that were used and adapted in other tricky cases like imposing criminal liability to legal person: anthropomorphic model and constructivist model[9].

a) according with the anthropomorphic model blameworthiness is measured by using the standards traditionally applied to individual culpability[10], but the identification theory and the collective intent theory – specific to this model do not apply to AI systems in case these systems achieve a level of autonomy or self-determination (very probable in the future). Maybe an imitative anthropomorphic model is to be considered in case of AI by identifying the necessary elements of liability present in case of humans mens rea, actus reus. This could be very difficult because the human conscience could not be yet replied by AI.

b) the constructivist model determines culpability based on the characteristics of the collective entity, on its policies, and its practices.[11] According to the constructivist model the legal person has a life of his own, a will of his own, from which results also the unrestricted possibility in attributing specific mental states to the crimes. Constructivism allows labelling of an entity by assigning certain characteristics in accordance with the purpose pursued by the legislator. These characteristics become legally relevant. The constructivist model allows the identification of an AI system as a distinct actor in the social relations and a imposition of criminal liability even in the absence of a human conscience, its place being taken over by other elements to which this role or relevance is assigned. But these elements are difficult to identify since there are no moral anchors in the synapses of machine learning matrices.

c) the strict liability solution. Both previous models apply in case of a subjective criminal liability which is based on the culpability element and could be adapted to AI systems but need important amendments. AI systems do not have conscience (yet), cannot judge the consequences of their actions in moral terms (yet?) and sometimes

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[9] The models of imposing criminal liability were also presented by the author in the study *Living in the Future: New Actors in the Field of Criminal Law – Artificial Intelligence*, presented at the University of Latvia, Faculty of Law with the occasion of the 7th International Scientific Conference "Legal science: Functions, significance and future in legal systems" – Riga, 18-19 October 2019.

[10] C. De Maglie, *Models of Corporate Criminal Liability in Comparative Law*, Washington University Global Studies Law Review, Volume 4, Issue 3, 2005, p. 556.

[11] De Maglie C, 2005, p. 556.

do not commit acts in traditional sense of the term. The culpability element (mens rea) is difficult to identify since they have no conscience. Relevant for their sanctioning are the consequences caused by their behavior. Thus, in the case of AI systems, the strict liability theory is probably the best choice. Strict liability implies an individual or company sanctioned for their deeds, conducts and outcomes that result in damages to others, not as a consequence of a foreplaned action or careless deed. Strict liability implies a retributive blame, which distinguishes wrongdoing (essentially, the ultimate harm) from culpability (essentially, the actor's mental state)[12]. And even if the imposition of severe criminal sanctions in the absence of any requisite mental element has been held by many to be incompatible with the basic requirements of law and „civilized jurisprudence"[13], in the case of AI agents, we can hazard to anticipate that the opposition of the doctrine will be from weak to absent. It would be almost natural to accept a strict liability in case of an agent lacking in conscience, based solely on the harmful results of its acts.

III. The unmanned vehicle issue: whom to blame for the collisions occurred?

Since the beginning of the XXth century[14], there has been an increased preoccupation on the safety of circulation and transport on the public roads. Criminal law became one of the main tools as driving on the public roads was qualified as an activity involving social risk. If a person drives in an unsafe manner, or if that person evades the scheme of regulation and compensation, criminal liability may be imposed.

But, as Du Savoy wondered, „What will happen, then, when drivers are taken out of the picture? As the technology advances, who should be responsible if a driverless car speed? Or drives in a way that, had it been the result of a human driver, would be considered careless or dangerous? Or if a driverless car kill someone?"[15]. Since the reality is running faster than the legislation, several road traffic incidents made us ask ourselves these questions, in a context in which autonomous vehicles (AV) technology is developing at a scary velocity.

Our discussion would seem a little out of place, but, as a woman in Arizona, United States, died on March 18, 2018, after being hit by a Uber-free car in the first incident of its kind, being the first time a car without a driver hits a pedestrian on public roads, we must admit that the reality doesn't wait for our legislators to keep up. The Uber vehicle was autonomous, but had a driver on board in case of "emergency". The woman struck off the wrong way, according to the Tempe police, the city where the incident occurred. Spokesperson Uber said the company was cooperating fully

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[12] Simons K.W., *When is Strict Criminal Liability Just*. Journal of Criminal Law and Criminology, Vol. 87 Issue 4, 1997, p. 1095.

[13] Wasserstrom R.A., *Strict Liability in the Criminal Law*. Stanford Law Review Vol. 12, No. 4, 1960, p. 731.

[14] On the evolving of road transport regulations see Hayargreeva Rao, Jitendra Singh, *The Construction of New Paths: Institution-Building Activity in the Early Automobile and Biotech Industries*, in Ragu Garud, Peter Karnøe (eds.): *Path Dependence and Creation*, Psychology Press 2012, p. 253.

[15] Alex Du Savoy, *Are we there yet? Criminal liability in the era of driverless cars*, Lexology, January 31 2019, https://www.lexology.com/library/detail.aspx?g=987ce516-7217-450a-895f-8174cd1617bb, accessed on 10.01.2020.

with local authorities. Uber announced suspending Autonomous Machine Tests in Tempe, Pittsburgh, San Francisco and Toronto.[16] In less than a week, a Tesla SUV with driverless technology on autopilot mode crashed into a road divider in Mountain View, California, killing its driver, Apple engineer Walter Huang.[17]

Are the regulating preoccupations serious enough worldwide? Our research conducted to a satisfactory result, as follows.

In 2010, the European Commission launched the Digital Agenda for Europe, a flagship initiative within Europe 2020, a 10-year strategy for the advancement of the EU economy[18]. The Digital Agenda for Europe is one of the seven flagship initiatives of the Europe 2020 Strategy, set out to define the key enabling role that the use of Information and Communication Technologies (ICT) will have to play if Europe wants to succeed in its ambitions for 2020. The objective of this Agenda is to chart a course to maximize the social and economic potential of ICT, most notably the internet, a vital medium of economic and societal activity: for doing business, working, playing, communicating and expressing ourselves freely. Successful delivery of this Agenda will spur innovation, economic growth and improvements in daily life for both citizens and businesses. Wider deployment and more effective use of digital technologies will thus enable Europe to address its key challenges and will provide Europeans with a better quality of life through, for example, better health care, safer and more efficient transport solutions, cleaner environment, new media opportunities and easier access to public services and cultural content[19].

According with the European Commission, digital technologies make transport and mobility smarter, safer and greener. „Human error is involved in 95% of all traffic accidents on Europe's roads, in which more than 27 000 people are killed and 1.2 million injured every year. Road transport also burns one quarter of the European Union's overall energy consumption, with one fifth of the EU's CO_2 emissions caused by road vehicles. iMobility "smart" technologies, based on the powers of computers and telecoms, can make a major difference to these figures."[20]

In this wider context, it is obvious that the interest and use of AV will increase, making the analysis and proper regulation of AV dramatically necessary.

According to SAE – Society of Automotive Engineers – AV may be categorized into six types, depending on their level of autonomy in supporting and assisting the driving tasks as results in the figure below[21]:

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[16] http://www.zf.ro/auto/primul-accident-mortal-produs-cu-o-masina-fara-sofer-o-femeie-care-traversa-neregulamentar-a-murit-dupa-ce-a-fost-lovita-de-un-vehicul-autonom-uber-17070679 accessed 29.05.2018.

[17] See Dan Noye, *I-TEAM EXCLUSIVE: Victim who died in Tesla crash had complained about Autopilot*, ABC 7 News, March 29, 2018, https://abc7news.com/automotive/i-team-exclusive-victim-who-died-in-tesla-crash-had-complained-about-autopilot/3275600/ accessed on 10.01.2020; also see Tesla Team, *What We Know About Last Week's Accident,* March 27, 2018, https://www.tesla.com/blog/what-we-know-about-last-weeks-accident, accessed on 10.01.2020.

[18] http://ec.europa.eu/europe2020/index_en.htm, accessed on 10.01.2020.

[19] European Commission, Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions, *A Digital Agenda for Europe*, p. 3, https://ec.europa.eu/eurostat/cros/system/files/09_Digital%20Agenda.pdf, accessed on 10.01.2020.

[20] http://ec.europa.eu/digital-agenda/en/about-mobility, accessed on 10.01.2020.

[21] SAE – Society of Automotive Engineers. On-Road Automated Vehicle Standards Committee, 2014. Taxonomy and definitions for terms related to on-road motor vehicle automated driving systems, https://www.sae.org/search/?qt=levels+of+autonomy, accessed on 10.01.2020.

SAE level	Name	Narrative Definition	Execution of Steering and Acceleration/ Deceleration	*Monitoring* of Driving Environment	Fallback Performance of *Dynamic Driving Task*	System Capability *(Driving Modes)*
***Human driver* monitors the driving environment**						
0	No Automation	the full-time performance by the *human driver* of all aspects of the *dynamic driving task*, even when enhanced by warning or intervention systems	Human driver	Human driver	Human driver	n/a
1	Driver Assistance	the *driving mode*-specific execution by a driver assistance system of either steering or acceleration/deceleration using information about the driving environment and with the expectation that the *human driver* perform all remaining aspects of the *dynamic driving task*	Human driver and system	Human driver	Human driver	Some driving modes
2	Partial Automation	the *driving mode*-specific execution by one or more driver assistance systems of both steering and acceleration/ deceleration using information about the driving environment and with the expectation that the *human driver* perform all remaining aspects of the *dynamic driving task*	**System**	Human driver	Human driver	Some driving modes
***Automated driving system* ("system") monitors the driving environment**						
3	Conditional Automation	the *driving mode*-specific performance by an *automated driving system* of all aspects of the dynamic driving task with the expectation that the *human driver* will respond appropriately to a *request to intervene*	System	**System**	Human driver	Some driving modes
4	High Automation	the *driving mode*-specific performance by an automated driving system of all aspects of the *dynamic driving task*, even if a *human driver* does not respond appropriately to a *request to intervene*	System	System	**System**	Some driving modes
5	Full Automation	the full-time performance by an *automated driving system* of all aspects of the *dynamic driving task* under all roadway and environmental conditions that can be managed by a *human driver*	System	System	System	**All driving modes**

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However, it is a fact that, at this point, due to the momentary nature of the actions of active safety systems, their intervention does not change or eliminate the role of the driver in performing part or all of the dynamic driving task, and thus are not considered to be driving automation.[22]

As resumed in the doctrine, „an autonomous vehicle is any vehicle that adopts a technology capable of *supporting and assisting a human driver* in the tasks of:

1) controlling a vehicle (and its main functions of steering and controlling its speed); and

2) monitoring the surrounding environment (e.g., other vehicles/pedestrians, traffic signals, road markings etc.). The two functions are clearly interconnected and depend on each other, given that the execution of particular control functions (e.g., accelerating or decelerating) will depend on inputs and signals received from the surrounding environment (e.g., a traffic light turning red)."[23]

Domestic legislations are not to be amended yet, still there are few states which are few steps ahead, as they were preoccupied in regulating AV at different levels. For example, four US states have enacted legislation that defines autonomous vehicles[24].

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[22] SAE – Society of Automotive Engineers, Taxonomy and Definitions for Terms Related to Driving Automation Systems for On-Road Motor Vehicles J3016_201806, 2018, https://www.sae.org/standards/content/j3016_201806/, accessed on 10.01.2020.

[23] F.M. Favarò, N. Nader, S.O. Eurich, M. Tripp, N. Varadaraju, *Examining accident reports involving autonomous vehicles in California*. PLoS ONE. 2017; 12:e0184952. doi: 10.1371/journal.pone.0184952, accessed on 15.01.2020.

[24] The definitions were retrieved from Erica Palmerini, Federico Azzarri, Fiorella Battaglia, Andrea Bertolini, Antonio Carnevale, Jacopo Carpaneto, Filippo Cavallo, Angela Di Carlo, Marco

The State of Nevada regulates AV to exclude a vehicle enabled with a safety system or driver assistance system, including, without limitation, a system to provide electronic blind spot assistance, crash avoidance, emergency braking, parking assistance, adaptive cruise control, lane keep assistance, lane departure warnings and traffic jam and queuing assistance, unless the vehicle is also enabled with artificial intelligence and technology that allows the vehicle to carry out all the mechanical operations of driving without the active control or continuous monitoring of a natural person. In California, an autonomous vehicle is defined as any vehicle equipped with technology that has the capability of operating or driving the vehicle without the active physical control or monitoring of a natural person, whether or not the technology is engaged, excluding vehicles equipped with one or more systems that enhance safety or provide driver assistance but are not capable of driving or operating the vehicle without the active physical control or monitoring of a natural person, while in Michigan, it is a motor vehicle on which automated technology has been installed, either by a manufacturer of automated technology or an up fitter that enables the motor vehicle to be operated without any control or monitoring by a human operator. Automated motor vehicle does not include a motor vehicle enabled with 1 or more active safety systems or operator assistance systems, including, but not limited to, a system to provide electronic blind spot assistance, crash avoidance, emergency braking, parking assistance, adaptive cruise control, lane-keeping assistance, lane departure warning, or traffic jam and queuing assistance, unless 1 or more of these technologies alone or in combination with other systems enable the vehicle on which the technology is installed to operate without any control or monitoring by an operator. Finally, Florida legislation defines AV as any vehicle equipped with autonomous technology. The term "autonomous technology" means technology installed on a motor vehicle that has the capability to drive the vehicle on which the technology is installed without the active control or monitoring by a human operator. The term excludes a motor vehicle enabled with active safety systems or driver assistance systems, including, without limitation, a system to provide electronic blind spot assistance, crash avoidance.

The recently updated UK Code of Practice for Automated Vehicle Trialing provides important definitions on specific terms and also defines the automated driving system (ADS) as a vehicle system that uses both hardware and software to perform all of the dynamic driving tasks needed to undertake a journey. When activated, the vehicle enters automated mode ("self- driving mode"), and the driver does not need to monitor the road traffic environment, or the ADS. The ADS may work within specific driving situations (sometimes referred to as an operational design domain), or in any driving situation. Outside of these situations, a driver is needed to control the vehicle.[25]

Cempini, Marco Controzzi, Bert-Jaap Koops, Federica Lucivero, Nikil Mukerji, Luca Nocco, Alberto Pirni, Huma Shah, Pericle Salvini, Maurice Schellekens, and Kevin Warwick, *RoboLaw. Regulating Emerging Robotic Technologies in Europe: Robotics facing Law and Ethics,* Collaborative project (CP), FP7-SiS-Challenge 1-3: Regulating emerging scientific and technological developments, D6.2 Guidelines on Regulating Robotics, 2014, p. 68, www.robolaw.eu, accessed on 10.01.2020.

[25] The Department for Transport and the Centre for Connected and Autonomous Vehicles, *Code of Practice: Automated vehicle trialing,* February 2019, p. 25, https://assets.publishing.service.

Also, in its *Future of Mobility: Urban Strategy*[26], the UK Government stated that its approach to innovation in urban mobility will be underpinned by nine principles, stating that the new modes of transport must be safe and secure by design:

1. The benefits of innovation must be available to everyone.
2. Walking and cycling must remain the best options for short urban journeys.
3. Mass transit must remain fundamental to an efficient transport system.
4. New mobility services must lead the transition to zero emissions.
5. Mobility innovation must help to reduce congestion, for example through sharing rides, increasing occupancy or consolidating freight.
6. The marketplace for mobility must be open to stimulate innovation and give the best deal to consumers.
7. New mobility services must be part of an integrated transport system combining public, private and multiple modes of transport.
8. Data from new mobility services must be shared where appropriate to improve choice and the operation of the transport system.
9. In other words, innovative services should be safe, accessible and lead the transition to zero emissions. They should also feed into an integrated transport system which uses mass transit and increased occupancy to reduce congestion. They should do this in a way which encourages active travel, such as walking and cycling.

The same document provides also important definitions for specific terms:

- *Assisted driving:* When individual automation features such as adaptive cruise control or lane changing features assist the driver.

- *Automated driving system:* A vehicle system that uses both hardware and software to exercise dynamic control of a vehicle on a sustained basis. Sometimes abbreviated to ADS.[27]

- *User-in-charge:* a human who is in position to operate the controls of a highly automated vehicle. The user-in-charge would not be a driver while the automated driving system is correctly engaged but must be qualified and fit to drive. Their main role is to take over in planned circumstances after the vehicle has come to a safe stop. They would also have obligations to maintain and insure the vehicle and report accidents. A highly automated vehicle would require a user-in-charge unless it is authorized to operate without one. The user-in-charge must be in the vehicle (or in line of sight of the vehicle) and can be distinguished from a remote supervisor (discussed above).

In terms of civil liability for injury or damage caused by AV there is a general agreement that the insurer is directly liable to compensate the victim. The insurer may then reclaim these damages from any other party liable for the accident, in other words the civil liability regime is generally "good enough for now"[28], although the increase of case-law in this field would reclaim for a specific set of rules.

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gov.uk/government/uploads/system/uploads/attachment_data/file/776511/code-of-practice-automated-vehicle-trialling.pdf, accessed on 15.01.2020.

[26] Scottish Law Commission, *Automated Vehicles: Consultation Paper 2 on Passenger Services and Public Transport. A joint consultation paper,* 16 October 2019, pp. 16-17, https://www.scotlawcom.gov.uk/publications, accessed on 10.01.2020.

[27] Idem, p. xi.

[28] Idem, p. 2

In terms of criminal liability, things are different. Traditional contemporary legal models are challenged by the AV. The doctrine has revealed that, in order to find the best solution to impose criminal liability related to AV, one must answer to the following questions: *"What crimes may be committed in context of autonomous vehicles? Who should be held responsible in case when using an AV a crime is committed (the owner of the vehicle; the person who is sitting in the driver's seat – if there is any kind of it; the vehicle manufacturer; the mechanic who mounted the autonomous technology to the vehicle or another entity)? The incidents may happen under various circumstances. Will the responsible subject change depending on these circumstances and if so, how? What are basic model scenarios of incidents related to the use of autonomous vehicles? How should the law react, if the criminally responsible subject is a legal entity? As for the criminal responsibility for harm caused by an AV, according to most European states' criminal codes, the driver (or vehicle owner) may be charged with negligence even if the AV was in control (in autonomous mode). If no negligence is proved, the criminally responsible entity is the manufacturer. Since in most cases, a vehicle manufacturer is a legal entity, it is highly important to consider the issue of corporate criminal responsibility. The European Union countries do not have an identical legislation in this area. Some countries' criminal codes (including the Slovak republic as well) are built on the idea of personal guilt. These codes would definitely need an amendment. Hence, any research questions focusing on corporate criminal responsibility are on high importance."*[29]

Du Sautoy oppinates that *„the assignment of fault between the company that designed the system, the registered keeper of the car and the user-in-charge raises three issues of which legislators and practitioners will need to be mindful"*[30], but also expresses concerns that developers may think twice about investing in this technology if their liability and legal expenses are going to be extortionate[31].

IV. Talking about the AI AV legal regulation necessity. Standards, expectations and conclusions

Even there is an important social opposition in regulating AI AV, important steps were made in regulating AV and the doctrine agrees on the need to encourage progress. If driverless vehicles will be, on the whole, safer than human-driven cars, then the legislators should be careful not to introduce laws that prevent use and development of the technology. „As the law tries to develop in step with the technology, it is an unenviable task to walk the line between effective protection of road-users in the short-term and the encouragement of a potentially life-saving innovation in the long-term".[32]

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[29] Ilková V., Ilka A., *Legal aspects of autonomous vehicles—An overview*, Proc. 21st Int. Conf. Process Control (PC), pp. 428-433, Jun. 2017, retrieved from https://www.researchgate.net/publication/317580822_Legal_aspects_of_autonomous_vehicles_-_an_overview_pre-print accessed on 30.01. 2020.

[30] Alex Du Sautoy, *Are we there yet? Criminal liability in the era of driverless cars*, Lexology, January 31 2019, https://www.lexology.com/library/detail.aspx?g=987ce516-7217-450a-895f-8174cd1617bb, accessed on 10.01.2020.

[31] Idem.

[32] Alex Du Sautoy, *Are we there yet? Criminal liability in the era of driverless cars*, Lexology, January 31 2019, https://www.lexology.com/library/detail.aspx?g=987ce516-7217-450a-895f-8174cd1617bb, accessed on 10.01.2020.

At present, autopilot is an assistance driving tool and does not replace the human driver. So, AV are not 100% autonomous yet.

But there is few understandings among jurists on how the AI AV systems work and how is it possible for traffic incidents to occur? If we consider in the future to recognize AI as subject to criminal law, we must be aware that the whole discussion is on debate strictly in relation with „machine-learning" type AI systems. These are designed as matrices composed by cells displayed on layers and the more cells are, the more complex AI system is. A „machine-learning" system learns by recognizing patterns and creating new connections between data, and thus, creates new patterns. AI „machine-learning" type system copies the neuronal synapses of the human brain (as we all know, human brain recognizes patterns, too). The biased output that occurs sometimes is due to a false connection the system creates during the „learning process" (acting similarly with occurrence of optical illusions) or due to the lack quality of data the system was fed with. Actually, studies revealed that in case of traffic incidents involving AV, in 95% humans are to blame. Tests with autonomous cars conducted in California by Google-Waymo have shown that 19 out of 21 accidents that the autonomous cars were involved in, were caused by expectation violations done by humans.[33] Other studies confirm that human factor is mainly to blame in case of AV collisions.[34]

Despite the technology used to build AV, there still are a several aspects their designers and engineers must resolve in order to make the public roads safer. Some of the issues needed to be taken care of are: developing of problem-solving capabilities for „trolley problem"-type scenarios[35] because moral judgments are required in these cases. Other problems which need specific abilities still needed to be developed are the choice dilemmas (situations in which committing small crimes, like slight speeding, is better for traffic or to avoid accidents or cases where accidents are not preventable, but a driver's choices will either hurt more or fewer people).[36]

Another aspect that is still on debate is the double standard in anticipating risk situations: We tend to impose a lower standard for the humans, who are to blame only if they could have reasonably prevented the traffic incident (otherwise fortuitous case shall erase their criminal liability), and a higher standard for the AI (which is expected to reach a 100% level of prevention rate no matter the particular circumstances of the collision occurred). If humans cannot avoid and predict all negative events, why should we impose a higher standard for AI?

With so many questions still without answers a discussion on criminal liability of AI systems used to build AV seems premature. Since AI systems are not 100% autonomous, do not have conscience and self-determination, they apparently cannot be granted rights and imposed obligations because it would be a nonsense. In the

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[33] Gunnar Deinboll Jenssen, Terje Moen, Stig Ole Johnse, *Accidents with Automated Vehicles -Do self-driving cars need a better sense of self?*, Proc. of 26th ITS World Congress, Singapore, 21-25 October 2019 p. 5, retrieved from https://www.researchgate.net/publication/337211374_Accidents_with_Automated_Vehicles_-Do_self-driving_cars_need_a_better_sense_of_self, accessed on 10.01.2020.

[34] See Don Reisinger, *Humans—Not Technology—Are the Leading Cause of Self-Driving Car Accidents in California,* Fortune, August 29, 2018, https://fortune.com/2018/08/29/self-driving-car-accidents/, accessed on 10.01.2020.

[35] Joshua D. Greene, *Solving the trolley problem*, 2016, Wiley Online Library, pp. 175–178.

[36] Flankie Wallace, *Will Self-Driving Cars Reduce Accidents and Improve Safety?* Science &Tech, 26 February 2019, https://www.headstuff.org/topical/will-self-driving-cars/.

actual stage of development, AI reactions and involvement in social relations depend 100% of human conduct. And in this case, it is better to focus on blameworthiness of humans who designed, operated or manipulated the algorithms. But, still, the research in the area of machine-learning points to a rapid achievement[37] of an „artificial" conscience. We need to prepare ourselves for this moment, but, until then, we must be aware of the importance of creating the proper framework in order to achieve general goals: Progress, Accessibility, Equity, Damage recovery. We do not need to recognize yet AI as subject of law even we could think some legal-logical schemes in order to impose criminal liability for AI…but we need to be prepared for the future.

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New Trends in Addressing Corporate Crimes: Internal Investigations

Dr. Flaviu Ciopec*

Abstract

The new provisions on the liability of legal entities have brought about a significant gain for criminal justice: companies could now be fined or subjected to penalties, often more severe than fines, i.e. dissolution, temporary suspension of activity or prohibition of participation in public tenders. Faced with sanctions that have the ability to alter the ultimate essence of a corporate milieu, alongside and outside the criminal justice process, internal control procedures have been put in place in order to take away a potentially criminal matter from the state supervision. These processes, neutrally called - internal investigations - have the capacity to be the genuine content of a new criminal practice, adopted by all major law firms that provide advice to large corporations.

This study seeks to identify the main features of this type of investigation, the convergence of elements belonging to different areas (criminal law, labor law, corporate law etc.), the divergence from classical investigative procedures and the potential insurgence against human rights.

Keywords: *internal investigations, new criminal practice, emergence, convergence, divergence, insurgence*

1. Emergence

Criminal liability of corporations is a hot topic worldwide[1]. The Romanian legislator criminalized the deeds of legal entities for the first time in 2006 and fully addressed the topic by adopting the new Penal Code, enforced in February 2014. According to the Prosecutor's General Office Report of 2018[2], out of 807 corporations which were investigated, only 242 were indicted (compared to the maximum level of 487 corporations indicted in 2016)[3].

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[3] Prosecutor's General Office (2018). *Criminal Investigations Statistical Data*:

Year	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
orporations under investigations	287	288	421	527	1054	1238	2073	1008	1037	807
Corporations indicted	23	29	106	127	187	358	319	487	346	242

According with the legal provisions in force, liability of the corporations applied to:

i) Any crime regulated in the Criminal Code / special acts containing criminal provisions, e.g. active and passive corruption, misrepresentation, fraudulent management, bankruptcy or insurance fraud, breach of fiduciary or trust, diversion of public tenders or diversion of funds, computer fraud, failure to report offences, tax evasion, unfair competition, conflict of interests, embezzlement, counterfeiting of currency, bonds, payments instruments or documents, money laundering etc.;

ii) Any capacity, e.g. main offender, abettor, accomplice;

iii) Any act committed by the management / representatives / employees / agents acting *de jure* or *de facto* (no employment contract needed);

iv) Any act committed in the performance of the corporations' business or in their interest or on their behalf, irrespective of any benefit moral or material;

v) Independent criminal liability of corporation in relation to the liability of the natural person involved.

With these coordinates in mind, it is easy to conclude that an imminent risk of serious criminal liability occurs for any corporation, which entails criminal sanctions such as: fine, under a maximum of LEI 3,000,000 (approx. EUR 630,000), judicial supervision, temporary suspension of one or more business lines, permanent closure of premises, prohibition of participation in public tenders, dissolution.

The application of such sanctions seems a terrible instrument able to cause an alteration of the corporate milieu. How to escape such an almighty repressive power? Or, if this is not possible at all, how to gain cooperation credit, in order to relax the sanction's burden? The answers are not facile since they imply acting *intra legem*, not *contra legem*. The idea is to have access to a protection against the law by legal means and procedures very much alike what is called legal avoidance in the field of tax evasion. One solution is to look out the dichotomy *intra / contra legem*, which leaves no much room for action. Latins knew that acting *praeter legem* refers to a procedure that is not regulated by law and therefore not illegal, but still efficient as a strategy able to compose a self-defense against the criminal law or judicial power.

On these grounds, a new criminal practice for all major law-firms which provide legal advice to corporations arose. The name of this new born area of practice is internal investigations. The strategy is chameleon-like: using neutral label for an effective and rather un-orthodox tool to provide legal havens for corporations. An internal investigation could comprise different and diverse procedures, such as: interviews of employees, confrontations, crime scene investigations, premises search, body search and computer search, expert reports, video, audio and photo surveillance, GPS location, phone or wiretapping, undercover agents etc.

Three dimensions of internal investigations are commonly addressed. *Primo*, the fertile convergence of many areas of practice into a whole brand-new approach. *Secondo*, the remarkable divergence of the features of this new tool in relation to the ambit of criminal justice. And finally, *terzo*, the inevitable insurgence of this procedures to human rights.

2. Convergence

All the procedures described above as being compatible with internal investigations are in fact imported from criminal procedure law. The idea is to copy all

these instruments and to replicate them in a so-called "neutral" way by depriving them of the 'criminal' flavor. These means must look the same, except for the repressive component. An average observer must not be able to discern the true origin of these tools. If depriving is not possible, then concealing could work instead.

This disguising could be aided by the disciplinary component of labor law. Labor law is targeted to settle the relationship between employer and employees by allowing the former to deal with two specific powers. One is the power to edict private norms applicable *intra muros* of the company under the form of an internal regulation policy (IRP). Nevertheless, these rules must respect all the existing superior norms, i.e. the company cannot enforce a norm which is contrary to a specific legal standard already applicable. Still, the power is effective to a great extent since it derives from the consensual nature of the employment agreement. The employee is free to accept the employment terms or to decline them. By accepting, the employee acknowledges the enforcement prerogative of the employer.

Any company is used to develop specific and clear IRPs in order to keep the focus on the lucrative business. This approach led to the emergence of a truly substantive law: compliance. As a consequence, a corporation has been allowed to legislate within its own yard and fully took advantages of that power. The very distinctive feature of this power resides in its unilateral character, meaning that the IRP is not negotiable as the employment agreement terms are. The employee has only a partial view of what he/she is doing. Bargaining on the wage or working hours, he /she leaves aside an important matter which remained to be regulated only by the employer. As a result, the company uses that uncensored power to impose specific obligations and prohibitions on employees and to assure that its liability could not be entailed by an act of an employee committed in the performance of the corporation's business or in its interest or on its behalf.

The company is interested to point out that specific conducts are prohibited, disclosed and punished before the liability of a company could be triggered by third parties. These specific conducts are not just linked with labor, but could envisage basically any matter within the company's business lines. Using one metaphor of the corporate law, compliance concerns all the elements that compose the corporate veil.

The second power is the possibility to enforce such private norms by conducting disciplinary investigations on employees in case of non-compliance. All recent labor codes integrated specific norms on conducting such investigations in order to balance the interests of the parties at conflict. A company cannot investigate a disciplinary breach at its own discretion, otherwise the procedure would be void.

Besides labor law and corporate law, other issues related with information and communications technology law arise.

In a recent case against Romania[4], the European Court of Human Right concluded that the Romanian courts, in reviewing the decision of Mr. Bărbulescu's employer to dismiss him after having monitored his electronic communications, failed to strike a fair balance between the interests at stake: namely Mr. Bărbulescu's right to respect for his private life and correspondence, on the one hand, and his employer's right to take measures in order to ensure the smooth running of the company, on the other.

[4] Case of Bărbulescu v. Romania, Judgment of 5 September 2017, www.hudoc.echr.coi.int, accessed on 02.11.2019.

The Court considers that States should ensure that, when an employer takes measures to monitor employees' communications, these measures are accompanied by adequate and sufficient safeguards against abuse. In particular, the authorities should determine the following[5]:

- Whether the employee has been notified of the possibility that the employer might take measures to monitor correspondence and other communications, and of the implementation of such measures. For the measures to be deemed compatible with the requirements of Article 8 of the Convention, the notification should be clear about the nature of the monitoring and be given in advance;

- The extent of the monitoring by the employer and the degree of intrusion into the employee's privacy. In this regard, a distinction should be made between monitoring of the flow of communications and of their content. Whether all communications or only part of them have been monitored should also be taken into account, as should the question whether the monitoring was limited in time and the number of people who had access to the results;

- Whether the employer has provided legitimate reasons to justify monitoring the communications and accessing their actual content. Since monitoring of the content of communications is a distinctly more invasive method, it requires weightier justification;

- Whether it would have been possible to establish a monitoring system based on less intrusive methods and measures than directly accessing the content of the employee's communications. There should be an assessment in the light of the particular circumstances of each case of whether the aim pursued by the employer could have been achieved without directly accessing the full contents of the employee's communications;

- The consequences of the monitoring for the employee concerned and the use made by the employer of the results of the monitoring operation, in particular whether the results were used to achieve the declared aim of the measure;

- Whether the employee has been provided with adequate safeguards, especially when the employer's monitoring operations are of an intrusive nature. Such safeguards should in particular ensure that the employer cannot access the actual content of the communications concerned unless the employee has been notified in advance of that eventuality`.

As a result, for the purpose of conducting internal investigations, within the limits designed by the European Court, a video, audio and photo surveillance, a GPS location and phone or wiretapping could be legally engaged.

Last, but not least, a corporation could use private detectives as undercover agents in order to investigate specific conducts of its employees. Nevertheless, private investigations law is equally present and involved in internal investigations.

3. Divergence

The ability of internal investigations to concentrate many practice areas in a `melting pot` is very strong. This new convergent instrument shaped *praeter legem* not only has it gained advantages, but it has caused issues as well. In the following section a survey on the most important challenging issues will be addressed.

[5] https://www.echr.coe.int/Documents/Press_Q_A_Barbulescu_ENG.PDF, accessed on 02.11.2019.

Internal investigations are a real shift in the legal practice of corporate crime. The emergence of this new criminal practice was determined by the need to surpass the fundamental weaknesses of classical procedure to deal with the corporate crime. As already mentioned before, applying a criminal sanction to a corporation is a terrible instrument able to cause an alteration of the very essence of the company's *raison d'etre*. Such effect is caused by three main disadvantages: lack of control, slowness and adverse publicity.

Lack of control or partial control comes from the monopoly of criminal justice which state is empowered with. Any procedure called `criminal` means the intervention of the judicial police and the public prosecutor and often, even if not always, of a competent judge. This implies a total or almost total submission of the investigations in the hands of the authorities. When the company is not under investigation (suspect / defendant), its position is reserved to be minor, meaning weak control over `what`, `how` and `when` is performed during the investigations.

The company is interested to develop a strategy able to free from these constraints by shaping an instrument which allows regaining full control. The idea was to change official agents with private investigators competent to do the same thing. This is a burst for the lawyers' profession since the most qualified private investigators are nobody but the lawyers themselves. Being an investigator in an internal affair of a company means the fulfillment of a constant dream of criminal lawyers: to take part offensively to the investigation of a crime. Most commonly, a criminal lawyer is a defense lawyer and always envied the powers of a public attorney. Shifting carriers for such a pleasure looked always a huge stake.

Using lawyers for internal investigations has changed everything. Lawyers are deeply accustomed with the sense and value of time and confidentiality. This approach had the effect of speeding the procedures on the one hand and the increasing of the non-publicity on the other. Slowness is history, and publicity the same. Additionally, bringing lawyers as chief investigation officers led to a different outcome. Lawyers are trained to deliver bargain solutions. The rigid nature of the official approach is now counter-balanced by negotiations. That feature is more likely to be accepted in civil law systems where the bargaining in criminal matters is more looked for than found. Moreover, internal investigations enjoy the advantage of no supervision state authority. The criminal area does not only evade from public agencies but also escapes any review. The bargaining solution reflects the 'win-win' philosophy and is unlikely to be subject to external supervision.

All these amendments are evidently divergent from the classical paradigm. However, there is a cost to be paid. Internal investigations are a camouflaging procedure, sourced in a criminal one, but being fast, confidential and transactional, they need to give up to an important component of criminal justice: the penalty. In fact, criminal justice is a public affair not so much because of its procedural dimension, but due to the power to inflict harsh penalties. Internal investigations prove to be an innovation only on the procedural side, leaving aside the penalties as the price for such innovation. Indeed, the `penalties` usually reached in internal investigations is warning (written or oral), suspension with or without salary, transfer to a different job, demotion, fine, dismissal far away from the deprivation of liberty, confiscation or prohibition of rights.

4. Insurgence

Shaped for the company's purposes and objectives, internal investigations are not human rights friendly when comes to the investigated subjects. This genuine insurgence against the renowned safeguards of fair proceedings is the consequence of the allegedly effective protection for the company. A low-profile approach to defense rights could affect the right to access to a counsel, the privilege against self-incrimination, the right of access to documents of the investigation file etc.

Some basic requirements have been settled[6] in order to preserve the defense rights:

- The employee may – if requested – consult his or her own legal counsel. The expense may even be borne by the company. The employee is summoned for the interview well in advance so that he or she will be able to adequately prepare.

- The employee is informed about the subject matter of the internal investigation, as well as its context. He or she is informed about the fact that the attorneys conducting the interview represent the company and not the employee and that, therefore, they may be pursuing other interests.

- The employee is notified that notes will be taken by the attorneys and that, under certain circumstances, contents of the interview may be forwarded to national of foreign authorities. The employee's legal counsel may be given the opportunity to inspect the notes.

- During the interview, the employee is treated altogether fairly. He or she must not be influenced in an unfair manner. The employee's freedom to determine his or her own will must not be affected. No improper pressure may be brought to bear on the individual`.

Internal investigators must be cautious about this dimension of their practice since it often takes place in parallel with an official one performed by public investigation authorities. The risk of overlapping procedures is clear and present and surely none of the company stakeholders would assume the adverse labelling which may lead to the idea that an internal investigation is just a `capitalist` instrument to evade the law.

5. Conclusions

Corporations are being scrutinized today as never before. There is a path for corporations to best protect themselves and that are internal investigations. As a guide[7] pointed out: `When a company is confronted with evidence or allegations of potential wrongdoing, the company is well served to respond deliberately and thoughtfully with appropriate discipline, remediation, and (in certain cases) perhaps even discussions with the government. Conducting an effective corporate internal investigation can benefit the company in a number of ways:

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[6] Sven H. Schneider, Mathias Priewer (2019), *German legislation and its impact on employees' rights in internal investigations*, available at https://www.financierworldwide.com/german-legislation-and-its-impact-on-employees-rights-in-internal-investigations#.Xi7aLmgzaHs accessed on 02.11.2019.

[7] JonesDay (2013), *Corporate Internal Investigations. Best practices, pitfalls to avoid*, available at https://www.jonesday.com/files/upload/CII%20Best%20Practices%20Pitfalls%20to%20Avoid2.pdf accessed on 02.11.2019.

- Revealing all of the relevant facts so that management and/or the board can make a fully informed decision as to how best to proceed;
- Stopping the conduct to prevent further violations;
- Memorializing the company's good-faith response to the facts as they become known;
- Insulating management and/or the board against allegations of complicity; and
- Promoting a culture of transparency and compliance throughout the organization.

Internal investigations emerge from due diligence[8] practice adapted to more sensitive issues like violation of certain company policies, or worst, the criminal law rules. This shift is not accidental, but has appeared as the effect of a new paradigm in criminal law, which is becoming more and more preventive than before.

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[8] I am grateful to Dr. Magdalena Roibu for pointing me out this aspect.

25 Years of Fight Against Money Laundering in Hungary

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Abstract

The AML regulation is continuously enhancing in the last two and a half decades in Europe. Hungary was the first of the former COMECON member states which enacted anti-money laundering rules in 1994. Regulations have changed several times since that year, but there was no significant practice in the crime. Usually fewer than 5-10 investigations were launched each year with suspicions of money laundering, but something changed in the 2010's. Today we have 400 investigations in progress with the suspicion of money laundering. Something is happening in Hungary, and the EU is upgrading its regulation permanently. The 6th AML directive is coming soon.

Keywords*: money laundering, AML, criminal law, Anti-Money Laundering Directive, MONEYVAL*

1. General aspects on Money Laundering

The AML regulation is continuously enhancing in the last two and a half decades in Europe. Hungary was the first of the former COMECON member states which enacted anti-money laundering rules in 1994. Regulations have changed several times since that year, but there was no significant practice in the crime. Usually fewer than 5-10 investigations were launched each year with suspicions of money laundering, but something changed in the 2010's. Today we have more than 400 investigations in progress with the suspicion of money laundering. The judicial practice has to prepare itself for the increasing number of money laundering cases from 2020.

The time which was passing by between the EU Directives regarding our topic became shorter and shorter. Experts (criminal lawyers, compliance officers, judges, prosecutors etc.) has to train themselves day by day, if they want to make their job properly.

Money laundering is the complex entirety of illegal economic transactions pursued under the concealment of legal economic transactions that aim to justify the origin of wealth obtained through criminal act, this way getting rid of its recognizably illegal nature. "Therefore, the reason and origin of money laundering is always a crime that becomes unretractable, while its aim is that the fortune obtained this way should be used in the legal economy."[1]

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[1] Ferenc Kósa, *The criticism of the bill against terrorism and preventing money laundering*, www.jogiforum.hu/publikaciok/index.php?p=47&print=1 accessed on 5 November 2001.

On the other hand, money laundering has become one of the most paying and vast businesses in the world. According to the IMF estimations in the last two decade the volume of money laundering amounts to 2-5% of the unified GDP of all the countries on Earth. This seems to be true in 2018 too. Translated to concrete sums this means at least 590-1.500 billion USD annually[2] ten years ago, but in 2018 we can estimate these sums about more than 10.000 billion USD. In 1999 John Walker estimated this amount to be 2.850 billion USD annually in his work about modelling the tendencies of money laundering.[3] According to the estimations of the FATF the sum of the annually laundered "dirty money" equals to the total annual production of the economy of Spain, that also underlines the largeness of the danger.[4] This number does not seem to be exaggerated if we take into consideration that behind an important number of crimes committed all over the world there is a motive to gain material benefit. (To the question why he had robbed banks, the notorious American bank robber, Willie Sutton gave the laconic answer: "Because money is there."[5]) We could almost regard it as logical that perpetrators of a crime try to avoid to raise the attention of the investigating or tax authorities by newer and newer, diverse methods. On the following pages we introduce nineteen such techniques.

Who has money deriving from crime in his possession first has to decide whether there is need for money laundering? That is to say up to a certain amount (for an average Hungarian citizen this is about 50.000 EUR) the sum can be spent without any problem or it can be used in legal economic activity (this latter is also qualified as money laundering). In cases of financial or bank transactions with the division of the sum (for example 50.000 EUR can be divided to five 10.000 EUR) the limit of 3.600.000 HUF (approximately 11.500 EUR) can be easily avoided.

If the sum of money of suspicious origin reaches a certain amount that can make the "smooth" use risky, then still there is possibility for the perpetrator to account for the origin of the guilty money in case of the danger of being caught: the source is a family gift, succession, loan from a friend. There is no need for anything else just to invent a credible legend (expression used at Secret Service) about the origin of the money. The main point is the adequately worked out strategy for crisis and of course it is advisable to consult a lawyer continually.

If it is about a really huge sum (of course it is relative what sum is to be considered "big") then there might be the need for money laundering. A sum around half million EUR absolutely "claims" laundering. Naturally the amount is very relative: if someone has already had a fortune of some million and pursues legal economic activity (also), for that person not even the spending of half million EUR of illegal origin means risk. So we can say that "above a certain level", steeled with adequate economic (and political) relations there is no need for the laundering of the money obtained in an illegal way, it can be spent "filthily" …

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[2] Patrick Moulette, *Money laundering: staying ahead of the latest trends* in: Observer No. 220. April 2000. 28. oldal.

[3] Peter Lilly, *Dirty transactions. The world of money laundering*, Perfekt Economic Consulting, Educational and Publishing Spa., Budapest, 2001, p. 39.

[4] Jackie Johnson, *In Pursuit of Dirty Money: Identifying Weaknesses in the Global Financial System,* Journal of Money Laundering Control, Henry Stewart Publications London, Autumn 2001. 122. oldal).

[5] Steven Mark Levy, *Federal Money Laundering Regulation (Banking, Corporate, and Securities Compliance),* New York, 2003. Chapter 1 p. 3.

Moreover, if the perpetrator has at least one legally registered firm, then about 30% of the turnover of the firm can be laundered through it annually with the help of an accountant with enough expertise (and "venturesome"). The adequate technique for example is fictitious billing. In this sense money laundering is nothing else then the complementary transaction for tax fraud. Tax fraud is usually committed by keeping in secret a part of the income or by showing costs bigger than they are in reality. It is a basic economic relation that the profit is the part of the total income decreased by the total costs that is usually indicated with the following formula: profit is the total revenue minus the total costs. As we define the variant of money laundering with the help of economic activity as the complementary transaction for tax fraud, the logic of the commission of this crime is reversed, that is either the costs should be showed as less than in reality or (and this is more common) income should be showed as more than in reality. It is nearly a well-known fact that in Hungary it is not a serious problem for anyone to decrease his income before taxation by fictitious cost bills. (We could only suppose it with some malice that when creating taxation laws, the tax creator reckons in advance that a lot of people admits a lot less of income than it is really, so the rates of taxes are adjusted to this de facto situation…) The generality of fictitious billing is backed up also by the fact, that so called "bill factories" – that means firms that do not pursue real economic activity and produce bills in unlimited amounts for some percentage of the bills without real economic performance and after a while the actual owners disappear with the money (the registered owners of the firms are either non-existing people or homeless from whom of course the remaining public debts cannot be recovered) – are regularly pinched. After this it is easy to see that if it is relatively easy to get fictitious cost bills, then it is even more easier to get fictitious income bills and for this even some percent of commission can be asked for and not even the tax authority will suspect a thing if someone accepts to pay the rates and taxes after his fictitious incomes. It is conceivable that the cost of money laundering is here the least as the rates and taxes that have to be paid after the fictitious income bills can be decreased by the "commission" received for the bills. Moreover, the rates and taxes are to be paid after the income decreased with costs, meanwhile "commission" can be asked for the total value of the bill. This way such a situation can occur that the operation of money laundering will not be loss-making.! (Just think it over: 50% of average cost level, 30% of rates and taxes and if the buyer pays 15% of the value of the bill for the fictitious bill then the result of the operation will be 0, so there is not going to be neither profit nor loss.) It is worth for the perpetrators to use this method even if 10-20% loss is formed, furthermore the danger of getting caught is possibly here the least.

Even those might need money laundering who realize income regularly from crimes and have no civil job, so who perpetrates crime as a life style. The easiest technique even here is to establish a cover firm.

There are countries that conduct a very profitable business through the tacit suffering of money laundering, by allowing phantom firms to be formed and, by the very strict interpretation of banking secrets, make anonymous bank deposits possible. As "unclean" money very quickly finds such areas, these countries come into outstandingly high incomes through money laundering. We have to admit, however, that Hungary must not choose this route not only for sheer moral reasons (although these alone would be enough), but also for reasons dictated by economic rationality.

An average-sized European country with a democratic political culture would lose more as a result of the sanctions introduced by the international community and the organizations dealing with money laundering that the profits it would gain from the capital to be laundered coming in to be laundered in the country. We could also say that we are neither small, nor large enough to put up with money laundering. Every opinion in between, any tiny allowance could be equally dangerous as tacitly letting money launderers gain ground. Therefore, the interest of Hungary is to prosecute money laundering with all the means at its disposal, or at least try to drive it out of the country.

2. The evolution of Anti Money Laundering regulation in Hungary

In the interest of the struggle against money laundering as an objective, we need to cooperate with other countries and international organizations. With respect to this, we have already undertaken several international obligations but we are to be ready to conclude further agreements or the reinforcement of the earlier ones; at the same time, we are also to initiate such.

The reason there was no money-laundering in the *1970-1980s* in Hungary is not that there were no organized criminals or that no extra profit was produced but that the underdeveloped nature of the banking system and the lack of the convertibility of the Forint prevented it.

A couple of years later, however, everything changed drastically. The standard of living was dropping continuously in the second part of the 1980s, while inflation speeded up. It became obvious that something had to be done to the economy, and the political change of regime was also around the corner. By the summer of 1989, "the movements going on in the political sphere became modified in their direction, contents and dynamism as well; in addition to the change of models advertised, the emphasis – at least in the manifestation of some organizations and certain layers of society – shifted in the direction of the change of regime."[6] Following the *political and economic change of regime,* the establishment of a market economy started in 1990. This paved the way for the spending of moneys that had been accumulated earlier. The banking system was not yet able to satisfy the hunger for capital; usurious interest rates and the collection of money related to it flourished in the underworld. The long-term decrease of the standard of living, the increase of the tensions of income distribution gave an impulse to crime, and, additionally, subsistence crime also spread. Criminals of outstanding abilities and good organizational skills started building their domestic criminal organizations, for which they also had sufficient amounts of cash. The disarrangement of the police also contributed to the launch forward of the criminal underworld. The *economic and social transformation* related to the change of regime, as well as the *privatization of state property* necessarily went together with the appearance of certain business crimes. The significant increase of the number of criminal activities and the increase of the average amount of damage calculated for one criminal activity – even with the rate of inflation deducted – continuously produces the wealth that can also be the basis of money laundering. In addition to this, on 1 January 1987, the *one-tiered banking system was replaced by the*

[6] Horváth József, *A tábornok vallomása,* Budapest, 1990. p. 315.

two-tiered system, and, in the early years, the too broad interpretation of the circle of banking secrets provided a favorable area for money launderers. However, the creation of anti-money laundering regulations and the criminal law protection took years to develop.

In Article 86 of the *Articles of Partnership* of Hungary, *created* with the *European Community* in 1994, we undertook the obligation to make all efforts to prevent money laundering, and to introduce sufficient regulation that is of equivalent value with those regulations that the Community and other international forums working in this area – including the Financial Action Task Force (FATF) – accepted.

In 1994, the Parliament passed a law covering the prevention and obstruction of money laundering, and the Government issued an executive order; furthermore, the definition of the crime of money laundering, and that of the sanctions of the crime, took place in the Criminal Code: Law IX of the year 1994 integrated money laundering as §303 in the Criminal Code. The law ordered that the laundering of money be sanctioned with regard to material goods emerging in connection with the areas most affected by organized crime, that is crimes committed in connection with drug abuse, arms smuggling, and terrorism. In harmony with the planned modifications of Law number LXIX of the year 1991, on financial institutions and activities of financial institutions (the predecessor of Hit.) sanctioned the failure to perform the obligation of reporting defined in the law in the case of both willful and negligent commission.

As aggravated cases, the legal regulations contained habitualness, and, similar to drug abuse, commission within the framework of an organization; furthermore, the law ordered that those perpetrators who – through their position (rank, occupation, profession) – found it easier to help with the covering up of the origins of the money one came into in an unlawful way, be punished more severely.

Furthermore, Hungary joined the Convention on money laundering, the search for, seizure and confiscation of items originating from criminal activity, ratified in Strasbourg, on 8 November 1990, the announcement of which was ordered by *Law CI* of the year *2000*.

The facts of the case of money laundering as it is described in the Criminal Code went through continuous change, it was modified practically every second year so that the delict had no real practice.

However, these steps did not satisfy the international financial organizations. Hungary (as the first and so-far only OECD member country) *was put on the money laundering "black list" of FATF at the end of June 2001,* among non-cooperating countries. Even though along the law-making process there were legal regulations created at the end of 2000, according to which it should not have been possible to open a bearer and code-named savings deposit[7], as well as withdraw money from those already existing without identification, from the day of the accession of Hungary to the EU, the FATF did not consider this solution sufficient, with special respect to the fact that the neighboring countries – that were in similar shoes as Hungary – tied the termination of identification to a fixed date.[8]

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[7] Such were banking papers under the given names of "Jubileum" (Jubilee), "Garas" (Penny), "Dénár" (Denarius), "Zafír" (Sapphire) etc.

[8] Koós-Hutás Katalin, *A pénzmosás elleni szabályok szigorítása: megszűnő anonimitás,* Cég és Jog 2002. 3. szám, p. 44.

Three months after the decision of FATF, under the influence of the September 11 terrorist attacks, the international cooperation against terrorism definitely started to strengthen, and the strengthening of anti-money laundering regulations on the agenda anyway was accelerated[9]. It was in the wake of this that Law number LXXXIII of the year 2001, on the struggle against terrorism, the strengthening of the decrees on the prevention of money laundering, and the order of particular restricting measures, was born. This legal regulation tried to remedy the problems and shortcomings brought up by FATF, in the following manner:

a) The prevention of going around the legal regulation on money laundering is served by the fact that through the modification of Law-decree number 2 of the year 1989, on savings deposits, the possibility of opening anonymous deposits is terminated. The law contains sufficient measures with respect to the already existing bearer and code-named savings deposits as well. In the case of safety deposits transformed into bearer deposits following 30 June 2002, and reaching or exceeding the amount of 2 million HUF, every credit institution is obligated to send the data of identification of the client to the National Police Department with the aim of the prevention and obstruction of money laundering. After 1 January 2005, upon the client's written request and with the approval of the National Police Department, the non-bearer safety deposits can be transformed into bearer ones.

b) For reasons similar to those of savings deposits, the law orders – with the modification of Law number CXI of the year 1996, on the marketing of securities, the investment services and the securities stock exchange – that securities can only be issued and publicly marketed in series only in a bearer manner.

c) A significant part of the turnover of money is performed in cash. The monitoring of this in international turnover is served by the above-mentioned law by forcing those crossing the country border – if they have Forints or foreign currency reaching or exceeding one million Forints in their possession – to report this fact to the customs authorities and provide the particulars, and the information on the amount and currency of the money in their possession to the customs authority.

d) After 1 January 2002, only the credit institution or the agent of the credit institution can get permission from the State Supervision of Financial Institutions to carry out money-changing activities. Through this, the performance of money-changing activities, and the strengthening of their conditions of operation, as well as their increased monitoring, take place on the basis of regulations identical with those with respect to enterprises performing the other financial services.[10]

As a result of the measures introduced, in June 2002, we were removed from the list of Non-complying Countries and Territories.[11] In 2003, the former money laundering law was replaced by a new law: at its sitting on 24 February 2003, the Parliament passed Law XV of the year 2003, on the prevention and obstruction of

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[9] The terrorsit financing is closely connected to the money laundering int he legal reulation. It has new forms too, as the famous Hungarian judge and criminal procedure law professor wrote in one of his recent essays. In: Elek, Balázs, *From poaching to financing terrorism.: Thoughts on poaching endangering society,* JEECL 3: 1, 2016, pp. 190-200.

[10] 2001. évi LXXXIII. tv. Indokolása (=CompLEX CD-Jogtár).

[11] On the most recently published list, (FATF-GAFI Annual Review of Non-Cooperative Countries and Territories, 20 June 2003) we can find the following countries: Cook Islands, Egypt, the Philippines, Guatemala, Indonesia, Myanmar, Nauru, Nigeria, the Ukraine).

money laundering. This law, as well as the previous measures, forced the decision-makers of FATF to *terminate the former special monitoring mechanism against Hungary at its Berlin meeting ending on 20 June 2003.* After the Law XV of the year 2003 we have had two more AML Law, the Law CXXXVI. of the year of 2007 and the newest and current one, the Law LIII. of the year 2017.

We cannot give up on the development and continuous improvement of the legal regulations in view of the fact that the problem of money laundering cannot be solved through exclusively criminal law means. Criminal law – as we can unfortunately experience nowadays – is not able to remedy the deleterious social phenomena; furthermore, it cannot even solve the problems emerging in connection with crime. Crime is a social phenomenon in connection with which criminal law – to use a medical expression – can only provide symptomatic treatment. In spite of this, this branch of law cannot be neglected or replaced by anything else either. In the fight against money laundering, however, we should give priority to non-criminal law means; that is, we should develop the financial system in such a way that money laundering in Hungary would be possible only through extreme difficulties. This way, a great percentage of "unclean money" would avoid the country and would move towards areas where it would not meet such strong opposition. If we achieve this, while simultaneously taking part in the cooperation conducted for the fight against money laundering, we can say that we have performed the obligations we have undertaken internationally. However, we can still not lean back as the methods of money laundering are continuously being perfected, perpetrators are developing newer and newer techniques. As far as we can see, the fight will never end, consequently, the main aim can only be that we are a step ahead of the perpetrators, and we preserve this step for the longest possible time.

The fourth Anti-Money Laundering Directive (EU) No. 2015/849 entered into force on 26th June 2015. After it entered into force, Hungary started to make the new AML regulation. This is the Act LIII. of the year 2017., which contains the most important elements of the new Hungarian AML regulation, and totally comply with the 4th EU Directive.

The key elements of the 4th Directive according to a recent article published in this topic are the followings:

"Under the 4th AMLD, a key role is accorded to the principle of risk analysis and the corresponding adequate safeguards. Both the EU Commission and jointly the European supervisory authorities EBA, EIOPA and ESMA (ESAs) shall conduct an analysis of money laundering and terrorism financing risks. The EU Commission is instructed to send its findings and its recommendations based on this analysis to the Member States and the obliged entities under the Directive so that the Member States can better understand and counteract such risks more effectively.

In addition, the 4th AMLD will also provide for an extension of the scope of anti-money laundering legislation requirements: for example, by reducing the threshold for cash transactions above which persons trading in goods qualify as 'obliged entities' and in particular in which an obligation to identify the customer is triggered. This threshold will be reduced from €15,000 to €10,000.

The 4th AMLD also extends its applicability to providers of gambling services which are now listed as 'obliged entities'. The Member States can, however, remove these providers – with the exception of casinos – partially or completely from the list of obliged entities if a low money laundering risk is evidenced.

The scope of the 4th AMLD is also extended by including as obliged entities not only real estate agents involved in the purchase or sale of real estate properties, but also those agents involved in the letting of real estate properties.

As regards beneficial ownership, the EU Member States are obliged under the 4th AMLD to create central registers containing information on the beneficial ownership of corporations, including Anglo-American trust structures.

The 4th AMLD provides that the competent national authorities (such as the Financial Intelligence Units) and obliged entities have to have access to the central register under the national anti-money laundering legislation for exercising their customer due diligence. Persons and organizations capable of evidencing a 'legitimate interest' in this information (e.g., an interest relating to money laundering) must get access to the central register except for information regarding trust structures.

The 4th AMLD no longer differentiates between politically exposed persons (PEPs) resident in the same country as the obliged entity and in other countries. Further, special obligations apply with respect to PEPs classified as beneficial owner. Furthermore, the 4th AMLD expands the category of PEPs to include members of the governing bodies of political parties, which will result in the necessity to update existing PEP lists.

Whilst already under the current European legislation, banks and certain other companies in the finance sector are obliged to establish group-wide compliance systems, including due diligence requirements relating to money laundering, this obligation will in future also apply to other obliged entities under the Directive.

As regards sanctions, the 4th AMLD is following an approach pursued in recent European legislation of requiring specific and far-reaching powers of the Member States to be exercised in case of non-compliance with the requirements of the Directive.

The approach of 'naming and shaming', which can likewise be observed more frequently in recent European legislation, is also being pursued. That means that the competent authorities shall publish the decisions based on breaches of the requirements laid down by the 4th AMLD, unless overriding reasons require an anonymous publication."[12]

In the former decade the number of the money laundering investigations in Hungary was not so high. In the official crime statistics, we could see 5-10 cases in a year. Today something is happening, only in Budapest there are more than 100 money laundering investigations. The number of the reported suspicious transactions was around 10.000 in the last decade every year.

We had a MONEYVAL monitoring process in 2016, the results were published in December 2017[13]. "As a result of Hungary's progress in strengthening its framework to tackle money laundering and terrorist financing since its mutual evaluation in September 2016, MONEYVAL has re-rated the country on 13 of the 40 Recommendations. Hungary has been in an enhanced follow-up process, following the adoption of its mutual evaluation, which assessed the effectiveness of Hungary's anti-money laundering and counter-terrorist financing (AML/CFT) measures and their compliance with the

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[12] Jens H. Kunz, *Key elements of the 4th EU Anti-Money Laundering Directive,* https://www.financierworldwide.com/key-elements-of-the-4th-eu-anti-money-laundering-directive/#.WtMmZC5uaUk accessed on 15. 04. 201).

[13] https://rm.coe.int/moneyval-2017-21-hungary-1st-enhanced-follow-up-report-technical-compl/1680792c61 accessed on 15. 04. 2018.

Recommendations by the Financial Action Task Force (FATF). In line with MONEYVAL's rules of procedure, the country has reported back to MONEYVAL on the progress it has made to strengthen its AML/CFT framework. This report analyses Hungary's progress in addressing the technical compliance deficiencies identified in the mutual evaluation report. The report also looks at whether Hungary has implemented new measures to meet the requirements of FATF Recommendations that have changed since the country's 2016 mutual evaluation. MONEYVAL decided that Hungary should remain in enhanced follow-up and next report back in December 2018 as per Rule 23, paragraph 1 of MONEYVAL's 5th round rules of procedure."[14]

"As a result of Hungary's progress in strengthening its framework to tackle money laundering and terrorist financing since its mutual evaluation report in September 2016, MONEYVAL has re-rated the country on two Recommendations originally rated as "partially compliant".

Hungary was placed in an enhanced follow-up process, following the adoption of its mutual evaluation report, which assessed the effectiveness of Hungary's anti-money laundering and counter-terrorist financing (AML/CFT) measures and their compliance with the Recommendations by the Financial Action Task Force (FATF). Hungary had previously submitted its first enhanced follow-up report in December 2017. In line with MONEYVAL's rules of procedure, the country has submitted its second enhanced follow-up report to MONEYVAL on the progress it has made to strengthen its AML/CFT framework.

This follow-up report analyses Hungary's progress in addressing the technical compliance deficiencies identified in the mutual evaluation report. It also looks at progress made in implementing new requirements relating to FATF Recommendations which have changed since the since the first follow-up report.

To reflect this progress, MONEYVAL has re-rated Hungary on Recommendations 5 (terrorist financing offence) and 28 (regulation and supervision of DNFBPs). These Recommendations are now re-rated as "largely compliant".

The ratings for Recommendation 7 (targeted financial sanctions related to proliferation, re-rated "largely compliant" in Hungary's first enhanced follow-up report), Recommendations 18 (internal controls and foreign branches and subsidiaries, rated "partially compliant"), and 21 (tipping-off and confidentiality, rated as "largely compliant"), the requirements of which changed since the first follow-up report, remain unchanged.

MONEYVAL decided that Hungary will remain in enhanced follow-up and will continue to report back to MONEYVAL in December 2019 on further progress to strengthen its implementation of AML/CFT measures."[15]

3. The future of the fight against Money Laundering

Something is happening in Hungary, and the EU is upgrading its regulation permanently. The 6th AML directive is coming soon. „The 6th Anti-Money Laundering Directive (6AMLD) will be transposed into member states' national laws by December

[14] https://www.coe.int/en/web/moneyval/home (accessed on 15. 04. 2018).

[15] https://www.coe.int/en/web/moneyval/home/newsroom/-/asset_publisher/zTE3FjHi4YJ7/ content/ moneyval-publishes-follow-up-report-on-hungary?_101_INSTANCE_zTE3FjHi4YJ7_viewMode=view/ accessed on 02. 11. 2019.

2020, and organizations within all member states will be required to implement the new regulations by 3rd June 2021. Importantly, the regulations will cover all regulated entities across the EU, plus any UK organizations that are operating within the EU after Brexit, whatever the outcome of current political negotiations. Brexit does not represent a way around 6AMLD; any UK business wanting to operate within the EU need to comply with the new rules. What's more, there's a definite likelihood that non-EU states around the world will replicate the content and spirit of 6AMLD within their own regulatory frameworks over the next few years. Much like we are seeing with the General Data Protection Regulation (GDPR), the EU's recently implemented regulatory framework around data security and privacy, other economies wishing to trade with the EU are developing their own versions of these EU-mandated rules in order to reduce barriers to global trade and drive consistency."[16]

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Future Developments and Challenges in Criminalistics as Part of Criminal Justice

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Abstract

This study analyses the future theoretical and practical development possibilities of criminalistics – as universal fact science. It tries to sign the further tendencies of forensic sciences in the XXI. century as well. The author composes scientific fields where can be and need to real, intentional strengthening of recent forensic methods and writes about his future guessing, suggestions and challenges of criminalistics.

Keywords: *criminalistics, developmental suggestions, scentmap, brainreader, identification, FISH, mobile lab, digital data, technical improvements*

1. Introduction about the concept of criminalistics

First of all, it is useful to give a meaning to the subject of our thesis, criminalistics. In this field the literature appears unified, as can be read below in our explanation; criminalistics is the mostly practical (and in some cases) theoretical doctrine of criminal and general investigation, the part of criminal sciences, which opens up to creates the detection (and prevention) of crimes, and the means and modes of proof adopting in certain legislation across the world. Besides effective crime prevention as a by-product, the basic function of criminalistics is the detection and collection of the most and authentic evidence in order to get the final aim; a legal (criminal) impeachment – avoiding any miscarriages of justice.

In short, criminalistics is the science of the effective, professional, law enforcement, which serves to combat against crime and purposes to bring the delinquents to trial.

Our study attempts to label the stages of development corresponding with the tendencies of XXI century. We have drafted from the scientific fields, within which progress in forensic methods is expectable and necessary, and we resume our surmise, developmental suggestions or future challenges of criminalistics.

2. The discovery of human scent

A) People believe as fact, due to the reality regarding actual experiments of natural science, that after a few years or decades, we can receive the answer to the main forensic question – "Who committed the crime?" – through the scent left behind by the perpetrator.

The detection of the perpetrator who fled the crime scene based on following their scent may be valuable – largely because it rarely succeeds – even more valuable

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is the scent connected to the crime, or the perpetrator that is attached by posterior identification.

Currently this special forensic field; the odorology knows only one "instrument" for the identification and detection of scents. It is known as a "biodetective", and is none other than the dog.

The source of many problems is the animal itself, because it has no moral or legal responsibility.

It cannot report about its methodology of identification, therefore the control of the signs cannot be positive and could cause false consequences. The "biodetective" can be wrong when you regard the technical practice of the applying countries (e.g. Belgium, South-Africa, Netherlands, Poland, Germany, Romania, Slovakia and France since 2003), just as was shown in Hungary as well.[1]

The researches into miscarriages of justice and past cases show, as well, the danger of possibly incorrect consequences and failure.

We have to highlight – when examining our best research – that nowadays there are no responsible control-tests, so without these examinations you can only note the correspondence and the failure of the dog.

We recommend, the possibility of a validity test, because we ourselves can create the test scent and complete the controlling scent-identification.

Until a better method is created, whether it is an independent method of science or criminalistics, one stronger than the dog, then experts should control and improve this available method, discover its credibility value, and undertake widespread testing on individuals.

B) As a fact for a progress in the methodology of scent identification we need transparent, clear, verifiable examining methods and individuals who could be responsible for their results. It bases on a research result that we don't know yet and also could be honored by a prestigious international award (as the Nobel-prize for instance): and this result could be the description of the structure of the human scent. In other words, the modelling of the molecular structure of human scent. Just as researchers are willing to make the human genome map complete, it could be also desired to create the „scentmap" about the internal components of the human scent.

What kind of advantages could we earn from inventing a „scentmap" about the internal components of the human scent?

- We surely admit that in the criminalistics it could gain an important identification, which is typify only one individual („scentfingerprint");
- We could describe the clear, plain ingredients of an individual's scentmap and could be understood by anyone;
- By years becomes obvious that we can talk about permanance or variability (based on ages) in the case of human scent;
- The experts of scent identification could perform his researches based on global standards (supervised, submitted by the Daubert-test as well);
- The tests and results could be checked by controltests/controlresearchs;
- The person expertized in scent identification also has responsibility (just like in case of the identification of fingerprints or DNA) and could be controlled in cross examination in the context of jurisdiction/administration of justice;

[1] See more about it: Horváth, O. (2018), Kereső és azonosító kutyák kriminalisztikai alkalmazása. Ph.D-theses, Pécs, PTE ÁJK.

• There will be a good chance, that the result will show or at least will be close to reality;

• Could creat a result with strong validity, which could be used as evidence in the procedure and could reach its main aim, to avoid miscarriages of justice and to identify the actual perpetrators.

C) There are experiments to invent „fake noses" to apply in the health system, but these cannot solve the real problem, they just use them instead of the animals (dogs). A huge step could be the discovery of the scent's internal structure just as a material remain in the terms of criminalistics because it refers to the internal – unique structure. We know what is it made of, it's sources (continuously peeling epithelials from the surface of the skin, sweat, phlegm of sebaceous glad with various components of fat acid, but we don't know the components of it's mixture. Does it exist or not or is it possible to examine or describe it at all? The experts who do the main researches have to give us the answers to the previous questions. If the answer is no, then unfortunately we have to count on the irreplaceable animals (as dogs, pigs, wasps, rats, mice) or the „fake noses" which replace the below mentioned animals for a long term.

3. Monoscanner („brainreader") instead of polygraph

A) The polygraph in the investigation (as an orienting part) and in the control of the detecting versions is similar to the dogs' scent identification, which is usually called as „lie examiner" or „truth examiner" by others. The way it works is when an individual says a not true statement there will be physiological mutations, so the potential perpetrators could be spotted and mapped. Also, in some cases with the right tactical questioning we could get to answer one of the seven main questions of criminalistics. (Questions as where could we find the stolen object, the instrument of the perpetration for instance.)

Essentially and in general we have the knowledge that the examined individual did not tell the truth to one of the questions. However, the method does not give any explanations about the reasons. Thus, the result could and will be deformed, because there are a ton of irrespective (or coherent) reasons from the felony, why the questioned person did not tell the truth. (Previous personal positive or negative experiences, other individuals or in order to cover another feasance for instance.)

B) With this end in view our theoretical model has two main aims:

B/1. Spot and cut out the unknown deformations.

B/2. Collect appraisable data and information for criminalistics.

It will serve both, if we will not test the physiological phenomena by the individual who's under prosecution, then the memories and real thoughts that appears in the brain. So, a body polygraph is less useful, than a „monoreader", a scanner totally focused on the brain. Only with the permission of the person who's under procedure and in an no-secret procedure –just like in the case of the polygraph – the authorities would have the chance to resort experts to read the signs and images of the brain meanwhile the authorities question the person about general and concrete aspects of the felony. To succeed this result, the „only" need is to identify and

explore the technique of reading and picturing the thoughts of our mind. No exaggeration, it could definitely win a Nobel prize, like Paul C. Lauterbur did in 2003 for the invention of the installations of the magnetic resonance tomograph – fMRI – which could separate a piece from the brain in the resolution of 1,5 mm x 1,5 mm x 4 mm (similar to the size of a piece of rice) from a volume of 150 thousand size of these one single rice.

The fMRI by realizing the brain's use of oxygen, the amount of streaming blood could track the human decision-making process, reasoning, emotions, thus the truthtelling as well. First of all, it's extremely expensive, but the main problem is the functioning of the brain cannot be seen or sensible neither the mental pictures appearing inside the brain, which would have a useful knowledge about the offender for the law enforcement and which could not be hidden or limited by the examined individual. It claims the invention of another high-impact, scientific instrument.

C) The advantages of the „monoscanner" – as we named it, or also called monoreader, brainreader;[2]

a) The examined individual's brain (thoughts) – compared to the low source of material remains – are available in every single case.

b) The images appearing in the examined individual's brain – regarding to the nature of cerebration – could be less or not manipulated, which means there will be real pictures appearing in the brain, related to the felony by the questions at the actual perpetrator.

c) No guilty people would be scanned easier, because there will not appear pictures in their brain related to the felony (absent information). Even by any application for retrial would be possibly used posteriorly, if the instrumental resource and the scientific method reaches reliability in general. (Just like nowadays at the post-DNA identification.)

d) In context of the real images, there are chances of other efficient, proper, investigative acts. For example, authorities could have house search at the place that appears on the brain-image, other individuals (other perpetrators, plaintiffs etc), objects related to the felony could be traced as well.

e) The real (criminal) brain-images (information present) – according to our point of view – are displayed, so by chance it could be printed as well (by „monoprinter" or „monophoto"), which could be a part of the evidence or criminal investigation/procedure.

4. Other "honesty controlling" methods

A) Not only the mono-scanner or fMRI are the possible sources of detecting dishonesty and false statements in the future. The researches about this topic opened up that there is a possibility in the examination of eye-temperature to detect false statements by using/adopting a special eye-thermometer. This method brings a relation between the increase of metabolism of the eye and false statement, assuming that more blood flows into the iris and due to this effect, the temperature of the eye increases, when the person lies.

[2] See more details: Fenyvesi, Cs. (2017) A kriminalisztikai tendenciái. Budapest, Dialóg Campus Kiadó.

The other method/instrument was invented in the United States as well, named as Psychological Stress Evaluator (PSE), which measures and graphs the components of human voice related to stress. The procedure based on two tones of the human voice – one is audible, the other is not. At the existence of human stress (which could be based on a lie) the PSE shows the non-sensible tones for the human ear. The scientific evaluation and control of the efficiency of the instrument is yet not extensive enough, but it's supporters think, the use is way easier than the polygraph's, even though it could be used indirectly through telephone conversation or record.

B) As a second option we need to mention the "thermal-cam" method throughout you can conclude the existence of honesty or dishonesty by the changes of body temperature. Based on a Hungarian experimentation 1/3 Celsius (0,3 – 0,4) grades are the differences in general between the temperatures measured on the reference points – as the middle of the forehead, under the left eye, under the right eye in the middle, middle of the lips, middle of the neck – between these points the most irrelevant difference was the temperature on the middle of the forehead (0,37 Celsius) and the most relevant was at the lips (0,47 Celsius). At the evaluation of this experiment experts draw the inference, that at some of the reference points, the general maximum temperatures are higher when the person is dishonest than the average temperatures at honest responses and the same difference was shown by the minimum temperatures.

C) On third place we mention the Layered Voice Analysis (LVA), which gives results about the honesty of the said statement or denial. The LVA was invented in 1977 and can sense the person's mental state, level of stress and its changes by the human speech and shows the cognitive processes going through the speaker, so the mental process of – observation, – remembrance, – information conversion could be detected.

D) Among the possible methods of the searching for the truth or the exploration of lies you can find processes related to graphology. Tamás AGÁRDI reports one of these methods.[3] The main point is that the expert does various statements just like in the polygraph tests and the person has to reply with –yes or – no answers. But this time the person has to draw a circle by "yes" and a square by "no". Through these experiments the tests show what the kind of suspicious signs appeared as the result of psychic lie, how is the unfeatured presentation of reality – just as elongated reaction time, vague marks, fractions or hesitancy. By the expression of the dishonest contents seems;

a) Ordinary writing changes, automatism is taken over by a complex process controlled on purpose,

b) Reaction time elongates,

c) The spontaneous, harmonic writing skills come apart, the dynamic stereotypes are loosing their priority; intense control is noticeable.

E) In searching for the truth, as it is mentioned in the D) point, there are further refinements needed in the field of grapho-researches. In this context we have to

[3] Agárdi, T., Kármán, G. (1999), A hazugságvizsgálatról más szemmel. *Belügyi Szemle,* vol. 10. pp. 99-105.

highlight the future possibilities in grapho-comparison, grapho-analysis and grapho-linguistics. All three handwriting researches based on the same source, which is the fact that handwriting is a personal-specified, learnt for a long term, stereotype activity, practiced permanently, which is a projection of someone's personality and inner side. Especially because as it is known since a long time, that the brain writes and not the hand. Comparison means the identification of handwriting and it's future possibilities will be detailed in the next point.

In the aspect of the exploration of reality-untruth, we have to highlight that with the combination of these techniques could come into existence the so-called "three-probe procedure". It bases on once experts map out the handwriting criteria's and system of specialties connected to the untruth, then they confer the questioned handwriting from the exact same person to a surely false and to a surely true handwriting sample and then they value by quantity and quality the matching/ corresponding or distinct writing specialties. Through this procedure another type of polygraph (the known one based on speech and hearing) and this one would be based on handwriting, as the grapho-polygraph.

Besides the polygraph nature, the profiler nature could be discovered and used, because the grapho-linguistics and grapho-analysis could draw a conclusion about the writer's/author's sex, age, education (profession), illnesses (mental state) or deviance, but only as a possibility, not as a fact.

In a wide/broad meaning you will receive a profile, so it could be a so-called profiling, so grapho-profiling is basically a profile made out of handwriting. Its importance is mainly in the detection; in the identification of the possible suspects and in this context in the fomentation of setting up various possible versions, efficient investigation and in planning of secret service operations. Based on researches, the grapho-linguistics and grapho-analysis also aspire to hedge in with the most efficiency and possibility. In this endeavor in gracious cases they can count on special handwriting characteristics.

Besides the mentioned methods, a "double grapho-profiling" could be useful, when the results of grapho-linguistics and grapho-analysis show a coincidence. This type of "double-profiling" could be lead to a personal identification supplemented by any other technical featured handwriting research, not only by grapho-comparison. This is the reason why you can reckon on the development and refinement of this type of modus. In this pursuit the science of psychology has a major role by giving potent help to improve this field of criminalistics.

5. Techniques and possibilities in writing-identification

A) The grapho-cpmparison is more valuable than the grapho-analysis or grapho-linguistics because it gives specific/personal identification. This is the reason why these types of experiments and investigations need to receive more attention in the forensic detection. These are mostly techniques finished by criminalistics itself, therefore we can likely trust in them in the future as well. We find the most enticing the ones build on computers, special software and digital data. From these we see future opportunities and chances for development in the German FISH (Forensische Information-System Handschriften), which was started in 1988 and it works as a sorter and library system. There is a strong chance that having various on-going and

intensive achievements in computer techniques and with its graduation the program will put on more minim information on the map and compare them in the writing identification, therefore the validity, possibility and credibility of modus will approach an even closer level to reality.

B) Another similar computer-based method is called graphometry. The computer based graphometry procedure starts with the digitalizing of the writing. It happens with the use of a scanner, camera or digitalizing tablet and continues with the screening of the "noises". The program registers static features (as figure, shape, extensity, position) and dynamic parameters (as pressure, speed, the position of the pen etc.) and measures through previously defined settings and resolution. After follows the processing by statistic methods, evaluation and decision-making. Its greatest advantage is that the "text probability scales" can be changed by the level of significance and the certitude showed in numbers. The personal identification characteristics are definable and the possibility of matching with the incriminated writing is numerically expressive. Other progress could be the measurement and analysis of the frequency of some writing-characteristics/features in the population. With this method the strength of the value of each writing parameter could be definable. Regarding to this subject the authors, AGÁRDI – KÁRMÁN highlight the future chance to establish databases by the help of computerized graphometrial procedures, which opens up an automatic way by generating huge amount of data. By this method the establishment of computerized database based on handwriting will be in reachable proximity, which – with adequate searching and identifying functions – could be a new addition to the automatized personal identification systems.[4]

C) From literature we know other promising experiments about the fields of writing-identification, so we have to point out the American CEDAR for first, which deals with the exploration and comparison and mostly diversion and not identification of handwritings objective, reproducible characteristics. Between the characteristics tested by forensic experts 21 was processed as algorithm and thru tests based on 1.500 people's handwriting sample, identified the source of the handwriting with a 98% efficiency and security, even though the program was invented to distinct handwritings and not for identification.

The Dutch development, the TRIGRAPH is the next one which based on pattern recognition and image processing. The modus tests some characteristics of the handwritten documents as the automatics, the writing hand-measured geometric characteristics and in the end the variants of letters.

6. The future of mobile labs and DNA tests

A) Inspections are so called inevitable investigation actions in general, which expression refers to the "periculum in mora" situation; to the requirement of essential velocity. How could it be even more increased, how could make faster the quest, fixing

[4] Agárdi, T. (2003), Grafológia a nyomozásban, grafológiai hazugságvizsgálat. *Grafológia,* vol. 4. pp. 7-11.; Agárdi, T.-Kovács, Zs.-Hamperger, A.-Holéczy, Zs.-Nemes, A. (2009), Alternatív hazugságvizsgálati módszer kifejlesztése. Budapest, Közép-magyarországi Regionális Innovációs Ügynökség Innovációs Nagydíj pályázata

and researches of traces and material remains? The answer is, you have to make shorter the way of "scene-lab-court" triangle in the future. The way how it is reachable, is we have to locate the lab into the scene. Bringing there the most important, mostly basic trace and material remain "searcher" tools. What are we thinking of: what options are close to reality in the near and further future?

In these days there are only a few crime-investigations that need no special expertise. In this way we can freely think and organize equipment (experts and special techniques) at the well-modeled crime scenes, just as homicides. The logistics of criminalistics could help to direct the powers, objects, tools and vehicles (vans and trucks e.g.) to the scene of special "mini-labs". In these mini-labs you could already find digital scanners, which could make the digital image of the trace, fixed at the scene and a high-efficiency computer could execute the database-comparison right there as well. The exact same procedure would happen to the DNA content of the material-remains (mostly blood, spit, sweat, sperm) – collected from the crime scene – and after its examination the record-comparison could be accomplished. The inspection is not even done yet – all these examinations run during the procedure – and the perpetrator could be identified right at the crime scene. The identification of inner identity at the scene could be also useful, for example if different material remains belong to one person, or the distinction of the blood (material remain) of the victim and perpetrator. It could give a clear sight, helps to build up the right versions and to choose the adequate investigation action. Especially efficient in the detection of "white-powder" bio-weapons, when a possible virus could jeopardize not only the forensic investigator but the wider environment as well. In case of these types of public danger, the immediate bio-exam and the actuation of these mentioned "mini-labs" at the scene is almost inevitable.[5]

B) Obviously, there is a continuous development in the 1985 elaboration of DNA identification. This process will not stop and it is not hard to predict that other refinements are expected in the subsidiary utilization of genetic systems and technologies. The next generation technologies will fundamentally change the nature of DNA tests and not only with the localization to the scene – as mentioned in A).

We will discuss only a few from these.

Ba) The actual DNA "interrogating" materials apply automated gel tests (e.g. Hitachi FMBio, Molecular Dynamic Fluor-Imager, BioRad Multi-Imager) including tabular gel electrophoresis and the capillary electrophoresis systems as well. The further, new instruments would be expended to offer a way wider capacity than the actual ones.

Bb) The matrix-helped laser-absorbing mass spectrometria (MALDI-TOF MS) is an existing technology, which can finish genetic analysis in seconds. Thousands of analyses are done in one single day with the robotic sample-product and sample-loading. It could examine extremely small samples as well, with low expenses under its highly qualified leading.

The development of this technology leads to a possible chance of assaying bigger and bigger samples.

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[5] Belgrader, P.-Bennett, W.-Hadley, SD.-Richards, J.-Stratton, P.-Mariella, R.-Milanovich, CH F (1999), PCR detection of bacteria in seven minutes. *Science,* volume, 284. pp. 449-450.

Bc) The nowadays used drained-capillary electrophoresis instruments (PE Biosystems 3700, Molecular Dynamics Mega BASE 1000) in the expensive cases with a wide database are based on the successive sample dosage, in which's number of channels an improvement is definitely expected.

Bd) The DNA identification and its significance/importance will be even more improved, because it will be possible to search for material remains – and its structure – inside traces. E.g. a blurred fingerprint could be perfectly able to fix material remains in it and to detect/determine the DNA content in the end.

To achieve this level, we have to improve the making samples, pay special attention to the elaboration of cleaning techniques and the optimization of some type of material remains (male-female, animal-vegetal).

7. The future of digital exploration/discovery

A) We can surely say, this field has a dynamic, bright future. Basically, there are no technical tools/materials in our environment, which have not been touched by any digital technology in some point, and this fact will not change. Contrarily, law enforcement have to permanently count on the fact that criminals will also use up the advantages of digital technology, this involves to be aware of a "cyber war", so you have to unremittingly work on preceding, preventive, exploratory and evidentiary materials and credit the advantages of digital data (as second generation evidence).

B) For this general purpose, there is a need for unremitting digital data collection and updated/timely, wide registration where the data collection, ("Rasterfahndung" – in Germain), induction takes place with maximum output computers and programs by trained "digit-commando" and special subunits.

These systems have to be connected to other law enforcement officers' notebook stores as well. As an example, the British Police (PITO – Police Information Technology Organization) together with the NPIA developmental agency (National Policing Improvement Agency) works on the development of a monitoring system for the entire subway system in London, which could identify wanted persons by their faces. The base of this idea is establishing a huge multifunctional database. The cameras would have a direct contact with the police registration, so an immediate identification would be possible in this way.

The photos and it's criminal database/information for the identification would be available in mobile formats, so the police and detectives in service/on duty in the streets could reach the entire information, furthermore they would be provided by portable fingerprint-recognizers.

C) To reflect the past, digital-visual recording of accidents could be a perfect material in the exploration of the circumstances of traffic accidents, through a miniature video-camera, fixed in the margin of the upper windshield for example, in vehicles (automobiles, trucks or in any other hydraulic, aeronautic or vehicular vehicle), which after the electronic ignition records continuously – just like nowadays' lane-follower distronic system. The situation could be even luckier and more accurate/exact, if every single vehicle which were involved in the accident had this automatically or post-built in "eye-witness" systems and also "ear-witness" system as

well, because voice/noise recording is possible too with these digital cameras, so the reconstruction of scenes would be more accurate and evident.

D) The never-ending international fight against 3D printers started in 2013 and it probably will not stop at its beginning. Law enforcement have to be aware of and be prepared against this way of weapon or explosive transportation. They have to work out the preventive, exploratory opportunities and special know-hows.

E) In this context we have to highlight the future requirement and challenge that the criminalists need to participate in effective, fast and on-going education (with priority) and in training, because there is no chance for a relief in cyber-crimes in the near future; they have to compete in knowledge against the other side; against the well-prepared criminals, who feel themselves home in the cyber-field. Only special rained expert groups will not be enough (certified forensic computer examiner) in the digital internet-war (network forensics), each "fighter" have to learn with accelerated "knowledge-transportation" the basic and most important cognitions about hardware – software – internet – media/data carries – PC properties and the preventive, – monitoring, – seizure, – investigational, – security materials and modus (computer aided investigative environment). In our point of view, these will be the main challenges in the next years and decades for the World's criminalist.

F) Beyond that criminalistics needs those highly certified computers hacking forensic investigators, who could do digital entering/invasion; who could help to map, detect the "digit" criminals, organizations, systems and at the same time are able to paralyses and stop their field.

G) We can prognosticate breach or at least further development and excursion in the way of personal categorized identification in the method of digital voice/sound identification. Nowadays, in spite of the unbelievably developed acoustic materials and technologies – will not be able to ensure number –"1"-value personal sound-identification. Following our presumption, the forensic acoustic "sound works" – using sound engineers scientific results – will configure a comforting, reassuring technique related to some records (just as phone messages, tape-dictaphone records and other digital messages).

H) A growth in the data of digital networks, which was not seen before is probable in the future, on one part because of the junction of international network and on the other part because of the flare of the applying of informatics – analytics systems and its international dissipation.

In the framework of cross-border police and forensic collaboration in favor of fighting against crimes, the junction of national data networks already exists in many fields. The junction is under a continuous and intensive expansion in some continents; let us just think about Interpol, Europol, Eurojust, OLAF, Eurodac and Schengen – System. This process will continue in the future – even if homogenization is not probable – by trying to build up standards on criteria in data-comparison.

We assume, that in the application of Geographical Information and Analysis System (GIS) the future center of the so called "crime – mapping" digital mapping will move to the side of totally computerized, almost automatically run, prognostic "hot spots" data analysis.

I) The use of higher level of digital technique is a requirement not only with the scenes related to computers, but also with traditional (classic) crimes (attack upon life and physical integrity of a person, robbery, sexual assaults) as well. It is necessary to have a strong quality camera – and tape records, which are able to reconstruct the scene by any competent criminalist or any other law enforcement personnel in the future and any other viewer could digitally imagine him or herself at the scene and observe. They can monitor/control sizes, distances, colors, the spatial position of traces and material remains and the finished exploration actions.

J) The innovation will not stop in the process of super-projection with having more precise digital scanners, cameras; the Forensic Face Reconstruction (FFR) will develop as well.

The anatomy knowledge and data from autopsies and successful identifications gives a chance to make the FFR become a scientifically acceptable technique. For this aim, an objective method needs to be processed, which always bring adequate, same results tested by other experts. Therefore, materials as the computerized tomography, the magnetic resonance image, photogrammetry and leaser exams – which lead face-forming to another meticulous level – for example at the definition, modelling of eye-hair colors or chin-ear-lip shape will help a lot.

Also, the computerized animation procedures will be extended to the face-reconstruction, therefore the model will be able to smile, laugh or talk on the screen in the future by changing the face's features. We believe also, that the brave idea of recognizing a face only by DNA in the future will be possible thanks to the fast-changing/developing science of DNA mapping.

8. Development of secret techniques

In our point of view, nowadays sensible valorization tendency in between secret powers-materials-methods will moreover continue, you can expect the broadening of applications and entering of methods.

This forecast based on the development of digital data – mentioned in point 6 – because the technical knowledge and material /base/ system behind it is in continuous progress; there are more sophisticated, more sensitive and even smaller micro-nano materials/tools available for secret monitoring and for making sound-and-photo records in stable-fixed places (as public – or private properties) or even in moving vehicles (just as in cars, trucks, airplanes, helicopters, ships etc.), and articles. It is also true about materials of secret operations, which are under a continuous pressure of digital and online improvement in the virtual field of operative crime –interventional, crime –response and exploration activities. For example, new version of "spy-programs" with a positive aim need to be invented, produced to get with the powers against it.[6]

9. Further future developmental possibilities and suggestions

The most important parts were point 1-7, but now we sum up some fields where less change is expected, but improvements would be needed.

[6] Mészáros, B. (2011), *A fedett nyomozó alkalmazásának kérdései büntető eljárásjogi és kriminalisztikai szempontból*. Ph.D-theses, Pécs, PTE ÁJK.

A) The institutional introduction of a forensic nursing – forensic nurse system (which works well in the English-speaking/anglo/common law countries) could be one of the changes, in the continent, especially in the Hungarian practice. It would be needed on one side for the interest of the plaintiffs, for the prevention and avoidance of secondary victimization, and on the other side because of criminal-tactical interests of fast and silent acquisition of testimonies.

B) The Bayes-analysis (which is also based on English speaking/anglo/ common law countries' theoretical and practical results) supposes to have more attention, that gives an objective solution-model for handling insecurity in the valoration of mathematical feasibility in the continental – especially in the Hungarian law enforcement and jurisdiction – evidence, mainly the expert's opinions (and the guiltiness of the accused). It is time, that after Biology (in prediction of virus-spread, DNA-profile analysis, reconstructional eye-color modelling); Physics (in gravitational waves); Economics (in game-theory, in marketing as in the separation of products); Computer Science (as Google uses Bayes-filters for the unwanted letters); to appear in this field as well and be used/applied efficiently.[7]

C) Profiling – also with English (American) origins, theory and praxis is used in a smaller circle, but with success – which is a person-identifying (better explained as a person-constrictor method) has to be developed as well. Profiling system needs to be deepen by giving more help and feedback to the criminalists to identify/constrict the circle of possible perpetrators. Knowing more data, details about the perpetrator/s, criminalists could set up a smaller group of possible perpetrators – and finally in the end – the one person, who actually committed the crime.

D) Forensic advices are also the technical improvement, the deeper, wider application of cognitive interviews. Especially for the clarification of testimonies. We cannot give up on the improvement, discovery and testing of further, new interrogation methods (just as PEACE, SUE, SAI).

10. Summary

As being at the end of our study, we cannot finish without mentioning a noteworthy thought, that even if all of our prognosis become facts and if technique, digitalization, computer,-natural,-and social sciences get together, not even then could be exchangeable or replaceable the real key of the future's successful criminalistics; the criminalist him/herself.

He/she is the other focus besides identification. The expert, the explorer, the data collector, the effective detective, who takes risk and danger, who stands against continuous challenges, the crime-fighter in the never-ending real and virtual battlefield, where he/she only has one weapon in their hands: the criminalistics, as an "international treasure".[8]

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[7] Orbán, J. (2018), Bayes-hálók a bűnügyekben. Ph.D-theses. Pécs, PTE ÁJK.

[8] „The Forensic Sciences – An International Treasure." (President of American Academy of Forensic Sciences 2011): UBELAKER, D.H.: *The Forensic Sciences: International Perspectives, Global Vision.* Journal of Forensic Sciences. 2011/5. Volume 56. 1091.

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Some New Trends in Romanian Criminal Law Legislative Development

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Abstract

In the last period of time previous to the moment of elaborating this article (from around 2017 to 2019), the Romanian legislator (either the primary one: the Parliament, or the delegate one: the Government) manifested an intense and constant preoccupation regarding the modification of the current (and still relatively new) Criminal Code, and in general, of changing different parts of the criminal legislation dating from 2009 (year of conception and official publication), but who went into force only in 2014 (on the 1st of February).

This political will often went into conflict with the general view of justice projected by some representatives of the civil society and by some of the most important professions in the juridical field of occupation (e.g.: the judges and the prosecutors), giving rise to extended media coverage, endless discussions, (sometimes) street manifestations and even some quasi-riot like phenomenon in several cities and towns in Romania (and especially in the capital of the country), polarizing most of the society and maintaining a general state of pressure.

The interesting outcome (namely, that none of the most important modifications proposed and/or adopted by the legislator, in this period, didn't actually went into force, most of them being rejected by the Constitutional Court of Romania), is only surpassed by the peculiarity of inconsistency of the new proposals that now occur, in comparison with the former one's (the red thread being that the legislator seems to be set on changing at least some parts of the current criminal legislation, though it is still a new legislation).

In this article, the author will present and critically comment some of this new tendencies revealed in the last period by the current criminal law legislature of Romania, in order to diagnose the trends of criminal law evolution (or involution) that currently occur in the Romanian legislative landscape, the focus being set onto the general aspects of criminal law that the legislature proposed to change (taking into consideration, among others, the scientific specialization of the author in the general part of the criminal law).

Keywords: *Romanian Criminal Code, Romanian Constitutional Court, constitutionality, Emergency Ordinance*

1. Legal frame and context

On the 1st of February 2014, a new Criminal Code entered into force in Romania; it was enacted since 2009 (Law no. 286/2009)[1], and it replaced the Criminal Code

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[1] Published in the Official Monitor of Romania (M. Of.) no. 510/2009; the Romanian Criminal Code can be consulted online, (among others) at the Internet address (verified on 18th of Nov. 2019):

drawn up during the period in which the communist regime was established, which had been into force since 1969 (Law no. 15/1968)[2]. Despite the relatively new character of this essential normative act, amid changes in the political orientation of the governors who took over the state leadership shortly after its entry into force (among other things), the new legislator began to show (again) interest and increasing tendencies to modify / supplement the criminal law. In a generally tense political climate[3], the opportunity of manifesting such a legislative will was questioned by a part of the civil society (and even by some representatives of the main professional bodies existing in the field of justice), there being suspicions that some biased political pressures will disturb the objectivity of the state's criminal policy. That was because at least some measures envisaged were perceived by part of the public opinion as able to benefit, directly or indirectly, to some important political figures, related to the political coalition that dominated in Parliament and which ensured the government at that time, persons who had various ongoing criminal files, which were under investigation or at the stage of trial in front of a criminal court.

In this context, the fact that, objectively, some provisions of the (substantial and / or procedural) criminal law had been declared (meanwhile) unconstitutional by the Constitutional Court of Romania, respectively that the Romanian state had the obligation to implement some legislative solutions assumed through its international obligations (especially as a member state of the European Union), has represented the catalyst for starting the legislative reform process.

This process started with the adoption by the Government of an emergency ordinance for the modification and completion of the Criminal Code and the Criminal Procedure Code (O.U.G. no. 13/2017)[4], with the formal indication in the preamble of the normative act of the reasons previously stated. As some provisions were likely to contribute to the improvement of the procedural situation of some politicians with criminal files under analysis, this operation produced mass demonstrations of civil society and of the opposition (including large street protests in the capital and the main cities of the country). Therefore, this emergency ordinance was repealed shortly,

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http://www.cdep.ro/proiecte/2009/300/00/4/leg_pl304_09.pdf, and the version translated into English is accessible at the Internet address: http://www.just.ro/wp-content/uploads/2016/01/Noul-cod-penal-EN.doc accessed on 18th of Nov. 2019.

[2] Published in the Official Bulletin of Romania (B. Of. – the old name for the current Official Monitor) no. 79-79 bis / 1969 and republished in B. Of. nr. 55-56 / 1973 and in M. Of. no. 65/1997; the previous Romanian Criminal Code can be consulted online, (among others) at the Internet address: http://www.cdep.ro/pls/legis/legis_pck.frame, accessed on 18th of Nov. 2019.

[3] The existing tension is formally and officially invoked even in the preamble to some normative acts of that period, involved in the series of legislative events whose analysis is (also) presented in this article. Thus, for example, in the foundation note of the Government Emergency Ordinance (O.U.G.) no. 14/2017 an express reference is made to this state of tension and to its possible consequence: the real danger of the separation of the society (other terms used / other expressions used in this emergency ordinance, referring to a previous emergency ordinance aiming to modify aspect in the field of criminal law, OUG no. 13/2017, were: massive reactions coming from both the institutions of the judiciary and from other state authorities; the existence of public manifestations in a general context of misunderstanding, which may lead to consequences on the general climate of stability of the society; intensely criticized legal texts).

[4] Published in M. Of. no. 92/2017 (31st of January); the text of this normative act can be consulted online at the Internet address: http://legislatie.just.ro/Public/DetaliiDocumentAfis/186333 accessed on 18th of Nov. 2019.

after only a few days (also by an emergency ordinance, regarding the repeal of the Government Emergency Ordinance no. 13/2017 for the modification and completion of the Criminal Code and the Criminal Procedure Code, as well as for amending the Criminal Procedure Code: OUG no. 14/2017)[5]. As a peculiarity, the abrogation occurred before some provisions of OUG 13/2017 (those regarding material / substantial criminal law) would at least start to enter into force...

Subsequently, taking place, meanwhile, some political transformations and changes in the composition of the executive power, an initiative from the Ministry of Justice started to develop (among others) a draft law amending the Criminal Code and the Criminal Procedure Code. For this purpose, there were also requested the opinions of the criminal law specialists (theorists and / or practitioners), especially considering the need to comply the criminal law legislation with the mandatory solutions pronounced by the Constitutional Court of Romania and to some supranational normative imperatives. Once it reached the legislative forum, this bill was diverted to an ad hoc parliamentary committee, especially set up to this end, named: The Joint Special Committee of the Chamber of Deputies and the Senate for the systematization, unification and assurance of legislative stability in the field of justice. As a result, the normative form finally adopted by the Parliament was extremely different in comparison to the initial draft from which the legislative initiative started (both in terms of substance and form, as well as in scope, sphere of problems addressed, but also regarding some specific solutions that it has chosen).

Consequently, being notified repeatedly, within the framework of the a priori constitutionality control, the Constitutional Court of Romania decided the overall unconstitutionality of this normative act (adopted, but not yet promulgated / published in the Official Monitor)[6], after a somewhat similar prior decision[7], but which had dealt only to certain specific provisions of the legislative project in question. By the last decision thus pronounced, the Constitutional Court of Romania established, however, that despite the legislature's blunders, the legislative approach to elaborate a normative act to modify the criminal law, in order to comply (among others) with the decisions of the Constitutional Court mustn't be abandoned, but only more faithfully carried out in relation to the official objectives indicated and assumed in the note of foundation of the respective normative act.

Therefore, the conclusions drawn in this material are not definitive; there is to be determined in the future to what extent they will or will not materialize, in the process (still pending) of normative adaptation of the national criminal law in Romania to the standards imposed by the compulsory jurisprudence of the Constitutional Court of Romania, as well as by norms of the European Union (supranational level). Thus, in correspondence with the objectives and theme of the symposium that occasioned this

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[5] Published in M. Of. no. 101/2017 (5th of February); the text of this normative act can be consulted online, at the Internet address: http://legislatie.just.ro/Public/DetaliiDocument/186389 accessed on 18th of Nov. 2019.

[6] See the decision of the Constitutional Court of Romania (CCR) no. 466/2019 (on the 29th of July), published in M. Of. no. 862/2019 (on the 25th of October); the text of the decision can be consulted online at the Internet address: http://legislatie.just.ro/Public/DetaliiDocument/219100 accessed on 18th of Nov. 2019.

[7] See the decision of the Constitutional Court of Romania (CCR) no. 650/2018 (on the 25th of October), published in M. Of. no. 97/2019 (on the 7th of February); the text of the decision can be consulted online at the Internet address: http://legislatie.just.ro/Public/DetaliiDocumentAfis/210596 accessed on 18th of Nov. 2019.

article, the current material only presents some possible trends in the development of contemporary Romanian criminal law.

2. A panoramic view and brief comment on some modifications of the General part of the Romanian Criminal Code recently intended by the legislature, but unfulfilled yet

Starting from the aforementioned considerations – regarding the criminal reform desired by the modern Romanian criminal legislator, which is still (still) unaccomplished, given the intervention of the Constitutional Court, prior to the promulgation and entry into force of the law amending the Criminal Code – we will briefly mention and analyze some new normative trends regarding a few provisions from the general part of the Romanian Criminal Code.

- Firstly, the legislature sought to modify the text applicable in case of emergence of a more favorable criminal law until the final judgment of the case (the hypothesis regulated by article 5 from the Criminal Code), in the sense of expressly stating the absolute prohibition for the judicial bodies to create a *lex tertia*[8]. This completion of the legal text was due to the existence of Decision no. 265/2014 of the Constitutional Court[9], which imposed a strict global comparison of successive criminal laws in order to apply only one of them as a more favorable law, and not a combination of favorable dispositions regulated in various laws, some in force at the time of judgement, and some abolished or modified. This decision practically invalidated the existence of the so-called *criminal law institutions with autonomous application* (concept whose existence, widely accepted in most of the Romanian criminal doctrine from that moment and in the mandatory criminal practice issued by the supreme court[10]) strongly relativized the formal prohibition to create a *lex tertia* in the process of applying the *mitior lex* principle (by accrediting a restrictive interpretation of the *lex tertia* notion and of the prohibition of its application).[11] Although the newly used

[8] The prohibition to create *lex tertia* in the process of applying the more favorable criminal law means that the judge may not combine the most favorable dispositions from two or more criminal laws that had been into force from the time when the crime was committed, until the moment when the final judgement is passed; instead, the court must compare the two or more criminal laws, in their entirety, and pick only one of them, as the most favorable, as a whole, who will be applied under the aspect of all its provisions related to the case. The judge may not copy only the most favorable dispositions from one law and then paste them together with the most favorable dispositions from another law, thus creating, basically, a third law (*lex tertia*), made up, ad hoc, only from the most lenient dispositions of the laws actually in existence, because such a law was never in the intent of the legislature, and the judge must apply the law as it is, and not create a new law (according to the constitutional principle of separation of state powers).

[9] The CCR Decision no. 265/2014 (from the 6th of May) was published in M. Of. no. 372/2014 (from the 20th of May); the text of the decision can be consulted online at the Internet address (verified on 18th of Nov. 2019): http://legislatie.just.ro/Public/DetaliiDocumentAfis/158344.

[10] See the Decision no. 2/2014 (from the 14th of April), preliminary ruling to settle legal issues of criminal law pronounced by the judicial panel for the settlement of legal issues (regarding criminal law), published in M. Of. no. 319/2014 (from the 30th of April); the text of the decision can be consulted online at the Internet address (verified on 18th of Nov. 2019): www.just.ro/wp-content/uploads/2016/01/Noul-cod-penal-EN.doc.

[11] Basically, by the concept of applying the more favorable criminal law according to the autonomous institutions (which is a more flexible system for applying the mitior lex principle), although

formulation, in the law amending the Criminal Code, regarding the full application of the more favorable criminal law, without the possibility of combining provisions from successive criminal laws, was not *per se* censored by the Constitutional Court (representing precisely the essence of the idea imposed *erga omnes* by CCR's Decision no. 265/2014), however, by the CCR's Decision no. 650/2018, a series of subsequent provisions which were to be added to the text of art. 5 C. pen. (paragraphs 1^1 to 1^4) were invalidated as lacking conformity to the Constitution. Through these provisions, the legislator aimed to establish certain criteria for identifying the most favorable criminal law (occurred before the issuing of the court's final decision), and also, he tried to establish a legal order for their valorization; the judge had to take these criteria into account, in the legally prescribed order, for establishing the more favorable criminal law, in every particular case. The problem was that the order in which these criteria were provided was sometimes objectively impossible to obey (the verification steps were incompatible with the logical procedure imposed in the process of identifying the more favorable criminal law, as it is constantly indicated by the specialized literature and admitted in the stable practice of the judicial bodies).[12] Also, some provisions in this matter from the law amending the Criminal Code, in the form prior to the first decision of the Constitutional Court (no. 650/2018), were redundant, the same idea or variations of the same idea being re-written in separate paragraphs, sometimes in a different way, uncorrelated, or overlapping (at times) with provisions contained in other texts of law (such as those in article 4 of the Criminal Code, regarding decriminalization). Moreover, these aspects had also been highlighted by the advisory opinion of the Legislative Council[13], a document largely ignored by the legislator (which unfortunately represents a relatively constant position of the Romanian legislator). Basically, as the Constitutional Court decided in the first decision regarding this draft of law (no. 650/2018), by the complementary provisions to art. 5 C. pen. the legislature was about to create the paradoxal premise of

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the prohibition of creating a lex tertia is formally stated, it is not considered that this rule is violated unless the provisions of the successive laws are combined regarding one and the same institution (but not when they refer to criminal law institutions with autonomous application). Therefore, under the formal prohibition to create a *lex tertia*, in this conception there are many more hypotheses where one can actually combine more favorable provisions from separate criminal laws, in applying the *mitior lex* principle (without considering that it is so created a *lex tertia*), than according to the other (more rigid) system - which leads, however, to a stricter observance of the principle of separation of state powers, according to the rule that the judge must apply the law, in its entirety, and not create the law, not even from preexisting normative sets, adapted *ad hoc* to particular factual hypotheses.

[12] For example, a certain mandatory order was required to verify the criteria from the perspective of which a criminal law might appear to be more favorable than another, but within this order, the checking of a criterion that has, logically and objectively, priority (namely: taking into account the modification of the conditions for taking criminal responsibility, as it is the criterion of verifying the prescription of criminal liability), was provided only after the checking of a subsequent criterion (namely: the criterion of the potential modification of the sanction prescribed by law for that offense). However, the compulsory imposition of such an order of the criteria for verifying the more favorable character of one law in comparison with another was effectively impossible, challenging scientific laws impossible to modify according to the arbitrary preferences of the legislator (because, in case of prescription of criminal liability, the criminal can no longer be convicted; on the other hand, if a law only provides for a lower sentence than another, then the criminal will be sentenced, but to a less severe sanction; it is obvious that the first alternative is more favorable to the offender).

[13] The opinion of the Legislative Council regarding the law amending the Romanian Criminal Code (PL-x no. 406/2018) can be consulted at the Internet address: http://www.cdep.ro/proiecte/2018/400/00/6/cl557.pdf accessed on 18th of Nov. 2019.

qualifying a harsher criminal law as more favorable one; in addition, some legal formulations were contrary to the principle of application of the more favorable criminal law, as opposed to the CCR's Decision no. 265/2014. All in all, the Constitutional Court of Romania found that the expected changes of article 5 from the Criminal Code were likely to cause confusion and it pronounced them as contrary to the fundamental law.[14]

- The Romanian criminal lawmaker was also concerned about adding a certain nuanced provision to the general regulation regarding a certain form / modality of the criminal guilt, namely the intention, in its most intense form: the direct intention[15]. Thus, according to the majority opinion in the current criminal doctrine, when the norm of criminalization of a certain conduct makes express reference to the existence of a certain purpose, in the pursuit of which the respective act must be committed in order to be considered a crime (or to maintain its existence in an aggravated form of commission), then the form of guilt can only be the direct intention (direct intention qualified by purpose). Aiming at the express normative consecration of this doctrinal rule which, in its current form, may be subject to discussion (it is already contested, in a relatively recent minority opinion), the legislator has envisaged an amendment (through completion) of art. 16 paragraph 1 letter a) C. pen. However, the Parliament has inserted in the supplementary provision some (unclear) procedural provisions – such as that the existence of the direct intention must doubtfully result from the concrete circumstances of the case – which do not have their place in the general criminal law, but, possibly in the Code of Criminal Procedure. In addition, it is unclear why the hypothesis of the existence of a specific motive (reason) for committing the crime (regulated in the constitutive content of certain infractions) was not also expressly provided for, because the majority opinion is that the solution of such a case is in the same sense as if there is a purpose, namely: the restriction of the guilt only to the direct intention.

- Regarding the institution of the continued crime[16] and the modifications regarding its regulation (art. 35 paragraph 1 of the Criminal Code), the legislator had an incoherent attitude. Thus, initially, the draft law amending the Criminal Code provided (at point no. 5) the modification of art. 35 paragraph 1 of the Criminal Code, in what the legislator believed (wrongly) that it is the meaning of CCR's Decision no. 368/2017.[17] Essentially, by the CCR's Decision no. 650/2018 it was established that

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[14] See paragraphs 249-265 of the CCR's Decision no. 650/2018.

[15] According to article 16 paragraph 1 letter a) of the Romanian Criminal code, an action is committed with intent when the perpetrator can foresee the outcome of their actions, in the expectation of causing such outcome by perpetrating the act (representing what the doctrine calls *direct intention*); there is also another mode of intention (called in the doctrine: indirect), provided for in article 16 paragraph 1 letter b) of the Criminal Code: an action is committed with intent when the perpetrator can foresee the outcome of their actions and, while not intending to produce it, nevertheless accepts the likelihood that it will occur.

[16] According to article 35 paragraph 1 of the Romanian Criminal code, an offense is said to be continuing when a person commits, at various time intervals but for the realization of the same resolution [and against the same passive subject*], actions or inactions each having the content of the same offense. *The part regarding the unity of the passive subject was declared unconstitutional by the Constitutional Court – Decision no. 368/2017.

[17] CCR's decision no. 368/2017 (pronounced on the 30th of May) was published in M. Of. no. 566/2017 (on the 17th of July); the text of the decision can be consulted online at the Internet address (verified on 18th of Nov. 2019): http://legislatie.just.ro/Public/DetaliiDocumentAfis/191292. By this it was decided that the legal imposition of the uniqueness of the passive subject as a general condition

the criminal lawmaker misinterpreted those previously established by the Constitutional Court, regarding the continued crime, by Decision 368/2017. As a result, resuming the legislative process, the legislator considered that it is simpler to give up altogether the modifications regarding the disposition of art. 35 paragraph 1 from the Criminal Code! However, this solution was censored by the CCR's Decision no. 466/2019, as it practically violates the obligation of the Parliament to reconcile the Criminal Code with some mandatory decisions made by the Constitutional Court, which was one of the main goals assumed by the draft legislative amendment thus started![18]

- The legislator was also concerned about the partial modification of the sanctioning regime of the multiple concurrent offenses.[19] Thus, according to the provisions of art. 39 of the Criminal Code, in case of multiple concurrent offenses, there exist and are used several systems of sanctioning the criminal plurality thus committed, depending on the gravity of the crimes that compose it (which is reflected in the individual penalties established for each of these crimes).[20] In addition, the Criminal Code of 2009 brought, as an innovation, in the matter of sanctioning the multiple concurrent offenses, the possibility of applying as a resultant punishment, under certain express and limiting conditions provided by law, the sentence of life imprisonment, even if it was not established for none of the concurrent offenses and even if it is not even provided by law for any of them (art. 39 par. 2 of the Criminal Code).[21] The legislature initially wanted the penalty increase applicable to prison

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for the existence of a continuing crime is unconstitutional (what the 2009 Criminal Code legislator had introduced as an innovation compared to the previous regulation of the continued crime). By the draft law amending the Criminal Code PL-x no. 406/2018, the legislator sought to amend art. 35 paragraph 1 C. pen. not only by its partial repeal (extracting from the text the reference to the uniqueness of the passive subject), but it also disposed in the following sense: „An offense is said to be continuing when a person commits, at various time intervals but for the realization of the same resolution, actions or inactions each having the content of the same offense. *In the case of offenses against the person, the continued form is retained only when the facts are committed against the same passive subject*". However, this express provision, which excluded the condition of the unity of the passive subject, in the case of the continuing offenses directed against other social values than the person (for example: the patrimony), but maintained this condition, generally, on all categories of offenses directed against the person, was regarded by the Constitutional Court, through Decision no. 650/2018, as not being in accordance with the meaning of its previous statutes, from Decision no. 368/2018; see paragraphs 278-289 of Decision no. 650/2018.

[18] See paragraphs 125, 147-150, 157-162 and 164-169 of CCR's Decision no. 466/2019.

[19] According to article 38 par. 1 of the Romanian Criminal code: *There exist multiple (concurrent) violations when two or several violations have been committed by the same person, via various actions or inactions, before receiving a final conviction for any of them. There also exist actual multiple violations when one of those has been committed in order to commit or conceal another offense*; the second paragraph stipulates: *There exist formal multiple (concurrent) violations when an action or inaction committed by a person, because of the circumstances under which it occurred and because of the consequences it produced, contains the elements of several violations*.

[20] The absorption system is adopted if at least one of the crimes committed drew the establishment of a life imprisonment; the system of legal cumulation with fixed and compulsory penalty increase is provided if all the concurrent offenses have determined the establishment of penalties of the same kind: either imprisonment or fine (in this case, to the most severe penalty a mandatory increase is added of 1/3 of the sum of other similar penalties); it was chosen the arithmetic cumulative system when a prison sentence and a fine are imposed, the two being executed entirely.

[21] According to article 39 par. 2 of the Romanian Criminal Code: *When several penalties of imprisonment have been established, if, by adding to the heaviest penalty a third of the total of all other penalties of imprisonment, and for at least one of the multiple offenses the penalty provided by law is 20 years or more, the penalty of life imprisonment can be applied*.

and fine to be neither mandatory nor fixed, but to be an optional and variable increase (as in the former regulation), expressed as follows: in the case of prison sentences, by a maximum, predetermined number of years that can be applied to the basic punishment, from which it starts in the construction of the resulting punishment for the multiple concurrent offenses (the applicable increase was, in this vision, for a maximum of 3 years); in the case of fines, a maximum fraction (related to the maximum penalty provided by law for the offense that generated the highest concrete fine), which could not be exceeded (1/3 of the maximum punishment provided by law). By Decision no. 650/2018, the Constitutional Court decided that although, in principle, the legislator has the right to adopt any type of criminal policy he considers to be appropriate at a certain time, he must nevertheless do so in a correlated and balanced way. In the view of the constitutional litigation court, a relaxation of the sanctioning regime of the multiple concurrent offenses (as it resulted from the changes desired by the legislator) should, therefore, have been compensated by a systematic increase of the limits of the penalties provided for by the law for most of the infractions (which this was not the case), in order not to distort a coherent criminal policy of the state. As a result, some expected changes in this matter were declared unconstitutional, while others were considered appropriate, from this point of view (in our opinion, with at least arguable argument regarding the criterion of distinction between the two categories). Essentially, it was appreciated that regarding the hypothesis in which all the penalties established for the concurrent offenses are criminal fines, the increase may be optional and variable, but, if they are imprisonment penalties, the increase must remain mandatory and non-variable.[22] In the process of correlating the law amending the Criminal Code with Decision no. 650/2018 of the Constitutional Court, the legislator has, however, again misinterpreted some of the court's statutes. Thus, the modification of a text (art. 39 paragraph 1 (e) of the Criminal Code) was renounced, although its intended modification had not been declared unconstitutional. As a consequence, some problems of correlation with other texts also appeared, the new disposition of modification becoming partially incoherent and absurd (inapplicable).

- The same criticisms previously made regarding the amendments referred to by the criminal lawmaker on the topic of the sanctioning of the multiple concurrent offenses (indicated above, regarding the failure to take over and to correct some provisions in the law of modification, in the form existing after the Decision no. 650/2018 of the CCR) can be also formulated with regard to several other dispositions whose modification was aimed at by the legislator, the problem being therefore a systematic one, and not a punctual / short-term one. For example, in this framework it may be mentioned the renunciation of introduction of a new article in the Criminal Code, art. 159[1], which, in conjunction with the compulsory jurisprudence in this matter and with the provisions of the special law on mediation[23], would have expressly provided in the Criminal Code a new cause for the removal of the criminal liability applicable to certain offenses, namely: conclusion of a mediation agreement regarding the criminal side of some cases. It should be mentioned that this *sui-generis* cause for the elimination of criminal liability (with this specific legal qualification)

[22] See paragraphs 290-313 of CCR's Decision no. 650/2018.

[23] Law no. 192/2006, regarding the mediation and organization of the profession of mediator, was published in M. Of. no. 441/2006; this law can be consulted online at the Internet address http://legislatie.just.ro/Public/DetaliiDocument/71928, accessed on 18th of Nov. 2019.

exists at this time, but not according to a provision contained in the Criminal Code, but according to the provisions of art. 67 paragraph 22 of Law no. 192/2006.

- The criminal lawmaker also considered the repeal of another innovation brought by the Criminal Code of 2009, namely the possibility of applying a fine with and a prison sentence (cumulative main penalties), if the crime was committed in order to obtain a material gain (art. 62 from the Criminal Code[24]). Also, some modifications were mentioned in case of replacement of the fine with the obligation to perform unpaid work in the benefit of the community, or in case of replacing it with a prison sentence, in case of non-payment made without ill-faith (art. 64 of the Criminal Code). In the context in which some of these changes were interpreted by the Constitutional Court (by decision no. 650/2018) as being likely to violate the constitutional prohibition of imposing forced labor, the legislature has restricted the area of the changes initially envisaged in this domain.

- The legislator also intends to extend the scope of mitigating circumstances, including by expressly stipulating the illustrative character of the optional ones (modifications regarding art. 75 par. 2 of the Criminal Code). It should be noted that this amendment does not tend to be confined to the purpose of initiating this draft law, since this matter is not about putting legislation in accordance with the decisions of the Constitutional Court, nor about connecting to supranational regulatory standards.

- The legislature also considered changes in the matter of suspension under supervision of the execution of the sentence, as well as in the field of conditional release (parole). Essentially, the newly envisaged conditions of release were more favorable, the minimum fractions of served penalty after which the convicted criminal would become eligible for release being reduced, in relation to the current provisions. However, certain formulations initially used by the lawmaker, beyond their predominantly procedural burden, were considered as inappropriate, even as a sign of the legislator's misunderstanding of some essential notions, such as "evidence" (for example, it was stipulated as a condition of granting the release, that there is no evidence for the court to assess that the convicted person would not and could not reintegrate into society).[25] As a result, the legislator revised his formulations and provided in a clearer and uncontroversial form the rules he aimed to express.[26]

- In accordance with the objective assumed by the explanatory statement of the draft law amending the Criminal Code, a concern was also the correlation of some provisions of the national criminal law with the supranational regulatory standards assumed by Romania. Thus, taking into account Directive no. 2014/42 / EU of the European Parliament and of the Council from the 3rd of April 2014, on the freezing and confiscation of the instruments and products of the crimes committed in the European Union, the Romanian criminal legislator aimed to modify the provisions contained in art. 112^1 of the Criminal Code, which regulates, as a specific sanction of criminal law (namely, a security measure), the extended confiscation. According to Romanian criminal law, the security measures represent sanctions of criminal law different from punishments (specific criminal sanctions for major offenders and for legal persons), as

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[24] According to article 62 par. 1 of the Romanian Criminal Code: *If the committed offense was intended to provide a material gain, the penalty by imprisonment can be accompanied by a penalty by fine*.

[25] See paragraphs 373-377 of CCR's Decision no. 650/2018.

[26] In the form subsequent to the CCR's Decision no. 650/2018, the condition envisaged is worded as follows: the court is convinced that the convicted person has rectified its behavior and can be reintegrated into the society (nothing is mentioned anymore about "evidence").

well as from the educational measures (specific criminal sanctions for minor offenders). Thus, they constitute a special kind of criminal law sanctions, characterized in that they do not represent consequences of criminal liability for a crime, but only consequences of committing an unjustified conduct described by the criminal law. As a rule, security measures shall be taken against persons who commit simple unjustified acts provided by the criminal law[27], even though those acts cannot be effectively qualified as infractions, because they do not meet all the other essential features of the crime (for example, they are not imputable to the person who committed them, or that person did not manifest the specific type of guilt the criminal law required for that act to be punishable as criminal). However, the extended confiscation, introduced in the national legislation in 2012, also as an effect of the need to respect the supranational (European) regulatory standard, is a relative exception, because, although formally it is not a consequence of the criminal responsibility for committing an offense, it is however (the single security measure) conditioned by this premise. Thus, this is the only security measure that can be disposed of only when the deed was retained / qualified as a crime, and there are a number of other specific / particular conditions expressly provided by art. 112^1 of the Criminal Code. Broadly speaking, in essence, these conditions refer to: the classification of the offense committed in the limiting list provided by law, according to art. 112^1 paragraph 1 letters a)-q) from the Criminal Code; the existence of a penalty provided by law of 4 years or more, stipulated for the respective offense; the existence of the possibility that the crime thus committed may give the offender material benefit; finding that the value of the goods acquired by the convicted person within a period of 5 years before and after the time of the crime, until the date when the criminal court is formally notified with its judgment, clearly exceeds the revenues obtained by him / her legally[28]; the existence of the court's persuasion that the goods envisaged come from criminal activities of the nature of those in the limiting list provided by law. According to the law amending the Criminal Code, in the initial form (prior to the CCR's Decision no. 650/2018), the legislator partially modified these provisions, but (in an overall assessment) in a sense that was not strictly in accordance with the provisions contained in it in Directive no. 2014/42 / EU of the European Parliament and of the Council from the 3rd of April 2014, although this was formally the officially stated purpose of the amendment. Essentially, given that according to the European standard in this matter it can be stated that an enlargement of the scope of the extended confiscation is concerned (by comparison to the current state of the Romanian legislation in this field), the Romanian lawmaker intended to regulate this institution in an even more restrictive manner. In addition, the formulations envisaged by the legislature, at this stage, were sometimes contradictory and even incapacitating for the extended confiscation, raising the level of probation necessary to dispose of this criminal law sanction at almost the same level imposed and for the (distinct) security measure of special confiscation (a security measure pre-existing in the Romanian legislation).[29] Most of these aspects

[27] According to article 107 of the Romanian Criminal Code: *(1) Security measures seek to eliminate any state of hazard and to prevent the commission of offenses provided by criminal law. (2) Security measures are taken against a person who committed an unjustified offense under criminal law. (3) Security measures may also be taken in case no penalty is applied to the offender*.

[28] For this evaluation, there must be taken into account: the value of the goods at the date of their acquisition, the expenses incurred by the offender and his / hers family members as well as the value of the goods transferred to his / hers family members or to a legal person he / she controls.

[29] In the case of special confiscation, a certain link must be proved effectively between the confiscated good and the commission of the unjustified deed provided by the criminal law (e.g.: the

were properly censored by the CCR's Decision no. 650/2018.[30] As a consequence, the criminal lawmaker reverted to the changes he intended to make in the matter of extended confiscation, among others eliminating the limiting list of crimes for which this sanction can intervene, but without corroborating the rest of the provisions of art. 112[1] from the Criminal Code with this elimination. Therefore, there would have been legal provisions, in subsequent paragraphs of the article, regarding the persuasion of the court that confiscated goods come from committing criminal activities similar to those regulated in par. 1, under the conditions in which this paragraph no longer expressly regulated certain categories of offenses to which this condition could be verified (which would have practically led to the inapplicability of the institution). Along with a number of other inconsistencies, these problems have led to a new pronouncement of the unconstitutionality of the provisions for amending the Criminal Code (prior to their promulgation), by the Constitutional Court (Decision no. 466 / 2019).

- The Parliament also considered reducing the duration of certain terms of prescription of criminal liability, in comparison to the current regulatory stage, but (curiously), not in the case of all crimes. Thus, the duration of prescription periods for very serious offenses (those for which the law provides for the punishment of life imprisonment or imprisonment of more than 20 years) and for two categories of offenses of minor gravity (namely those for which the law provides for a higher prison sentence then one year, but not more than 5 years, respectively those for which the law stipulates the penalty with the fine or imprisonment of maximum 1 year) would remain unchanged (namely: 15 years in the first case, 5 years in the second case and 3 years in the third case).[31] Instead, the legislature aimed to change the term of limitation of criminal liability for two categories of medium gravity offenses, in order to reduce the duration of this term, thus: for offenses for which the law stipulates the prison sentence of more than 10 years, but which does not exceed 20 years, the prescription term would decrease from 10 to 8 years; for offenses for which the law stipulates the prison sentence of more than 5 years, but which does not exceed 10 years, the prescription term would decrease from 8 to 6 years.[32] The inexplicable character of this decision of criminal policy, unsolicited by doctrine and practice and completely devoid of problems in law enforcement, raised some question marks for certain segments of the population. There were suspicions that the legislature (in which the political power was ensured by the coalition at that time in government) aimed in particular to create the legislative framework conducive to extinguishing the criminal responsibility of prominent political personalities (with important functions in the state apparatus and within the political parties that were members of the respective ruling coalition) who were prosecuted at the time on the charge of committing crimes that, by a difficult to ignore coincidence, were part of the categories of offenses whose prescription term was to be reduced.

- Also, the legislator aimed at reducing the duration of the special prescription term, by returning to the previous solution (recently abandoned): exceeding by half more the duration of the ordinary prescription term (and not exceeding it once again, as foreseen at the moment), would have to attract the consideration as prescribed of the

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good must come from committing that act; the good must have been used in the crime or to ensure the escape of the perpetrator etc.).

[30] See paragraphs 389-413 of CCR's Decision no. 650/2018

[31] See the provisions of art. 153 par. 1 letters a), d) and e) of the Criminal Code.

[32] See the provisions of art. 153 par. 1 letters b) and c) of the Criminal Code.

crime committed, no matter how many interruptions of its term would have taken place. Although these legislative solutions were not considered unconstitutional by the Constitutional Court, they represented a main reason for the social disturbances and mass demonstrations organized in Romania during the last years, by various representatives of the civil society and of the political opposition to the governing power (from the moment of making these legislative proposals). Moreover, as we have already mentioned, those amendments were not requested by theorists or practitioners of criminal law, and the formal justification of the legislative initiative, in the explanation of reasons, regarding the need to promptly resolve cases by the judicial bodies, was profoundly unconvincing[33], since it was not envisaged to reduce all the prescription terms, for all categories of offenses.

3. Short conclusion

Objective reasons of economy of time and space did not allow us to point out, also, in this material, some changes that the legislator wanted to bring to the special parts of the Romanian Criminal Code, although those may have agitated the spirits even more. By reviewing only a few of the changes that the current Romanian legislator wanted to make on the Criminal Code (still new!), one can easily observe the profound, sometimes radical, nature of the intended reform, but also the obvious amateurism and partisanship by which it was intended to be carried out. These features are even more obvious if we mention, for example, that through alternative legislative projects to amend the criminal legislation, often coming from the same legislative initiative, it is desired to amend the Criminal Code in some diametrically opposite ways than the ones presented above. For example, after an intense media coverage of a recent case of kidnapping and killing a hitchhiker underaged girl, the Government initiated a draft emergency ordinance[34] that aims (among others) to tighten, under certain aspects, the regime of granting conditional release… In this context, comments tend to remain superfluous!

One can only hope that, with the recent political changes regarding the assurance of the Romanian government, such legislative loopholes will cease, allowing the

[33] In addition, the statement of reasons is actually insulting to the judicial bodies, referring explicitly to the possibility of blackmailing some people whose files have long remained in non-processing, to the existence of illicit research and trial purposes, to abusive investigations etc., in the conditions in which such practices no longer tend to be characteristic for the Romanian judicial system. Such a formal accusation of the legislative power vis-à-vis the judiciary, given that in today's Romania the collective perception is more favorable to the correctness of the latter, being generally circumspect with regard to the verticality of the representatives of the political class, it has been perceived by large groups of the population as a demagogic and hypocritical attack, especially given the lack of evidence to support / justify such assertions, all the more so as these provisions would undoubtedly be able to help the situation of certain great (V.I.P.) defendants (people with great political visibility). Beyond the indicated aspects, it is to be observed that such an unacceptable positioning of a state power in regard to another one, reveals the existence of a climate of maximum political, social and (inter-) institutional tension, incompatible with the good and general functioning of a state, an aspect that it is urgent to be deeply remedied.

[34] The project and the foundation note of this project can be consulted online at the Internet address: http://www.just.ro/proiect-pentru-modificarea-legislatiei-penale-si-procesual-penale-in-cazul-infractiunilor-grave-si-foarte-grave-contra-persoanei-in-special-in-situatiile-in-care-este-afectata-valoarea-sociala-supre/ accessed on 18th of Nov. 2019.

legislator to worry about solving the real incongruities that crush the domestic criminal legislation, without further following various regulatory chimeras with special recipients. The future will reveal the extent to which this hope will be fulfilled or not, since, by decision no. 466/2019, the Constitutional Court established that, despite the overall unconstitutionality of the law amending the Criminal Code, in the form adopted by the Parliament after the decision no. 650/2018 of the Constitutional Court (regarding the initial version of this law), the legislator must, however, resume the legislative process and finalize it in correspondence with the goals initially assumed, through the explanatory memorandum to the draft of this law. We only wish that the manner in which this operation will be carried out will be more coherent, more objective and more professional than the one in which this true saga of the recent modification of the new Romanian Criminal Code began.

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The Convict's Right to Hope. Difficulties Regarding the Prejudice Payment Conditions in the Matter of Conditional Release

Dr. Matei-Ciprian Graur*

Abstract

The year 2014 was an important moment in changing the dynamics of criminal law institutions in our internal system, the legislator reinventing some of the rules of the criminal process.

Among many criminal law institutions, conditional release has received a new legislative approach, which has also led to a change in judicial practice in the matter.

Regulated as a way of individualizing the execution of a custodial sentence, this aspect of controversy over when the institution of conditional release becomes applicable, it is based on the state's criminal policy at a certain point in time.

The controversy we are referring to considers that the individualization of the execution of the sentence in the case of conditional release operates post-judicially during the execution of the punishment, and not at the time when the conviction is pronounced.

As stated in the doctrine[1], the institution of conditional release is a vital criminal policy measure for the purpose of punishment. In this respect, it was mentioned[2] that conditional liberation should be regarded as an incentive for convicts who give evidence of correction, being intended to accelerate the process of reeducation and social reinsertion.

Keywords: *hope, conditional release, criminal process, prejudice, social reintegration, civil obligations.*

1. The need to modify the institution of conditional liberation in domestic criminal law

Even from the Explanatory Memorandum of the Criminal Code in force it is shown that the institution of conditional liberation knows significant changes both in terms of granting conditions and the process of social reintegration of the condemned by the active and qualified involvement of the state, the essential role of probation counselors.

It is stated in the Explanatory Memorandum[3] that conditional release is not a right recognized by the sentenced person not to execute the penalty until the deadline,

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[1] Florin Streteanu, Daniel Niţu, *Criminal Law. General Part*, Vol. II, Ed. Universul Juridic, Bucharest, 2018, p. 576.

[2] *Ibidem.*

[3] www.avocatnet.ro, accessed on 23.05.2019.

but a legal instrument whereby the court finds that it is no longer necessary to continue the execution of the sentence under detention until full compliance with the length of the conviction as the convict, through his conduct throughout the period of execution, proves that he has made obvious progress towards social reintegration and thus convicts the court that he will no longer commit crimes, and his early release does not pose any danger to community.

Based on these considerations, the provisions of Article 100 The Criminal Code regulate the following conditions in relation to which the convict's conduct for the granting of conditional release is assessed:

a) the sentenced person has executed at least two-thirds of the sentence, in the case of imprisonment not exceeding 10 years, or at least three-quarters of the penalty, but not more than 20 years, in case of imprisonment for more than 10 years;

b) the sentenced person is in the execution of the penalty in a semi-open or open regime;

c) *the convict has fully complied with the civil obligations established by the conviction, unless he proves that he has had no possibility to fulfill them;*

d) the court is convinced that he has turned and that he will no longer commit other crimes.

In the Explanatory Memorandum of the Law on the Adaptation of the Law no. 286/2009 on the Criminal Code, as subsequently amended and supplemented, with the decisions of the Constitutional Court, Directive no. (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and the right to be present in the criminal proceedings, Directive 2014/42 / EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and the proceeds from crime in the European Union[4] shows that the need to amend the provisions on conditional release art. 100 The Criminal Code is given by the fact that a state's criminal policy can be changed and may be based on the principle, enshrined in all democratic states, that a person can be recovered and re-educated as a behavior towards society, and obliging it to a certain type of attitude by releasing them more quickly.

It is also shown that a change in criminal policy is necessary and we must be able to consider that a person can correct his behavior and without fully executing a custodial sentence. Persons committing offenses established by criminal law must actually have a chance of rehabilitation in society, and the lower penalties to be executed are sufficient to demonstrate to the judge that he understands the consequences of his deeds and that he is ready for the release. Moreover, the additional condition imposed, that the judge will order the measure only if he is convinced that the convict has turned and can integrate into society, is capable of regulating any inconvenience. The fraction of the punishment that has been executed or deemed to be executed creates only a condition for conditional release rather than a right, and the one who will have the necessary margin of appreciation will be the judge entrusted with the settlement of the case.

At the same time, the role of the state in correcting and reintegrating into society the people who have been convicted, and not to remove them and keep them in prisons for as long as possible, so that they become irrecoverable for society.

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[4] Available online at www.cdep.ro, accessed on 23.05.2019, a draft law currently in the constitutional review stage by the Constitutional Court (referral dated 02.05.2019). The draft was adopted by both the Senate and the Chamber of Deputies on 17.04.2019 and 24.04.2019 respectively.

In this regard, the numerous convictions ordered by the European Court of Human Rights against Romania for overcrowding in prisons are taken into account, especially since it has already pronounced the *pilot decision Rezmiveș and others v. Romania* of 25.04.2017[5], which obliged the Romanian state to provide a clear timetable for general measures to address overcrowding in prisons and to improve prison conditions.

In our analysis, we also need to take into consideration the Recommendation rec (2003) 22 of the Committee of Ministers to Member States on conditional release[6] that conditional release presents one of the most effective ways to prevent relapse and promote placement, planned reintegration, assisting and supervising the detainee in the community.

As a general principle, the recommendation establishes that conditional release is aimed at helping detainees to move from prison life to law-enforced life in the community through post-release and surveillance conditions that promote and contribute to public safety and community crime.

2. The convict's right to hope

By the judgment of the European Court of Human Rights in *Matiošaitis and others v. Lithuania*, judgment of 23.05.2017[7], the Court referred to life imprisonment sentences that do not offer prospects of release, finding that the provisions of Article 3 of the Convention.

In fact, the six applicants whose applications had been declared admissible had all executed sentences for life imprisonment. In their applications before the European Court, they complained under Article 3 of the Convention that their sentences could not be reduced.

The applicants submitted that serving a life sentence without a real hope for release was further aggravated by the segregation imposed under Lithuanian law as well as by inhuman conditions of detention in Lukiškės Prison. Life prisoners' segregation had also been noted and criticized by the CPT in its reports on Lithuania.

Consequently, with no de facto opportunity to have the penological grounds for their continued detention assessed, the applicants were in practice deprived of any prospect of release and their continued detention was therefore in breach of Article 3 of the Convention.

In law, having regard to the provisions of Article 3 of the Convention, the issue before the Court had been whether the penalties imposed on the applicants could be classified as irreducible, or whether there was a prospect of release.

In order to ensure an adequate assessment of the changes and progress towards the rehabilitation made by a prisoner sentenced to life imprisonment, the review of such a punishment would entail either giving reasons to the executive or exercising judicial control, so that even the appearance of arbitrariness would be avoided. Lithuanian presidential pardon did not allow detainees, de facto, to know if they were

[5] www.echr.coe.int, accessed on 27.05.2019.

[6] Available online at www.rm.coe.int, accessed on 23.05.2019, adopted by the Committee of Ministers on 24 September 2003 at the 853rd meeting of the Prime Ministers.

[7] www.hudoc.echr.coe.int, accessed on 23.05.2019.

intended for release and on the basis of which conditions there was no judicial control. Accordingly, the applicants' life imprisonment sentences could not be regarded as reducible for the purposes of Article 3 of the Convention.

The Court therefore found, in these circumstances, that there had been a violation of Article 3 of the Convention.

In Lithuanian criminal law, detainees could be released from the condition of the detainee's condition at the terminal stage, or they could be amnestied or punishable. None of these measures provided the true perspective of liberation. Under Lithuanian law, only detainees serving limited sentences, not those sentenced to life imprisonment, were eligible for release. In its turn, as the Court has consistently held, switching the sentence to life imprisonment due to the prisoner's terminal condition could not be considered a "prospect of release." Similarly, the amnesty under Lithuanian law could not be considered as a measure that would give prisoners sentenced to life imprisonment the prospect of mitigating their punishment or release. The Court held that, moreover, as acts of general rather than private application, amnesties did not seem to take into account the aspect of the rehabilitation of each detainee.

As the Court has held in previous cases, reviewing a life sentence should allow the authorities to address any changes in the prisoner's life and any progress towards rehabilitation.

Also, although Article 3 of the new Criminal Code allowed convictions for life imprisonment to be reclassified and commuted to a limited term, this was the only possibility and all eligible applicants had requested this on the basis of that provision, but without success.

With respect to presidential pardon, detainees sentenced to life imprisonment were eligible to meet their pardon demands within a substantially shorter time than the 25-year maximum that the Court has said is acceptable in Vinter's and others and Murray, the procedure was transparent and accessible and implied the existence of a set of criteria that allowed the President, based on an opinion from the pardon commission, to determine whether the continued detention of a life sentenced had been penalized.

However, presidential pardon could not be considered as de facto reducing convictions for life imprisonment. First, neither the pardon commission nor the President was obliged to give reasons for the refusal of a petition for pardon. Secondly, the President's pardons of pardon were not subject to judicial control and could not be directly challenged by detainees. Thirdly, the work of the pardon commission was not transparent, and its recommendations were not legally binding for the President. In conclusion, the presidential pledges of pardon in Lithuania were the present equivalent of the royal prerogative of forgiveness based on the principle of humanity rather than the existence of a mechanism with adequate procedural safeguards to control the detainees' situation so that the review of their sentences to life imprisonment did not lead to their rehabilitation.

In any case, the example presented highlights a need for criminal policy at European level in criminal matters, that of Member States' guarantee that those sentenced to imprisonment (even for life) may enjoy a possibility in the future of liberation before the full length of the penalty.

We have in mind, in this context, *a genuine right to hope of the condemned*, without which he no longer presents the premises of a real desire for redeployment.

The Court reiterates that the mere fact that a prisoner has already served a long term of imprisonment does not weaken the State's positive obligation to protect the public, and that no Article 3 issue could arise if a life prisoner continues to pose a danger to society. This is particularly so for those convicted of murder or other serious offences against the person (see Vinter and Others, § 108; also see Murray, § 111, both cited above). However, it equally considers that even those who commit the most abhorrent and egregious of acts, nevertheless retain their essential humanity and carry within themselves the capacity to change. Long and deserved though their prison sentences may be, they retain the right to hope that, someday, they may have atoned for the wrongs which they have committed. They ought not to be deprived entirely of such hope. To deny them the experience of hope would be to deny a fundamental aspect of their humanity and to do that would be degrading.

It is precisely the possibility of premature release that can cause the condemned to reconsider its values and conduct throughout the period of detention, thus being able to reward and reintegrate into society more quickly.

In order to achieve an effective social reintegration, conditional release can be preceded by a temporary release, which is intended to help the detainee to become aware of the rules to which he will have to obey when he or she will leave the detention permanently.

Thus, including in Romania, detainees can get permissions to leave the penitentiary management where they execute the punishment, as a reward, following a positive conduct during the period of imprisonment.

Similarly, England introduced the temporary release, ROTL (Release on Temporary license), in its domestic legislation, in the form of a temporary leave to leave the prison. The institution becomes applicable in exceptional circumstances, for example when a close relative is seriously ill, or to help the convict reintegrate more easily into society, thus preparing for further release.

In this respect, English law regulates the possibility of releasing the following forms of premises[8] to prisoners with positive behavior: Permit for special events. This is a permit for a few hours and is granted for:

• visiting close relatives on the verge of death
• traveling to the funeral of close members
• marriage or religious services
• medical treatment – during admission or treatment
• traveling to court or interrogation.

Permit for days of reintegration. This permit is granted for:

• participation in community-based projects or other out-of-prison events in preparation for release
• keeping in touch with the family
• training or education to gain working skills. Extended permit for days of reintegration.

It is granted for purposes similar to the re-entry permit, but it also offers the opportunity to spend more time at the place where the convict will live after the release. Permission to stay in touch with children. This permit is issued for detainees who are the only parent or supporter of a child under 16 years of age. This permit can be taken every 2 months.

[8] For an ample presentation, see www.prisonreformtrust.org.uk, accessed on 01.06.2019.

We note that including these institutions, applied before conditional release, are likely to urge the condemned to adopt constant positive behavior, and he can reasonably hope that he will be released before the total amount of the established sentence is reached.

3. Damage payment conditions – jurisprudence difficulties

A current issue of conditional release, which may blur the right to hope for conditional release, takes into account the obligation imposed on the convicted to pay the damage established by the offense.

How severe is this obligation? How far does the state's desire to protect the material interests of the person injured by the offense extend to the vocation to release the convict?

The jurisprudence is controversial regarding the fulfillment of the condition provided by Article 100 lit. c Criminal Code, regarding the coverage of the prejudice, before the conditional release, by the convicted person.

This is also due to the fact that the jurisprudential reality highlights fairly frequent situations in which convicted persons do not have the concrete possibility of covering the damages, often very significant as extent.

An excessive duty imposed on the convicted person would, indeed, *can affect the right to hope*, which the European Court of Human Rights is referring, thus restricting the willingness of the sentenced person to reschedule. Even if the above-mentioned decision was made following an analysis of the lifetime situation, the existence of a high amount of damage to the defendant may have consequences for possible future release. Access to this institution, which, undoubtedly, remains a vocation of the convict, must be possible with the help of normal care, natural in the context of an ordinary detainee.

Consequently, the eventual establishment of excessive obligations in relation to the situation of a detainee could eradicate the content of conditional release, the convict not expecting to be able to release himself in the future.

Relevant in this respect is the criminal decision no. 265 / CONT of 18.03.2019 of the Timiş Tribunal, delivered in file no. 3469/325/2019[9], which allowed the convict P.A. against criminal sentence no. 473 from 12.02.2019 of the Timişoara Court.

The first court held that the documents in the file show that the Arad Court of Appeal, No. 360/2015, ordered the defendant to pay moral damages to civil parties in the amount of 4.000 euros, damages which had not been paid by them. According to the committee's conclusions, the convicted proved the impossibility of paying the moral damages and during the execution of the punishment he carried out productive activities that did not generate income. However, in relation to the act for which the petitioner was convicted, the court notes that the failure to pay even the partial damage to which he was ordered proves an appropriate failure of the offense.

In this respect, the first instance has held that convicted persons, who are also obliged to pay damages to injured persons, must show active conduct during detention, in the sense of trying to perform paid activities, if possible, precisely in order to restore the socially violated and materially.

[9] Unpublished.

However, the impossibility of paying any money on behalf of the injured persons, the deed being of high gravity, by invoking only the unfolding of unpaid activities, cannot be received by the court, the convicted person having the obligation to try to find a legal solution for payment of the damage to which it was bound.

Thus, the Court of First Instance held that precisely the aspect of reparation was introduced in 2014 as an additional condition in the matter of conditional release, convicted persons including the payment of moral or material damages by sentencing sentences were also obliged to engage in activities that would bring them licit incomes during the period of detention to be able to fulfill this obligation.

Moreover, the first instance found that the convicted person paid legal expenses in the amount of 1463 lei, thus proving an available money, which is not related to the damages established for the injured persons, which is why he considers that the payment of the part of it to civil parties.

In view of these issues, the court first found that the convicted person did not meet all the conditions laid down by the law in order to be released conditionally.

In view of these considerations, the first instance rejected the request made by the Timisoara Penitentiary in respect of the convict P.A.

The Timiş Tribunal amended the ruling given that, as regards the condition of full payment of the civil damages established by the conviction, indeed, the plaintiff did not pay these damages, but it is necessary to check whether the challenging claimant had the opportunity to meet them.

In this regard, the court held that, according to the documents in the file, the P.A. does not appear in the tax records with income nor owns property.

It is also noted that while the sentenced person worked during the detention, the lucrative activities consisted of unpaid servicing and productive services.

In view of these issues, the tribunal has appreciated that the P.A. was objectively unable to pay the civil damages established by the conviction judgment, by reference to the lack of valuable assets and any other income.

It was also noted that although conditional release can be ordered as a result of the impossibility to pay civil damages, it does not affect the right of the civil party to obtain compensation for the damage caused by the convict by committing the deed, under the law, the impossibility of payment being only found at the time of considering the request for conditional release, by reference to the material situation of the convicted person during detention.

Analyzing this judgment, we see a distinction between the impossibility to pay and the actual opportunity followed by non-payment.

As long as the convicted person has provided income-generating activities such as housekeeping or servicing at the place of detention and does not hold any other money or property, the imposition of the payment obligation arises as excessive.

Therefore, it is important to determine what is the reason for non-payment of the damage, including the legal provision in Article 100 lit. c The Criminal Code stipulating that in the case of proof of impossibility of payment, the condition is no longer to be fulfilled in the context of conditional release.

It has been pointed out in the doctrine[10] that the requirements imposed by the provisions of Article 100 lit. c Criminal Code imposing the obligation to pay the

[10] Florin Streteanu, Daniel Niţu, *op. cit.,* p. 579.

damages established by the conviction decision are similar to those encountered in the case of the revocation of the postponement of the punishment and the suspension of the execution of the punishment under supervision.

In this respect, it has been appreciated[11] that the courts will have to be extremely demanding, the full non-fulfillment of the civil obligations leading to the existence of a presumption of bad faith of the convicted person, who has to prove the absence of any possibility.

By this approach of both legislative and jurisprudential approach, by vigorously enforcing the aforementioned provisions, there is an active concern in helping to respect the civil rights of injured persons by committing offenses.

Thus, once conditional release is granted, it is clear that all the comminatory means that exists on the condemned will disappear, the chances for civil obligations to be fulfilled are illusory.[12]

However, the obligation must not be excessive, impossible, and it is obvious that a person deprived of liberty has little chance of getting large amounts of money.

This is also the position of the Council of Europe expert, Mariavaleria del Tufo, a professor of criminal law, the University of Naples, who affirmed that suspension or conditional release in advance is subject to full reparation of the damage caused, creates unacceptable discrimination among offenders the rich and the poor. A mechanism should be found that would allow them to benefit from these measures and those who are unable to fully repair the damage caused by their economic situation.[13]

At the same time, in the analysis of the condition of payment of the prejudice, regardless of the fact that, according to civil law, the convict can no longer be compelled to pay civil damages[14], the court must determine whether or not there are financial possibilities, and if there is no, the convict appears to be of bad faith, and the codes of liberation are not fulfilled.

Therefore, regardless of whether or not the sentenced person has a forced execution under civil law, the conditional analysis at the time of the conditional release request must be made distinctly.

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1. Streteanu, F., Nițu, D., *Criminal Law. General Part*, Vol. II, Ed. Universul Juridic, Bucharest, 2018, p. 576.

2. www.avocatnet.ro, accessed on 23.05.2019.

3. www.cdep.ro, accessed on 23.05.2019.

4. www.rm.coe.int, accessed on 23.05.2019.

5. www.hudoc.echr.coe.int, accessed on 23.05.2019.

6. www.echr.coe.int, accessed on 27.05.2019

[11] *Ibidem.*

[12] *Idem,* p. 580.

[13] Broad analysis at www.nettsteder.regjeringen.no, accessed on 01.06.2019.

[14] For example, there was a prescription for the execution of civil obligations.

Budget fraud – Preparatory Meeting

Dr. Edit Szentpáli*

Abstract

The pursuit of acceleration of legal proceedings in the Hungarian procedural law has been observable for long. In the past decades several European countries have implemented new laws to reduce the time required by litigations.

In the Hungarian procedural law, preparatory meeting introduced by Act XC 2017 is intended to fulfil the economy goals in court proceedings. To achieve the targets the court, the prosecution and the defence should be able to interpret and put the law in practice in a consistent way.

During both the negotiation over the preparatory meeting and the court proceeding, the accused's confessions play a key role, for the simplification of the process is based on, after all, the sentences by which the accused plead guilty to avoid imprisonment and losing freedom, which would be the most painful for them. In case of criminal proceedings initiated owing to budget fraud, the accused usually plead guilty if – considering the volume of the financial loss caused by them – the prosecution proposes suspended imprisonment. Therefore, if the loss exceeds 50 million forints, the prosecution proposes mandatory prison sentence and the case shall be solved within the framework of standard judicial processes.

Keywords: *admission of guilt, acceleration of procedures, budget fraud, preparatory meeting, preparation for hearing, cooperation between the accused and the defence counsel*

I. Introduction

An effort to accelerate procedures has long been present in Hungarian law governing criminal proceedings. Since the early 1980s, criminal proceedings have become increasingly lengthy. Not only has the number of crimes increased significantly since the 1990s, but the factual complexity and intricacy of the cases have rendered judgment more and more difficult. Added to this the norms of the criminal justice system have become increasingly complex.[1] With this in mind, in recent decades, many European countries have introduced new rules with the aim to reduce the length of court proceedings and to promote other rules of procedural economy.

This study provides a brief overview of legal instruments intended to introduce new concepts to the different codes of administrative procedure in line with the aforesaid thoughts. I will emphasize in particular the role of the Preparatory Meeting as it appeared in *Act XC of 2017* on Criminal Procedure and which entered into effect

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[1] Belovics, Ervin, *A büntetőeljárás időszerűsége*. In Gál, Andor-Karsai, Krisztina: AD VALOREM, Ünnepi tanulmányok Vida Mihály 80. születésnapjára, Iurisperitus Kiadó, Szeged, 2016, p. 35.

on 1 July 2018 (hereinafter referred to as CP) and at the same time analyses the possibilities it provides for a speedy completion of fiscal fraud cases.[2]

II. Provisions accelerating proceedings before the entry into force of Act XC of 2017

The Criminal Law Proposal of 1795 laid down as a basic requirement that any verdict should be preceded by a public and oral hearing.[3] It must be noted that Hungarian Criminal Procedure abandoned the idea of procedure simplifying regulations based on an agreement until the end of the 20th century.

Indeed, in accordance with legislation aspiring to establish guarantees, the principle was that the accused had to be given an opportunity to defend himself and that during his questioning no promises or plea bargains could be offered in exchange for his confession.[4]

Nonetheless, the Criminal Prosecution Code of 1896 regarded and regulated vindictive orders as an accelerating provision. Its purpose was to simplify and speed up procedures and thereby reduce the workload of the courts. Decisions were made solely on basis of the content of documents without collecting evidence, which

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[2] According to Section 396 of Act C of 2012,

(1) any person who

a) induces a person to hold or continue to hold a false belief, or suppresses known facts in connection with any budget payment obligation or with any funds paid or payable from the budget, or makes a false statement to this extent

b) unlawfully claims any advantage made available in connection with budget payment obligations; or

c) uses funds paid or payable from the budget for purposes other than those authorized; and thereby causes financial loss to one or more budgets, is guilty of misdemeanor punishable by imprisonment not exceeding two years.

(2) The penalty shall be imprisonment not exceeding three years for a felony if:

a) the budget fraud results in considerable financial loss; or

b) the budget fraud defined in Subsection (1) is committed in criminal association with accomplices or on a commercial scale.

(3) The penalty shall be imprisonment between one to five years if:

a) the budget fraud results in substantial financial loss; or b) the budget fraud results in considerable financial loss and is committed in criminal association with accomplices or on a commercial scale.

(4) The penalty shall be imprisonment between two to eight years if:

a) the budget fraud results in particularly considerable financial loss; or b) the budget fraud results in substantial financial loss and is committed in criminal association with accomplices or on a commercial scale.

(5) The penalty shall be imprisonment between five to ten years if:

a) the budget fraud results in particularly substantial financial loss; or

b) the budget fraud results in particularly considerable financial loss and is committed in criminal association with accomplices or on a commercial scale.

(6) Any person who manufactures, obtains, stores, sells or trades any excise goods in the absence of the criteria specified in the Act on Excise Taxes and Special Regulations on the Marketing of Excise Goods or in other legislation enacted by authorization of this Act, or without an official permit, and thereby causes financial loss to the central budget, shall be punishable in accordance with Subsections (1)-(5).

[3] Hajdu, Lajos, *Az első (1795-ös) magyar büntetőkódex-tervezet*, Közgazdasági és Jogi Kiadó, Budapest, 1971, p. 260.

[4] Fantoly, Zsanett, *Lemondás a tárgyalásról – lemondás az igazságról?* In Erdei Árpád: A büntető ítélet igazságtartalma, Magyar Közlöny-, és Lapkiadó, Budapest, 2010, pp. 139-140.

allowed a significant saving of time.[5] Article 139 states that "after the accused has admitted his crime, normally other evidence of his guilt must be obtained. In the event that the admission of guilt is supported by other details found during procedure, further investigation or proceedings will only be made if the accuser makes a motion.

The First Socialist Code of Conduct was Act III of 1951 following Soviet pattern. Law-Decree number 8 of 1962 was constituted on similar principles. The principle of procedure acceleration safeguarded by warranty elements was not reflected in any law of that time.[6] Provisions relating to the Preparatory Meeting were referred to in Article 172 of Law-Decree number 8 of 1962. According to this, the court shall examine a given case in a Preparatory Meeting if there might be need for referral, suspension or termination of the case, or the possibility of additional investigation or a different classification of the crime emerges, furthermore if a decision has to be made on pre-trial detention, a prohibition on leaving the country or on a temporary compulsory medical treatment. From the viewpoint of the subject of this paper the most important rule regarding the regulation of the Preparatory Meeting was that decisions were made during the Preparatory Meeting in cases where fines could be imposed without a hearing. Paragraph VIII/A of the above Law-Decree contained the rules on prosecution under the heading 'prosecution without indictment or trial'.

Act I of 1973 is still of decisive importance, both as regards the guarantee rules and the provisions for accelerated procedures. This law contains extensive provisions regarding the preparation of the trial; furthermore, its *Special Proceedings* section mentions provisions which may accelerate procedures as known today. Section 167 of this law, similarly to Law-Decree 8 of 1962, contains a comprehensive list of the tasks to be performed by the chairman of the council or in case of a trial that of the judge regarding the preparation of the trial. A new element in this list emerged, namely the possibility to be summoned in front of a five-member council. The intention was to involve the accused and his lawyer in the preparatory procedure, although at this stage the principle of the written form still prevailed.[7] It should be noted, however, that Act I of 1973 did not include any provisions that could speed up any given procedure in merit, although it included regulations with the intention to speed up proceedings. These included such concepts as '*diversion*' to divert people from crime in the pre-trial phase, whereas during the court phase, the range of legal instruments included putting people to trial (Criminal Procedure, Section 345) or the omission of court hearings (Criminal Procedure, Section 351).[8]

Even in Act XIX of 1998 the concept of the Preparatory Meeting only appears in connection with the preparation of the hearing. According to Section 272 (1), if it appears necessary to hear the prosecutor, the accused or the victim in matters examined during the preparation of the trial, the court shall have a meeting, within 30 days after the expiry period specified in section 273 (1). It should be noted that this law provided legal instruments with the intention of accelerating criminal procedure,

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[5] Farkas, Ákos, Róth, Erika, *A büntetőeljárás*, Complex Kiadó Jogi és Üzleti Tartalomszolgáltató Kft., Budapest, 2012, p. 466.

[6] Szabóné, Nagy, Teréz, *A büntető eljárás egyszerűsítése*, Közgazdasági-, és Jogi Könyvkiadó, Budapest, 1970, pp. 269-305.

[7] Bérczes, Viktor, László, *A védői szerepkör értelmezésének kérdései – különös tekintettel a büntetőbíróság előtti eljárásokra*, Pázmány Press, Budapest, 2014, pp. 107-108.

[8] Farkas, Ákos, *A falra akasztott nádpálca, avagy a büntető igazságszolgáltatás hatékonyságának korlátai*, Osiris Kiadó Budapest, 2002, pp. 97-106.

meaning that the role of the Preparatory Meeting was not the speeding up of the proceedings. The accelerated procedures that were originally applied to minor crimes were now also applied to cases that involved more serious and relatively frequent crimes. The confession of guilt played a prominent role in these special procedures initiated by prosecution.[9]

Government Resolution of 2002/1994 (01/17) on the Concept of Criminal Procedures has already formulated its aim to strengthen the right of disposal of the parties as well as the implementation of simplified procedures.

Having this in mind Act CX of 1999 established the institution of *waiver of trial*. This regulation was a milestone, as the court by giving up an eventually lengthy process of finding evidence was able to impose a punishment within a significantly reduced range, in exchange for the admission of guilt. The essence of a special procedure based on a plea bargain at that time in Hungary was that the accused had waived his right to a trial and doing so completely deprived himself of his right to appeal. In return, abandoning the general principles of imposing a sentence, the prosecutor accepted the court's decision to impose a sentence from a given frame.[10] We may assume that the above mentioned waiver of trial was meant to play a similar role as the Preparatory Meeting does currently, and emphasis was put on the confession of crime which in turn could give way to a waiver of trial. The aim was to make proceedings faster and simpler and to avoid the accumulation of cases in the courts. At the request of the prosecutor the court was able to declare the accused guilty and impose a sentence at a public hearing, provided that the offense did not imply an imprisonment exceeding 8 years and the accused waived his right to trial and at the same time pleaded guilty.[11] However, due to the characteristics of Hungarian criminal law, the waiver as specified under special proceedings differs from the Anglo-Saxon model. A major difference is that it only applies to offenses for which the Criminal Code imposes a sentence not exceeding a period of 8 years of imprisonment. Another difference is that the settlement takes place between the prosecutor and the accused and the attorney is formally excluded from the process. Thirdly, the right to dispose of the accused is not comprehensive. The court will only accept admission of guilt if it is supported by evidence found during the investigation phase. In case the court believes that there is reasonable doubt regarding the ability of the accused to be accounted for his actions, or whether his confession is voluntary or credible, or if the testimony differs significantly from the confession made during the investigation, the case will be referred for trial.[12]

III. Efforts to speed up the proceedings as stated in the provisions of Act XC of 2017 regarding the Preparatory Meeting

The concept of speeding up judgment is handled under Article VI of the European Convention on Human Rights and similarly in Article 14.3 of the International

[9] Cséka, Ervin, *Megjegyzések az új Büntetőeljárási Kódex koncepciójához*, Acta Juridica Et Policita, Tomos LIV., Fasticulus V., Szeged, 1998, pp. 12-13.

[10] Fantoly, Zs., *op. cit.*, pp. 140-141.

[11] Chwala, Tamás – Fülöp, Edit – Sléder, Judit, *Büntetőeljárás – Jog*, Rejtjel Kiadó, Budapest, 2004, p. 365.

[12] Farkas, Á., *op. cit.*, pp. 113-116.

Covenant on Civil and Political Rights.[13] The slowness of proceedings undermines in every respect the belief in criminal justice and may interfere with the proper functioning of jurisdiction. For this reason the development of legal instruments which intend to speed up procedure is highly justified, given that the participants in criminal proceedings usually complain about the length of the proceedings when they turn to the European Court of Human Rights.[14] In the court's view, the specific circumstances of an individual case may play a decisive role in undue delays, such as the complexity of the case and of the proceedings, the behavior of the people involved in the proceedings, whether they have deliberately contributed to its delay, or if they have done everything possible to speed up the proceeding.[15] The European Court of Human Rights has also found that a significant part of the delay in court proceedings is due to the fact that they have to investigate the circumstances of the case in detail. According to the European Court of Justice, it is not necessary and not in the interest of anyone that the police and the court conduct double investigations.[16] However, this is one of the peculiarities of Hungarian probative proceedings. Section 164 (1)-(3) of the above Act on Criminal Proceedings clearly states that the burden of proof is on the accused. In the absence of a request for proof, the court is not required to obtain or examine evidence. Nonetheless, the defence counsel often accuses judges who seek a thorough and well-founded judgement of having made inquiries about the case. Subject to Article IV of the European Convention on Human Rights on fair trial, and Recommendations 87 / 18 of the Council of Europe on the simplification of criminal justice[17], several European countries have introduced new procedural rules in recent decades with the aim among other things, to reduce the length of court proceedings and to promote rules to reduce court costs.[18] There are various ways of accessing fast, impeccable justice respecting individual rights.[19] One solution might be to facilitate speedy proceedings when it comes to crimes of minor importance. Naturally it should only apply to cases where the offender, the circumstances of the offense, the quality of the crime, the degree of punishment that can be imposed, and the extent of the damage caused makes it possible.

Recently, however, there has been a demand for co-operation-based regulation even in cases of high-profile offenses, modelled after American plea bargains.[20]

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[13] Az emberi jogok és alapvető szabadságok védelméről szóló Rómában 1950. november 4-én kelt egyezmény és az ahhoz tartozó 8 kiegészítő jegyzőkönyv kihirdetéséről szóló 1993. évi XXXIII. törvény, Dunay, Pál-Kardos, Gábor-Kende, Tamás-Nagy, Boldizsár, *Nemzetközi jogi szerződések és dokumentumok*, Nemzeti Tankönyvkiadó, Budapest, 1991, pp. 278-307.

[14] Polgári és Politikai Jogok nemzetközi Egyezségokmánya és a hozzá kapcsolódó fakultatív jegyzőkönyv, Dunay, Pál-Kardos, Gábor-Kende, Tamás-Nagy, Boldizsár, *Nemzetközi jogi szerződések és dokumentumok*, Nemzeti Tankönyvkiadó, Budapest, 1991, pp. 223-246.

[15] Belovics, E., *op. cit.*, p. 36.

[16] Bogár, Péter, *Az Európa Tanács Miniszteri Bizottságának R. (87.) 18. számú ajánlása a büntető igazságszolgáltatás egyszerűsítéséről*, In Tóth, Mihály, Büntető eljárásjogi olvasókönyv, Osiris Kiadó, Budapest, 2003, p. 458.

[17] Recommendation R.87 / 18 of the Committee of Ministers of the European Council on the simplification of criminal justice accepted by the Committee of Ministers on17 September 1987, Strasburg, 1988.

[18] Tarr, Ágnes, *A büntetőeljárás gyorsításáról*, Gondolat Kiadó, Budapest, 2012, pp. 10-11.

[19] Bogár, P., *op. cit.*, pp. 455-458.

[20] Gácsi, Anett Erzsébet, *A terhelti együttműködés rendszere az új büntetőeljárási törvényben*, http://jogaszvilag.hu, downloaded on 11/01/2019, p. 275.

Another important point to consider is the necessity of reducing the number of criminal cases pending before the courts. The legislator deemed that the implementation of the above could only be carried out if the Preparatory Meeting was made compulsory.[21] Thus it has become a general principle to hold a Preparatory Meeting in all cases. Its role has become increasingly important as in case of a confession of guilt it opens the way to make judgement at the Preparatory Meeting, while in the absence of confession the framework of the probative proceedings and the direction of defence tactics are set.[22] By doing so the law established a system of co-operation with the defendant, and one of the priority areas of this new concept is the reinterpretation and making mandatory of the Preparatory Meeting.

Article 499 (1) A Preparatory Meeting shall be a public meeting after the indictment in order to prepare the trial, at which the accused and the defence counsel may express their views on the accusation before the trial and assist in the further development of criminal proceedings.

Section 183 (4) of Act on Criminal Proceedings specifies that other evidence is to be obtained upon admission of guilt of the defendant. This guarantee rule serves to clarify the material truth so that criminal authorities and the court do not have to question the veracity of the confession. Nevertheless, according to the studies of Balázs Elek and Zsanett Fantoly, it is an eternal dilemma whether criminal proceedings should allow for simplified rules based on confession or they should pursue the evidentiary procedure in order to find out material truth. The Act on Criminal Proceedings has clearly moved towards the simplification of proceedings based on admission of guilt. As a primary form of co-operation, a plea bargain is favoured, but even if it fails, the legislator manifests a desire to encourage the accused to acknowledge his guilt even at later stages of the procedure. Thus, if our aim is to speed up criminal proceedings, it might be a good starting point if the accused and his counsel agree on the facts of the accusation.[23] For this reason it is worthwhile treating those cases in which the accused confesses his guilt differently from proceedings in which a denied guilt must be proved.[24] We must allow for a paradigm shift to ensure that a fair settlement of the charges would not only be in the interest of the courts, but also of the state's prosecutor and of the defendant and his defence counsel.

I agree with the thoughts of János Bánáti: " the court will need to deal with far fewer cases in detail and lengthiness would impose a less great problems as it does today".[25][25]Besides the opinion of lawyer János Bánáti regarding plea bargains I would like to mention the thoughts of another practicing lawyer Gábor Dicső: “I do not believe that any waiver of trial or agreement will serve its purpose, unless the defendant might feel that he can expect a significantly more favorable judgment by

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[21] Nagy, Anita, *Büntetőeljárást gyorsító rendelkezések az Emberi Jogok Európai Egyezményében, az Európa Tanács Miniszteri Bizottságának ajánlásaiban és az Európai Unió és a hazai jogalkotásban*, Bíbor Kiadó Miskolc, 2008, p. 42.

[22] Pataki, Bettina, *Az új Be. előkészítő üléshez kötődő terhelti együttműködése*, https://arsboni.hu/, downloaded on 11/01/ 2019, pp. 1-5.

[23] Elek, Balázs, *Költség és időtartalékok a büntetőeljárásban*, https://ujbtk.hu/dr-elek-balazs-koltseg-es-idotartalekok-a-buntetoeljarasban/, downloaded on. 11/01/2019, pp. 4-5.

[24] Gácsi, A., E., po.cit, pp. 273-275.

[25] Bánáti, János, *Gyorsítás, hatékonyság, versus garanciák*, In Polt, Péter-Belovics, Ervin-Gellén, Balázs-Ambrus, István, Ünnepi kötet Györgyi Kálmán 75. születésnapja alkalmából, ELTE Eötvös Kiadó, Budapest, 2016, pp. 15-17.

making use of this opportunity."[26] In these cases – he goes on – the defendants explicitly ask him to contribute to a speedy conclusion, due to the considerable stress and cost factors. In the case of a court appointed public defence counsel, however the interests of the parties are not necessarily met.[27]

1. Preparatory Meetings at the level of district courts and courts of justice regarding Budget Fraud

For a realistic presentation of the institution, I have investigated several cases of Budget Fraud pending before five courts and fifteen district courts between 1 July 2017 and 1 February 2018 with the following considerations in mind:[28]

- Was there an investigation initiated due to a budget fraud as specified in Section 396 (1)-(5) or (6) of the Criminal Code?
- Did the accused make a confession during the investigation?
- If no agreement was reached during the investigation, did the accused and his defence attorney appear in court?
- What was the content of the motion made by the prosecution regarding the criminal classification of the budget fraud in question, the penalty frame and the financial loss caused?
- Has the accused made a confession due to the motion and has he exercised his right to waive trial?
- In how many cases was there a settlement reached, has the court approved the parties' agreement in all cases?
- In the absence of a settlement, how lengthy were the proceedings?
- Did the judgment of the court differ from the motion handed in originally by prosecution?

Regarding the cases studied, it can be stated that according to their subject matter the felonies were all classified as Budget Fraud specified in Section 396 (1) to (5) of the Act. Typically, offenses referred to in Section 396 (1) (a) have been committed, such as receiving or issuing fictive invoices for Excise Goods and claiming tax returns, thus causing a financial loss to one or more budgets. Among the cases pending before the District Court, nine involved this type of offense, whereas in six cases the subject of the offense was obtaining and marketing of Excise Goods (typically cigarettes), causing a financial loss to the state as referred to in subsection (6).

A form of co-operation can start during the investigation phase titled: Agreement on Confession of Guilt.[29] However, I do not intend to deal with this legal institution in detail, as in the cases studied this type of co-operation had obviously not occurred. At any rate, prosecution does normally not provide the court any information about unsuccessful attempts of settlement initiated by the defendant, nor does it provide the

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[26] Dicső, Gábor, *Egyeztetés a büntetőeljárásban, avagy „alku" a büntetőperben*, In Elek, Balázs-Miskolczi, Barna, Úton a bírói meggyőződés felé, A készülődő büntetőeljárási törvény kodifikációja, Printart-Press, 2015, p. 89.

[27] Dicső, G., *op. cit.,* pp. 88-90.

[28] Empirical research conducted on cases pending before the District Court of Debrecen and at the General Court of Debrecen

[29] Act XC of 2017 paragraph LXV Sections 407 to 411

court with relevant documents.[30] On the other hand, three of the five cases studied showed that the suspects exercised their right to remain silent until the indictment was filed. In two cases the suspects testified, but they stated that the companies involved in the case were engaged in genuine economic activities and that there were real economic activities behind the invoices received and issued.

In one of the cases pending before the District Court, the prosecution brought the accused to court after he confessed to possess Excise Goods and after having confiscated 2000 boxes of cigarettes found in his vehicle. The accused maintained his testimony during the trial. The motion by the prosecution to sentence him to suspended prison terms on probation was not contested by either the accused or his lawyer, and the trial was thus closed. In one case of Budget Fraud as described in subsection (6) the court ruled without hearing, in line with the motion of the prosecutor. During the investigation phase, the place of abode of the accused was known. When the order was delivered, however he moved to an unknown place, so the court continued with a trial. The content of the judgement was identical to that of the order, as the accused had not been found.

In six out of the remaining thirteen cases, the defendants admitted their guilt during the investigation. Regarding matters covered by Subsection (6) denial is difficult, since the accused are mostly caught red handed. In connection with offenses as referred to in Subsections (1) to (4) of Section 396 in five out of seven cases the accused confessed their guilt, while in two cases the accused did not testify.

Unnecessary delays in procedures are prevented by Section 499 (2) of the Act on Criminal Proceedings[31], which states that a Preparatory Meeting shall be held within three months of delivery of the indictment. The presence of the defendant, the defence counsel and of the prosecutor is mandatory. In the case of a Preparatory Meeting, the presence of a lawyer is mandatory, both in terms of a better co-operation of the accused and due to the concentration of evidence. Therefore, in such cases the presence of a lawyer is obligatory even if it is not otherwise required by the law. In all twenty cases, the defence attorneys appeared well prepared for the case. The parties expected to conclude a settlement, especially at the courts of justice and therefore did not intend to delay the proceedings.

The presence of the accused is mandatory at the Preparatory Meeting. Therefore, if despite proper summons he remains absent, the court shall use all legal means to ensure his presence. If this cannot be achieved within a reasonable time, the Preparatory Meeting shall be postponed for no more than two months. As stated above, it is not the absence of the defender that will result in postponing the Meeting, but the non-appearance of the accused. In five district court cases, the Preparatory Meeting was postponed because the defendants did not appear. The actions taken to search them were unsuccessful so these cases were closed in their absence. In my view, if the accused do not appear voluntarily upon proper summons, it indicates, that they are not willing to come to an agreement or to admit their guilt and that they are not at all interested in the proceedings.

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[30] Fantoly, Zsanett, *Konszenzuális elemek az új büntetőeljárási törvényben*, In Dobák, Imre-Hautzinger, Zoltán Szakmaiság, szerénység, szorgalom, Ünnepi kötet a 65 éves Boda József tiszteletére, Dialóg Campus Kiadó, Budapest, 2018, pp. 193-195.

[31] Act XC of 2017 Section 499 Subsections (2) to (6).

2. Settlement at the Preparatory Meeting

Section 502 (1) states that if there are no obstacles to hold a Preparatory Meeting, the prosecutor shall, at the request of the court, set out the substance of the charge, indicate the means of evidence in support of the charge and propose the duration or measure of the sentence if the accused admits his guilt at the Preparatory Meeting.

At the joint request of the accused and their counsel, it is possible to hear only the substance of the accusation, and at court hearings even this may be omitted. At the district courts however, it was found – as the charges are minor – that the judges made the prosecutor read the charges.[32]

After this the prosecutor usually held to the motions as indicated in the indictment, unless some new evidence came to light before the Preparatory Meeting. From the prosecution's point of view, this could include a repayment or part payment of the financial loss caused. In the five court cases – where in one case the financial loss caused was over HUF 55 million and in the other four cases over HUF 200 million – the prosecutor's office emphasized in his petition that a more favorable motion can only be made in case the admission of guilt is accompanied by partial or full recovery of the financial loss caused. This made the accused to consider making a confession. As regards the cases at the district courts, since the financial losses caused were under HUF 50 million, typically between HUF 3 to 30 million, prosecution has originally filed a suspended sentence on probation and insisted on this during the Preparatory Meeting as well.

Following the prosecutor's motion, the court warns the accused that he may plead guilty at the Preparatory Meeting and at the same time may waive trial. The warning should also state that, if the admission of guilt is accepted, the court will not adduce further specific evidence to establish the facts of the charge and to establish guilt. The court will base its judgment solely on the confession, the acceptance of it and the content of the case file.[33] The roots of this modern form of settlement are to be found in the USA. The application of such settlement was possible because of the broad scope of the prosecution's ability to exert pressure on the accused. It must be noted that in case of a plea bargain the primary objective of prosecution is to condemn the accused as soon as possible, to minimize the likelihood of terminating the process or to release the accused, and to obtain an acceptable sentence. The prosecutor considers it his duty to obtain an acceptable punishment. Meanwhile the defence attorney must weigh the probability of his client being released and in the light of this reconsider whether accepting a plea bargain is in their interest or not.[34]

Therefore, it is largely up to the prosecutor whether the judge will condemn the accused or not. As a public prosecutor he has the right to choose from different legal forms already in the investigational phase if he deems it appropriate for a certain case. It can be stated that the key initiator of an eventual diversion from the normal flow of things – that is to say to have a trial at the court – is the prosecutor. The extent to which a prosecutor makes use of this opportunity can hardly be influenced by legislation or jurisprudence. This will be addressed later in connection with a case

[32] Act XC of 2017 Section 502 Subsection (2)
[33] Act XC of 2017 Section 502 Subsection (3)
[34] Farkas, Á., *op. cit.*, pp. 107-114.

studied.[35] In a state governed by the rule of law, the legislator will only give room for opportunism if it can be assumed that it is beneficial to the parties and not disadvantageous. The rule of law does not waive its right to punish, but must indirectly, through the discretion of the prosecution, guarantee the fulfilment of the ius punendi nature of the rule of law, i.e. the core elements of justice, fair trial and the principles of legal certainty.[36] As explained above in connection with district court cases, given a lower material value – unless aggravating circumstances exist – motions usually propose suspended custodial sentencing. Crimes against the economy are listed as priority as they have mushroomed at national level. In four out of the thirteen cases pending before the district courts the Preparatory Meeting had to give way to trial because the accused stayed at an unknown location. Eight cases were concluded with a settlement between the prosecution and the accused, while in one case the parties went to trial.

Returning to the thoughts of the above-mentioned prominent attorneys, if the sentence suggested in the motion suited the defendant, the defence counsel also searched the interests of his client and wanted to avoid criminal proceedings. Ancillary issues such as the confiscation of assets and legal expenses lose their significance compared to the importance of getting a reasonable sentence. In cases pending before the courts, motion was made for imprisonment, due to the extent of the pecuniary damage caused. In only one case did the defendants make a full confession accompanied by a repayment of HUF 2 million per capita relying on the court's practice namely, that on account of the HUF 55 million forfeitures they caused, the court could impose a suspended custodial sentence. In another case, the accused denied their guilt from the outset. Given the caused HUF 150 million loss, defence justly feared a sentence of imprisonment. Again, taken into account the established judicial practice, the financial loss was reduced to less than HUF 100 million by repayment. The prosecution amended the indictment and its motion prior to trial for suspended custodial sentence. In the other three cases no agreement was reached so it took the courts several months to make judgement.

3. Acceptance of the confession of guilt

If the accused confesses being guilty with respect to the accusation, the court must first decide whether to accept the confession or not. The court must examine whether the accused has made a confession of his own accord, without any outside influence, and whether he is aware of the nature of his confession and its possible consequences. To exclude all doubt concerning the credibility of the confession, it should be duly supported by other available evidence. Confession of the accused must be voluntary, free from all forms of coercion.

For this reason, the court must examine the circumstances as a matter of guarantee and make an order of it. The statement of the accused to facilitate a successful conclusion of the proceedings must be evaluated by the court in order to

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[35] Róth, Erika, *Az ügyész diszkrecionális jogköre*, Miskolci Egyetemi Kiadó, Miskolc, 2015, pp. 23-31.

[36] Horgos, Lívia, A ius puniendi jogállami tartalmának kiteljesedése, Doktori értekezés, Debreceni Egyetem Marton Géza Állam-és Jogtudományi Doktori Iskola, Debrecen, 2018, downloaded on: 1/03/2019, https://dea.lib.unideb.hu/dea/bitstream/handle/2437/256269/Horgos_Livia_Maria_doktori_disszertacio_nyilvanos.pdf?sequence=1&isAllowed=y, p. 208.

exclude any doubt as to the mental ability of the accused, and thus the voluntary nature of the confession.[37] The purpose of criminal proceedings still remains to find out material truth and then to impose a sentence or measure in proportion of the crime committed. No practical or expedient consideration should override this concept.[38] The main issue of applying this legal institution is to arrive at a confession of guilt. A clear description of the facts of the crime must be obtained. On the other hand, however we must not overlook subjectivity, since an offense is only committed in the presence of factuality and in the absence of any reason excluding lawfulness, in other words if the perpetrator is aware of the consequences of his acts. Therefore, care must be taken to avoid an eventually subjective judgment of the accused of his guilt and not to condemn an innocent person so that unexplored truth will become the cost of speed. Consideration should be given to the fact that in return for a lighter penalty the defendant might accept an unfair bargain only to get rid of the burden of the proceedings as soon as possible. While conscientious defence attorneys have a great responsibility to avoid such cases, courts must take all possible actions to avoid unfair judgments.[39] In the cases studied, the courts had no doubt as to the verity of the confessions of the accused and therefore approved the settlements.

According to Anita Nagy, the plea bargain is an agreement between the prosecutor, the accused and the defence attorney. Its essence is that the accused gets some kind of a concession in return for his confession, and the prosecutor promises that he will not propose the highest punishment possible, but a significantly more favorable sentence. He will dismiss aggravating circumstances and file a motion for a less serious form of crime, impose a suspended sentence, and will not bring any other offenses against the accused. Of the various crimes committed the accused will only face charges for one crime. The place and the method of how the sentence will be served may also be negotiated. When it comes to plea bargains the parties' willingness to compromise is of great importance. Therefore, this procedure can be considered a more humane model for the future.[40] In case the court accepts the confession of the accused, it cannot examine the merits of the indictment or the question of guilt, nor may it impose a less favorable sentence or a less favorable measure than the punishment proposed by prosecution. The question arises whether the judge may differ from the classification of the crime as described in the indictment when judging. In the opinion of Ervin Belovics, he cannot, since the confession of the accused covers the facts described in the indictment and the qualification formulated by the prosecution.[41] If the court has doubts in this regard, it will not approve the settlement and will refer the case to trial. Therefore, if the court has doubts as to the authenticity of the confession, it must declare that the conditions for accepting the confession are missing. As a result of such an investigation, the court may make two types of decision.

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[37] Elek, Balázs, *Költség és időtartalékok a büntetőeljárásban*, https://ujbtk.hu/dr-elek-balazs-koltseg-es-idotartalekok-a-buntetoeljarasban/, downloaded on 11/01/2019, pp. 5-7.

[38] Kovács, Tamás, *A büntetőeljárás reformjának egyik dilemmája*: a *vádalku kérdése*, In, Fenyvesi, Csaba-Herke, Csongor, A munkát nem lehet eltitkolni, Tiszteletkötet Tremmel Flórián professzor emeritus 75. születésnapjára, Pécsi Tudományegyetem Állam-és Jogtudományi Kara, Pécs, 2016, p. 67.

[39] Fantoly, Zs., *op. cit.*, pp. 142-143.

[40] Nagy, A., *op. cit.*, pp. 40-41.

[41] Belovics, Ervin, *Az előkészítő ülés szerepe a 2017. évi XC. törvényben*, In, Polt, Péter-Belovics, Ervin-Gellér, Balázs- Ambrus, István, Ünnepi kötet Györgyi Kálmán 75. születésnapja alkalmából, Elte Eötvös Kiadó, Budapest, 2016, p. 48.

On the one hand it may accept the confession of the accused and see no obstacle to close the case at the Preparatory Meeting. The accused is interrogated regarding circumstances of sentencing and judgment is made. If the accused does not admit his guilt or there seem to be an impediment to settle the case during the Preparatory Meeting the court will arrange for a trial.[42] If the court has accepted the confession of offender, it cannot proceed to prove the merits of the indictment and the question of guilt. Only evidence necessary for the imposition of a sentence or adjudication of ancillary matters shall be admitted.

4. Preparation of a substantive and concentrated hearing

Another key function of the Preparatory Meeting is the preparation of a substantive and focused hearing. If the accused has not made a statement of confession or has made a statement but there is no legal condition for its admission, the need to establish the framework and means of proof at the earliest possible stage of the trial will prevail. According to the proposals annexed to the law this is the only way to ensure that the procedure will be completed within a reasonable time. In all cases, the person who submits a motion for probative proceedings must state the reason and purpose of his submission and indicate which fact needs to be proven.

The purpose of excluding certain evidence is to clearly clarify the scope of evidence that cannot be used for the establishment of the facts at an early stage of the trial. Any deficient or unlawfully acquainted evidence precludes the court from considering its probative value subsequently.

In order to avoid unnecessary and lengthy proceedings for the taking of evidence, the court may determine the framework of evidence collection. In my view, a well-prepared judge will be aware of what evidence is required and which motions of the prosecutor or of the defence attorney regarding the collection of evidence he or she can reject at the Preparatory Meeting.

According to the proposals annexed to the law a hearing following the Preparatory Meeting may also accelerate procedure, as at this hearing a proximate date may be appointed to close the proceedings.

In all court cases, the court went to trial. As already mentioned, in one case the defendant testified and only the amount of tax loss caused was disputed. The court held a hearing to contact the state tax authority in this regard. In the remaining four cases, the court held at least fifteen to twenty hearings subject to the great number of defendants and witnesses, and to obtain expert evidence. The district court completed those cases where the accused remained at an unknown location after two or three hearings on average, while for the complex budget fraud cases termination could take between ten to fifteen hearings.

The possibility of co-operation of the accused is not limited to the Preparatory Meeting, but could be exercised in any crime case. The accused may at any time use this opportunity to shape the process of obtaining evidence.[43] It can be stated that in cases where the accused did not exercise their right of confession at an early stage, they will not make use of this possibility at a later stage of the proceedings either. Rather, they will get involved in the process of collecting evidence and wait for the outcome.

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[42] Act XC of 2017 Section 505.-508.

[43] Gácsi, A., E., *op. cit.*, pp. 280-283.

The procedure can therefore be finalized within a few hours during the Preparatory Meeting. It can be stated, that such a proceeding will not only highlight the discretion of the prosecutor but the general professional skills of the lawyer may emerge as well. The defence attorney will have to co-operate with his client most intensely at this stage of the procedure, where he can demonstrate that he is well informed. He will also facilitate a speedy closure of the proceedings with an appropriate penalty keeping his client's interests in mind. It is important to underline this, as the European Court of Human Rights has stated that numerous criminal proceedings were lengthy, not only due to inactive periods of the national authorities, but also due to the dilatory conduct of the complainant.[44] However, the role of a defence attorney may take numerous forms depending on the course of proceedings, the attitude of defence, the style of questioning, and the way in which the defence speech is structured and presented. Pleading guilty in line with the indictment could be, in my view, part of the defence tactics, as the accused obviously expects the best solution from his lawyer. The role of the Preparatory Meeting – as has been mentioned several times – is to highlight that a speedy conclusion of the proceedings is in the interest of the defendant as well. The question often is whether the lawyer will give his client the best possible advice in this regard.

Despite the introduction of institutions to speed up proceedings, the period of time cases are dealt with within the framework of ordinary procedure after the Preparatory Meeting is too long. Evidencing must be detailed, resolving any contradictions, in other words complete, which is a time-consuming task.[45] According to Ervin Belovics, the reason for this lies in the following, 'in particular, in the growing number of crimes against intellectual property rights, which cause loss to the budget and undermine the order of business, but especially because of their growing complexity. In these categories, – also at the request of the accused – almost all cases require the assignment of an expert, and the processing and analysis of accounting and other documents and electronic data, sometimes consisting of tens of thousands of pages. „[46]

It cannot be ignored however, that in these cases prosecution consistently proposes the accused to be sentenced to the gravest form of penalty, i.e. imprisonment, despite their confession of guilt. On the other hand, compensation plays an important role. In the event of causing a financial loss exceeding HUF 50 million, compensation is the only means to give way to a settlement. Imposing of a severe penalty can only be achieved if an independent, impartial tribunal follows the requirements of fair trial in public hearings. It must be stated that current international legal and constitutional guarantees limit the possibility to increase efficiency, speed and simplicity of proceedings.[47] The Hungarian system is still a long way from the well-known and effective practice of arriving to a plea bargain as practiced in Anglo-Saxon countries. According to statistics about 90 percent of convictions in the United States are the result of the defendant pleading guilty. If a

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[44] Czine, Ágnes – Szabó, Sándor – Villányi, József, *Strassburgi Str Bo. Ur. Strassburgi ítéletek a magyar büntetőeljárásban*, HVG Orac Lap-, és Könyvkiadó Kft. Budapest, 2008, pp. 423-428.

[45] Belovics, E., *op. cit.*, pp. 37-40.

[46] Belovics, E., *op. cit.*, pp. 45.

[47] Hack, Péter-Horváth, Georgina, *A büntetőeljárás egyszerűsítésének lehetőségei és korlátai*, In, Finszter Géza-Kőhalmi, László-Végh, Zsuzsanna, *Egy jobb világot hátrahagyni….*, Tanulmányok Korinek László professzor tiszteletére, Kódex Nyomda Kft, Pécs, 2016, pp. 300-301.

large number of defendants did not admit their guilt, the already heavily burdened justice system would drift to the brink of collapse.[48]

IV. Conclusion

With the above few thoughts, I have tried to outline to the arch of development of the attitude of Legislative Authorities regarding the acceleration of criminal prosecution from the entering into force of Act XXXIII of 1896 to Act XC of 2017. Added to this I have examined the possibilities of saving time and expenses with respect to the already heavily burdened and costly criminal procedures. Undoubtedly, the new Procedural Act, which entered into force on 1 July 2018, contains the most promising regulation out of the aspirations described in this paper.

In my opinion, the success of the new law will not depend on the coherence of its textual body. As a matter of fact, the extensive regulations, and all elements of the new Act will fully comply with the requirements regarding procedural economy and litigation efficiency and with the requirements regarding timeliness as outlined in EU law. To illustrate the above idea, I have presented the rules governing the Preparatory Meeting making use of the detailed justifications as indicated in the draft of the Criminal Proceedings.

The achievement of the targets described above will largely depend on the ability of the participants, such as the courts, prosecutors, law firms etc. to interpret these rules uniformly and apply them for the purposes indicated in the law. It may also be important to know what the outcome of the mandatory Preparatory Meeting will be for each factual situation as referred to in the Penal Code. Enforcement authorities rarely encounter sets of rules, the application of which highly depends on the interpretation of the professions described above, the mentality of the enforcement authorities, and how they are able to get rid of the established frameworks of previous rules governing procedure. The question still remains whether the Preparatory Meeting has lived up or will live up to expectations.

I have studied 20 budget fraud cases since the entry into force of the new Criminal Proceedings. The findings of my research made me conclude in line with the opinion of noted experts in this field, that in cases of fiscal fraud causing significant loss to the budget and of great complexity, reaching an agreement is usually not in the interest of the parties. I agree with the thoughts of Ervin Belovics, that these matters can only be resolved within the framework of ordinary court proceedings. Given that such cases generally involve a substantial loss caused to the budget, the prosecution's position is that the proposal of suspended custody can only be considered if a significant amount of the loss is reimbursed. Therefore, it can be stated that the sole purpose of simplifying the procedure is to make the accused to acknowledge his guilt in order to avoid imprisonment. We must not forget an ancillary issue, namely the confiscation of property, on the other hand however nothing is more painful than losing one's liberty. Therefore, it is worth considering the viewpoint of Gabor Dicső

[48] Tarr, Ágnes, *A vádalku szabályozásának egyes kérdései*, In, Szabó Krisztián, Tanulmányok Dr. Kováts Andor professzor születésének 120. évfordulójára, Debrecen, 2004, pp. 141-143.

representing defence position, according to whom an agreement can only be reached if the accused receives a significant reduction of his penalty.

The investigation of the budget fraud cases pending before the above-mentioned district courts and tribunals indicates that agreement is more easily reached at the district courts and in less severe cases. Experience so far has shown that the likelihood of reaching an agreement at the tribunals is much lower. Such opportunity only arises if with regard to the conduct of the defendant, namely significant compensation of the loss caused, the prosecutor will be satisfied with suspended imprisonment.

The possibilities to accelerate proceedings as regulated in the current Criminal Proceedings, and as outlined above in the context of fiscal fraud goes beyond the framework of domestic regulations. Part of the conduct regarding facts in current criminal law is meant to protect the financial interest of the European Union. The European Council Resolution of 12 June 1994 set out forward-looking ideas on the protection of the Community's financial interests and made it compulsory to prosecute illegal activities detrimental to financial interests.[49] Therefore it is not irrelevant how much time will be spent on adjudicating conduct which infringes the financial interests of the Union. For this reason, provisions accelerating proceedings serve not only the interests of Hungarian law enforcement but also the interests of the European Union.

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Discussions on Amending the Law no. 241/2005 of Tax Evasion. The Position of Romanian Constitutional Court

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Abstract

A recent discussion on a draft law amending the Law no. 241/2005 on the prevention and combating tax evasion has attracted our attention and we considered it necessary to consult the official websites of the chambers of the legislative in order to observe the status of the amendment. We can observe that the law amendment has not been noticed by criminal law specialists, from the examinations carried out until this moment, excepting some short press articles.

We have observed, on December 2018, that the Chamber of Deputies adopted the final form for the promulgation of the law, which was filed on 20 December 2018 at the General Secretary for the exercise of the right to contest its constitutionality. On 21 December there has been sent a unconstitutionality control request by some deputies. On 13 march 2019, The Constitutional Court, after observing the Law, declared that all the amendments are contrary to the Fundamental Act.

On a first analysis, the position ot the Court is fully justified. The amendment contains some solutions that are, in our opinion, contrary to the provisions of the Criminal Code and the Procedural Code and which are contrary to the rule of the separation of powers, the independence of justice and the equality of the citizens. Moreover, a number of criticisms can be argued regarding the very weak legislative technique used by inserting some terms and expressions that move away from the field of criminal law.

Keywords: *tax evasion, Law no. 241/2005, amendment, claimed prejudice, taxes, equality, oportunity*

1. Some introductory remarks

Amending the Law no. 241/2005 on preventing and combating tax evasion[1] is always a challenge for the legislator. This criminal special law involves a lot of interests, regarding business, and it can be statued that it is between the most discussed and controversial criminal acts. The recent amendment proposal has attracted our attention and we considered it necessary to consult the official websites of the legislative in order to observe the law[2] is in its way.

The so-called „*a priori* constitutionality control" procedure, regulated by Art. 146 of the 2003 Constitution of Romania, also called an „objection of unconstitutionality"[3],

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[1] Published in Oficial Monitor, no. 672 from 27 July 2005

[2] Consulted at http://www.cdep.ro/pls/proiecte/upl_pck2015.proiect?idp=16750, accessed on 10.09.2019.

[3] Muraru, I., Tănăsescu, E.S., (coord.), *Constituţia României, Comentariu pe articole*, Ed. CH Beck, Bucureşti, 2008, pp. 1396-1397.

concerns the constitutional legitimacy of a law, before its promulgation by the President of the Republic, after it is finally adopted by the legislative[4].

Kelsen was one of the first scholars that affirmed the necessity of a "supreme" act. In *The Pure Theory of Law*, he said that the assertion that a law is unconstitutional is in itself a contradiction, for the reason a law can only be valid on the basis of the fundamental one. If we have reason to assume that a law is valid, the reason for its validity must be find in the state Constitution. An invalid law, sais Kelsen, is not at all a law, and there is no legal basis for it, so no legal claim can be made in relation to it. When we speak of a law that is unconstitutional, we will understand that the law in question can be cancelled, according to the Constitution, not only by the joint procedure, that is by another *lex posteriori*, but by a special procedure, provided by constitution. As long as the rule is not cancelled, it should be considered valid, and as long as it is valid, it can not be unconstitutional[5].

Returning to the amendment in discussion, it contains some solutions that are contrary to the provisions of the Criminal Code and the Code of Criminal Procedure, and which contradict the rule of the separation of powers, the independence of justice and the equality of the citizens in front of the law. Also, a number of criticisms can be made about the weak legislative technique used by inserting some terms and phrases that depart from the field of criminal law.

As we will observe, this was also the option of the Constitutional Court, which, by Decision no. 147 of march 13, 2019, declared the entire law unconstitutional.

The central idea of the Decision is that the amendment contains a lot of uncertain terms and innovations, that cannot be accepted. Our critics in the article follow also that conclusion.

Lex certa imposes a rule of a qualitative condition, to be drafted with sufficient clarity so that any addressee can figure out whether an action or omission falls under the protection of the law[6]. In fact, we can observe that nowadays, the certainty of criminal provisions is understood most like a foreseeability, or predictability, and this condition makes a principal control by international Courts, as the ECtHR, and, observing its jurisprudence, by the national Constitutional Courts[7].

It has been said that besides the desiderate of security of the citizens, the definitely determined character of the criminal norm even comes to support the achievement of the main function of criminal law, which is the protection of social values. The criminal law is enacted to be respected, but it is obvious that it can be respected only to the extent that it determines precisely the scope of the imposed or prohibited actions, in other words to the extent that it can be understood by its recipients[8].

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[4] The objection may be drafted by the President of Romania, by one of the two Legislative Chambers, the Government, the Supreme Court, the Ombudsman and by at least 50 MPs or 25 Senators.

[5] Kelsen, H., *The Pure Theory of Law*, Humanitas Publishing House, Bucharest (2000), p. 324.

[6] Stănilă, L.M., *Principiul legalității: de la lex scripta la lex certa*, in Analele Universității de Vest Timișoara, Seria Drept, nr. 2/2018, p. 78, https://drept.uvt.ro/administrare/files/1550013880-uj-anale-2-2018--paginat.pdf, accessed on 10.09.2019.

[7] Stan, A., *Nullum crimen sine lex certa. The lack of previsibility in criminal law. Legal versus illegal in the recent Romanian Constitutional Court jurisprudence*, in Yearbook, Human Rights protection, from unlawfulness to legality, nr. 1, Novi Sad, 2018, p. 528

[8] Streteanu, F., Nițu, D., *Criminal Law. General part*, vol I, Universul Juridic Publishing House, Bucharest (2014), p. 39.

2. Critics regarding the statement of reasons of the Law

The „explanatory memorandum”[9] of the legislative act is particularly very succinct and does not observe the standards of such an act, especially when it comes to changes that are intended to have a high significance, with serious consequences on the sanctioning level.

It is well known that a lot of European countries adapted the system of punishments against the „financial crimes relating to the position of the accused on the damage caused. It can be said that in Romania this is a new "crime control policy", since the enforcement of the new criminal legislation in 2014[10]. In Western Europe, one of the most efficient legislations in this matter is the Italian one[11].

The legislative said that the main reason of the initiative is "the status of the Romanian judiciary system, the detention conditions and the prison agglomeration, as well as the cases in which Romania was convicted by the international courts for these conditions".

A first criticism of this statement is that the agglomeration level in penitentiaries and the precarious conditions of detention do not belong to the judiciary, being possibly administrative, legal, related to justice, but still beyond the meaning of the "judicial system" that the initiator gives. In Romania, the detention places are subordinated to the Minister of Justice, but it is to much to say that justice is made there. Justice is made in the Courts and it is also known that the detention regime refers to the post-judiciary individualization of the punishment, after the judge pronounced the decision.

On the other hand, although we have criticized[12] the very high punishment limits of aggravated forms of the tax evasion (referring to paragraphs 2 and 3 of Article 9 of Law 241/2005), neither the explanatory memorandum nor the final form adopted by the Chamber of Deputies make any reference to disproportionately high penalties (15 years imprisonment). However, we assume that most of the crimes of tax evasion do not result in very high convictions, there can be identified serious cases where the alternative without deprivation of liberty is impossible. To argue, therefore, that the agglomeration of prisons is the reason why the changes we were about to talk about here is, we think, a false hypothesis.

Moreover, the statement of reasons also uses an expression that contradicts the old and current principles of criminal law. It says that: "the purpose of punishment is to prevent, re-educate, but also to recover damages rather than to keep people in detention, which even attracts more expenses from State".

We can observe that the purpose of the criminal punishment cannot in any case be the recovery of the damage caused by the offence. This may possibly be only one of

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[9] http://www.cdep.ro/proiecte/2018/300/50/4/em445.pdf, accessed on 10.09.2019.

[10] Ciopec, F., *Crime control or due process? Which are the tendencies in Romanian criminal Justice?*, in *Journal of Eastern-European Criminal Law*, no. 1/2017, p. 193.

[11] Mariani, C., *Patteggiamento subordinato al pagamento del debito tributario: nessuna deroga per i delitti di cui all'art. 13 d.lgs. 74/2000*, https://www.penalecontemporaneo.it/d/6517-patteggiamento-subordinato-al-pagamento-del-debito-tributario-nessuna-deroga-per-i-delitti-di-cui-a, accessed on 10.09.2019.

[12] Stan, A., *Considerații cu privire la proporționalitatea sancțiunilor penale. Limitele controlului Curții Constituționale. Cazul contrabandei în formă agravată*, în Revista de drept penal al afacerilor, nr. 1/2018, Ed. Universul Juridic, pp. 65-90.

the aims of the criminal proceedings (in fact, the civil aspect of them). It is true that the finality of punishment oscillates between retribution and prevention (*punitur quia peccatum est, et non pecetcetur*, the old scholars say)[13]. But saying that the purpose of the penalty is the recovery of damages is a legal nonsense.

Recovery of damage caused by the offences is an aim of the victim, that is „civil action", in addition to „public action", which remains a subsidiary action, even in the case the state budget is harmed, as it is the case with tax evasion offenses. The state, that has the attribute to judge is the same as the state that is the victim of tax evasion, but, through a necessary fiction, the identity is removed in the criminal proceedings. The state authority protects the citizens, but it also has to protect itself, it is both a judge and a victim. Otherwise, this situation would generate a difficult discuss about the principle of *nemo esse judex in propria causam suam*[14].

To affirm that a person is convicted in order to recover the damage that he caused by the offence is, we think, dangerous for the system of criminal law. Changing the concept of the right to punish, moving it from the original purpose to the patrimonial purpose, we believe that it is proceeding in the wrong way, where criminal justice approaches rather a patrimonial one than the traditional system.

In any case, some steps along this way have been made and they hardly seem to be stopping. This is because the level of entrepreneurial criminality has made the recovering of illicit gain to become one of the main policy objectives in global criminal proceedings. Thus, the products and the proceeds of crime, meaning here, on the one hand, *lato sensu*, the civil damage caused to the injured and on the other hand the proceeds obtained by the violation of the law became a constant of the criminal activity and a central goal for the authorities.[15]

The Constitutional Court, in decision 147/2019, stated that the main problem of the amendment is the lack of clarity, the confusion of legal terms. It said that: "Regarding the quality standards of the law and the principle of the lawfulness of crimes and punishments, the Constitutional Court, referring to the jurisprudence of the European Court of Human Rights, held that although the criminal law cannot have absolute precision and it is inevitable it is mandatory for it to allow its recipients, if necessary by means of clarifying instructions, to reasonably determine the conduct sanctioned by the rules of incrimination and the consequences of non-observance in the concrete circumstances of each individual causes. At the same time, it was stated that these considerations are all the more relevant to the case of professionals who are required to exercise great care in the exercise of their profession, which is why they expect them to pay special attention to the risk assessment which it presents."

3. Tax evasion crimes: „state of danger or harm offences?

Most taxpayers voluntarily comply with their tax obligations. However, some taxpayers persevere in being non-compliant and use any means to evade their tax

[13] For a large discussion on the punishments, see Tanoviceanu, I., *Treaty of Law and Criminal Procedure*, Second Edition, Vol. III, Bucharest, 1924 p. 11 *et seq*.

[14] *lat, nobody can be his own judge.*

[15] Gaito, A., Furfaro, S., *Giustizia penale patrimoniale*, revista Archivio Penale, Fasc. 2/2016, accessed at http://www.archiviopenale.it/giustizia-penale-patrimoniale-/articoli/15072, accessed on 10.09.2019.

obligations. It is in respect of those taxpayers, for whom support and monitoring does not improve compliance, that criminal law plays an important role. Moreover, it enhances the general preventive effect that criminal law enforcement can have and reduces noncompliance[16].

Tax evasion, drug or person trafficking and corruption are the main offences that generated the new "crime control" international policy, an international movement where the freezing, tracing and recovering the proceeds of crime is seen as the most important aspect of criminal investigations[17].

In connection with the tax evasion offenses provided in Romania by Law no. 241/2005, although the majority opinion is that these are prejudice offences, that cause damages to the state budget, the opposite opinion was also expressed[18] in the sense that these are crimes that only regard a state of danger.

Legal scholars say that the law does not pretend to use the offenses provided by art. 9 a material, certain and conclusive result, the damage remaining a civil law offense, with criminal relevance only in the matter of individualizing the punishment. However, it cannot be omitted that tax evasion is sometimes in relation to the damage caused, the state budget damage being an implicit consequence of committing the offenses, which would not mean, however, that they become a crime of consequence[19]. The omission to pay what is due to the state budget does not lead to an offender's appropriation with the money, in the classical sense of the term, he does not „take" something to which he is not entitled, but he does not pay for something to which he would be bound, causing damage, an unrealized benefit of the state.

It has also been observed[20], in connection with the crimes prescribed by art. 9 of the special law that the immediate effect of the tax evasion offenses is creating a state of danger for the legal object (the honest economic activities). With regard to tax evasion offenses that have complex content, some of them produce results. For example, it is the result of the offense under art. 9 al. (1) lit. d[21]. English scholars also observed this real controversy, and affirmed that the failure to pay duty does not necessarily mean that the individual has obtained benefit by evading it.[22]

The aspect of the incrimination architecture of art. 9 from the Law, shows another author[23], is the essential element that makes the opinion, even the majority one, that we are talking about danger crimes, to be strongly questioned. The existence of the two aggravated forms, lead to the conclusion that art. 9 par. 1 of the Law no. 241/2005, which actually incriminates the tax evasion, is based on the fact that these crimes have caused a general consolidated budget loss of up to 100,000 EUR.

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[16] OECD (2017), *Fighting Tax Crime: The Ten Global Principles,* OECD Publishing, Paris. http://www.oecd.org/tax/crime/fighting-tax-crime-the-ten-global-principles.htm, accessed on 3.06.2019.

[17] Boucht, J., *The limits of asset confiscation. On the legitimacy of extended appropriation of criminal proceeds*, Hart Publishing, Oxford and Portland, Oregon, 2017, p. 4.

[18] Boroi, Al., (coord.), *Dreptul penal al afacerilor*, Ed. 6, Ed. CH Beck, București, 2016, p. 132.

[19] Boroi, Al., (coord), *ibidem.*

[20] Hotca, M.A., (coord), *Infracțiuni prevăzute în legi speciale. Comentarii și explicații*, Ed. a IV-a, Ed. CH Beck, București, 2017, p. 159.

[21] Lit. d) and art. 9 penalizes "the alteration, destruction or concealment of accounting documents, fiscal stamps or electronic fiscal stamps or other means of data storage".

[22] Alldridge, P., *The limits of confiscation*, 2011, Criminal Law Review, pp. 827-843.

[23] Toader, M-C., *Este sau nu infracțiunea de evaziune fiscală infracțiune de pericol?,* accesed at www.juridice.ro, https://www.juridice.ro/384656/este-sau-nu-infractiunea-de-evaziune-fiscala-infractiune-de-pericol-2.html, accessed on 10.09.2019.

4. Analysis on the text of the amendment

If until February 1, 2014, Law 241/2005 provided for a case of non-punishment and a case of reducing the punishment, after the amendment of the Law from that date, Article 10[24] regulates only the attenuation of the punishment: *("in case of a crime of tax evasion provided for in Articles 8 and 9, if in the course of criminal investigation or trial, until the first term of trial, the defendant fully covers the claims of the civil party, the limits provided by the law for the committed crime are reduced to half ")*.[25]

Discussions on the nature of the offenses provided by Law no. 241/2005 may be particularly extensive, but we do not believe that it is the time of a digression in this sense, because the purpose of our short analysis is to highlight some inaccuracies and errors in which the legislator fell upon the law amending the provisions of tax evasion. We will not insist on the issues in which the scholars have broadly expressed, even in the current regulation, by criticizing them from the point of view of the lack of clarity, but only of the elements brought by the modifying law.

1.1. Recovering the damage caused, a condition for giving up the accusation?

First of all, the law-draft amendment regulates that paragraph 1 of Art. 10 shall be modified and shall have the following content:

"In case of a crime of tax evasion referred to in Articles 8 and 9, if during the criminal investigation or the trial, until the first term of the trial, the defendant fully covers the damage caused by committing the offense, increased by 20% with the addition of interest and penalties, it will be ordered, once, to give up the prosecution. "

The text begins by taking over the content of art. 10, but continuing with new elements, the first of which being the replacement of the *"claims of the civil party"* with *"the damage caused by committing the offence"*. It seems that the legislator's intention was to cut the issue, which we have already pointed out, in relation to the two opinions regarding the nature of danger or of prejudice, in the sense that the introduction of the phrase: *"the damage caused"* is unequivocally established that the crime is one of damage (prejudice). In this respect, we remark the inconstancy of the legislator, because in the text form before the amendments made on 2014, art. 10 also referred to *"damage caused".*

Is there a difference, other than terminological, between the two concepts? We believe that it is, the central element of the difference being that between the concept of "availability", or "disponibility", specific to civil proceedings, and the "officiality", a characteristic of public criminal action. Damage is one of the elements of tort law civil liability, but a primary element, because in its absence there is no civil liability[26]. It has also been argued that although damage is the essential and necessary condition of civil liability, the proof of its existence is not in itself sufficient to incur civil liability,

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[24] Hotca, M.A., (coord), *op. cit.*, pp. 181-188, B. Vîrjan, *Infracțiunile de evaziune fiscală*, Ed. CH. Beck, București, 2011.

[25] According to art. 8, "It is a criminal offense and is punished by imprisonment from 3 years to 10 years and the prohibition of certain rights in the taxable person's determination in good faith of the taxes, taxes or contributions, resulting in obtaining, without right, money with title of repayments or refunds from the general consolidated budget or compensation due to the general consolidated budget".

[26] Vanca, P.O., *Acțiunea civilă în procesul penal*, Ed. Universul Juridic, București, 2018, pp. 64-65.

the damage still having to be certain, directly and personally, and be the causal consequence of the illicit activity.

Returning to the "traditional" form, it seems the legislative made a step forward, because the evaluation criterion is materialized, the budget damage being determined by an expertise. The claims of the civil party, as has been said, relate only to an allegation, sometimes being not realistic. The civil party in a case referring to tax evasion is the state, represented by the Ministry of Public Finance, respectively the National Agency for Fiscal Administration[27]. In conclusion, the defendant, in order to benefit the legal disposition, must cover the claims of the civil party, not the damage caused to the general consolidated budget.

We believe, however, that we cannot really speak of a real damage but also of the claims of the allegedly injured, because this can only be discussed when the injured party has established it by the court. Expertise is only a means of proof, among others, which does not by itself constitute a dictum of a court. Only the judge dealing with the related criminal and civil conflict may order the defendant to cover a certain amount of damage to this final moment, although, declaratively and terminologically, he uses the same denomination, in reality we are only talking about claims.

Without making a forced comparison, just as we cannot really talk about a crime committed until the court has finally ruled in this respect, but just an act prescribed by the criminal law or a reasonable doubt, we cannot talk about a certain damage, but only a claim.

Then, another issue that can be the subject of many controversies is the nature of the 20% percentage of the calculation base, which increases the amount to be paid. The Criminal Code and the special criminal laws no longer use these kinds of institutions to increase the costs the defendant will pay. Is this a „criminal fine of mixed, a criminal and civil fine? It seems to be compulsory, because the law makes the exercise of a right conditional upon its execution. What can be an amount that exceeds the proven damage – it is not a civil fine, more a criminal one. It is although certain that the law linked its payment to a new institution of criminal procedural law – the waiving of accusation, which the prosecutor orders when finds a reduced gravity of the offence. We believe that the addition to the proven prejudice is a *sui-generis* criminal law institution, similar to a fine, which can be difficult to fit into one of the traditional institutions of this type.

What also surprises us in this paragraph is that the law falls into a serious confusion, stating that waiving the accusation may be a solution of the judge, when it is obvious that this is not an attribute of it. The text asserts, without doubt, that "if, in the course of the criminal prosecution or trial, until the first term of the trial, the defendant fully covers the prejudice (...), the criminal prosecution is waived".

The hypothesis in which the defendant pays the prejudice and the "increase" being, at first sight, legally covered, because, according to art. 318 Code of criminal procedure: "in the case of offenses for which the law provides for the punishment the fine or imprisonment of maximum 7 years, the prosecutor may waive the criminal prosecution when it finds that there is no public interest in pursuing the offence". But such a solution after the trial begins is not legal and has no support in procedural provisions. In Romanian system, once the case is sent to the Court, the prosecutor cannot waive his accusation (in some common law procedural systems, this can happen).

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[27] Toader, M.C., *cited.*

Only the Judge is sovereign to pronounce one of the solutions provided by the law, waiving the punishment (not the prosecution), postponing the punishment, conviction, acquittal[28]. So, whether or not it is a confusion, it is a gross one, between waiving up the accusation (attribute of the prosecutor) and waiving up the punishment (court solution), the legislative ignoring the separation of judicial functions and the solutions that can be ordered by them, considering that the prosecutor could use the remedy after the court was notified.

Another problematic issue of the provision is that the legislator requires the prosecutor (and the judge, if admitting that the reference is to waiving the punishment and not to waiving the accusation) a certain solution. It is true that under the regulation in force until 1 February 2014, the old art. 10 of the Law required the court if the damage caused and recovered was up to EUR 50,000 in the equivalent of the national currency, the application of an administrative sanction (a fine of 100 to 1,000 lei). The provision, although not declared contrary to the Constitution, raises issues from the point of view of the magistrate's independence, it is true, by reference to the law, but it can be said that by imposing a certain solution without accepting a margin of appreciation. Even the Constitutional Court, in a controversial decision stated in this respect, and that a solution might be imposed upon him[29].

The Court, in the decision on the amendment, argued that "regarding the prosecutor's obligation under Article unique pt. 1 of the Act, to order the waiving of accusation, if the defendant, during criminal investigations, fully covers the damage caused by the act, plus 20% (...), notes that these aspects are violations of the principle of the lawfulness of incrimination and punishment, 23 par. (12) of the Constitution and, at the same time, of the quality standards of the law, stipulated in art. 1 par. (5) of the Constitution".

1.2. The fine, a possible solution?

After paragraph (1), of art. 10 of Law 241/2005, the legislator introduces three new paragraphs, par. (1^1)-(1^3). The first one has the following content:

"(1^1) in case of committing a tax evasion offense referred to in Articles 8 and 9, if, in the course of the trial, until the end of the judicial investigation, the defendant will fully cover the damage caused by committing the offence, increased by 20%, plus interest and penalties, the court will order the penalty of criminal fine."

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[28] See also Udroiu. M., (coord.), *Codul de procedură penală, comentariu pe articole*, Ed. CH Beck, Ediția a II-a, București, 2017, p. 1353 și urm.

[29] In Decision no. 90 of February 22, 2016, the Constitutional Court ruled that "through the prosecutor's competence to waive the prosecution, according to art. 318 of the Code of Criminal Procedure, prior to or at the beginning of this procedural stage, with the consequence of not prosecuting the suspect or defendant and of abdicating ab initio a penalty, places him in the position of "saying" the right and to give a judgment likely to be enforced, conferring its prerogatives of juris dictio and imperium, specific to the courts. In this way, the Court held that, by applying the provisions of art. 318 of the Code of Criminal Procedure, the prosecutor directly carries out an act of justice. However, justice needs to be done in a transparent way by settling cases according to the principles of criminal procedural law governing the conduct of court hearings. At the same time, the Court found that, by imposing the obligations laid down in Art. 318 par. (3) of the Code of Criminal Procedure, the prosecutor places himself on the position of judge of cases by applying measures similar to punishments through an act that is neither administrative nor judicial.

The text is intended to be a procedural extension of the previous one, whereby the benefit of a lower punishment (the criminal fine, in the present case) is granted in the case of the payment of the damage, with the related increase and after the first term of the criminal trial.

Firstly, it should be noted that in this case, the payment shall be completed at least when the debates in front of the judge are finished. The procedural moment is the one in which the court, after the administration of the evidence, asks the prosecutor and the parties to present the arguments on the criminal charge. The sanction is higher, because the trial evolved over time and it could be said that the defendant did not understand from the first moments to repair the damage, realizing it only at the last moment before the beginning of the debates. From this point of view, the solution is justified, but we believe that the lack of an option given to the court is contrary to the Constitution (for the aforementioned reasons).

We cannot fail to recall the old provision of art. 10 of Law 241/2005, which stipulated (before February 1, 2014) that, if during the criminal prosecution or trial, until the first term of the trial, the defendant fully covered the damage caused, up to 100,000 euros, in the equivalent of the coin national, the fine *"could be"* imposed. The law therefore provided only an option, a possibility for the court to choose the pecuniary penalty. But by the new amendments, as with the provision requiring the prosecutor to waive prosecution, the judge is required to impose a fine on this date without any other sanctioning option. This is not constitutional, and we are returning in the time of fixed, predetermined punishments, of a sad memory, where the court, in case of guilt, had to apply the single punishment[30]. It can be argued that the fixed penalty is a pecuniary one, being a favor, but we still believe that the breached principle is the same in all cases.

Most modern states adapted their repressive systems, paying more attention to the fines[31], by increasing the number of cases where it may be applied alternative with the imprisonment. The fine is also said to realize its coercitive function by its ability to reduce to a certain extent the patrimony of the offender, following his re-education through the material restrictions that follow.

However, it is not clear, according to the criticized norm, the amount of the fine that could be applied, since the provision does not corroborate with the general rule regarding the criminal fine, from art. 61 Criminal Code. First of all, Art. 8 and 9 of Law no. 241/2005 do not provide for alternative punishment of the fine to that of the prison and the first legitimate question is whether a special provision may derogate from it. Our view is that this is not possible without a correlative change of the pure sanctioning rule, because, in essence, the rules we are considering are a mixed, substantive criminal law and procedural law. Therefore, in order to be able to order the payment of the criminal fine, we believe that a judge cannot directly apply the text of the art. 1^1, cited above, but will have to refer to the special rule (Articles 8 or 9 of the law) and then to the text governing the criminal fine.

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[30] Tanoviceanu, I., *Treaty of Law and Criminal Procedure*, 2nd ed., 1924, vol. III. More than half of Vol. III is devoted to the history and evolution of punishments, especially to the capital punishment, because most of the times the fixed sentence was death, its individualization on the way of execution only, depending on the seriousness of the offense and the accused person. In the French Penal Code in 1810, the fixed death penalty was imposed in 27 cases.

[31] Paşca, V., *Drept penal. Partea Generală*, Ed. a IV-a, Ed. Universul Juridic, Bucureşti, 2015, p. 456.

Then, even if we admit that a criminal fine might apply, we are not sure what are the limits between which it would be established. Article 61 of the Criminal Code links the amount of „days/fine" with prison sentences with which the fine is provided alternatively. However, if we do not have this alternative, we cannot legally establish a number of days. There are in fact very few offenses that provide only the penalty of the fine, with a unique character[32], and art. 61 al. 4 lit. a) The Criminal Code also stipulates certain limits within which the court will set the days-fine. In the case of tax evasion to use this mechanism, in this case we will have a single penalty provided for by a derogatory rule? Hard to accept, because the criminal policy imposed that the fine, as a single punishment, should be a sanction imposed on particularly socially dangerous acts at the lower limit of criminal repression.

1.3. Late payment of the damage and the conviction without deprivation

Article 1^2 of the amending law reads as follows:

"(1^2) in the event of a crime of tax evasion referred to in Articles 8 and 9, if the defendant's obligation to cover within one year from the delivery of the sentence is established by court decision, the damage caused by committing the act, increased by 20 % of the base, plus interest and penalties, the court may only order the suspension of the sentence under probation only once. If the convict does not cover the amount ordered within the prescribed time limit, the probation will change into imprisonment".

It is particularly difficult for us to understand what the legislator wanted to regulate through this text. Is this a special rule of "canceling the probation"? How can the Court otherwise order the suspension of the execution of the punishment, if we already speak of the premise of establishing a payment obligation? It would appear that the legislator considered the hypothesis that the defendant undertakes to pay the damages in one year, in which case it would be possible to choose for the actual non-execution of the punishment (which, however, it is possible also by broad law, if we consider the minimum of punishment for the simple variant of Article 9 of the law).

Then, it is almost impossible to understand the meaning of the following phrase, which seems to want to regulate a new institution in criminal law, not envisaged in any other law, that of "the transformation of punishments". A "transformation" as stated in the text under consideration is completely devoid of normative support in the general part of the Code, generating serious confusions and enrolling in the incoherence of the entire law under our criticism. The Court said it is "non-juridic".

In fact, comparing it with the system in force, al. 1^2 seems to be unfavorable for the accused, contrary to the apparent intentions of the amendment, because if, according to the general rule, the court dismisses the probation and orders the execution of the punishment, unless the convict proves that he had no possibility to fulfill the civil obligations, the new derogatory text does not provide for this exception, sanctioning with imprisonment the defendant in all cases.

The following text provides that:

"If the magnitude of tax evasion provided for in art. 8 and 9 justify such a measure, the court may order the sums provided for in the preceding paragraphs to be covered within 1-3 years, the failure to pay them with the consequences provided for in the previous paragraph".

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[32] In the Romanian Criminal Code, a single offense provides for the single fine punishment, the "violation by any means of the secret of voting" (Article 389, paragraph 1).

The text does not seem to have the right place in the succession of the texts of the law, it would naturally have been placed before, and not later, because we find out from its content that it is intended that, by judgment, payment within a set timeframe of established injury. The legislative technique is deeply deficient, naturally the previous norm being a development and a consequence of what follows, they had to be reversed in a somewhat natural sequence. But almost nothing seems legally in this amendment as we advance in its analysis, as this text also has a number of deficiencies.

First of all, the use of terms that have nothing to do with criminal law continues: "the magnitude of tax evasion". In current language, it is true that tax evasion can be large or small, but although the law is said to be foreseeable, accessible to the recipient, the concept seems to have been taken to the extreme, and the law should not operate with such terms. A number of synonyms could find their place: quantum, value, extent, but the legislator did not consider them, preferring a popular, even an argotic term.

We do not understand the rationale of this provision, because, as we have shown in the foregoing, the provision of art. 97 of the Criminal Code is more favorable, granting the convicted person the right to pay civil damages for the entire time, up to the end of the probation period (which may vary between 2 and 5 years) and on the other hand granting it the benefit of the lack of a bad faith, which, it is real, must be proved, but in any case does not automatically impose the imprisonment.

1.4. Payment of the damage, a personal circumstance?

Lastly, the final text of the amending law states that:

"(1) the provisions of art. 10 par. (1) shall apply to all defendants who have jointly committed one of the acts referred to in art. 8 and art. 9, regardless of whether the payment of the damage was made only by one or a part of them".

This text tried to change the interpretation given by the High Court of Cassation by Decision no. 9/2017[33], whereby it was established that "the provisions of art. 10 par. 1 of the Law no. 241/2005, in force until February 1, 2014, regulate a personal cause of non-punishment/ reduction of punishment limits".

So, the last text being analyzed is a measure of criminal policy that, contrary to what the Supreme Court has established before, benefits all participants in a tax evasion offence, even if only one or more of them paid the damage.

The High Court cites in its decision the Constitutional Court[34], which has ruled against the criticism of the inequality before the law of the defendants in the application of art. 10 of the Law no. 241/2005 that "criticism of violation of the constitutional principle of equality of rights cannot be accepted because the case of reducing the punishment provided by the law applies equally to all persons that are in the situation of art. 10 par. (1) sentence I of Law no. 241/2005, that is to say the authors of a tax evasion offense, which during the criminal prosecution or the trial until the first term of the trial fully payed the damage caused by the criminal offense. As it has also stated: (...) The legislator regulated in Article 10, paragraph (1), sentence I of Law 241/2005 on the prevention and combating of tax evasion a cause of reducing the punishment prescribed by the law for the committed offence, under the conditions established by the law. This is a criminal policy measure determined by the specific

[33] Published in Official Monitor no. 346/11 may 2017.

[34] Constitutional Court Decision nr. 285/2009, published în Official Monitor, Part I, nr. 192 /27 March 2009

nature of the tax evasion offenses, namely the need to recover the sums owed to the consolidated budget as a matter of urgency and is not likely to undermine the right to a fair trial (...) The fact that only the accused who pays covers the damage caused during the criminal prosecution or legal proceedings is entitled to reduce the penalty limits provided by law until the first term of trial has no significance to the restriction of free access to justice. The person concerned has the possibility to appeal to the courts if they consider that the rights, liberty or legitimate interests have been violated and to enjoy all the procedural safeguards provided by law, including in relation to the civil party (...) the interested party is fully free to prove the existence, or the non-existence or the extent of the damage, the court being the one which, on the basis of its constitutional competence (...), decides on the basis of the evidence also on the civil side..."[35]

Returning to the mechanism of unified jurisprudence, which the new law wishes to contradict, the Court, after presenting its own jurisprudence and the views of the doctrine, has shown that in order to have the cause of non-punishment regulated by the provisions of art. 10 par. (1) of Law no. 241/2005, it is necessary to ascertain "the contribution of the defendant to cover all the damage and not the attitude and the contribution of the civil party to recover the debts". In other words, not every way of recovering the damage leads to the incidence of the case of non-punishment, *but only an active, strictly personal attitude of the defendant, to eliminate the consequences of the offense committed.*

It is, therefore, a subjective attitude of the accused to pay the damage caused, which could not be objectively justified, in the opinion of the Supreme Court. The conflict is real and the problem is difficult because we are at the confluence between two systems, the objective and the subjective (which are at the base of almost the major controversies of criminal law)[36]. Is the state's interest in recovering the damage or punishing the person who breached the tax law? It could be argued against the proposal that it is absurd to "award" a defendant who takes advantage of the consistency of another's patrimony (which may have paid the damage without the least intention of helping the former). The criminal trial is not just about paying the damages, it has other reasons. However, the opposite argument can be put forward, in the sense that it would be equally unjust to punish him, as the damage was recovered.

As we said, the Court, on 13 march 2019, declared all the amendment contrary to the Constitution. The main idea of the decision is that the law does not respect the technique of elaborating normative criminal provisions.

5. Final conclusions

The old latin dictum *qui non habet in aere, luat in corpore*[37] seems to be still present in the criminal legislations. Returning to what has been said before in the criticisms expressed, the question of the relation between civil damage, pecuniary

[35] Decision of Constitutional Court no. 647/19 June 2012, published în Official Monitor of Romania, Part I, no. 494/ 18 July 2012.

[36] The situation is also encountered at the institution of anticipate liberation, where the non-payment of the damage is not analyzed as an objective condition, from the point of view of lit. c) and art. 100 Criminal Code, but as a lack of rehabilitation, a negative attitude, according to the subjective criterion.

[37] *He who has no money, will pay with his body*, Digeste, *apud* Tanoviceanu, I., *op. cit.,* p. 561.

punishment on the one hand and criminal law is one of the oldest and most controversial issues in the matter.

We believe that the law amending provisions sanctioning tax evasion does not meet the criteria of either form or content of an effective, foreseeable criminal law, as the Constitutional Court also observed. Although we still argue for reducing the severity of the sanctioning regime, we appreciate that the amendment was an error of the legislator. On the one hand it contains a set of strange terms of criminal law, a series of inaccuracies with the general texts of the Code and, on the other hand, the consequences that would have result if it came into force would not be the expected.

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Strenghtening the Capacities for Combating Corruption in the Republic of Serbia – New Challenges in the Process of Accession to the European Union

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Abstract

International organizations and European Union institutions have always been strongly engaged in the international fight against corruption, promoting lawfulness, the stability of democratic institutions, human rights protection and social and economic progress. Public integrity, transparency and accountability have been identified as part of the founding principles of good governance and public sector which should be enacted in legislation and applied consistently in practice. The paper restricts itself to review of the institutional and legislative framework to strengthen the effectiveness of the anti-corruption policy and public integrity system in Serbia. The field of conflict of interest can be a powerful tool in establishing and maintaining citizens' trust in public institutions. The aim of the paper is the analysis of anti-corruption legal and institutional framework in Serbia and rules governing the conflict of interest of public officials.

Keywords: *anti-corruption policy, special organizational unit, integrity, public sector, good governance, accountability.*

1. Introductory remarks

Corruption has a negative impact of political, social-economical, cultural development of the society, affecting all aspects of public service operation and reducing trust of citizens in government institutional framework. Politically, corruption lowers the quality of democracy and governmental performance and creates negative social environment and the low confidence in basic democratic institutions. Political parties have a tendency to use corruption as an instrument for political goals. Corruption is the corruption of politics, which means all kind of actions where political actors breach the rules of the democratic political game and put their private interest before anything else. It is widely accepted the notion of corruption as a "abuse of public powers for private interests", which has been manifested through various forms (bribery, fraud, embezzlement, extortion, conflict of interest, discretionary power, abuse of public function, nepotism.[1] Corruption is also capturing policies, the abuse of power, illegal financing of parties, buying votes, granting favors,

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[1] Šikman M., Tanjga R., *Prevention of corruption by the system of integrity - building of institutional capacity,* Thematic proceedings: Methodology of integrity system building in anti-corruption institutions, Banja Luka, 2010, p. 1.

and trading in influence. R. Klitgard has developed a model of corruption dynamic in public institutions which assumes the following: C – Corruption is M – monopoly in decision making + D (discretionary power) – A (accountability).[2]

One of the essential elements of the integrity in public sector is application of rules on conflict of interest. It is viewed as a powerful tool in establishing and maintaining citizens' trust in public institutions. With respect to that, the conflict of interest rules should not prohibit all forms of private interest of civil servants, but should contribute to maintaining the integrity of state institutions, by recognizing that an unresolved conflict of interest can lead to abuse of power. In these situations, public sector employees are in the position to advance both personal and institutional integrity, provided they resolve the conflict of interest, and present the result to the interested general public.

It is clear that public sector employees bear a crucial responsibility for maintaining public trust in state institutions, since "individual responsibility is both a starting and an end point on the integrity route in public service".[3] The second part of the responsibility lies with the public bodies and institutions, which are under the obligation to inform the employees of the conflict of interest rules, and to sanction failure to comply with them. Otherwise, the sense of responsible behavior will be lost, whilst unethical behavior will become acceptable. Although enforcement corruption and other violations to integrity should be detected, investigated and sanctioned, sometimes, bureaucratic control process can be.[4] Like Crozier states "bureaucracy encourage the abuse of powers".[5]

2. International and european union public integrity principles

Regarding the international framework for successful fight against corruption, the UN Convention against Corruption from 2003 is significant in that it obliges the signatories[6] of the Convention to develop pre-emptive anti-corruption policies and mechanisms, to ensure integrity strengthening. More specifically, Article 1 sets out the objectives of the Convention: to promote and strengthen measures to prevent and combat corruption more efficiently and effectively; to promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including asset recovery; to promote integrity, accountability and proper management of public affairs and public property.

Similarly, the OECD has adopted several recommendations – Principles for Managing Ethics in the Public Service.[7] A total of twelve of these principles elaborate four main integrity system management goals: determining and defining integrity, guiding towards integrity; monitoring integrity and enforcing integrity. These

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[2] Klitgard R., *International cooperation Against Corruption*. Finance and Development (pp. 3-6). https://pdfs.semanticscholar.org/b6cf/ccb56a32cf9124be07c07b3494b79e841f58.pdf, accessed on September 16th, 2019.

[3] Lewis C.W., Gilman S.C., *The Ethics Challenge in Public Service* (pp. 16-17). Jossey- Bass: 2005, https://www.academia.edu/33471776/THE_ETHICS_CHALLENGE_IN_PUBLIC_SERVICE_A_Problem-Solving_Guide_SECOND_EDITION, accessed on September 20th, 2019.

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[5] Crozier M., *The Bureaucratic Phenomenon,* Chicago: University of Chicago Press, 1964.

[6] The Convention has been widely accepted (140 States), including all the Western Balkan countries.

[7] OECD, *Recommendation of the OECD Council on Improving Ethical Conduct in the Public Service, Including Principles for Managing Ethics in the Public Service,* OECD legal instruments. https:// legalinstruments.oecd.org/public/doc/129/129.en.pdf, accessed on September 16th, 2019.

principles should serve as a guide for countries, which would incorporate them into their respective national instruments.

The European Union has also paid due attention to the issue of the public officials' integrity. One of the key requirements is related to measures for promoting integrity, preventing corruption and ensuring discipline in the public service are in place. These measures refer to 1) effective and adequate legal provision and institutional arrangement and tools exist to promote integrity in public service, and are applied in practice; the following elements could be considered relevant to an effective public service integrity system: managers responsibility (managerial responsibility, regulation of incompatibilities and conflicts of interests, restriction of secondary employment, post-employment restrictions, guidelines for gifts and benefits, financial disclosure, whistle-blower protection, codes of ethics and conduct, ethics training and guidelines, anti-corruption and integrity policies and action plans and 2) corrupt behavior of public servants is criminalized in the penal code.[8]

According to OECD Recommendations on public integrity, it is necessary to demonstrate commitment at the highest political and management levels within the public sector to enhance public integrity and reduce corruption, in particular through: ensuring that the public integrity system defines, supports, controls and enforces public integrity, and is integrated into the wider public management and governance framework; ensuring that the appropriate legislative and institutional frameworks are in place to enable public-sector organizations to take responsibility for effectively managing the integrity of their activities as well as that of the public officials who carry out those activities; establishing clear expectations for the highest political and management levels that will support the public integrity system through exemplary personal behavior, including its demonstration of a high standard of propriety in the discharge of official duties.[9]

It is also required to clarify institutional responsibilities across the public sector to strengthen the effectiveness of the public integrity system, in particular through establishing clear responsibilities at the relevant levels (organizational, subnational or national). Good governance adheres to the rule of law principle – legality, administrative procedures, rights to legal protection, investigation, responsibility.[10] In some situations, however, it may be possible to introduce an element of shared authority, instead of allocating responsibility to individual public officials.[11]

3. Anti-corruption legislation and conflict of interest policy for suppressing corruption – major challenges in Serbia

One of the key elements in preventing and combating corruption and other violations of integrity is conflict of interest regulation and effective implementation in

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[8] OECD/SIGMA, *The principles of Public Administration*, 2017, http://www.sigmaweb.org, accessed on September 17th, 2019.

[9] OECD/SIGMA, *Conflict of interest Policies and Practices in Nine EU member states: a comparative review,* Working papers, Sigma paper, No 36, 2007.

[10] Lane J.E., *State management,* An enquiry into models of public administration and management, Megatrend: 2012, p. 20.

[11] Soreide T., Rose-Ackerman S., *Corruption in State Administration*, Edward Elgar: 2017, retrieved from: https://www.researchgate.net/publication/280697801_Corruption_in_State_Administration:accessed on September 4th, 2019.

practice. Some authors state that "conflict of interests is structural root of the corruption. Moreover, it is necessary but not sufficient precondition for the corruption".[12] Notion of "nepotism" is mainly related to public functionaries, which using social influence often favorize their own family members. It might be serious mean of conflict of interest, sublimizing systemic corruption.[13]

Conflict of interest regulations, incompatibility laws and other instruments, constitute a very effective approach to preventing corruption. Conflict of interest policies are also part of the detection and investigation of corruption, such as declaration of income or the declaration of family assets can help a great deal in the detection of corrupt practices. In some countries, conflict of interest is considered a crime (or misdemeanor) and other countries have foreseen various sanctions for breaching the laws on conflict of interest (disciplinary sanctions.[14] This implies to various regimes of legal responsibility (criminal, disciplinary, material etc.).

The most important rules to prevent and avoid conflict of interest are: restrictions on ancillary employment, declaration of personal (family) income, declaration of gifts, restrictions on property titles of private companies, restrictions on external concurrent appointments. SIGMA reports indicate that there are certain shortcomings in resolving the issues related to conflict of interest and as such remain one of the major challenges in countering corruption in Serbia. In its 2019 Report on the Implementation of Principles of Public Administration, European Commission recommended that the Serbian Government should ensure consistent implementation of the administrative legislation in order to ensure a depoliticized public administration and a stronger merit-based human resource management and revision of anti-corruption legislation, especially rules governing conflict of interest. It is beyond dispute that a certain level of awareness regarding this problem exists; however, conflict of interest is still perceived as an abstract category the consequences of which are not fully comprehended.

Adhering to European standards, Serbian administrative legislation introduces new arrangements for handling conflicts of interests in order to be applied precisely and completely. The existence of a conflict of interest in the Republic of Serbia is regulated by the Constitution, Law on the Anti-Corruption Agency, Law on Civil Servants, and a number of laws and secondary regulation (decrees, rulebooks, instructions, code of ethics).

Bearing in mind the above, the conflict of interest is a constitutional category and the Anti-Corruption Agency of the Republic of Serbia has the sole authority to decide on conflicts of interest.[15] In order to prevent corruption, in this way, the Agency promotes the integrity and accountability of public officials, as well as institutional integrity.

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[12] Milic D., *About incompatibility of functions and conflict of interest,* Belgrade: SIC, 2016, p. 104.

[13] *Ibid*., p. 103.

[14] OECD/SIGMA, *Conflict of interest Policies and Practices in Nine EU member states: a comparative review,* Working papers, Sigma paper, No 36, 2007.

[15] The competence of the Anti-Corruption Agency is the prevention and resolution of conflicts of interest in holding public offices. The task of the Agency, with its decisions or opinions, as well as positions taken, is to prevent, resolve and eliminate the consequences of conflicts of interest in holding public offices; to resolve the cumulation of public offices; performance of another engagement, exercise control over the transfer of management rights and entrusting management; decide on the prohibition of establishing a company or public service during the holding of a public office, membership in an association and bodies of association, unauthorized influence on officials, prohibition of employment or business cooperation after the termination of public office, act in case of violation of the provisions of the Law on the Agency related to the conflict of interest.

According to Serbian anti-corruption legislation, in performing their duties, persons who exercise public authorities should not allow their private interest to conflict with public interest. Conflict of interest means a situation in which the public servant has a private interest which affects, may affect or appears to affect, his/her conduct in the performance of official duties, in a manner which threatens the public interest.[16] A public official (or associated persons) must not demand, nor receive a thing, right, service or any other benefit, given or performed, without appropriate compensation – a gift, for him/herself or associated persons, which affects, can affect or appears to affect the impartial or professional discharge of duties, or which can be considered a reward in connection with the performance of his/her duties, except for an appropriate gift of low value.

Even if formal legal framework is in place, it tends to be insufficient. Although mechanisms for the disclosure of interest exist, they have so far remained toothless because they lack the capacity to verify information and to threaten negative consequences for offenders. In 2018, the highest number of measures and decisions of the Agency, a total of 124, were imposed to officials due to the cumulation of offices, while the following by number, 113 of them, were measures imposed on officials in situations of conflict of interest and nepotism.[17]

Of the total of 124 decisions related to the cumulation of public offices, the Agency made 38 decisions which imposed the termination of the second public office by force of law (in eight cases of which a measure of caution was imposed as well), imposed 77 measures of caution, nine (9) measures for publicly announcing the decision on the violation of the Law on the Agency and one (1) measure of public announcement of recommendation for dismissal from a public office.[18]

In 2018, 16 criminal complaints were filed with the competent prosecutor's offices for the existence of grounds for suspicion that officials had not reported assets or had provided false information to the Agency, with the intent of concealing information about assets. Even 13 reports were submitted to the competent prosecutor's offices and other competent state authorities due to the existence of grounds for suspicion that officials whose assets and incomes were subject to check committed another offense (receiving/giving bribes, tax evasion, money laundering etc.), including: competent prosecutor's offices – two (2), Tax Administration – two (2) and Administration *for the* Prevention of Money Laundering – nine (9).

In 2018, in this segment of the Agency's work, a total of 45 requests for initiation of misdemeanor proceedings were submitted, due to: untimely submission of reports on assets and incomes – 43 and failure to provide documents and information at the request of the Agency – two (2).

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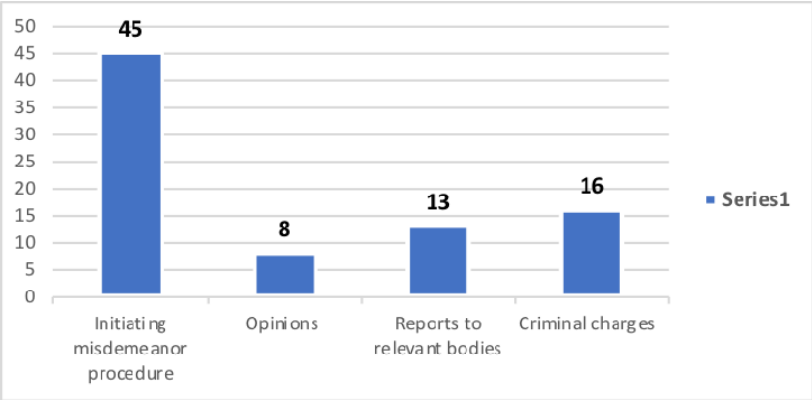
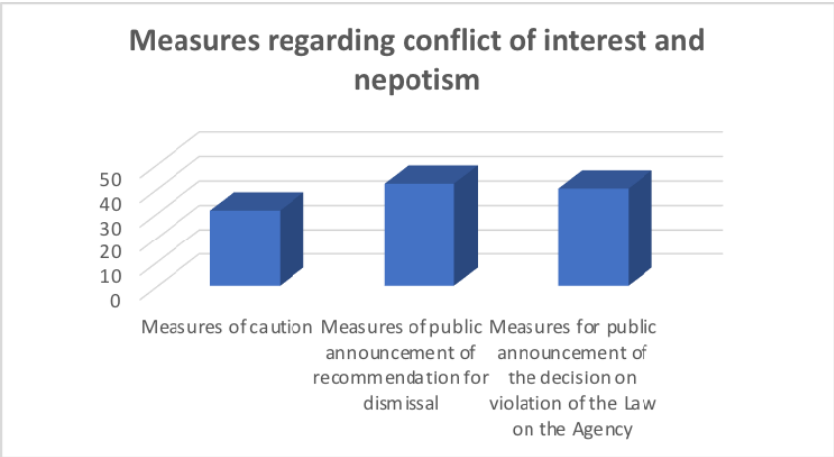
[16] Private interest of a public official is any benefit or advantage for the public servant him/herself or for persons associated with him/her. Public servants must take all necessary steps to avoid any situation that gives rise to the conflict of interest.

[17] There is a long-lasting negative perception of the following sectors: 76,7% judiciary system, 69,3 law enforcement agencies, senior civil servants 73%, custom administration 65%, police 62%, health system 58 %. Media 51,6. The most negative perception have political parties. Source: TNS-Medium Gallup/UNDP, 2011.

[18] Anti-corruption agency, Republic of Serbia, *Annual Report of the Anti-corruption agency for 2018:* Belgrade, 2019.



Graph 1. Source: *Annual Report of the Anti-corruption agency for 2018, 2019.*



Graph 2. Source: *Annual Report of the Anti-corruption agency for 2018, 2019.*

In situations that involve conflict of interest and nepotism, from a total of 113 measures, the Agency imposed 42 measures of public announcement of recommendation for dismissal, 40 measures for public announcement of the decision on violation of the Law on the Agency and 31 measures of caution. Regarding all decisions made and measures imposed, as well as the opinions given, it was noted that most officials appreciated the decisions of the Agency and that the Agency's opinions were respected, all of which leads to the strengthening of the integrity of officials in holding public offices.

However, it happens that the competent bodies that have elected, appointed or nominated officials do not exercise or respect the Agency's recommendation for dismissal, which was primarily noted at the lower level of government. Most of those who failed to comply with the Agency's decisions indicate, as a reason for non-compliance, that they have found no conflict of interest, which is not within their competence and does not lead to the rule of law and respect for institutions. Promoting positive professional culture through permanent training and education,

encouraging moral behavior, stipulating conditions for recruitment and termination of public officials, shall maintain high level of professional integrity).[19]

The most significant obstacle refers to unclear and inconsistent provisions of the current anti-corruption legislation. Some of the competent bodies are failing to act upon the Agency decisions for dismissal of public officials. Other important problem is the lack of possibility of direct access to database and records kept by the other competent state bodies. Incompatibility of databases of different public institutions are additional impairment to effective exchange of information.[20] New regulation is expected to reduce imprecision of provisions related to Agency competences as well as to put foundation for more efficient collaboration and exchange of data with other relevant institutions.[21]

In addition to establishing principles for regulating the conflict of interest, a necessary link in implementation of efficient conflict of interest resolution policy is the existence of adequate mechanisms that will enable these principles to be effectively applied in practice.

4. Criminal law instruments for effectively combating corruption

Effectively combating corruption is one of the more demanding challenges in a contemporary democratic society, and in accordance with the rule of law, it requires ensuring legal certainty, democratic reforms, monitoring the work of state authorities – as a sure-fire path to a more successful fight against corruption. In accordance with the generally accepted standard that the criminal law reaction should be *ultima ratio* and should be used after all other means and ways of protection have been exhausted, the emphasis of modern society in the fight against corruption is the implementation of the preventive aspect of the criminal policy as regards criminal offenses of corruption. Considering the fact that the criminal law reaction through its highly repressive character is in the function of prevention, we can conclude that the prevention of corruption implies the effective detection and prosecution of persons responsible for corruption offenses as well as the influence on potential perpetrators. In order to realize the aforementioned goal, it is necessary to adequately criminalize behavior of corruption, to specialize state authorities competent for detecting, proving and prosecuting criminal offenses of corruption, to ensure a more efficient relationship among state authorities, but also to perform reform[22] of the normative framework of Serbia[23] that would respond to contemporary challenges in a more successful manner. These steps to successfully combat corruption in Serbia must be in line with

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[19] Kesic Z., *Corruption in the Police,* Criminology perspective, Belgrade: Academy of criminalistics and police studies, 2017.

[20] Anti-corruption agency, Republic of Serbia, *Report on the implementation of the UN convention against corruption within the statutory powers of the Anti-corruption agency of the republic of Serbia,* Belgrade, 2018.

[21] GRECO, Council of Europe, *Fourth evaluation round, Corruption prevention in respect of member of parliament, judges and prosecutors, Compliance report,* Serbia, 2017.

[22] Bejatovic S., *Several reasons necessity of continuing work on the reform of criminal procedural legislation of Serbia*. Retrieved from: In G. Ilic (ed.), *Reform of the criminal law* (pp. 87- 114). Belgrade: The Association of Public Prosecutors and Deputy Public Prosecutors of Serbia, 2014.

[23] Skulic M., *Misconception and numerous technical errors of the new code of criminal procedure - What next and how to reform the Serbian reform process.* Retrieved from: In G. Ilic (ed.), *Reform of the criminal law* (pp. 23- 65), Belgrade: Association of Public Prosecutors and Deputy Public Prosecutors of Serbia, 2014.

international standards, implemented international documents, but also with requirements that are set in the process of Serbia's accession to the European Union.[24] The international framework largely determines the direction of reform of the national framework, the limits and the goals that need to be achieved. The most important international documents, when it comes to combating corruption, are: The Criminal Law Convention on Corruption – Council of Europe[25] and The United Nations Convention against Corruption[26], which set a number of requests to the Republic of Serbia after their ratification. Serbia has fulfilled most of its requests through the reform of the Criminal Code, through criminalization of offenses recognized in both international documents, some of which are: trading in influence, liability of legal person for criminal offenses of corruption, money laundering etc., which will be analyzed through statistical indicators of efficiency of actions of the competent state authorities in combating corruption.

The specialization of state authorities in charge of combating corruption, which requires international cooperation in all areas of combating this form of crime is achieved through the formation of the Group of States against Corruption – GRECO.[27] The main task of this international body is to monitor the implementation of the main principles in the fight against corruption and the adequacy of the implementation of the adopted international legal instruments. In addition to the ratified international instruments, effective instruments in the fight against corruption are adopted strategic documents and legal texts, within the framework of European integration.[28] It is necessary to emphasize that the European integration process itself is a long and continuous reform process in the area of justice, fundamental rights and corruption. The reform process in these areas is the result of the Screening Report received for negotiation Chapter 23: Justice and Fundamental Rights, 28 July 2014,[29] outlining recommendations in accordance with which Serbia should reform the normative framework with particular emphasis on areas that the European Commission considers to be a priority. The strategic documents that fulfilled the requirements from the Screening Report for the negotiation Chapter 23 are: National Judicial Reform Strategy for the period 2013-2018,[30] Action Plan for the Implementation of the National Judicial Reform Strategy for the period 2013-2018 and the Action Plan

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[24] Ilic G., *Criminal procedure law of Serbia and the standards of the European Union.* Retrieved from: In S. Bejatovic, & L. Trunov (eds.), *Serbia criminal law and EU standards*. Belgrade: Serbian Association for Criminal Law Theory and Practice, 2010.

[25] The Convention entered into force on 1 July 2002. The Federal Republic of Yugoslavia ratified this Convention on 18 December 2002 (Official Gazette of the FRY, International Treaties, No. 2/02). Serbia again adopted the Convention in 2005 (Official Gazette of Serbia and Montenegro, International Treaties, No. 18/05).

[26] Serbia ratified the United Nations Convention against Corruption, which entered into force on 30 October 2005 (Official Gazette of Serbia and Montenegro, International Treaties, No. 12/05).

[27] The Committee of Ministers adopted the Resolution (98) No. 7 which provides for the establishment of an international body, with Serbia and Montenegro becoming its members in July 2003.

[28] Bejatovic S., *Criminal procedure law*. Belgrade: Official Gazette, 2014; M. Skulic, *Criminal procedural law*. Belgrade: Faculty of Law, 2014.

[29] *Screening Report for negotiation Chapter 23: Justice and Fundamental Rights,* available at: http://seio.gov.rs/upload/documents/eu_dokumenta/Skrining/Screening%20Report%2023_SR.pdf, accessed on 19 September 2019.

[30] *The National Judicial Reform Strategy for the period 2013-2018* was adopted by the National Assembly of the Republic of Serbia on July 1, 2013, while the Government of the Republic of Serbia on August 31, 2013 adopted an Action Plan for the implementation of the National Judicial Reform Strategy for the period 2013-2018. "Official Gazette of RS ", no. 57/13, available at: https://www.mpravde.gov.rs/tekst/22598/nacionalna-strategija-reforme-pravosudja.php, accessed on 19 September 2019.

for Chapter 23[31] adopted by the Government of the Republic of Serbia on 27 April 2016. Given that the Action Plan for Chapter 23 provides for further steps in the reform process of all designated areas by the European Commission,[32] which includes combating corruption as well, particular attention will be paid to the recommendations and activities that need to be taken in order to more effectively detect, prove and prosecute offenses of corruption. Some of the most important strategic documents adopted in the area of combating corruption are: National Anti-Corruption Strategy in the Republic of Serbia for the period 2013-2018, Action plan for the implementation of the National Anti-Corruption Strategy,[33] Financial Investigation Strategy 2015-2016[34], the newly adopted Anti-Corruption Law.[35] The key measures in accordance with the Action Plan for Chapter 23 in combating corruption are the Financial Investigation Strategy 2015-2016 and the Anti-Corruption Law. The Action Plan clearly defines the normative framework for the prevention and repression of corruption, in accordance with the relevant legal texts. Namely, in accordance with the Action Plan, the normative framework for the prevention of corruption in the Republic of Serbia is: Law on Financing Political Activities,[36] Anti-Corruption Law, Public Procurement Law[37] etc.

Regarding the normative framework of repression of corruption in the Republic of Serbia, the following legal texts are provided: Criminal Code of Serbia,[38] Code of Criminal Procedure[39], Law on Asset Forfeiture[40] and Law on Organization and Jurisdiction of State Bodies in the Suppression of Organized Crime, Terrorism and Corruption.[41] The key principles provided for by the Action Plan, with the aim of more effectively realizing the repressive aspect of the criminal policy of corruption offenses, are: developed effective and proactive treatment in detecting and prosecuting corruption, independence of competent institutions, adequate staff, effective horizontal and vertical cooperation established[42] and the exchange of information among the police, public prosecutor's office[43], courts, as well as other state authorities and institutions. The requirements set out in the Action Plan, with the aim of more effective criminal law response to corruption offenses, were set through the necessity

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[31] *Action Plan for Chapter 23*, available at: http://www.mpravde.gov.rs/files/Akcioni%20plan%20PG%2023.pdf, accessed on 19 September 2019.

[32] Kolakovic-Bojovic M., *Accession negotiations between the Republic of Serbia and the EU within the framework of chapter 23 and the necessity for amending criminal procedural legislation*. Retrieved from: In G. Ilic (ed.), *Dominant directions of the development of criminal legislation and other current issues in the legal system of the Republic of Serbia*. Belgrade: Association of Prosecutors of Serbia and Association of Lawyers of Serbia, 2016.

[33] *Official Gazette of RS*, No. 71/13, 55/14.

[34] *Official Gazette of RS*, No. 43/2015.

[35] *Official Gazette of RS*, No. 35/19.

[36] *Official Gazette of RS*, No. 43/11 and 23/14.

[37] *Official Gazette of RS*, No. 124/12.

[38] *Official Gazette of RS*, No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014 and 94/2016.

[39] *Official Gazette of RS*, No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014 and 35/2019.

[40] *Official Gazette of RS*, No. 32/13.

[41] *Official Gazette of RS,* No. 94/2016.

[42] G. Ilic, *Pre-trial procedure: Manual for application of the criminal procedure code.* Belgrade: The Association of Public Prosecutors and Deputy Public Prosecutors of Serbia, 2013.

[43] Cvorovic D., *The public prosecutor as a powerful figure of the modern criminal procedural legislation.* Zbornik: Crime and Society of Serbia, Institute for Criminological and Sociological Research, Belgrade, 1/2015, pp. 223- 237.

of changing the legal framework for the fight against corruption, compliance with EU legislation and international standards, all through identifying problems in the field of combating corruption. It can be stated that the Republic of Serbia has taken a big step forward with regard to the reform of the regulatory framework[44] and that a number of legal texts to be adopted listed in the Action Plan, have in the meantime been adopted, whereas for some of them there are statistical indicators of practical application and efficiency results. This primarily refers to the amended Serbian Criminal Code and the criminalization of corruption offenses in line with international documents. Furthermore, the Anti-Corruption Law was adopted, as an extremely important instrument of monitoring mechanism by the Anti-Corruption Agency, whose jurisdiction was expanded with the new legal text.

Regarding the requirements related to the specialization of anti-corruption state authorities and the more efficient cooperation of competent state bodies, the Republic of Serbia fully responded to the requirements of the Action Plan by adopting the Law on Organization and Jurisdiction of State Bodies in the Suppression of Organized Crime, Terrorism and Corruption (hereinafter referred to as LOJSBSOC). The new legal text, which became effective on March 1, 2018, has largely contributed to the realization of the requirements set out in the Action Plan, namely the introduction of special departments at higher public prosecutors' offices for combating corruption (Belgrade, Novi Sad, Niš and Kraljevo, Article 14 (1) of the LOJSBSOC), the introduction of the Financial Forensics Service (Article 19 of the LOJSBSOC), the appointment of liaison officers (Article 20 of the LOJSBSOC) and the formation of task groups (Article 21 of the LOJSBSOC). The analysis of the new legal text indicates a strict provision of conditions and subjects in the field of combating corruption characterized by more efficient fighting, dynamics, durability and quality in all segments of their realization[45]. The efficiency of competent state authorities[46] in the field of combating corruption combines both qualitative and quantitative component and primarily refers to special departments for combating corruption at higher public prosecutor's offices, an organizational unit competent for combating corruption within the Ministry of Interior and special anti-corruption departments at higher courts. Particularly significant is the introduction of the Financial Forensics Service, liaison officers and task groups that not only met the requirements of the Action Plan but also contributed significantly to more efficient criminal proceedings for corruption offenses.[47]

In support of the justification of the new legal solutions and the efficiency of the competent state authorities in combating corruption, we will present statistical indicators of criminal charges filed for typical corruption offenses, such as receiving

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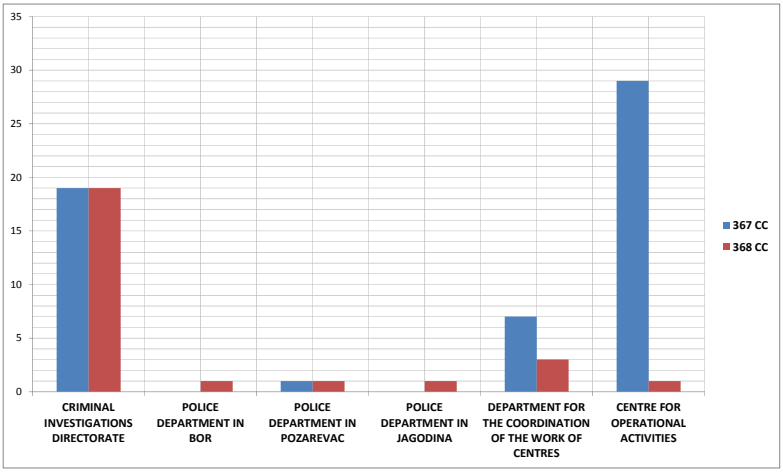
[44] Cvorovic D., Turanjanin V., *Reformed Criminal Procedural Legislation and Legitimacy of Serbian Police in Europe (Doctrine, statistics and consistency*). Retrieved from: In Dj. Djordjevic (ed.). *Thematic Conference Proceedings of International Significance.* Belgrade: Academy of Criminalistic and Police Studies, 2016, number 1, pp. 483-494.

[45] Mijalkovic S., Cvorovic D., Turanjanin V., *New Criminal Legal Challenges in Combating Organized Crime and Terrorism in the Republic of Serbia – A Big Step Forward*. Retrieved from: In Gjurovski, M. (ed.): *The Great Powers Influence on the Security of Small States* (50- 63). North Macedonia: University'' St. Kliment Ohridski ''- Bitola&Faculty of Security- Skoplje, 2019.

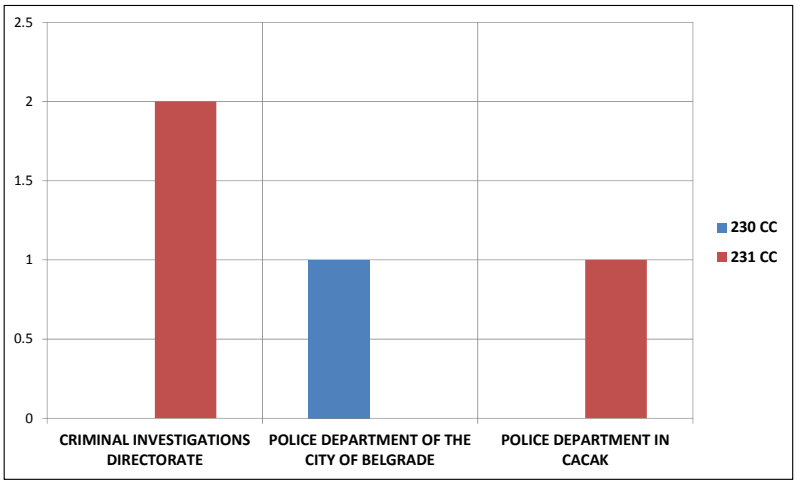
[46] Bejatovic S., *The efficiency of the criminal proceedings as an international legal standard and the reform of criminal procedural legislation of Serbia. Journal of Criminal Justice and Law*, *3*, 2015, pp. 27- 55.

[47] Mijalkovic S., Cvorovic D., Turanjanin V., *Efficiency of criminal proceedings in corruptive criminal offences in the Republic of Serbia – new challenges,* 6th Zagreb Police College Research Days keeping pace with security challenges - where do we stand?, The Police College in Zagreb, Police Academy of the Ministry of the Interior, Zagreb, 2019, paper in press.

bribes (367 CC), giving bribes (368 CC), accepting bribes in the exercise of economic activity (230 CC), and giving bribes in the exercise of economic activity (231. CC).



Graph 3. *Statistical indicators of criminal charges filed for typical corruption offenses, such as receiving bribes (367 CC) and giving bribes (368 CC) in Serbia for 2019.*[48]



Graph 4. Statistical indicators of criminal charges filed for typical corruption offenses, such as accepting bribes in the exercise of economic activity (230 CC), and giving bribes in the exercise of economic activity (231. CC) in Serbia for 2019.[49]

The presented statistical indicators point to the positive effects of the new legal text, more efficient cooperation of the competent state authorities, but also a considerable number of instruments to control the legality of police work in the area

[48] Data obtained from the *Sector for Analytics, Telecommunications and Information Technology, Department for Analytics, Ministry of Interior, Republic of Serbia.*

[49] Data obtained from the *Sector for Analytics, Telecommunications and Information Technology, Department for Analytics, Ministry of Interior, Republic of Serbia.*

of corruption, which is indicated by the greater number of criminal complaints filed by Criminal Investigations Directorate, Police Departments in Bor, Pozarevac, Jagodina, Cacak, Police Department of the City of Belgrade, Department for the Coordination of the Work of Centers, Centre for Operational Activities during 2019.

Increasing the efficiency of detecting, proving and prosecuting corruption offenses, both through the strategic framework and through ratified international documents and adopted legal texts, indicates a great step forward for the Republic of Serbia when it comes to the implementation of the criminal policy as regards this form of crime. However, the process of reforming Serbia's normative framework should not be completed with the aforementioned novelties, but it should represent yet another step forward in the process of future reforms that await our country in the process of accession to the European Union.

5. Concluding remarks

It is obvious that corruption is a serious threat to democratic institutions and processes. All democratic societies uphold public integrity and do not tolerate corruption. Moreover, integrity provides the basis for transparency and accountability. There is a permanent tendency in all democratic societies to enhance public integrity and reduce corruption within the public sector.

The basis of a systemic prevention of corruption is in introducing integrity. The key elements of an effective approach to prevent and combat corruption include measures for promoting awareness, particularly ensuring the clarity of norms, preventive mechanisms for safeguarding impartiality of civil servants, clear provisions for disqualification of civil servants in case of actual conflict of interest and retroactive measures, legal protection through administrative self-correction, appeal and petition for review, ensuring transparency of the activities of state administration.

In order to enhance public integrity and reduce corruption, it has to be ensured that the appropriate legislative and institutional frameworks are in place to enable public-sector organizations to take responsibility for effectively managing the integrity of their activities as well as that of the public officials who carry out those activities.

Moreover, there has to be established clear expectations for the highest political and management levels that will support the public integrity system through exemplary personal behavior, including its demonstration of a high standard of propriety in the discharge of official duties. The integrity standards aim to assist public officials to better adapt their conduct, but also to make the broadest public in Europe aware of what type of conduct they can expect from public officials.

Conflict of interest policies are important for improving and consolidating European democracies. They are part of broader strategy or policy to prevent and combat corruption. The perception that personal interest is set aside and that priority is given to public interest, the citizens' interest and the good governance principles, sets sound foundation for further building of trust in the integrity of public officials and state institutions. In addition to establishing principles for regulating the conflict of interest, there should be established effective mechanisms that will enable adopted principles to be effectively applied in practice.

This practice is influenced by EU institutions, during the accession negotiation process moving this problem forward and creating more effective integrity management

frameworks. The most significant obstacle refers to unclear and inconsistent provisions of the current anti-corruption legislation. Some of the competent bodies are failing to act upon the Agency decisions for dismissal of public officials. The main goal of an accountable policy should be focused to integrity of state policy and administrative decisions. Let us hope that European union and international discourse will give incentives for the fight against corruption and the domestic receptiveness for further development of public integrity.

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12. *Criminal procedure code of the Republic of Serbia RS*, 'Official Gazette', No.72/11, 101/11, 121/12, 32/13, 55/14 and 35/2019.

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The Position and Rights of Homosexually Oriented Sentenced Prisoners in Serving Prison Sentences

Dr. Zoran Pavlović*

Abstract

The position and rights of homosexually oriented sentenced prisoners in serving prison sentences are an important topic both in the penological framework and in the general context of respect for human rights. Not just psychic, physical and sexual violence within the convicts collective, but also the inadequate attitude of professionals in prisons, are often highlighted as problems when we are talking about the people oriented to the same sex. It is precisely in this respect that this paper is going to present the results of attitudes of the persons serving the sentence, and in relation to the phenomenology and the etiology of the victimization of the gay population in penal institutions. A sample of 78 respondents from the District Prison in Novi Sad is included and the obtained data testify about the disadvantaged position of the mentioned subgroup, but also about the generally discriminatory and violent culture that is not determined primarily by sexual preferences.

Keywords: Prison, homosexuality, violence, human rights

I. Introduction

The rights, the position and the problems of homosexually oriented sentenced prisoners in serving the prison sentence are a penological topic that has been devoted attention to since the first half of the previous century (Karpman, 1947; Haines & McLaughlin, 1952; Ward & Kassebaum, 1964; Saum et al., 1995; Knowles, 1999). The mentioned phenomenon is thus presented in accordance with the social context and prevailing attitudes about the persons oriented to the same sex as a whole. The viewing of homosexuality (in prisons) as a disease (Dhikav, 2004; Green, 1972), or as a form of prostitution (Boyer, 1989; Caukins & Coombs, 1976) or a security problem (Lockwood, 1980; Nacci & Kane, 1983; Hensley, 2000) followed the evolution of penological thinking as well as the achievement of a global standard of human rights protection.

In the last decades, this topic, within the penal framework, has also become interesting from the health epidemiological position. Many researchers has been motivated to conduct a number of different studies in context of emphasizing that the population of people serving sentences is at an increased risk of transmission of Hepatitis and HIV (Harding, 1987; Thomas & Moering, 1994; Naeem et al., 2014).

Following the contributions of domestic authors, the subject matter is only paid a tangential attention to. Thus, the rights of homosexuals are most often considered

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within the broader framework of respect for human rights (Račić and assoc., 1998; Jerosimić & Dimitrijević, 2007; Isaković & Lazar), rights of prisoners (Soković, 2004; Igracki and assoc., 2016), or the general problem of sexual violence in penal institutions (Pavlović and Radojković, 2016). Mršević (2016) is slightly closer to focusing on the complexity of transgender women's problems in domestic prisons.

Respecting the above, the author is going to present a brief overview of theoretical and empirical observations in the context of the position of homosexually oriented sentenced prisoners. Also, the results of the research on the attitudes concerning the rights of this population and the forms of violence that are committed against them in the penal context will be presented. As the final part, integrating theoretical settings and research indicators, proposals for the improvement of the national practice of executing the prison sentence will be formulated.

II. Legal framework of protection and phenomenology of homosexuality in prisons

The analysis of the topic of homosexuality in the criminological, penological and wider social context carries quite heterogeneous perspectives, both in Serbia and in other countries of Europe and the world. Thus, in the first place, it should be noted that the given form of sexual orientation has been criminalized for a long time, while in some countries the same sex sexual intercourse is still punishable (death) (Crompton, 1976; Agoramoorthy & Minna, 2007).

The punish-ability of homosexuality of course, lasted for a long time in domestic legislative frameworks. Only after the Criminal Code amendments (1994), the decriminalization of these behaviors came, with the restriction that same-sex sexual relations would be punished in case one partner was underage (minor).

The equalization of the rights of homosexuals with heterosexual populations only came into being in 2006, when the same law stipulated the gender neutral limit for entering into sexual relations. And although this may be seen as a significant step forward, it must be borne in mind that in Germany, Magnus Hirschfeld, in 1898, had launched a petition for the abolition of the incriminating paragraph 175 by which homosexual relations were defined as punishable (Mancini, 2010; Steakley, 1993).

Following other legal changes in Serbia, other positive developments have been noticed. This applies primarily to the Law on the Prohibition of Discrimination[1] and the Law on Gender Equality[2], but also to the number of other laws, such as the Labour Law[3], the Law on Higher Education[4], the Law on broadcasting[5] and others. The above acts thus clearly respect the principle that sexual orientation is a private matter, and that no one can be invited to publicly declare it, or to be discriminated against on the basis of that choice.

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[1] ("Official Gazette of the Republic of Serbia", No. 22/2009)

[2] ("Official Gazette of the Republic of Serbia", No. 104/2009)

[3] ("Official Gazette of the Republic of Serbia", No. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017 - decision US and 113/2017)

[4] ("Official Gazette of the Republic of Serbia", No. 88/2017 and 27/2018 - other law)

[5] ("Official Gazette of the Republic of Serbia" Nos. 42/2002, 97/2004, 76/2005, 79/2005 - other law, 62/2006, 85/2006, 86/2006 - correction and 41/2009)

When it comes to the penological context, the topic of homosexuality is not been touched directly at the legal level. Thus, for example, the Law on the Execution of Criminal Sanctions[6] in Article 7 states that a person under whom a criminal sanction is enforced may not be placed in an unequal position. In this context, the discriminatory impediments of the prohibition include race, color, sex, language, religion, political and other beliefs, national or social origin, property, education, social status and other personal characteristics, without explicating the criteria of sexual orientation.

The framework of attitudes towards (homosexual) persons serving prison sentences was determined, of course, by other acts, and above all by an international character. This refers to a number of sources that prohibit torture and define the general minimum conditions for serving the sentence, with the emphasis on the prohibition of discrimination (Janković, 2010).

The legal framework and phenomenological picture of the position and rights of homosexually oriented sentenced prisoners can often be in conflict or in collision. For example, while homosexuality is decriminalized, in some US states, homosexual relations in prisons represent the basis for disciplinary punishment, regardless to the nature of consensus (Eigenberg, 2000).

Namely, numerous observations have led to the conclusion that some (physically weaker ones) convicts agree to sexual act, in order to avoid serious forms of violent victimization. In fact, a coherent relationship between the relationship and the security challenges posed by the joint accommodation in prison lead to the fact that no threat with violence is required at all, but the same is implied in a given situational framework (Eigenberg, 2000; Weiss & Frair, 1974).

Defining a clear and uniform response to the homosexual relationships in prison is also compounded by other aspects. Namely, although a rape has been regularly observed in a penal context, there is also a noticeable resistance in reporting this type of victimization. Thus, authors such as Garland and Wilson (2013) point out that any reporting to the security services is actually seen as "snitching," and in that sense, the victim is degraded even more in an informal hierarchy.

In addition, following the findings of the Eigenberg study (1994; 2000) that included the sample of 166 working professionals in prisons, it is observed that security service members in 46% of cases consider that some prisoners deserve to be raped. Also, the same author suggests that convicts are deliberately punished in prisons, either in the sense of being accommodated with sexually aggressive convicts in order to "encourage" their cooperation with security services, or to reward individuals who may be "the influencing ones "in the convicts' collective.

Viewed from somewhat different perspective, while Pinkerton and associates (2007) pointing out to the risk of HIV transmission in unprotected homosexual intercourses and rapes in prison, the idea of giving condoms to convicts is often seen as the promotion of same-sex relationships. In that sense, supporting safe sex would again lead to the security challenges of distinguishing between coherent and consecutive relationships. However, on the other hand, authors such as Garland and associates (2013) do not find confirmation for the given hypothesis by suggesting that condoms lead to a reduction in health challenges, but do not actually affect the frequency of homosexual orientation.

[6] ("Official Gazette of the Republic of Serbia", No. 55/2014)

III. The methodology of the research

The subject of this research is the attitude of the persons serving the sentence of imprisonment in respect of the rights and the position of homosexually oriented sentenced prisoners. The sample covered 78 respondents serving a prison sentence in the District Prison of Novi Sad. Inclusive criteria included penal returnees, that is, those who had experience of serving their sentences already and at the Penitentiary Institute in Sremska Mitrovica or another institution where they were serving a sentence of more than a year. Data collection was carried out in the period from April, 2015 to May, 2017.

The entire sample was made up of male persons, with all respondents declaring themselves as heterosexually oriented. The average age of the surveyed respondents, observed at the level of the entire sample, is 36 years. Given that these are persons who previously served the sentence of imprisonment, the average length of the total of served sentences exceeds 3 years and 6 months.

The research itself was carried out using the survey technique, and the questionnaire was specially designed for research purposes as a research instrument. Validation of the questionnaire was accomplished through a focus group made of the Law Faculty for Economy and Justice Professors, and professionals working in the Treatment service in the District Prison in Novi Sad.

The collected data were subject to quantitative and qualitative analysis. Determined statistical indicators (frequencies and percentages) were calculated within the quantitative analysis. Statistical analysis of collected data was carried out /processed in the SPSS 19 statistical program. Having in mind a more complete understanding of the obtained results, semi structured interview was conducted regarding the subject matter. The interview was conducted with convicted persons, as well as with employed professionals (n = 12) in the mentioned institution.

IV. The results of the research

The conducted research was divided into several segments, with the aim to cover the phenomenological and etiological aspects of the problem. In addition to assessing the attitudes of the respondents regarding positions and rights within the convicts' collective, the (discriminatory / violent) forms of behavior among professionals both, inside and outside the concrete institution were also analyzed.

The results obtained on the first item are statements by the respondents in relation to the following claim *"While I was serving a prison sentence in a joint accommodation (department, room), homosexuals were also placed/accommodated there."* Thus, 76.9% (n = 60) persons reported affirmatively in relation to the given claim, 12.8% (n = 10) were unaware or were not interested in knowing the sexual orientation of other convicts, while 10.3% (n = 8) stated that homosexuals did not serve the prison sentence in a joint accommodation with them.

By expanding the framework of the analysis to the presence of the persons at the institution in which they were serving the sentence, virtually all respondents (n = 78)

stated affirmatively, that they knew that at least one person of homosexual orientation was in a given correctional facility during the duration of their sentence.

The second item that was put before the respondents was of the requirement to estimate the frequency of homosexuality in the convicts' collective. So the respondents were offered a scale on which they were supposed to mark their observations. The obtained results indicate that the estimation of the convicts in terms of the frequency of the mentioned orientation was at the level of 6.4%, with 82.1% (n = 64) persons estimating at the level of approximately 5%, further 9% (n = 7) persons estimated that approximately 10% of the prisoners were homosexually oriented, 7.7% (n = 6) found this level to be 15%, while 1.3% (n = 1) also estimated at 20%.

In the same context, the respondents were asked to assess the percentage of persons in a passive-receptive position. That is how many persons in a homosexual relationship (according to the informal system terminology) play the role of *a "woman"*, and how many the role of an active or dominant sexual partner.

The results obtained thus testify that, according to the prisoners' assessment, the number of active partners or those who *"play the role of a man"* is almost twice as big as those who are passive or *"women / dragons"*, according to the before mentioned informal terminology. In terms of percentages, the proportion of passive convicts was estimated at 36%, compared to 64% of persons in active positions.

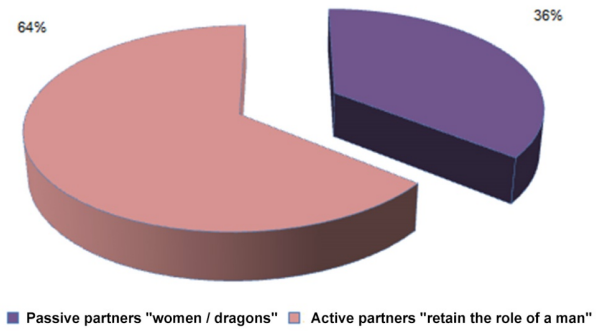

Figure 1. The ratio of passive / active homosexuals in the convicts' collective[7]

Analyzing, further on the phenomenological context, the question was placed: *"In your opinion, how many percent of prisoners who are in the position of a passive partner and who have a manifestation of transgender behavior, in terms of wearing women's clothes, and of feminine physical appearance, make-up, hair length, feminine pronunciation and similarly".*

The obtained data suggest that within those who are recognized as homosexuals, the proportion of transgender is negligible, is at the individual case level, or below 3%. So practically, all respondents reported that homosexual relationships are, as a rule, realized among convicts who have apparently retained the attributes of masculinity.

[7] The presentation of the jargon language, found within the institute, aims to illuminate the actual position of homosexually oriented persons in serving sentences rather than accepting it as scientifically adequate.

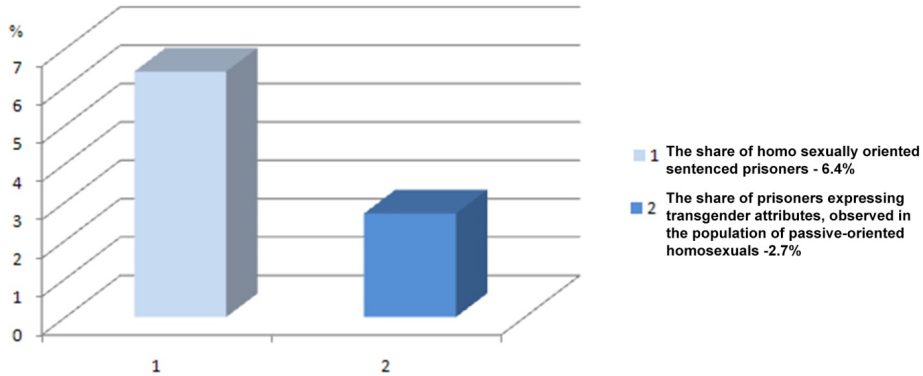

Figure 2. The proportion of homosexual and transgender people in the convicts' population

In the next item respondents were offered several protective factors in relation to which they were supposed to declare, on a three-level Likert scale, which they considered most important in maintaining the position and protecting the rights of homosexuals in prison. The value of 1 signified the position of the agreement, and the value of the 3 position of disagreement.

Thus, among the different, three factors are distinguished. Namely, the most dominant factor that provides a position to a given group of convicts was identified by members of the Security Service, where 96% (n = 75) of the respondents considered that the *"guard"* is the one who protected mostly the rights of the prisoners of the mentioned sexual orientation.

In the same context, 94.8% (n = 74) of respondents recognized the law as a framework that protects the rights of homosexuals. Most respondents, during the interview, reported that they were referring to the Criminal Code and the Execution of Criminal Sanctions law, and according to which the every (deserved) mistreatment of homosexuals would be punishable.

Relatively high level of protection was also observed in the context of NGO sector surveillance/monitoring, where 89.7% (n = 70) of respondents considered this a strong framework of protection. However, when it comes to the role of the Ombudsman/The Protector of the citizens and the Enforcement Judge, only 38.5% (n = 30), i.e. 37.1% (n = 29) of the respondents recognized it in the protective context.

Factor	Agree[8]	Undefined	They disagree	Average value
The Law	74 (94.9%)	2 (2.6%)	2 (2.6%)	1.07
Director of the Management Board	41(52.6%)	22 (28.2%)	15 (19.2%)	1.66
The Enforcement Judge	30 (38.5%)	41 (52.6%)	7 (9%)	1.70
Security Service	75 (96.2%)	2 (2.6%)	1 (1.3%)	1.05
Treatment Service	67 (85.9%)	6 (7.7%)	5 (6.4%)	1.20
Protector of Citizens	29 (37.2%)	29(37.2%)	20(25.6%)	1.88
NGO monitoring/control	70(89.7%)	3(3.8%)	5(6.4%)	1.16

Table 1. Protective factors of the rights of homosexually oriented convicted persons

[8] The value of the questions 1- I agree, 2- I'm not sure, 3-I do not agree.

Respecting the rights of homosexually oriented sentenced prisoners was also analyzed regarding the possibility of consuming the rights guaranteed by law and by by-laws, and from the position of the respondents. Thus, within the next item, several statements were offered, where on the Likert scale the convicted persons expressed their views (agreement/disagreement) on the position of the group in question, in the context of expert services of the institute, the Directorate for Enforcement of Criminal Sanctions, courts and the Ministry.

The results obtained suggest that there is practically no difference between the prisoners of homosexual and heterosexual orientation regarding the right to written correspondence within the institution, as well as with the other instances mentioned above. Also, no differences have been identified regarding the consumption of intra-institutional (inside the institution) rights to receive packages / visits or extra-institutional (outside the institution) rights.

The respondents also did not consider that the courts acted discriminatory on any basis (regular criminal proceedings, unreasonable/unreal repetition, conditional release), and in cases where the sexual orientation of the convict is known. Finally, equality of rights is also observed in the context of health care, where according to the attitudes of the respondents in the penal context, no difference is made between the convicts.

Nevertheless, the degree of discrimination was observed in the context of cooperation with the Treatment Service and the disciplinary committee. Namely, according to the stated attitudes, the teachers/educators in the institution reluctantly talk with convicts of homosexual orientation, except when it comes to those situations when they need *"snitches".* Also, when it comes to filing disciplinary charges and pronouncing disciplinary measures, homosexual convicts are perceived as protected, that is, they rarely got sanctioned disciplinary offenses.

Disrespect of law / discrimination	Agree	Undefined	They disagree	Average value
They are denied their visits/packages	/	1 (1.3%)	77 (98.7%)	2.98
They were deprived of their extra-institutional rights	/	/	78 (100%)	3
They are deprived of their right to health care	/	/	78 (100%)	3
Courts are not up to date / disrespectful of the law	/	/	78 (100%)	3
The educators are reluctant to talk to them	34 (43.5%)	6 (7.7%)	38 (48.8%)	2.05
They are disciplined less often	52 (66.6%)	4(5.1%)	22(28.2%)	1.61

Table 2. Forms of discrimination against homosexual convicted prisoners

The position of homosexuals in serving prison sentences has also been analyzed in the context of explaining the causality of the mentioned sexual orientation. In doing so, respondents were allowed to freely enter the answers, limiting them to a maximum of three answers, and then the answers were grouped into unique factors.

Thus, by analyzing the obtained results, three dominant views of the nature of homosexuality in prison were highlighted. Namely, out of the total number of respondents, practically all respondents described homosexuality as a disease (97.4%, n = 76). Furthermore, 74.3% (n = 58) of the respondents considered that homosexuality was the result of sexual deprivation, or lack of contact with people of the opposite sex. Finally, 69.2% (n = 54) of the person considered that homosexuality was an expression of a renting relationship and the way in which individuals met their material needs.

Analyzing the framework of the position of homosexually oriented persons in serving sentences in the convicts' collective within the next item, a ten-step or ten-level scale was set up. In relation to the scale respondents should have marked the hierarchical position of certain categories of prisoners in the informal prison system. In doing so, the categories of convicts were defined through a previously realized clinical interview, and where the different marginalized or stigmatized groups were identified.

Guided by the obtained data, the position of homosexually oriented persons is noted or placed, in the informal hierarchies, in the lower partitions. According to the perception of the convicted, the lower level is only occupied by "snitches", "pedophiles" and "rapists". Thus, in the range of 1 to 10 homosexually oriented sentenced prisoners were noticed at the level of 1.92, which was even lower to the level of hierarchy occupied by members of the Roma minority (2.91). Only when it comes to persons convicted for sexual violence against children, we can notice that they are marked as persons of the lowest status (0.4), while at the level of 1.64 we can find prisoners who serve the sentence for the committed criminal offense of rape.

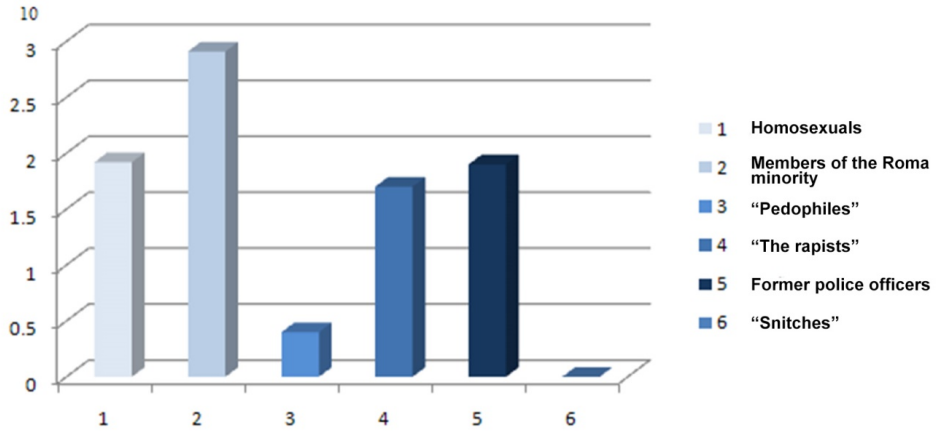

Figure 3. Position of individual groups in the informal structure – Scale range 1-10

The next item asked the respondents to determine in terms of identifying the existence and frequency of certain behaviors towards homosexually oriented sentenced prisoners. Thus, with concrete/particular behavior, which can be classified as violence, the scale was offered with the range from "never happens" to "it happens on a daily basis". The specified items are quantified on the scale from 0 to 5.

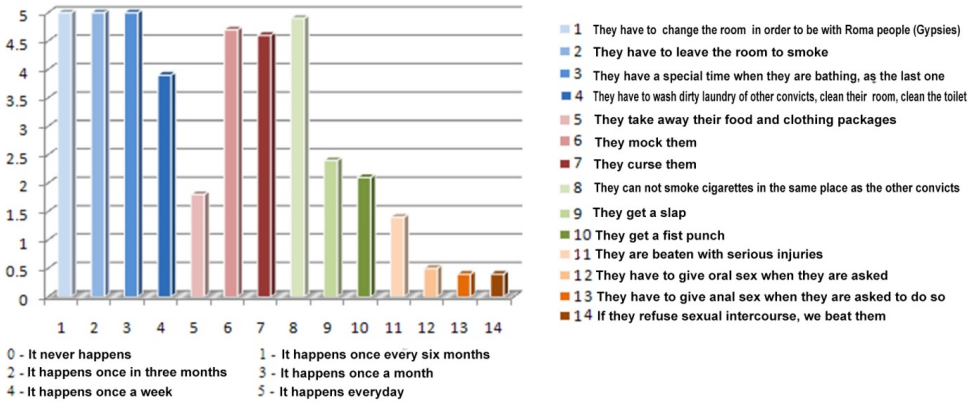

Figure 4. Frequency of certain forms of violence against homosexually oriented convicts by other convicted persons

The obtained results indicate that homosexually oriented sentenced prisoners are very often exposed to various forms of psychological violence, mostly or practically every day. This primarily refers to the pressure of segregation and isolation from a common accommodation, either in terms of staying in a specific room (5) or common spaces for other purposes (5). The particular consensus of the respondents was reached with regard to imposing an obligation that the mentioned group (homosexually oriented persons) cannot use showers and bath or shower together with other convicts (5).

When it comes to physical forms of violence, and in the sense of slapping, fists punching or punching with serious injuries, they are estimated to be relatively rare. So, slapping (2.4) and fist punching (2) are assessed with a frequency of once every three months, while punching with serious injuries is assessed with a frequency slightly higher than once in six months (1.3).

Finally, in terms of sexual violence, it was also assessed with a frequency less than once in six months (0.5). The results stated, are both in terms of coercion to sexual intercourse, and in the context of punishment for rejecting sexual contact (0.4).

Regarding the assessment of the incidence of sexual violence in the next item, the statement was given: *"While serving the sentence in prison, there have been cases of sexual violence (coercion to oral or anal sex) towards persons who are not homosexually oriented."* In relation to the above, the respondents answered within the three-step or three-level Likert scale, while subsequently in the segment of the respondents who were in agreement asked to assess the frequency of such events.

The obtained results testify that 76.9% (n = 60) of the subjects were in accordance with the assertion, 5.15% (n = 4) was not defined, while 17.9% (n = 14) denied that the cases of sexual violence against persons of heterosexual orientation ever occurred during the serving of their sentence of imprisonment. Observed at the level of an average value, the same is set at a level of 1.4, which shows a clear valence of the agreeing position. However, when it comes to the frequency of this type of violation, it is assessed as a sporadic one, and at a level lower than once in six months (1.8).

The next item analyzed contained a request: "If there are any reasons why you do not want homosexuals to serve the sentence together with you in the same

accommodation, please state the reasons for that." Again, respondents were allowed free/open responses, which were subsequently categorized into appropriate common denominators.

By analyzing the responses, the danger of infection and infectious diseases is the dominant reason, in 96.1% (n = 75) cases. Another reason regarding the frequency is the feeling of psychological discomfort in perceiving the situation of physical or sexual contact (kissing, hugging, and sleeping in the same bed, "sounds that are heard at night"). In doing so, 83.3% (n = 65) of the respondents report the above. Only as third reason, the psychological feeling of discomfort in situations where homosexuals can look at others without clothes (bathing, changing clothes) or perceive them as a sexual object appeared. 82% (n = 64) of respondents reported this reason as common one.

Respecting the rights of homosexually oriented sentenced prisoners has also been analyzed in the context of the behavior of security service members towards the same. Thus, respondents made statements in relation to certain forms of psychological, physical and sexual violence, and labelled them in terms of frequency on the scale shown, ranging from 0 to 5 (*never happens / happens on a daily basis*)

The obtained results suggest that the members of the said service (security service) most frequently, and practically every day, mock (5,8) and curse (5,4) convicted persons from the given context. However, when it comes to physical violence, the same is significantly less notified, and according to the assessments of the respondents, slapping occurs about once in three months (2,9). When it comes to fists hitting or punching it is also very low in terms of frequency (1.1), which brings out the conclusion that it does not happen almost at all. Finally, when it comes to sexual violence, all respondents agreed upon the view that members of the Treatment Service do not abuse persons of homosexual orientation (1).

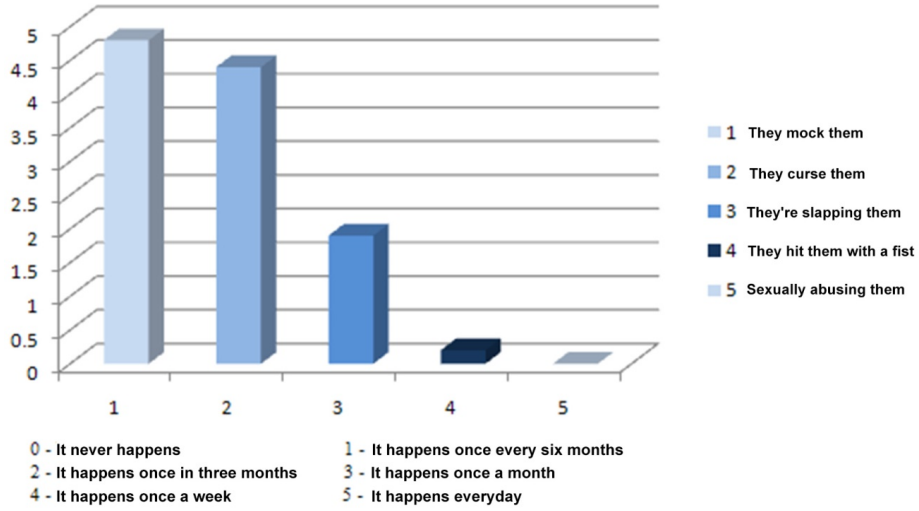

Figure 5. Frequency of individual forms of violence against homosexual sentenced prisoners by officials

The last item asked the respondents to determine on a three-step scale with regard to the agreement with the statement *"Members of the Security Service" turn*

their heads to the other side "when violence against homosexually oriented sentenced convicts occurs".

The results obtained indicate a high level of concurrence of the respondents (1.05). Thus, 89.7% (n = 70) persons confirmed that violence against the subject population was sometimes tolerated. Furthermore, 5.1% (n = 4) was undefined in this context, while the same proportion of respondents denied the practice of tolerating.

V. The interpretation of results

An analysis of the data collected in this study suggests that homosexuality is a phenomenon that is clearly noticed in a penal context. Nevertheless, estimates of the frequency of this phenomenon are really low and at the level of approximately 6%. Only, a comparison of the results obtained in this context can be considered as quite problematic. Thus, for the example, Harry (Harry, 1990), in a telephone-based study, suggests that the proportion of homosexual or bisexual people in the general population is at a level of 3.7%. Therefore, it can be concluded that the established frequency in penal conditions is almost twice as high, which could have the implications of the situation context.

However, when the mentioned estimates are concerned, one should be pretty cautious. Namely, authors such as Gagnon & Simon (1968), and Pillard and Weinrich (1986) point out that in the general population, the share of persons with at least one homosexual experience goes up to 30%, while in penal conditions this share ends up at 45%.

Respecting previously mentioned, the obtained data, as well as the results of the presented studies, require interpretation in the context of the methodology itself. It is therefore not impossible that different criteria of homosexuality actually point to such significant deviations. In addition, when conducting the research itself, one should bear in mind the sensitivity of the subject in a specific context, and the burden of the sincerity of the respondents. Finally, given the knowledge about the poor position of homosexuals in prisons, it is not excluded that a significant proportion of those who are homosexually orientated does not actually express or declare their sexual orientation. Clearly, this is especially likely in serving short sentences, where it is easier to tolerate sexual abstinence or deprivation.

Problems in this level of assessment also relate to the fact that it is not unusual that in the penal context certain prisoners were "stuck" the label of a homosexual, although they were not. This is primarily related to those who, by their physical or behavioral characteristics, deviate from the aggressively masculine culture of imprisonment.

Analyzing data obtained in more details, regarding the characteristics of this subgroup within the penal environment, it is interesting that the number of passive partners is estimated practically twice lower than the active ones. Namely, such a situation is not really unusual, and given the observations of various authors that indicate that in prisons often only a receptive position is recognized as female attributes. Hence, those who hold an active role, along with a coercive or manifestly aggressive pattern of relationships, despite homosexual orientation, retain an informal hierarchical position in the collective. If we accept that the prison culture is a

priori aggressive, the deprivation of sexuality can be conditioned by a greater number of those who take an active role (Krikham, 2000; Nacci & Kane, 1983; Knowles, 1999).

Precisely in this regard, all the previously presented results must be interpreted with a certain limitation. Namely, the data collected during the interviews with convicted persons testify that the perception of the position of homosexuals is precisely of the passive subjects, that is, those that are recognized in the "role of the woman". Thus, respondents testify about the various cases in which the "leaders of the bloc" were sexually violent towards other convicts, but these behaviors did not degrade them in a hierarchical sense, nor were they marked as "fagots".

When it comes to persons with transgender manifestations, the estimated share is very low. Most respondents talk about them anecdotally, with a ridicule. Nevertheless, in connection to this, it is interesting that their position or the vulnerability of their security has not been linked to their sexual orientation, as much as to their willingness to confront the pressures made by the Security Service. In this sense, it can be understood that "snitches" have the lowest position on the informal scale, even under/lower than the sexual offenders (child molesters).

In terms of the rights of the convicted persons of homosexual orientation, it seems that the same can be viewed in two directions. When it comes to rights that are exercised through written correspondence or which have a clearly written clue or trace, in the sense of verdicts, decisions or similar, there is no discriminatory behavior to be observed. This practically means that convicted persons, regardless of their sexual orientation, have the possibility of legal aid, legal remedies or court procedures. The same applies to the right to health care, which is not questionable at all regarding the criterion in question.

Certainly, different results can be noticed in terms of the observed protective function of various inside and outside instances of the institution. Namely, the obtained data indicate that the security service and the Criminal Code actually represent the most powerful means of deterring violence against the homosexual population. In doing so, these are generally interpreted in a pejorative context, in a way that the same (negative) attributes of homosexuality are added to the members of that particular service.

Guided by the fact that a prison represents a place of "clashes" between convicts and the Security Service, it is difficult to state the protective role mentioned as objectively perceived one. This is firstly noted in light of other results, which suggest that members of the same service practically regularly carry out some form of psychological violence against homosexually oriented convicted prisoners, as well as that members of the security service also often are "turning their heads to the other side" from cases of victimization.

Important remarks are made in the context of the function of the Ombudsman or the Enforcement Officer/Judge. Namely, the role of the mentioned instances was observed as very low in the protective sense. However, during the interview with the respondents, the dominant attitude was that the mentioned ones generally do not respond positively to the complaints of convicts, and that they are not aware at all of the rights of all persons in prison, and not just of the same-sex oriented.

Finally, the position of the subject subgroup is evidence of the etiology of the mentioned form of sexual orientation, as well as the reasons why heterosexual prisoners do not want to be in the same accommodation with same-sex oriented

persons. First of all, this refers to a strong belief that homosexuality is a disease, and that the joint presence carries an increased risk of transmission of infectious diseases.

In the context of the previously stated, the selectivity of such observations is interesting. Namely, since a significant share of the respondents testifies about cases of sexual violence against heterosexual convicts, and especially during the insurrection at the Penitentiary Institute in Sremska Mitrovica, the perpetrators of this violence are not perceived through the prism of same-sex sexuality. The argument *"deserved to be raped"* hence actually invalidates the fact that rapists had some form of sexual excitement of the same-sex nature.

Finally, while there is an explanation regarding the fear of *"contagion" (infection),* it is interesting that during the interview, convicts give rather uneven statements about HCV positive persons, and in the context of tattooing practice, shared cutlery or use of recreational devices. Thus, while there is no particular anxiety, on the one side, in relation to those who have been proven to be a potential source of the disease, homosexuals are, on the other side, in particular, the provoking ones within the given framework.

In addition to the fact that respondents report about the daily practice of (psychological) violence against homosexuals, the impression is that this form of behavior is not exclusively motivated by sexual inclination. This can be supported by the observation that violence in prison does not apply to all persons of homosexual orientation, and that the violence is also done as well as to other marginalized groups. Finally, it can be noted that prison violence, in particular, has an opportunistic character, and above all, it is mainly oriented towards physically weaker persons, members of the Roma minority or persons of extremely unfavorable economic status.

The fact that the previous allegations finally have some corroboration can also be concluded from the statements of the professionals engaged in the Security Service in the District Prison in Novi Sad. Thus, according to the given source, even persons convicted of sexual offenses (over children) do not have to be exposed to violence in a priori. This refers to persons who, through their criminal career, social skills or violent potential, secure themselves a higher position in the informal hierarchy.

VI. Conclusion

The position of homosexually oriented persons in serving prison sentences can certainly not be characterized as favorable in the national context. Although there is no discrimination based on sexual orientation in a formal sense, it is clear that the execution of criminal sanctions is burdened with this problem to a considerable extent.

However, it must be noted that the position of this subgroup is not particularly specific. In fact, the negative position within the convicts' collective is determined by a series of mediating criminological, penological and personal variables. In this sense, discrimination, stigmatization and victimization are representing, in fact, a constant that is being expressed towards different marginalized or groups burdened by some stereotypes.

Bearing in mind that previously noted incidents of various forms of violence still occur in Serbian prisons, and that professionals from the Security Service sometimes overlook them or tolerate them, it seems that there is an unequivocal need for more active approach to the given topic. This primarily concerns the education of the

employees, and the formation of binding protocols in cases of susceptible homosexuality or violence related to sexual orientation.

In support of the need to expand the secondary legislation, the attitudes of the convicted persons are also reflected by the professionals in the Treatment Service reluctant to communicate with homosexuals. In this sense, the equal need for continuous education is imposed, as well as the formulation of recommendations in professional work. So, for example, some observations from practice suggest that prisoners are not aware of security risks as well as the possibilities of confidential communication in cases of victimization upon their arrival in prison.

Additionally, if accepted, Knezic (2016) suggests that, there, in the Serbian prison, in the Treatment Service, as a rule, are employed persons who do not have any contact with penology and penological challenges in academic education, there is a question regarding the training of professionals to recognize signs of exposure to violence. In that sense, it is quite reasonable to expect that the professional services will not respond within a timely and adequate manner to cases of victimization of persons of the same-sex sexual orientation. Only the existence of specialized education programs, both for practitioners, as well as for members of the security service, can have some potential in this regard.

To sum up, the position and rights of homosexuals in the Republic of Serbia clearly bear the negative attributes. However, this does not only apply to the prison but also to the wider social context. In this sense, without the development of effective mechanisms for the protection of human rights, as well as the attenuation of prejudices regarding a given population on the level of the entire Serbian society, it is difficult to expect more complete correction of the situation.

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Criminal Offenses Illegal Production and Illegal Trade in Criminal Legislation of the Republic of Serbia – Criminally Legal and Criminalistics Approach

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Abstract

The authors first deal with the analysis of the provisions of the criminal offense of illegal production and illegal trade under the criminal legislation of the Republic of Serbia. In addition, the authors provide basic guidelines for combating of the criminal offenses illegal production and illegal trade. In discussing the topic of the paper, the authors start from the fact that these two criminal offenses from the field of crimes against economic interest, which are represented in the total amount of committed offenses in this area in the territory of the Republic of Serbia to larg extent, and that there is no sufficient commitment to scientific and professional considerations and analyzes of the problems of counteracting illegal production and illegal trade, as criminal offenses against economic interest whose execution causes enormous damage to the state budget and the country's economic system. Accordingly, the authors aim of the paper is to encourage scientific and professional debate on these crimes and, at the same time, to make up for the lack of papers dealing with these two criminal offenses.

Keywords: *illegal production, illegal trade, detection, proving.*

I. Introduction

The existence of illegal markets and the lack of some products on the market undoubtedly affect supply and demand. This affects the huge differences in commodity prices. On the other hand, the openness of borders and the desire to earn money quickly are the basic factors that influence and determine the appearance and existence of illicit production and illicit trade. Both illicit manufacturing and illicit trade are forms of unjustified enrichment of individuals. In recent years, there has been a tendency for an increase in illicit production and illicit trade, which has certainly been contributed by the liberalization of the market, but also by the lack of control of the competent services and the lack of activity of the services most responsible to combat this type of criminal

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manifestation, as well as the lack of proactive proactive approach in countering these types of economic crime. The manner of committing these two criminal offenses of economic crime mainly consists in:

a) illegal production of goods for further sale;

b) ales of such goods (its criminal realizations)..

Simply put, the point is that the goods are illegally produced and sold and not reported, and at the same time avoid the payment of taxes and related contributions. The possibility of providing material and other indications that indicate the existence of these crimes, reflected primarily in sudden and dubious enrichment.

Illegal production and illegal trade are criminal forms manifestation of economic crime related to the illegal traffic of goods and their export or import into the country, which is why the commission of these two criminal offenses is often connected with the criminal activity of smuggling. Namely, illegal production and illegal trade is a criminal offense committed in the field of production or trade, in the domain of traffic of goods and performance of trade services, while smuggling involves entering or taking goods through a customs line outside the customs control and thus avoiding payment of customs duties. Both illicit manufacturing and illicit trade occur in complex forms. This is especially because both criminal offenses are activities that are usually organized in an organized manner, sometimes by groups. The organization and professionalism of the perpetrators, with a strict division of criminal activities and respect for the hierarchy (from financiers and organizers who are usually untouchable, to suppliers, intermediaries, distributors and resellers), give this form of crime a special dimension, gravity and importance (Nicevic & Ivanovic, 2013: 41).

The concealment of criminal activities of these two criminal offences itself depends on the skill, inventiveness, resourcefulness, practicing, perseverance and other psychosocial characteristics of the perpetrator of these crimes as well as objective circumstances. Considering the characteristics of goods that are illegally produced or sold, it is possible to group all the ways of committing this criminal offense through several forms of illegal production and illegal trade: illegal production/trade in agricultural products; illegal production/trade in domestic and foreign production of textile goods; illegal production/ trade of technical goods, of which the trade of computer equipment etc., should be placed first in the recent past; illegal production/trade in gold and other valuable items; illegal production / trade in works of art and antiques; illegal production/trade in motor vehicles etc.[1] Essentially, any commodity, for which there are shortage of supply or has enough on the legal market, may be subject to both illegal production and illegal trade.

Some of the above manifestations related to illegal trade and illegal trade are also being transformed into manifest forms of organized crime. The transition period,

[1] It should be noted here that here intentionally is not mention of the illegal production of weapons or explosive materials, since when it comes to these goods it will exist a criminal offense of the illicit manufacture, possession, carrying and trafficking of weapons and explosive materials referred in the Article 348 of the CC. Namely, although the production or trade of such goods can also lead to the existence of characteristics of some other criminal offenses, such as illicit manufacturing (Article 234 CC) and illicit trade (Article 235 CC). In both cases, there will be only the criminal offense of Illicit Manufacturing, Holding, Carrying and Trafficking of Weapons and Explosive Substances under Article 348 of the Criminal Code, since it is a special form in relation to the criminal offense of illegal production, and when it comes to the criminal offense of illegal trade it should be noted that illegal trafficking in firearms or explosive materials is not criminalized as illegal trade (Lazarevic, 2006: 862).

especially in terms of changes in ownership structure and privatization, difficult economic situation, situation and supply of certain goods on the market, are crucial factors when it comes to the decision of certain persons and groups to start activities in this field. By committing the criminal offenses of illicit manufacturing and illegal trade, not only has the state budget been harmed, it also opens up room for the functioning of the illegal market in some economic branches, and such activities of individuals and groups really undermine the economic system of states.

Because of the danger of these acts, in addition to studying the ways of committing these crimes, it is also necessary to look for opportunities to take certain measures to prevent the emergence of new phenomena that usually accompany the conditions that promote this form of crime and that usually accompany the legislation that defines this issue. Taking into account the fact that both illicit production and illicit trade are primarily a social phenomenon and a phenomenon related to all environments as a reflection of the effects of negative influences, as part of taking preventative measures, the "blade" should be focused primarily on measures that change the economic-social environment in terms of eliminating the negative influence, improvement of the population standards and humanization of the entire social relations. This, above all, must be clear to us, that criminal legislation, however rigid it may be, cannot suppress these antisocial phenomena. It is clear that such activities can be countered more efficiently only by specialized operational units that exist de jure but de facto do not achieve the expected results in that regard. In this regard, the problem should be defined first, considering the conditions and priorities of educating the existing but also recruiting new staff, importing and coordinating the activities of all lines of work within the existing organizational forms of the Ministry of Internal Affairs, market inspection, but also from the Customs Administration. Condition for success at this field is successful legislation, which would adequately treat these jobs in certain Regulations defining the status of these workers (pay coefficients), as well as regulations that should regulate the system of promotion of civil servants, especially police officers.

Analyzing the problem of countering the criminal offenses of illegal production and illegal trade in the Republic of Serbia, from the aspect of scientific and expert workers dealing with analyzes of these offenses, we concluded that these offenses are not at all the focus of researchers and scientists. Namely, the analysis of the bibliography of criminal offenses against economic interest, dealing with the issue of combating certain offenses in this area, mainly finds works dealing with the following criminal offenses: tax evasion, money laundering, smuggling, counterfeiting, forgery and misuse of credit cards, misuse responsible person in the economy etc. Apart from the parts of the university textbooks in the field of criminal substantive law, which deal with the problems of the criminal offenses of illegal production and illegal trade, there are almost no separate scientific and professional papers dealing with both the criminal and criminalistic side of these two criminal offenses. On the other hand, the number of adult perpetrators reported in the territory of the Republic of Serbia for committing these crimes, as well as the number of adults sentenced of this crime is not negligible and, with the above-mentioned criminal offenses, count in the group of the most frequently committed criminal offenses in the area against economic interest in the last five years and beyond. These two facts, the absence of separate papers dealing with these criminal offenses from the aspect of criminal law and crime, on the one

hand, and the presence of these crimes in the total number of committed criminal offenses against economic interest in the Republic of Serbia, were an inspiration to the authors for the subject of this The papers take the criminal and criminalistic aspects of these two offenses. In addition, the authors are of the opinion that with these criminal offenses causes enormous damage to the state budget and the economic system of the country, which additionally gives importance of addressing of these two criminal offences from criminal and criminalistic aspects.

Based on the stated topic and purpose of the paper, we conducted an analysis of reported and sentenced perpetrators of economic crime in the Republic of Serbia for the period 2014-2018, which is represented in the Table 1.

Table 1: Number of reported adult perpetrators and sentenced perpetrators of criminal offenses against economic interest in Republic of Serbia for the period of 2014 until 2018.

Criminal offences against economic interest	**2014[2]**		**2015[3]**		**2016[4]**		**2017[5]**		**2018[6]**	
	A*	B**	A	B	A	B	A	B	A	B
Fraud in doing business	0	0	0	0	0	0	0	0	63	16
Insurance fraud	0	0	0	0	0	0	0	0	9	7
Embezzlement in conducting an economic activity	0	0	0	0	0	0	0	0	33	32
Tax evasion	712	400	715	449	734	419	649	392	967	266
Non-payment of withholding tax	62	44	63	30	52	20	30	23	39	6
Abuse of the position of the responsible person	684	337	697	317	684	274	617	248	343	165
Public procurement abuse	17	2	32	1	29	7	38	0	28	10
Abuse in the privatization process	0	0	0	0	0	0	0	4	3	0
Conclusion of a restrictive agreement	0	0	0	0	0	0	0	0	3	17

[2] Report of the Statistical Office of the Republic of Serbia, No. 192, Vol. LXV, 15/07/2015, Justice Statistics, available at https://publikacije.stat.gov.rs/G2015/Pdf/G20151192.pdf on date 28.10.2019.

[3] Report of the Statistical Office of the Republic of Serbia, No. 189, Vol. LXVI, 15/07/2016, Justice Statistics, available at https://publikacije.stat.gov.rs/G2016/Pdf/G20161189.pdf on date 28.10.2019.

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* Number of adult perpetrators criminally charged.

** Number of adult perpetrators criminally sentenced.

Receiving bribes in conducting business activities	0	0	0	0	0	0	0	0	10	17
Giving bribes in conducting business activities	0	0	0	0	0	0	0	0	1	1
Causing False Bankruptcy	3		5	1	4	0	9	1	4	0
Causing Bankruptcy	19	5	13	2	7	3	3	0	9	0
Damaging Creditors	52	22	50	23	60	11	63	15	61	31
Illegal Production	35	5	87	25	65	64	72	37	57	68
Illegal Trade	226	90	410	181	447	243	370	251	385	189
Smuggling	98	72	155	95	121	108	96	78	27	36
Preventing Control	6	0	10	2	9	3	6	4	12	0
Unauthorized Use of Another's Company Name	80	24	111	32	97	24	69	32	73	54
Damaging Business Reputation and Credit Rating	2	0	6	1	9	0	5	5	3	0
Disclosing a Business Secret	3	1	5	0	2	0	4	0	8	0
Counterfeiting Money	119	70	178	68	213	74	276	91	136	55
Forging Securities	9	2	2	3	9	3	6	4	28	21
Forgery and Misuse of Credit Cards	503	88	397	101	305	114	232	97	196	87
Counterfeiting of signs, seal for marking goods, scales and objects of precious metals	3	2	13	0	14	2	48	0	3	3
Forging Value Tokens	102	2	21	5	6	1	5	0	6	0
Making, Acquiring and Giving to Another of Means for Counterfeiting	6	3	3	3	6	4	7	4	3	0
Money Laundering	9	2	14	2	13	11	13	1	32	7
Deceiving Buyers	25	4	15	3	23	5	5	5	7	0
Issuing of Uncovered Checks and Use of Uncovered Credit Cards	169	133	172	82	109	36	74	30	75	9
Abuse of Monopolistic Position	7	5	3	0	3	0	1	0	4	0
Abuse of Authority in Economy	396	230	352	183	312	166	247	126	139	47

Looking at Table 1, we can see that, according to the number of reported perpetrators of criminal offenses, illegal production is in the 10th place, with 316 reported perpetrators out of the total number of reported perpetrators of criminal offenses against economic interest in the last 5 years in the Republic of Serbia. Illegal trade is ranked 3rd in this criterion, with 1838 perpetrators (just behind the criminal offense of tax evasion and abuse of authority of the responsible person). Also, when it comes to the number of sentenced persons, the criminal offense of illicit manufacturing is in 9th place, with 199 convicted persons out of the total number of convicted perpetrators of crimes against economic interest in the last 5 years in the Republic of Serbia, while the criminal offense of illegal trade on the same criterion ranks 3rd, with a total of 954 sentenced perpetrators (just behind the criminal offense of tax evasion and abuse of authority of the responsible person).

II. Incrimination of the criminal offense of illegal production according to the Criminal Code of the Republic of Serbia

The criminal offense of Illegal production is prescribed by Article 234 of the Criminal Code of the Republic of Serbia (Criminal Code of the Republic of Serbia ("Official Gazette of RS", No. 85/2005, 88/2005 – amended, 107/2005 – amended, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014 and 94/2016). The aforementioned article prescribes two basic forms of this criminal offense, one of which, according to the prohibited sentence, is lighter (paragraph 1) and the other more aggravating (paragraph 2).

The first, by prescribed punishment, the lighter form of this criminal offense is reflected in the unauthorized production or processing of goods, whose production (processing) requires the approval of the competent authority (Article 234 paragraph 1 of the CC). This is an easier form of this criminal offense, primarily because in this case, is about the production or processing of goods requiring the approval of the competent authority is considered by the legislator to be a minor violation of the regulations, if the production or processing was carried out without the prescribed authorization (Simonović, 2010:848). Alternatively, a fine or imprisonment of up to two years is prescribed for this form of crime.

The second, by prescribed punishment, is a more severe form in the production or processing of goods despite the prescribed ban (Article 234, paragraph 2 of the CC). In this form, the qualifying circumstance is a serious breach of the regulations, which is reflected in the fact that the production or processing, the production or processing of which is prohibited, is carried out. Thus, despite the ban, the production or processing of a certain type of goods is considered by the legislature as a serious violation of regulations, and therefore, prescribed by another, a more serious form of this criminal offense.

Any natural person can be the active subject of this crime. Both forms of this offense can only be committed with intent. So, there is need for existing of an intent which must encompass that produces or processes goods without the approval of the competent authority (paragraph 1) or goods the production or processing of which is prohibited (paragraph 2). When it comes to both form of criminal offence, their existence depends on the regulations governing the production and processing of certain goods, so it can be said that in this respect it is a criminal offense of illegal production of blanket character.

The question arises as to whether the (more severe) form referred to in paragraph 2 should be interpreted as constituting an absolute prohibition, since there are very rare cases where such an injunction exists and its violation constitutes another offense (eg., such is criminal offence from Article 377, Illegal production, trafficking and possession of weapons which use is prohibited). It should be noted that this is a prohibition against which very restrictive exceptions are allowed, in such a way that, under certain conditions, only certain entities may be allowed to manufacture or process certain goods (eg. production of narcotic drugs or weapons). In contrast, goods subject to the committing of criminal offence of the form referred to in paragraph 1 may be manufactured and processed by all entities that satisfy certain prescribed conditions, subject to the approval of the competent authority (eg. production of medicines) (Stojanović, 2017:760). Therefore, in the case of the act referred to in paragraph 1, it is not a violation of the prohibition but the performance of a particular economic activity without the approval of the competent authority, while the offense referred to in paragraph 2 is a violation of the prohibition of production or processing of certain goods.

The law also prescribes a security measure for the compulsory seizure of illicitly manufactured or processed goods, as well as the means by which those goods are manufactured or processed. (Article 234 (3) CC). The prosecution of these forms of this criminal offense shall be undertaken ex officio.

III. Methodology of detecting, prosecuting and proving the criminal offense of illegal production

The basic way of knowing about the existence of this crime is through the police's own-initiative operational work. Namely, the police's own-initiative operational activity may result in the police officers find out directly or indirectly about the preparation or existence of this crime (Ivaović & Ivanović, 2013:56). Immediate knowledge of the existence of the criminal offense of illegal production through self-initiated operational police work can be obtained by police officers as follows: through in-direct insight through criminal control and through persons hired as informants, or through a so called "network of cooperants".

Knowing by direct insight through criminal control is one of the ways in which police, through their own-initiative operational activity, obtain information about the existence of a criminal offense of illegal production. Namely, during regular activities, increased vehicle control, raids, or during work on detecting, lighting and proving criminal offenses (during searches or investigations), police officers may find that at that moment a known or unknown person committed a crime illicit production, of which existence police officers were unaware until that moment (eg., illegally producing or remodeled goods were found whose production or processing requires the approval of the competent authority or whose production or processing strengthening prohibited, and means of production of such goods.).

The police can also find out about the existence of this criminal offense through a person who were hired as an informant, ie through the so-called network of collaborators. This type of knowledge is an indirect way in which the police obtain information on the existence of a criminal act of illegal production through their own-initiative operative or criminal information activity. In addition, citizens' reports, both

anonymous and pseudonymous, may appear as a source of knowledge about the criminal offense of illegal production, and in certain cases initial information about the existence of this criminal offense may be obtained through public rumors.

In the criminal investigation of this criminal offense, it should first be determined whether the specific case involves the unauthorized production or processing of goods for which production or processing requires the approval of the competent authority, or goods whose production or processing is prohibited. So, it is necessary to determine what kind of goods it is, which authority is responsible for granting approval for its production or processing, or by which regulation it is prohibited its production or processing. After establishing these facts, it is necessary to determine the time, place and manner of execution, from which raw materials or materials such goods were made, or which goods were unauthorized processed, by which means they were made or processed, from whom the funds and raw materials were obtained for unauthorized production of such goods etc. Found unauthorized goods should be confiscated, together with the means of production or processing of such goods.

In detecting and proving this criminal offense, certain operational and tactical actions and measures, such as gathering notices, checking, monitoring, observing, ambushes etc., should be undertaken in order to obtain information indicating in which facility or location, performs unauthorized production. Based on the information collected, it is necessary to set up the versions, in order to ensure the factual situation by applying the indicative method, which is the basis for undertaking a search investigation which will also provide material evidence in relation to the criminal activity of a certain person/persons (Bošković & Jovičić, 2002:242). During the finding and seizing goods manufactured, that is, processed goods, materials and means for their production, certain persons who participated in the illegal production of the given goods can also be found, thus providing sources of personal evidences.

In proving this criminal offense, the key evidence is mainly the material evidence in the form of found and seized goods that were manufactured, unauthorized materials and the means from which they were produced. The provision of evidence is done through the use of investigative search activities, temporary seizure of items and expert evaluation. In this regard, it is very important that these actions be conducted in accordance with tactical and procedural rules, so that the validity of the evidence is not called into question in the further follow of criminal proceedings.

IV. Incrimination of the criminal offense of illegal trade according to the Criminal Code of the Republic of Serbia

Illegal trade belongs to the group of offenses whose forms and perpetrations are highly susceptible to the changes that socio-economic development and daily life experience entail. These changes are constantly leading to new manifestations of this crime, and to inconsistency and inequalities in case law. (Miladinović, 1971:210).

It is a criminal offense committed in the field of trade, ie. in the domain of traffic of goods and provision of trade services. This incrimination aims to protect trade as an economic activity. Trade is regulated by certain regulations defining its term (Law on Trade "Official Gazette of RS", No. 52/2019) and which, which is especially important for this crime, prescribe under what conditions a natural or legal person may to perform this activity. Indirectly, the state budget is also protected by this incrimination because by committing of this criminal offence, as a rule, denies sales

tax on goods. The offense of illegal trade is prescribed by Article 235 of the Criminal Code of the Republic of Serbia. This offense has several forms, namely three bases (paragraphs 1, 2 and 3) and one more aggravated or qualified form (paragraph 4).

The first form of this crime is committed by whoever is not authorized to trade, procures goods or other items of greater value for the purpose of sale, or who is unauthorized and to a greater extent engaged in trade or intermediation in trade or engaged in the representation of organizations in internal or foreign trade, goods or services (Article 235, paragraph 1 of the CC). By analyzing the incrimination, we can determine that the action of this form is determined alternatively and can be performed:

– by purchasing goods and other items of greater value for the purpose of sale;
– engaging in trade or brokering on a larger scale;
– engaging in the representation of organizations in domestic or foreign trade of goods and services on a larger scale.

The purchasing goods and other objects of greater value for the purpose of sale as the first way of committing this form of criminal offense of illegal trade consist in undertaking those activities which, on some legal basis, lead to goods or objects, such as buying, tramping, taking on loan etc. Acquisition within the meaning of this offense cannot be considered unlawful acts such as theft. Also, collecting abandoned items cannot be considered as procuring in terms of this offense. An essential element of this form of the criminal offense of illicit trafficking is "the acquisition of goods of greater value for the purpose of sale", not "the acquisition of goods in greater quantity for the purpose of sale", as was the case in earlier legal solutions of this crime. Also, in order for this form of illicit trade to exist, goods or items need to be procured for sale. It means that the executor of this part already at the moment of purchase of goods or objects intended to sell them, or that he purchased them for this purpose. The question of the existence of such an intention is a factual question that is established in each case.

Engaging in trade or brokering on a larger scale is another way of committing this form of illegal trade. Engagement involves permanent activity, so this form of illicit trade involves undertaking more trade activities (buying and selling, brokering etc.). It should be noted that there is an opinion that from the execution of only one trade activity, it can be concluded that the perpetrator "engages" in trade or mediation in trade, if all circumstances indicate that he would continue with such activities. In order for this form of crime to exist, it is necessary that the dealing with trade, ie mediation in trade, be carried out on a larger scale. The existence of a "larger volume" must be taken into account by the amount and value of the trade or brokerage activities performed.

Engaging in the representation of organizations in domestic or foreign trade of goods and services on a larger scale is the third way of committing this form of illicit trafficking. Representation in the sense of this criminal offense means acting on behalf of and for the account of a domestic organization whose activity is the trade of goods and services, and may manifest itself in various ways, in the form of tendering, acceptance of tenders, conclusion of contracts etc. The basic element of this form is that the perpetrator “deals” with it, ie. it does more often, and that it does so on a “larger scale”.

For this form of criminal offense of illegal trade to exist, it is necessary to perform these activities unauthorized, that is, contrary to special regulations that stipulate who and under what conditions may engage in trade.

Any person who commits any of the aforementioned activities without proper authorization may be an active subject of this form of criminal offense of illegal trade.

From the aspect of mental element, intent is needed. Alternatively, a fine or imprisonment of up to two years is provided for this form of crime.

Another form of this offense exists when one deals with the sale of goods which he or she has illegally organized (Article 235, paragraph 2 of the CC). By analyzing the incrimination, we can determine that the action of this form is determined alternatively and can be performed:

– engaging in the sale of goods, which production is illegal organized;

– by organizing a network of resellers or brokers.

Unlike the previous form, which deals only with the unauthorized trade of goods, that is, items that can be produced by anyone, a person organizing the production here appears as the organizer of the trade too. It is about the same person unauthorized organizing the production and sale of goods. Therefore, for this form of crime to occur, it is necessary that the offender previously organized the production of certain goods and then sell those goods. The organization of production, as the action of this criminal offense, means any activity that enables the production of goods intended for sale. The offender may be any person who illegally organizes the production of goods and also sells those goods without authorization. To this form of criminal offence illegal trade, it is necessary for perpetrator to "dealing" with sales. With respect to guilt, it is essential that the intent of the perpetrator exists. This form of crime is punishable by imprisonment for a term between three months and three years.

A third form of this criminal offense exists when the unauthorized sale, purchase or exchange of goods or items whose trade is prohibited or restricted is doing (Article 235, paragraph 3 of the CC). The main difference from the previous forms of illicit trade relates to the goods and objects that are the object of the action of execution. In this case, these are goods or items under a special regime, ie. they are not in traffic or its trafficking is limited. The object of this form of crime may not be every commodity or object whose trade is prohibited or restricted, as the placing on the market of certain objects is particularly criminalized. In this connection, this criminal offense will exist only if its execution did not lead to any other criminal offense which also has the object of placing on the market of goods which cannot be in circulation.

The fourth form of this offense is a qualified or more aggravated form that exists when the first, second or third form of the criminal offense of illicit trafficking is committed by a person who has organized a network of resellers or brokers, or has obtained a pecuniary gain exceeding four hundred and fifty thousand dinars (Article 235, paragraph 4 of the CC). By analyzing the incrimination, we can determine that the action of this form is determined alternatively and can be performed:

– by organizing a network of resellers or brokers in illegal trade;

– acquisition of property gain, illegal trade, the amount of which exceeds four hundred and fifty thousand dinars.

For the purposes of this criminal offense, a network of resellers or brokers exists when more persons in the wider area procure goods or other objects for the purpose of selling or carrying on other commercial activities, including mediation in them, for the account of the offender. The existence of this circumstance should be encompassed by the intent of the offender, since the act concerned is qualified by a special circumstance. Also, in order for this form of crime to exist, the network of resellers or brokers should be organized in such a way that it carries out its activity for the perpetrator of the crime and not sell or buy goods with each other so that it cannot be considered that there is an organized network of resellers or brokers if

more perpetrators are unauthorized to sell or buy goods and within the framework of their independent actions, and each one of them acts unlawfully on their own behalf and for their own benefit.

Regarding the other way of committing this form of the criminal offense of Illicit Trade, the material gain in the amount claimed for the existence of this form of the crime should have actually been realized. This form of crime is punishable by imprisonment for a term between six months and five years.

The law also stipulates a security measure of compulsory seizure of goods and objects of illicit trade (Article 235, paragraph 5 of the CC). The prosecution of all forms of this criminal offense shall be undertaken ex officio.

V. Methodology of detecting, prosecuting and proving the criminal offense of illegal trade

Regarding the way of knowing about the existence of this criminal offense, everything stated in the way of finding out about the existence of the criminal offense of illegal production is valid for this criminal offence too. When detecting the criminal offense of illegal trade, the operational activity should be directed to the organizers of this type of criminal manifestation, paying attention to the warehouses where the goods intended for illicit trafficking are stored, as well as the places where such goods are placed. In this regard, detecting, prosecuting and proving this criminal offense is often linked to the activity of detecting, prosecuting and proving the criminal offense of smuggling, because smuggling is often one of the ways in which goods are obtained for illegal trade.

The criminal investigation of this criminal offense should determine the form of the criminal offense of illegal trade, and then take appropriate operational-tactical and investigative measures and actions in order to prove the essential elements of this criminal offense. The existence of this work is mainly evidenced by material evidence in the form of goods that are the subject of illegal trade and certain documentation that is mostly forged to cover the true origin of the goods, then various types of correspondence, notes, photographs, telephone directories etc. However, regardless of the fact the fact that material evidence is emerging as the key evidence of this type of criminal manifestation does not mean that the operative activity should not be directed to finding sources of personal evidence. Since the commission of this criminal offense is often linked to the commission of the criminal offense of smuggling, a high degree of police coordination and cooperation with customs authorities, financial police, market inspection, as well as with traffic and transport companies is required in detecting, prosecuting and proving illicit trafficking, and etc., in order to obtain timely information relevant to suppressing and preventing this form of criminal manifestation.

The following operational tactical measures and actions are generally applied in detecting, prosecuting and proving the criminal offense of illicit trafficking: checking, gathering notices, observing, monitoring, enhancing surveillance, inspecting vehicles, passengers and luggage, ambushes, identification, alibi checks etc. Investigative actions include search, expert witnessing and, in certain situations, investigation of crime scene. Also, as in the work of detecting, prosecuting and proving the criminal offense of illegal trade, especially in the form reflected in the organization of the reseller network, special investigative measures and actions of actions-controlled

delivery and provision of simulated business services and the conclusion of simulated legal affairs should be applied.

VI. Conclusion

Based on all of the above mentioned, we can conclude that the criminal offense of illegal production and the criminal offense of illegal trade are among the 10 most common crimes against economic interest in the Republic of Serbia in the last five years. The criminal offense of Illegal trade is much more prevalent than the criminal offense of Illicit Manufacturing and ranks third in the total volume of criminal offenses committed against the economy in the Republic of Serbia over a five-year period.

Both parts are detrimental to the state budget and cause unfair competition in the market. Namely, the production or sale of goods whose production / sale is organized illegally avoids payment of taxes and related contributions, which threatens the economic system of the country. However, illegally produced / sold goods, in addition to taxation, are not subject to sanitary or any other technical quality control, thereby misleading buyers regarding the quality and composition of those goods, which can ultimately endanger their health. So, these acts not only leave negative consequences on the economic system of the country, but can also have a negative impact on the health of its citizens, that is, customers and users of the same goods.

Also, both parts are strongly influenced by the principle of supply and demand, and especially with the so-called, scarce goods on the market, which is why their mode of execution is characterized by a high degree of adaptation to the new socio-economic and market circumstances. All this imposes the need for a scientific approach in defining the methodology for detecting, prosecuting and proving these offenses. Also, these two parts are often closely related to the criminal offense of Smuggling, which is why in the approach to defining the methodology of countering of these offenses the tendencies in the ways of committing the criminal offense of smuggling must be taken into account too.

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Prosecutorial Discretion and Legal Predictability

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Abstract

The ability of every citizen to predict the outcome, but also the main parameters (e.g. length and costs) of judicial procedure constitutes the backbone of legal predictability, together with transparency of laws and court jurisprudence. However, widening competences of public prosecutors in order to allow them to dismiss a case based on application of the opportunity principle or just based on assess that there are no enough evidences that suspect committed a crime opens the floor for transferring a significant portion of cases out of judicial competences. Therefore, an issue of legal predictability and uniform application of law is not anymore reserved only for judicial decision-making processes. In this article, the authors analyses the modalities of prosecutorial discretion in light of legal predictability considering varieties of criminal procedure models as well as of public prosecution autonomy and/or independences. The special focus, authors put on efforts of the Council of Europe and its consultative bodies made in order to establish minimal standards that should ensure that prosecutorial discretion is not an act of arbitrariness. Finally, authors analyses the relevant provisions of Serbian legislation that deal with prosecutorial discretion and mechanisms to control it.

Keywords*: principle of opportunity, criminal procedure, prosecutorial discretion, legal predictability.*

1. Quality and uniform application of laws as guaranties of legal predictability

The analysis of prosecutorial discretion seems to be logically preceded by the issue of application of law in general context of the equality of citizens before law. Without any doubt, the process of application of law significantly overcame simple "put the facts under the legal provision" mechanism. (Kolaković-Bojović, Tilovska-Kechegi, 2018:115) *Rule of Law- not of men*, usually interpreted through the supremacy of law over arbitrary power and the universal application of law by courts, opens numerous questions related to relations between constitutive elements of the Rule of Law and their qualitative nature. The issue of discretion and possible injustice in the context application of law was well addressed by Radbruch (Radbruch, 1946:107) in form well-known as the Radbruch Formula (*Radbruchsche Formel*). Regarding the role and competences of the judge in case he/she rendering decision in

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certain case where there is a conflict between a statute and what he perceives as just, Radbruch argued that "the conflict between justice and the reliability of the law should be solved in favor of the positive law, law enacted by proper authority and power, even in cases where it is unjust in terms of content and purpose, except for cases where the discrepancy between the positive law and justice reaches a level so unbearable that the statute has to make way for justice because it has to be considered "erroneous law".[1] He concluded that positive law cannot be defined otherwise as a rule, that is precisely intended to serve justice. Among numerous authors who analyzed uniform application of law in the context of (in)justice it important to mention interpretation of Radbruch Formula given by Fuller, who identified eight basic principles of the rule of law necessary to ensure justice.[2] He concludes that, law is "the enterprise of subjecting human conduct to the governance of rules". When lawmakers respect the eight principles of the rule of law, their laws can influence the practical reasoning of citizens. They can predict how judges will interpret and apply rules, enabling them to form reliable expectations of the treatment different actions are likely to provoke. (Murphy, 2005: 239-262)

In addition to the quality of laws that, (in obviously too optimistic view of Fuller) guarantees legal predictability, various legal instruments across the world have been developed with the same goal: Publicly available court jurisprudence; introduction of the court jurisprudence in the hierarchy of legal sources; establishment of various internal judicial procedures aimed at defining guidelines and rulebook for judges etc. Moreover, following the process of unification of rules and procedures in the European Union, comprehensive EU standards have been developed in this regard. The ECtHR jurisprudence also plays an important, dual role: through recognition of the importance of uniform application of law and equality before law as elements of the right to fair trial and access to justice. Also, the ECtHR jurisprudence serves as an orienteer for national courts in similar cases.

However, the situation is bit different when it comes to application of law by public prosecutors, despite the trend of widening competences of public prosecutors all around the world, but also the trend of strengthening their independence in the separation of power system. Both of these trends affecting the citizens' right to be equally treated in the same cases, but also to predict whether procedure is going to be initiated as well as to predict possible outcome of procedure already initiated.

2. The notion and modalities of prosecutorial discretion

Differently from application of laws by courts, the notion "prosecutorial discretion" is commonly used to describe power of public prosecutors on various matters including

[1] He admitted that is impossible to draw a sharper line of demarcation between cases of legal injustice and statutes that are applicable despite their erroneous content, but clearly stated that "where justice is not even strived for, where equality, which is the core of justice, is renounced in the process of legislation, there a statute is not just 'erroneous law', in fact is not of legal nature at all."

[2] Laws must be general (specifying rules prohibiting or permitting behavior of certain kinds); Laws must also be widely promulgated or publicly accessible, that ensures citizens know what the law requires; Laws should be prospective (specifying how individuals ought to behave in the future rather than prohibiting behavior that occurred in the past); Laws must be clear in order to enable citizens to identify what the laws prohibit, permit, or require; Laws must be non-contradictory among themselves; Laws must not ask the impossible; Nor should laws change frequently; Finally, there should be congruence between what written statute declare and how officials enforce those statutes. (Murphy, 2005: 239-262)

those related to choose whether to (or not to) bring criminal charges; to defer criminal prosecution; to decide on the nature of charges, plea bargaining and sentence recommendation. In addition to these, typical sorts of prosecutorial discretion, public prosecutor is, depending on legal system where he/she acts, more or less free to decide on investigation strategies and techniques, but also on type and nature of alternative measures that follows deferring of prosecution. Since not every case falls within the literal terms of the law, but also no legal system can achieve a perfect congruence of formal rule and desired outcome, in practice, prosecutorial discretion includes "judgments about the social utility to be gained from the prosecution, as well as a moral evaluation of the wrongfulness of the defendant's conduct."[3]

The abovementioned power is recognized in most of modern legal systems. However, there are a few main factors that determinate a real range of prosecutorial power related to his/her discretion.

- The first of all, the prosecutorial discretion is limited by list of factors that prosecutor must take into account previous to rendering any of decisions included in the scope of prosecutorial discretion. These factors may be related to the nature and facts of the crime or to the content of provisions of penal legislation (the quantity and quality of evidence, the legality of procedure of collecting evidence, the legal definition of the crime, the range of sentence prescribe by law, relevant information about accused, deadlines etc.)

- The quality and transparency of laws are also important. Laws should be clear as much as possible to prevent prosecutors from transformation of discretion based on application of law on facts to arbitrary decision-making.

- In addition to this, prosecutorial discretion could be limited by the power of court to change and/or abolish decisions of the prosecutor. This power serves as corrective mechanism and could be initiated by injured party, accused of *ex officio*- by the court itself.

- Finally, the constitutional and legal mechanisms and guaranties of prosecutorial independence or autonomy play an important role in limitation of prosecutorial discretion.

The scope and content of prosecutorial discretionary powers varies considerably from one country to another and it is largely conditioned by the choice of the concept of criminal proceedings in particular legal system. It is well- known that the adversarial conception of criminal proceedings implies a stronger role and broader powers of the public prosecutor. Consequently, in countries that traditionally belong to the Common Law legal area, the authority of the public prosecutor in this regard is high. Nevertheless, as in recent decades there has been a trend of spreading the adversarial conception of proceedings in those countries that traditionally belong to the continental legal area, it can be said that strengthening the role of the public prosecutor and expanding his powers is a global trend. The reasons for this trend could be found in several facts:

- First of all, there is a need to improve the efficiency of criminal proceedings by extending the application of simplified of procedural forms, thereby, through the

[3] Prosecution: Prosecutorial Discretion - Controlling Prosecutorial Discretion http://law.jrank.org/pages/1867/Prosecution-Prosecutorial-Discretion-Controlling-prosecutorial-discretion.html, last accessed on December 10th 2108.

broader powers of the public prosecutor a significant number of proceedings are terminated without bringing the case before the court.

- Additionally, the range and scope of prosecutorial discretion are also related to the changes in domain of the organization of public prosecution and its position in the system of government and separation of power. In this regard, acceptance of the concept of prosecutorial autonomy or independence plays the main role.

3. The EU standards on prosecutorial discretion

The unification and standardization within EU legal area, affect to some extent the issue of prosecutorial discretion. It is true that a degree of unification and/or standardization in various fields may vary from the complete – in the areas in which there is the acquis, to a broad one – based on the EU standards.[4] Organization and functioning of judiciary, in general, belong to the group of issues where there is no *acquis*. Moreover, when it comes to public prosecution, the level unification is even a lower and standards are vague. This is understandable, having in mind that the constitutional system, competence, and functioning of the key institutions of the state, particularly the judiciary, is out of any doubt, one of the areas in which the states have difficulties to surrender their heritage.[5] The same tendency is noted in the Rec(2000)19 which says that, although the European legal systems are still divided between two cultures[6], the traditional distinction is tending to blur as the different member states bring their laws and regulations more closely into line with what are now common European principles, in particular those laid down in the Convention for the Protection of Human Rights. However, in the same document the Committee of Ministers of CoE (hereinafter: Committee) admitted that it is fair to say that, to date, the status, role and operating methods of authorities responsible for prosecuting alleged offenders have not been scrutinized in detail with a view to their harmonization at European level.[7] Recommendation (2000)19 defines that "public prosecutors are public authorities who, on behalf of society and in the public interest, ensure the application of the law where the breach of the law carries a criminal

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

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

[6] The split being evident both in the organization of criminal procedure (which is either accusatorial or inquisitorial) and in the initiation of prosecutions (under either "mandatory" or "discretionary" systems) (See more in: Rec (2000)19)

[7] Recommendation Rec (2000)19 of the Council of Europe on the role of public prosecution in the criminal justice system, adopted by the Committee of Ministers on 6 October 2000 at the 724th meeting of the Ministers' Deputies, p. 12-13. Furthermore, the Committee approaches to the harmonization/ unification at European level without ambitions to draw on features of both traditions in order to come up with some type of third option, nor to propose the unification of existing systems, nor to suggest a supranational model, nor did it believe that it should merely seek the lowest common denominator. The idea of the Committee is just to identify the major guiding principles - common to different types of system and to recommend practical objectives to be attained in pursuit of the institutional balance upon which democracy and the rule of law in Europe largely depend.

sanction, taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system. Operating neither on behalf of any other (political or economic) authority nor on their own behalf, but rather on behalf of society, public prosecutors must be guided in the performance of their duties by the public interest." They must observe two essential requirements concerning, on the one hand, the rights of the individual and, on the other, the necessary effectiveness of the criminal justice system, which the public prosecutor must, to some extent, guarantee.[8]

The Committee recognizes differences between models of public prosecution services. Throughout the World, there is no uniform model for all states.[9] However, in spite of differences, it is possible to identify features and values which are common to virtually all modern criminal justice systems. The Venice Commission sees it, primarily, in the criminal prosecution as a core function of the state. A crime is a wrong against society, although in many cases the same act will also amount to a private wrong against the individual victim. (CDL-AD(2010)040, par. 10-11)

Considering the seriousness of prosecutorial discretion power, the Commission also underlined importance of judicial control of prosecutor's actions which affect human rights, that should not function like a quasi-automatic approval of all such requests from the prosecutors. This is a danger not only for the human rights of the persons concerned but for the independence of the Judiciary as a whole. (CDL-AD(2010)040, par. 73-74)

In addition to what the Committee and the Commission stated, the Consultative Council of European Prosecutors (hereinafter: CCPE), also recognized differences among European states when it comes to (non)mandatory prosecution. The CCPE emphasized that some member states have the discretionary prosecution system. Other member states have the mandatory prosecution system, but their codes of criminal procedure provide for such exceptions as: – cases where prosecution is plainly inexpedient having regard to the stated objectives, one of which is to prevent the recurrence of the offence; – cases where financial or other redress is made; – cases involving a juvenile offender. In some countries, the obligation to prosecute can only be avoided for juveniles (CCPE, Opinion No. 2:11-12)

The CCPE specially analyzed issue of prosecutorial discretion from the perspective of alternatives to prosecution, excluding from the "list" of alternatives the procedure of "pleading guilty" before a curt, as it does not obviate criminal proceedings and leads to a conviction.[10] The CCPE concluded that recourse to alternative measures to prosecution is

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

[9] The main classifications could be made on systems which are adversarial in nature and those which are inquisitorial, between systems where a judicial officer controls the investigation and those where a non-judicial prosecutor or the police control investigations. In parallel, there are systems where prosecution is mandatory in accordance with the legality principle and others where the prosecutor has discretion not to prosecute where the public interest does not demand it (the opportunity principle). Differences exist also between systems which allow private prosecution while others do not do so or limit it. The same goes for position of a victim who, in some systems, has opportunity to take part in criminal proceedings as a "partie civile" while others recognize only a contest between the prosecutor representing the public or the state and the individual accused. (CDL-AD (2010)040-7)

[10] Consultative Council of European Prosecutors (CCPE), Opinion N°2 (2008) of the Consultative Council of European Prosecutors on "Alternatives to prosecution" adopted by the CCPE at its 3rd Plenary Meeting (Strasbourg, 15 – 17 October 2008), par. 9. For the purposes of this Opinion,

not in contradiction with Europe's mainstream system of mandatory prosecution (CCPE, Opinion No. 2:10) The CCPE insisted that alternative measures have to be consistent with the goals by which the action of criminal justice must be guided, namely to prevent re-offending, assist redress of the damage incurred by society, have regard to the interest of victims, uphold the rights of the defence, form a valid response to illegal acts, and to avoid the repetition of the offence. The CCPE also concluded that legislation in some countries stipulates that alternative measures should be used when a criminal sanction appears unnecessary to avert repetition of the offence. (CCPE, Opinion No. 2: 15-16)

An alternative measure not making offenders social outcasts, and instead encouraging their rehabilitation. "Alternative measures often make redress more visibly meaningful to society than mere payment of money (too superficially conscience-salving) or imprisonment. As alternatives to imprisonment, they lower the prison population in a Europe where many prisons are overcrowded and the prison budget often takes up a crippling proportion of the justice budget. Alternative measures can reduce the workload of courts, but often present the prosecution departments with a very large amount of work in arranging them." (CCPE, Opinion No. 2: 20-23)

When it comes to restrictions/limitations of the cases where alternative measures can be applied, the Committee recognized both- legal systems where this is done through precise enumeration/list of cases, but also systems that use non-binding legal instruments. In accordance with Recommendation Rec(2000)19 and with a view to promoting a fair, consistent and efficient activity of public prosecutors in this field, members states should seek to: – define general guidelines for the implementation of this criminal policy; – define general principles and criteria to be used by way of references against which decisions of individual cases should be taken, in order to guard against arbitrary decision making. In addition to this, the CCPE emphasized that the public must be informed of the above-mentioned system, guidelines, principles and criteria. It is advisable that specific arrangements be drawn up aimed at giving an account of the concrete implementation of the above-mentioned guidelines. In addition to transparency and accessibility of the rules and guidelines, the CCPE insists evaluation the economic, administrative and structural conditions prior to adoption of alternative measures to prosecution, in order to check the ability to implement these measures in a practical and concrete manner. (CCPE Opinion No. 2:26-27)

Finally, together with clear and transparent rules/guidelines that limit prosecutorial discretion and enable predictability of prosecutorial conduct, the CCPE recognizes importance of judicial and/or victim intervention. More precisely, the CCPE stated that alternative measures are conducive to acceptance of the judicial response by the offender and possibly the victim, if the latter is suitably associated with them. "Sometimes the code provides that the victim can object to a prosecution being dropped. This is done through a review of the decision taken by the prosecution authority, either to the hierarchical superior of the prosecutor or to the higher instance court. In some member states, there is no alternative measure without the victim's agreement." (CCPE, Opinion No. 2:19)

"alternative measures to prosecution" are understood to mean measures which go together with final, temporary or conditional discontinuation of prosecution where an offence has been committed, that would otherwise render the perpetrator liable to a criminal sanction such as a suspended or unsuspended prison sentence or fine, together with ancillary penalties such as deprivation of certain rights. (CCPE, Opinion No 2: 7)

4. Prosecutorial discretion in serbian criminal justice system

When it comes to the scope of prosecutorial discretion in Serbian justice system, the Criminal Procedure Code[11] (hereinafter: CPC) provides for basic list of the rights and duties of the public prosecutor in the Article 43. According to this provision, the basic right and the basic duty of the public prosecutor is to prosecute the perpetrators of criminal offences. In the case of criminal offences prosecutable *ex officio*, the public prosecutor is authorized to:

1) manage pre-investigation proceedings;
2) decide on not undertaking or deferring criminal prosecution;
3) conduct investigations;
4) conclude plea agreements and agreements on giving testimony;
5) file and represent an indictment before a competent court;
6) abandon charges;
7) file appeals against court decisions which are not final and submit extraordinary legal remedies against final court decisions;
8) conduct other actions when specified by CPC.

The right of public prosecutor to dismiss charges is regulated by Article 49 of the CPC which stipulates that a public prosecutor may dismiss charges:

1) from the confirmation of the indictment until the conclusion of the trial;
2) at a hearing before a second-instance court.

The highest level of discretion is regulated by Article 284 of CPC, which stipulated that the public prosecutor will dismiss a criminal complaint by a ruling if it proceeds from the complaint that:

1) the reported offence is not a criminal offence which is prosecutable ex officio;
2) the statute of limitations has expired, or the offence is encompassed by an amnesty or a pardon, or there exist other circumstances which permanently exclude prosecution;
3) there are no grounds for suspicion that a criminal offence which is prosecutable ex officio has been committed.

According to Article 51 of CPC, if in connection with a criminal offence prosecutable *ex officio* the public prosecutor dismisses a criminal complaint, discontinues the investigation or abandons criminal prosecution until the indictment is confirmed, he is required to notify the injured party thereof within eight days and to advise him that he is entitled to submit an objection to the directly higher public prosecutor within eight days of receiving the notification and advice. If the injured party has not been notified, he is entitled to submit an objection within three months of the date when the public prosecutor dismissed the complaint, discontinued the investigation or abandoned criminal prosecution. A directly higher public prosecutor will within 15 days of receiving the objection, deny or uphold the objection by a ruling against which an appeal or objection is not allowed. By the ruling upholding the objection, the public prosecutor issues a mandatory instruction to the competent public prosecutor to conduct or resume criminal prosecution.

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[11] Criminal Procedure Code, Published in the Official Gazette RS, Nos. 72/11 of 28 September 2011, 101/11 of 30 December 2011, 121/12 of 24 December 2012, 32/13 of 8 April 2013, 45/13 of 22 May 2013, 55/14 of 23 May 2014 and 35/19 of 21 May 2019

In the case of criminal offences punishable by a term of imprisonment of up to three years, the public prosecutor may dismiss a criminal complaint if the suspect, as a result of genuine remorse, has prevented the occurrence of damage or has already indemnified the damage in full, and in view of the circumstances of the case the public prosecutor finds that pronouncing a criminal sanction would not be fair. In this case the injured party is not allowed to assume prosecution.

When it comes to right of the injured party in case of dismissal of charges by prosecutor, differently from situation in which public prosecutor dismisses charges before conformation of indictment, where this decision cannot be appealed, when the public prosecutor dismisses charges from the confirmation of the indictment until the conclusion of the trial, the injured party is entitled to assume criminal prosecution (Article 52 of CPC).

Contrary to assumption of criminal prosecution by the injured party, according to Article 62, in proceedings conducted on the basis of charges brought by a subsidiary prosecutor, the public prosecutor is entitled to assume criminal prosecution and representation of the prosecution no later than the end of the trial.

The CPC also regulates the mechanism of deferring Criminal Prosecution. According to Article 283 of this Code, the public prosecutor may defer criminal prosecution for criminal offences punishable by a fine or a term of imprisonment of up to five years if the suspect accepts one or more of the following obligations:

1) to rectify the detrimental consequence caused by the commission of the criminal offence or indemnify the damage caused;

2) to pay a certain amount of money to the dedicated account for financing a humanitarian or other public purpose;

3) to perform certain community service or humanitarian work;

4) to fulfil maintenance obligations which have fallen due;

5) to submit to an alcohol or drug treatment program;

6) to submit to psycho-social treatment for the purpose of eliminating the causes of violent conduct;

7) to fulfil an obligation determined by a final court decision, or observe a restriction determined by a final court decision.

In order to defer criminal prosecution, the public prosecutor will determine a time limit during which the suspect must fulfil the obligations undertaken, with the proviso that the time limit may not exceed one year. Oversight of the fulfilment of obligations is performed by an officer of the authority in charge of the execution of criminal sanctions, in accordance with a regulation issued by the minister responsible for the judiciary.

If the suspect fulfils the obligation ordered by prosecutor within the prescribed time limit, the public prosecutor will dismiss the criminal complaint by a ruling and notify the injured party thereof. In this case, the injured party does not have right to assume prosecution.

5. Means to ensure uniformity of prosecutorial practice in Serbia

When it comes to tools and mechanisms aimed to ensure uniformity of prosecutorial practice in Serbia, it is important to emphasize that they are mostly

related to hierarchy principle as a backbone of prosecutorial organization according to the Constitution[12] and Law on public prosecution[13]. Following this principle, a public prosecution consists of a public prosecutor, deputy public prosecutors and public prosecution staff. The function of the public prosecution is performed by the public prosecutor. Everyone in the public prosecution is subordinate to the public prosecutor. (Article 12 of LPP) According to Article 16 of LPP, a lower ranked public prosecutor shall be subordinate to the immediately higher ranked public prosecutor, and a lower ranked public prosecution to the immediately higher ranked public prosecution. In parallel, every public prosecutor shall be subordinate to the Republic Public Prosecutor and every public prosecution to the Republic Public Prosecution.

According to hierarchy principle, the LPP recognizes instrument of mandatory instructions of higher ranked public prosecutor to lower. More precisely, a higher ranked prosecutor may issue to a directly lower ranked prosecutor mandatory instructions for proceeding in particular cases when there is doubt in respect of the efficiency and legality of his actions, and the Republic Public Prosecutor may issue such instruction to any public prosecutor.

When it comes to form of the mandatory instructions, they must be issued in writing and must contain the reasons and substantiation for their issuance. A lower ranked prosecutor who deems mandatory instructions unlawful and unjustifiable may submit a substantiated objection to the Republic Public Prosecutor within eight days of the date of receiving the instructions. This objection is filed through the public prosecutor who issued the mandatory instruction, who is required to review the mandatory instruction he issued within three days from the day of receiving the objection. However, the public prosecutor filing the objection is required to act in accordance with the instructions until the decision of the higher ranked public prosecutor or the decision of the Republic Public Prosecutor. The directly higher public prosecutor may set aside the mandatory instructions and in such case the objection shall not be forwarded to the Republic Public Prosecutor. The Republic Public Prosecutor is required to issue a decision within fifteen days from the date of receiving the objection to the mandatory instructions. This decision is final.

Article 24 of the LPP regulates mandatory instructions of public prosecutors to deputy public prosecutors and stipulates that a public prosecutor may issue to his deputy mandatory instructions for work and action. The instruction shall be in writing and shall contain substantiation for the issuance thereof. A deputy public prosecutor who deems the mandatory instruction unlawful and unjustified may file an objection with an explanation to a directly higher public prosecutor within eight days from the date of receiving the instruction. A decision on the objection shall be rendered within three days from the day of receiving the objection. The same as in case where mandatory instruction issued to lower prosecutor, the public prosecutor may during the reconsideration procedure set aside the mandatory instruction and, in such case, shall not forwarded the objection to the higher public prosecutor. However, the deputy public prosecutor filing the objection is required to act on the instruction until the decision of the higher public prosecutor. The directly higher public prosecutor is

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

[13] Law on Public Prosecution, "Official Gazette of the RS" no. 116/2008, 104/2009, 101/2010, 78/2011 – other law, 101/2011, 38/2012 – CC decision, 121/2012, 101/2013, 111/2014 - CC decision, 117/2014, 106/2015 and 63/2016 - CC decision)

required to issue a decision (which is final) within eight days from the day of receiving the objection to the mandatory instruction.

Different from two scenarios described above, where directly higher prosecutors issuing mandatory instructions to directly lower prosecutors or prosecutors doing the same to their deputies, Republic Public Prosecutor has the power (according to Article 25) to issuing, in written form, general mandatory instructions for all public prosecutors aimed at achieving legality, efficiency and uniformity in proceeding. The Republic Public Prosecutor may issue in written form general mandatory instructions upon a proposal of the Collegium of the Republic Public Prosecution.

In addition to mandatory instructions, Article 19 of the LPP regulates acting of public prosecutor according to devolution principle. A higher ranked public prosecutor may undertake all actions for which a lower ranked public prosecutor is competent, and is required to issue a substantiated ruling thereof. If a lower ranked public prosecutor deems the decision of the higher ranked public prosecutor unjustifiable may file an objection with the Republic Public Prosecutor within eight days from the date of receiving the decision. The objection shall be filed through the prosecutor who had issued the decision, who is required to review the ruling issued within three days from receiving the objection. The lower ranked public prosecutor may not undertake any case-related actions until the decision on the objection is issued. In the course of reconsideration, the public prosecutor may issue a decision setting aside his ruling, in which case the objection shall not be forwarded to the Republic Public Prosecutor. The Republic Public Prosecutor shall decide on the objection within 15 days from receiving the objection to the ruling.[14]

The third mechanism- reflection of the hierarchy principle is substitution of public prosecution, regulated by Article 20 of the LPP. The substitution of public prosecution means that a directly higher ranked public prosecutor may authorize a lower ranked public prosecutor to proceed in a matter under the jurisdiction of another lower ranked public prosecutor when the competent public prosecutor is prevented by legal or material reasons from proceeding in a particular case, and shall in such case issue a substantiated ruling.

Finally, in the Article 21 of the LPP, the mechanism of inspection of cases of lower ranked prosecutor. Namely, the Republic Public Prosecutor is entitled to inspect any case, and a higher ranked prosecutor is entitled to inspect any case of a directly lower ranked prosecutor. The request for inspection shall be submitted to the lower ranked public prosecutor, who shall thereafter promptly forward the case to the higher ranked public prosecutor.

6. Conclusions

Considering the importance of both- the uniform application of law, but also certain level of prosecutorial discretion in order to adapt to specificity of each particular case, it seems that several factors appear as important to ensure a proper balance between those two sides of the same coin, so called access to justice.

[14] See more in: Kolaković-Bojović, M. (2018) Organisation of Judiciary in the Republic of Serbia-Reform Framework and EU standards (Organizacija pravosuđa u Republici Srbiji - reformski okvir i EU standardi), Institute of Criminological and Sociological Research, Belgrade.

On the one hand, the discretionary right of the plaintiff must ensure, but at the level of legal provisions, sufficient power to decide, based on the assessment of the facts of a particular case, on:

- Rejecting criminal charges because there are no grounds for prosecution;
- The postponement of criminal prosecution conditioned by the use of some alternatives to prosecution, provided that alternative measures can adequately affect the defendant but also provide reparation to the victim;
- Conducting proceedings in one of the simplified procedural forms (most often a plea agreement).

However, in order to prevent arbitrary decision making by prosecutor, it is necessary to ensure protection mechanisms on several levels:

First, when it comes to the legal framework, the relevant provisions of the law must be precise, clear and publicly available to citizens. In addition, control mechanisms that are reflected in the victim's right to a remedy, as well as in the judicial control of the key public prosecutor's decisions, are of great importance. Finally, in systems where there is a hierarchical arrangement of the public prosecutor's office, prosecutorial discretion is limited by the binding instructions of superior prosecutors, as well as by the principles of devolution and substitution. In such systems, the power of the supreme prosecutor to influence the uniformity of prosecution practice, even within the broad legal framework of prosecutorial discretion, is high. This is of particular importance if monitoring of the prosecution practice shows significant inconsistency of prosecutorial practice in a particular category of crimes or perpetrators.

Finally, the availability of prosecutorial practice in various databases (which is although traditionally out of focus) plays an important role- both for public prosecutors, when deciding on the future course and / or outcome of the proceedings, as well as for lawyers, defendants and victims, enabling them to take an early view of prosecutors' similar cases and anticipate the further course and / or outcome of the proceedings in which the party is a party.

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

Crimes in Connection with Cryptocurrencies

Dr. Dávid Tóth*

Abstract

The aim of the article is analyzing the criminological aspects of cryptocurrency crimes. The use of cryptocurrencies as a payment method is a relatively new social phenomenon, and criminals have found different ways to misuse them. In many countries – like in Hungary – cryptocurrencies are existing in a legal grey area and they are not valued as an official payment method or not even a cash-substitute payment instrument. As a result of this if somebody counterfeits a cryptocurrency that would not be valued as the crime of counterfeiting of cash-substitute payment instruments, and the offender would avoid criminal punishment. It is necessary to give legal answers to this phenomenon to prevent future criminal conducts.

The current study after the overview of the cryptocurrency crimes researches the legal means in the European Union to combat this new form of cybercrime.

Keywords: *cybercrime, cryptocurrency crimes, bitcoin.*

1. Introduction – General remarks about cyber crimes

As the technology evolved and the internet-capable devices spread new opportunities appeared for the offenders. As a result of this nowadays cybercrime is becoming a more and more separate and unique part of the criminal law.[1] The research in connection with cybercrime – as a new trend in criminal justice – aims to give up to date answers to this sui generis phenomenon.

It is not an easy task to give an abstract definition of cybercrime. It also has to be noted that this concept is controversial. In 1991-ben Martin Wasik published a book titled Crime and computer. At this time the internet was not a part of the everyday life of people. The evolution of the cyberspace has changed the criminality entirely. According to Walden cybercrime is part of computer crime. A computer is required to connect to the cyberspace and to commit criminal offence there. In Walden's view internet crime is narrower than computer crime. Hunton had a similar argument when he stated that "digital" and "high-tech" is such a broad area where internet connectivity is not necessarily contrary to the so-called e-crime and cybercrime.[2]

Cybercrime can be classified in many ways. According to one division we can differentiate between crimes committed with computers and the so-called computer-centric crimes. This division is based on that in certain cases the computer only aids in

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[1] See: Gál, László István: *The criminal law protection of the stock market is Hungary. Economic policy,* Journal of Eastern-European Criminal Law 2015/2, pp. 43-45.

[2] Gillespie, Alisdair A., *Cybercrime.* Routledge. New York, 2015, pp. 1-3.

the crime which already exists in the criminal law. Theft and the distribution of child pornography can be a good example of this. Both crimes existed before the appearance of computers and the internet. On the other cyberspace created the possibility to commit these crimes with easier and more effective methods. Theft can be committed by hacking to an internet bank system or by phishing.[3]

The above-mentioned findings can be applied to the newer virtual phenomenon the cryptocurrencies. There are many ways to misuse these virtual currencies. The aim of the study to give a general overview of crimes related to cryptocurrencies and give possible legal solutions to this problem.

2. The concepts of the cryptocurrencies

According to the Oxford Handbook of Dictionary, the definition of cryptocurrency is the following: *"a digital currency in which encryption techniques are used to regulate the generation of units of currency and verify the transfer of funds, operating independently of a central bank."* https://www.lexico.com/en/definition/cryptocurrency date of download: 2019. 08. 14.). In Hungary, there is no legal definition for virtual money yet and they exist in a grey area in a legal sense. Under the Act CCXXXVII of 2013 on Credit Institutions and Financial Enterprises only established the concept of electronic money which is defined as the following:

- *"electronically, including magnetically, stored monetary value as represented by a claim on the issuer of the electronic money which is issued on receipt of funds for the purpose of making payment transactions as defined in the Act on the Pursuit of the Business of Payment Services, and which is accepted by a natural or legal person, unincorporated business association or private entrepreneur other than the electronic money issuer, excluding the monetary value stored on instruments provided for in Paragraph k) of Subsection (4) or used for the payment transaction defined in Paragraph l) of Subsection (4)".*

Furthermore, cryptocurrencies cannot be valued as cash-substitute payment instruments as well. The Criminal Code of Hungary (Act C of 2012) has an exhaustive listing of cash-substitute payment instruments[4] in the interpretation section (Paragraph 459. 19-20. point) and we cannot find cryptocurrencies there.[5] As a consequence of this, if somebody counterfeits a cryptocurrency that would not be valued as the crime of counterfeiting of cash-substitute payment instruments, the offender would avoid criminal punishment.[6]

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[3] Gillespie, *cited*, pp. 2-3

[4] See further in: Gál, István László, *A pénz- és bélyegforgalom biztonsága elleni bűncselekmények. [Counterfeiting and stamp forgery]* In: Polt, Péter (editor), Új Btk. kommentár: 7. kötet, Különös rész. Nemzeti Közszolgálati és Tankönyv Kiadó Zrt. Budapest. 2013. pp. 193-224; Kőhalmi, László, *A pénzhamisítással kapcsolatos bűncselekmények. A pénz büntetőjogi fogalma. [Crimes related to counterfeiting. The concept of money in criminal law]* In: Balogh, Ágnes – Kőhalmi, László - Büntetőjog II. Különös rész. Dialóg Campus Kiadó, Pécs 2005. pp. 411-417.

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[6] See: Gál, László István: *Economic policy, criminal policy and economic crimes,* Journal of Eastern-European Criminal Law 2019/1, pp. 100-103.

3. Crimes in connection with cryptocurrencies

There were many ways to misuse cryptocurrencies in practice. Without attempting to be exhaustive the following are examples:

- theft,[7]
- fraud,[8]
- Ponzi-scheme,[9]
- Using malicious codes and software against crypto wallets. This is also called as crypto jacking,[10]
- The so-called "Initial Coin Offerings" or ICO-s when fraudsters invite people to spend their money on fake virtual coins.[11]
- In theory, it is possible to commit virtual counterfeiting of money.
- Cryptocurrencies can be used for money laundering.[12]
- They can be used to buy an illegal market like on the darknet.
- They can be used to steal personal information.
- It can be instruments for terrorist financing.[13]
- They can be the means for tax evasion.[14]

As technology evolves newer and newer types of fraud can be committed in connection with cryptocurrencies.

3.1. Theft related to virtual money

According to a Cambridge University study around 3 million people trades actively with cryptocurrencies. The spread and easier access to the online business world resulted that the theft in the cyberspace is increasing. These can be committed against cryptocurrencies as well.[15]

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[7] Orme, David, *Is biometrics the answer to crypto-currency crime?* In: Biometric Technology Today, 2019/2. p. 8.

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[10] Sigler, Karl, *Crypto-jacking; how cybercriminals are exploiting the crypto-currency boom.* In: Computer Fraud & Security, 2018/9, pp. 13–14.

[11] See further in: Zetzsche, Dirk – Ross, Andreas, – Buckley, Ross P. – Arner, Douglas W. – Föhr, Linus, *The ICO Gold Rush: It's a Scam, It's a Bubble, It's a Super Challenge for Regulators* In: Harvard International Law Journal, Vol. 63, 2019/2, pp. 1-39.

[12] Vandezande, Niels, *Virtual currencies under EU anti-money laundering law*. In: Computer Law & Security Review: The International Journal of Technology Law and Practice (2017), doi: 10.1016/j.clsr.2017.03.011 (date of download 2019. 06. 01.); Gál, István László, *A pénzmosás* [Money laundering]. KJK-Keszöv Jogi és Üzleti Kiadó, Budapest, 2004, pp. 3-15.

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[15] Study highlights growing significance of cryptocurrencies. University of Cambridge. 4 May 2017. https://www.cam.acuk/researcli/news/study-highlighrs-growing-significance-of-cryptocurrencics 2019, accessed on 2019. 06. 01.

Researchers also found that the people who invest in cryptocurrencies are not fully aware of the mechanisms of these instruments. They are also not aware of the possible dangers and risks. A study in 2018 conducted by the IW Capital, a Mayfair-based SME investment house found that less than five per cent of the cryptocurrency investors in the United Kingdom could realize the actual profit.[16]

In most part of the world, the regulation of cryptocurrencies is incomplete or not existent. Furthermore, there are no consumer protector rules for cryptocurrency users. So many dollar millions worth of crypto money is lost without recovering them. In 2018 the South Korean crypto exchanger reported that 31.5 million dollars worth of virtual coins were obtained by hackers.[17] These types of attacks are breaching the trust in bitcoin and other similar virtual currencies. A mixture of a public and a private key (which are used for the authentication and encryption of the transaction) resulted that it is difficult to follow such transactions. This is true to the legal and illegal transactions as well.

3.2. Fraud in connection with cryptocurrencies

Dániel Eszteri had wrote a case report[18] which happened in Hungary. The offenders have cheated out a considerable amount worth of bitcoin. Eszteri was an advisor ordered by the court. The two accused persons have visited the victim in winter. Later they met at a parking lot of a store. The perpetrator offered 2.5 million Forints (around 7484 Euros) for 15 units of bitcoin. The victim brought the notebook with him to the parking lot to transfer the bitcoins. He transferred the crypto-money to the address assigned by the offender.

After this, the two perpetrators tried to flee from the scene with their car but eventually, police caught them. At first, time the authorities did not mention in their report that it was a financial crime and even though the victim asked for the seizure of the IT equipment the police failed to do so. Later the indictment contained the crime of fraud which caused a considerable amount of damage. The offenders transferred the bitcoins to several addresses and these were untraceable. The seizure probably would have prevented the loss of the 15-unit bitcoin according to Eszteri.[19] There are many challenges and questions regarding the seizure of cryptocurrencies.[20] The victim made a civil claim in the criminal procedure.

3.3. The ponzi-schemes

Virtual money can be used for ponzi-schemes. A few good examples for this were the OneCoin and the Bitconnect case. The Hungarian National Bank has warned the

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[16] Memoria, Francisco, *UK Crypto Investors Lack of Knowledge Is "Very Concerning" as Just 5% Make "Financial Gains."* In: CryproGlobe 2018. July. https://www.cryptoglobe.com/latest/2018/07/uk-crypto-investors-lack-of-knowledge-is-very-concerning-as-just-5-make-financial-gains/, accessed on 2019. 09. 01.

[17] Orme, *op. cit.*, pp. 8-10.

[18] Eszteri, *op. cit.,* 2017, pp. 25-29.

[19] Eszteri, *op. cit.,* 2017, p. 28.

[20] See further in: Simon, Béla, *A kriptovaluták és a kapcsolódó rendészeti kihívások. [Cryptocurrencies and challenges in the law enforcement]* In: Mezei, Kitti (editor.) A bűnügyi tudományok és az informatika. Pécsi Tudományegyetem Állam- és Jogtudományi Kar – MTA Társadalomtudományi Kutatóközpont, Budapest-Pécs. 2019, pp. 169-186.

retail clients to be cautious with the OneCoin cryptocurrency, because it can be an international disguised ponzi-scheme. The OneCoin had several promises like monthly 5 percent profit or weekly 1 percent profit without any risks. The organization of OneCoin scouted a lot of people on the internet to join the business by offering them a great yield. They paid out the older members with the investment of the newly entered people. In 2010 The Hungarian Financial Supervision made a police report against OneCoin. Not only in Hungary but other foreign countries also had scandals in connection with OneCoin. In 2017, In Italy the Competition authority temporarily banned the company, the One Network Services Ltd, which was responsible for the selling OneCoin. According to the investigation of the authority the company offered unrealistically high in exchange for a 140euro education package. They promised 2800 euro yield within 2 years. (Turzó, 2017)

Another infamous case (which is still going) was the Bitconnect scandal. The Federal Bureau of Investigation (FBI) in it's official website asked people to come forward if they were scammed in connection with Bitconnect. This company also offered high incomes for the investors. If somebody paid in ten thousand dollars the company offered fifty-two thousand dollars pay back within two years.[21]

The so-called Initial Coin Offerings (ICO-s) are similar to Ponzi-schemes. The perpetrators create a fake or non-existent virtual money and after a major marketing campaign, they persuade people to buy their coins. They promise high income within a short period time. Many people can be manipulated to buy their fake coins with the so-called fear of missing out (FOMO) psychological tactic. This method is called a quick fund-raising. The investors usually lack the knowledge of the topic and they only look at the promised incomes. A good example for the ICO scam can be the Prodeum cryptocurrency. The Prodeum used the blockchain of another cryptocurrency: Ethereum. They managed to elicit around three thousand dollars with ICO-s. The company in connection with Bitflur and the Magnalis cryptocurrency also used a similar technique. Under the report of the Enrst & Young in 2017 2017 around 400 million damage was caused by the offenders with the ICO-s.[22]

3.4. The crypto jacking

As Saad, Khormali and Mohaisen defined in their paper *"crypto jacking is the use of system resources of a target device to compute hashes and make profit out of mining without the consent of the target device's owner."*[23] The new phenomenon of crypto jacking has two forms. On one hand there is the browser based crypto jacking.[24] Usually, this malicious activity is executed through scripts that are running within a website. The mechanism of this can be summarized in the following example. The

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[21] https://www.fbi.gov/resources/victim-services/seeking-victim-information/seeking-victims-in-bitconnect-investigation 2019, accessed on 2019.07.15.

[22] Crypto-currencies hit by hacking attacks, theft and fraud. (2018). *Network Security, 2018(2),* pp. 1–2. http://doi.org/https://doi.org/10.1016/S1353-4858(18)30011-4.

[23] Saad, Muhammad, - Khormali, Aminollah - Mohaisen, Aziz, End-to-end analysis of in-browser cryptojacking. In: arXiv:1809.02152v1 [cs.CR] 6 Sep 2018, https://arxiv.org/pdf/1809.02152.pdf, accessed on 2019.07.15.

[24] Eskandari, Shayan – Leoutsarakos, Andreas – Mursch, Troy – Clark, Jeremy: *A First Look at Browser-Based Cryptojacking*. In: arXiv:1803.02887v1 [cs.CR] 7 Mar 2018, pp. 58–59. https://arxiv.org/pdf/1803.02887.pdf, accessed on 2019.07.01.

offender attacks a company network. The attacker recognizes a vulnerable website and hides malicious code on the internet site unbeknown to the user. When an employee, the corporate user logs in to the site to check the news, thanks to the malicious crypto jacking code this user is now the processing power for the attacker. The user's computer will become the mine for digital currency. As long as the web browser is open the offender benefits. Harnessing the users machine the attacker performs a computation needed to update blockchain and release new cryptocurrency. The mined currency is deposited into the electronic wallet of the offender while the cost on mining is worn by the user. Attackers decided to use this new method for a number of reasons. On the other hand, we can talk about the file based crypto jacking.

These attacks work like any other malwares. Usually they are self-propagating. They get in and spread thru the network and they cause huge cleanup cost. There are many reasons why criminals use this method. Firstly, they want to get money quickly, efficiently and easily. It only requires a simple script and browser based crypto jacking does not require the same level of skill from traditional threats. Some organizations are slow to recognize the dangers of crypto jacking. Crypto jacking is a stealthy method. Users usually only notice that their computer is becoming slower, and the electricity bill is rising. The increasing cryptocurrency value is also an important factor.[25]

Guillermo Suarez-Tangil from the King's College London University and Sergio Pastrana from the Charles III University of Madrid analyzed 4.4 million crypto jacking malware code. The malicious codes were used between 2007 and 2018 by criminals. According to their estimate crypto jacking produced 57 million dollars profit for the offender around the world. One of the largest organized crime[26] reached alone 18 millions dollar income.[27]

It is not easy to detect these crypto jacking malwares but there are browser extensions that are able to effectively prevent most crypto jacking attacks (like minerblocker add-on in the Mozilla Firefox browser).

3.5. Virtual money counterfeiting as a theoretical possibility

Virtual money counterfeiting is basically when a person transfers a virtual money twice (like one Bitcoin twice). In a technical sense this is impossible at the time of the writing. We can show this on the example of bitcoin. Bitcoin is not a computer file which can be copied two or more times. Bitcoin only exists in a ledger as a value. The ledger registers all of the bitcoin transactions in the History.

Every person who uses a bitcoin owns a copy of a ledger. If somebody wants to spend two bitcoins when in reality he has only one he has to modify all the ledgers in the world. Even if he can hack to some computers it is impossible to do this globally. The unhacked computers with the true copy of ledger will signal that the counterfeiter only actually has one bitcoin, most of the ledgers have to verify the bitcoin transaction to become completed. Due to fact that.[28]

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[25] Sigler, *cited,* pp. 13-14.

[26] See: Tóth, Dávid – Gál, István László – Kőhalmi, László, *Organized crime in Hungary*, Journal of Eastern-European Criminal Law 2015/1, pp. 22-23.

[27] Stokel-Walker, Chris, *Are hackers making money with your PC?* In: New Scientist, 2019/1, p. 6.

[28] Eszteri, *cited,* 2015, p. 129.

4. Combatting cryptocurrency crimes in the European Union with legal means

4.1. The new Directive Proposal of the European Commission

The European Commission proposed a new Directive on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA for the European Parliament and the Council. The European Union adopted the Directive in 17th of April 2019. This Directive aimed to modernize the previously existing EU legislation. The new legal source sets minimum rules in connection with the punishability of the non-cash payment instrument frauds in a more effective way. According to the European Commission the earlier regulation was not reflecting the reality and does not deal with actual problems due to the revolution of information technology (like the appearance of cryptocurrencies and mobile payments). The non-cash payment instrument frauds contribute to other crime forms like:

- organized crime groups;
- terrorism;
- drug trafficking;
- human trafficking.

The Commission in its Directive proposal set three goals:

- to guarantee clear, established and technological neutrality in the regulation.
- Operational barriers that limit investigation and prosecution should be eliminated.
- Lastly the EU should improve prevention.

4.2. The opinion of the European Economic and Social Committee

The European Economic and Social Committee (EESC) in the January of 2018 released an opinion about the new Directive proposal [COM(2017) 489 final – 2017/0226 (COD)]. The EESC had constructive findings. On one hand the EESC was positive about that the Commission aims to modernize the regulation in this area, because the fight against computer crimes should be a priority in the European Union while the electronic payments are becoming more widespread. The EESC agreed that the previous regulation was outdated and new rules are necessary to protect the information society. Overall, they acknowledge the aims of the Directive proposal.

I would highlight the following parts of the opinion:

- The Directive in the jurisdiction of investigation part (Article 11) must be clarified whether the fundamental principle is the location of the person or of the information system or computer used in order to avoid any conflict of jurisdiction. They propose to amend with a subpoint on settling conflicts of jurisdiction using one of the two methods mentions.

- They think that there may be some bewilderment regarding the subject of the Directive so they propose amending the title and replacing the phrase non-cash payment with electronic and digital means of payment.

4.3. The history of the Directive proposal

After the release opinion the European Parliament asked the Civil Liberties, Justice and Home Affairs Committee (LIBE) and Sylvia-Yvonne Kaufmann rapporteur,

to give another opinion on the Directive proposal.[29] The Europol gave a report in the September of 2018 about the organized crime activities on the internet which reviewed the fraud related to internet payment and the skimming of ATM-s and POS terminals. The telecommunication misuse is a big challenge for the law enforcement.

At the end of 2018. the European Parliament and the Council have established a formal agreement regarding the Directive Proposal. The two parties agreed in the following point:

- it is necessary to harmonize the crimes online, such as hacking and phishing.
- It is important to give a minimal legal framework for sanctions. The Directive should contain at least one to five years imprisonment commensurate with the gravity of the crime.
- There should be more effective legal and non-legal means to conduct investigations.
- The scope of the law should protect the virtual money transactions as well.
- The prevention and the protection of victims should be enhanced.

The Council informed the head of the LIBE that they accept the European Parliament's standpoint and approve the regulation in this for.

The plenary session was held in March 2019.[30] The Directive proposal was adopted on 17th of April 2019 in an ordinary legislative procedure.

4.4. The rules of the new Directive

The Directive has the title of "combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA." In the first article they drafted that the main goal is prevention and the of assistance to and support for victims. The accepted Directive contains the following crimes which are punishable:

- Fraudulent use of non-cash payment instruments.
- Offences related to the fraudulent use of corporeal non-cash payment instruments.
- Offences related to the fraudulent use of non-corporeal non-cash payment instruments.
- Fraud related to information systems.
- Preparation, Incitement, aiding and abetting and attempt of these offences.

Fraudulent use of non-cash payment instruments means when a person uses a stolen or otherwise unlawfully appropriated or obtained non-cash payment instrument. Under the Directive the fraudulent use of a counterfeit or falsified non-cash payment instrument is also punishable in this category. (Directive Article 3)

The second crime group consist the following conducts:

- the theft or other unlawful appropriation of a corporeal non-cash payment instruments.
- Counterfeiting or falsification of a corporeal non-cash payment instrument.
- The possession of a stolen or otherwise unlawfully appropriated, or of a counterfeit or falsified corporeal non-cash payment instrument for misuse.

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[29] http://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file- combating-fraud-counterfeiting-of-non-cash-means-of-payments 2019, accessed on 2019. 09. 01.

[30] http://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-combating-fraud-counterfeiting-of-non-cash-means-of-payments, accessed on 2019. 09. 01.

- Lastly the procurement for oneself or another of a stolen, counterfeit or falsified corporeal non-cash payment instrument for fraudulent use. Typically, the receipt, appropriation, purchase, transfer, import, export, sale, transport or distribution is punishable. (Article 4.)

It is novelty in the Directive that the crimes related to immaterial non-cash payments are regulated separately. The unlawful obtainment of these are punishable and Article 5 uses a referential disposition to the Directive on attacks against information systems and replacing Council Framework Decision 2005/222/JHA (2013/40/EU). If a person unlawfully obtains another person immaterial non-cash payment instrument with

- illegal access to information systems
- illegal system interference
- illegal data interference or
- illegal data interception should be punishable by the Member States.

The third crime besides the above mentioned consists of the following punishable conducts as well:

- the fraudulent counterfeiting or falsification of a non-corporeal non-cash payment instrument;
- the holding of an unlawfully obtained, counterfeit or falsified non-corporeal non-cash payment instrument for fraudulent use, at least if the unlawful origin is known at the time of the holding of the instrument;
- the procurement for oneself or another, including the sale, transfer or distribution, or the making available, of an unlawfully obtained, counterfeit or falsified non-corporeal non-cash payment instrument for fraudulent use. (Article 5.)

One of most significant novelty contrary to the previous regulation that the Directive contains the fraud related to information system. In this section the transfer of virtual currency (or money) with causing unlawful loss of property for another person to make an unlawful gain is punishable when committed intentionally by

- without right, hindering or interfering with the functioning of an information system;
- without right, introducing, altering, deleting, transmitting or suppressing computer data. (Article 6).

The Directive under the "tools used for committing offence" (Article 7) regulates preparatory conducts. According to this part the Member States should take the necessary measures to ensure that producing, procurement for oneself or another, including the import, export, sale, transport or distribution, or making available a device or an instrument, computer data or any other means primarily designed or specifically adapted for the purpose of committing any of the above mentioned crimes, at least when committed with the intention that these means be used, is punishable as a criminal offence.

The Directive differentiates between non-cash payment instrument and virtual currency. Any non-corporeal or corporeal protected device, object or record, or a combination thereof, other than legal tender, and which, alone or in conjunction with a procedure or a set of procedures, enables the holder or user to transfer money or monetary value, including through digital means of exchange are considers as non-cash payment instruments. Contrary to this any digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily

attached to a legally established currency and does not possess a legal status of a currency or money, but is accepted by natural or legal persons as a means of exchange, and which can be transferred, stored and traded electronically shall be considered as a virtual currency. For example, traveller's cheques, promissory are valued as non-cash payment instruments, bitcoin and Ethereum as virtual currencies. (Article 2)

There are different sanctions for people and legal persons. It is a common requirement against the punishments that they shall be preventive, proportional, and effective. The Directive only sets a minimum guideline not the concrete sanction.

- The theft, counterfeiting and falsification of material non-cash payment instruments the maximum penalty shall be at least 2 years of imprisonment. This sanction shall also be applied in the case of the unlawful obtainment, counterfeiting and falsification of immaterial non-cash payment instruments and every preparation type of conduct.

- The possession of unlawfully procured, counterfeited or falsified non-cash payment instrument with fraudulent intention shall be punished with a maximum of years imprisonment. This rule is also applied to the same conducts in connection with immaterial non-cash payment instruments.

- In regard to information system fraud maximum sanction shall be at least three years of imprisonment.

- The Directive deals with aggravated cases, when a person commits this crime in a criminal association the maximum punishment shall be at least five years of imprisonment (Article 9).

Legal persons[31] have special liability[32] rules.[33] They can be held responsible for the above-mentioned offences if the crimes are committed for their benefit by any person acting either individually or as a part of an organ of the legal person, and having a leading position within the legal (like a power of representation)

Furthermore, Member States shall take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in paragraph 1 has made possible the commission of any of the above-mentioned offences for the benefit of the legal person by a person under its authority.

The Directive also stipulates that the liability of legal persons shall not exclude criminal proceedings against natural persons who are perpetrators or inciters of, or accessories to, any of the offences.

There is one compulsory sanction according to the Directive: fine, even if it is called non-criminal law fine. Facultative sanctions are the following:

- exclusion from entitlement to public benefits or aid;
- temporary exclusion from access to public funding, including tender procedures, grants and concessions;
- temporary or permanent disqualification from the practice of commercial activities;

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[31] Kőhalmi, László, *A jogi személy büntetőjogi felelőssége* [Criminal liability of the legal person]. Collega 2000/2, pp. 18-21.

[32] Kőhalmi, László, *A jogi személyekkel szemben alkalmazható büntetőjogi* intézkedések [Applicable criminal measures against legal persons]. JURA 2006/1, pp. 53-57.

[33] See: Kőhalmi, László, *Some issues of criminal liability by reason of economic decisions*, Journal of Eastern-European Criminal Law 2019/1, pp. 44-47.

- judicial winding-up;
- placing under judicial supervision;
- temporary or permanent closure of establishments which have been used for committing the offence.

The Directive also establishes rules for jurisdiction in order to speed up the criminal proceedings. Every Member State shall take the necessary measures to establish its jurisdiction over the above-mentioned offences where one or more of the following apply:

- the offence is committed in whole or in part on its territory;
- the offender is one of its nationals.

An offence shall be considered to have been committed in whole or in part on the territory of a European Union Member State where the offender commits the offence when physically present on that territory and irrespective of whether the offence is committed using an information system on that territory. Lastly there is a notification obligation for a Member State to the Commission when it decides to establish jurisdiction over an offence referred to in the offences committed outside its territory, including where:

- the offender has his or her habitual residence in its territory;
- the offence is committed for the benefit of a legal person established in its territory;
- the offence is committed against one of its nationals or a person who is a habitual resident in its territory. (Article 12)

There also obligation for the Member states to exchange information quickly, and effectively to ensure the effective cooperation in criminal matters (Article 13-15)

Article 16 should be also highlighted because the victim support was missing in the previous regulation. The EU Member States shall ensure that natural and legal persons who have suffered harm as a result of any of the offences being committed by misusing personal data are:

- offered specific information and advice on how to protect themselves against the negative consequences of the offences, such as reputational damage; and
- provided with a list of dedicated institutions that deal with different aspects of identity-related crime and victim support.

Also, a positive solution that the Directive encourages Member States to set up a single national online information tools to facilitate access to assistance and support for natural or legal persons who have suffered harm as a result of the crimes being committed by misusing personal data.

The Directive also deals with legal persons as victims. They shall be offered the following information without undue delay after their first contact with a competent authority:

- the procedures for making complaints with regard to the offence and the victim's role in such procedures;
- the right to receive information about the case in accordance with national law;
- the available procedures for making complaints if the competent authority does not respect the victim's rights in the course of criminal proceedings;
- the contact details for communications about their case. (Article 16).

Prevention is one of the main goals of the Directive and it is regulated in Article 17 in detail.

According to this Member States shall take appropriate action, including through the internet, such as information and awareness-raising campaigns and research and education programmes, aimed to reduce overall fraud, raise awareness and reduce the risk of becoming a victim of fraud. Where appropriate, Member States shall act in cooperation with stakeholders.

Article 18 deals with the monitoring of the implementation of the Directive by Member States. By 31 August 2019, the Commission shall establish a detailed programme for monitoring the outputs, results and impacts of this Directive. The monitoring programme shall set out the means by which and the intervals at which the necessary data and other evidence will be collected. It shall specify the action to be taken by the Commission and by the Member States in collecting, sharing and analysing the data and other evidence. The Member States should bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 May 2021 and report this to the Commission (Article 18-20).

5. Summary and proposals

According to my view, the new Directive is a positive legal mean combatting the challenges in connection with fraud[34] related to electronic payment and virtual currencies. This will modernize the regulation in the Member States and create a legal harmonization which can suppress also the so-called forum shopping phenomenon when the offenders try to commit crimes in the state where the prescribed sanction is the lowest.

The Directive is also progressive that it deals with the phenomenon of virtual currencies because these transactions shall also be protected by criminal law measures.

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Witness Protection from the Aspect of Defence Attorney

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Abstract

One of the possible instruments of the criminal procedure in the fight against organized crime and high-level conspiracy is witness protection.

Witness protection, like any law enforcement measure, has some limitations. The use of the specially protected witness in the procedure of proof raises serious problems of the rule of law, as it reduces the defendant's freedom of defense, as the principle of the classical adversarial principle is violated.

He sets foot on the barren ground, giving up the classic rule of law prosecution in the hope of real or perceived law enforcement success.

Keywords*: witness protection, rule of law, fair trial, human rights, closed data management.*

I. Introduction

Due to the increase of the risk factors of criminality and global dangers, governments considered benchmarks in world politics see the solution to the challenges of crime in tightening[1] criminal law, based on arguments not proven scientifically and on preconceptions.

This criminal policy intending to increase severity and called „law and order" in the Anglo-Saxon terminology has sacrificed several unquestionable processual principles which have developed in the criminal proceedings for centuries on the altar of the rule of law with reference to 'security'. We should consider that based on the demonized and phantomized threats of terrorism[2] and organized crime[3] described as

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[1] Nagy, Ferenc, *Új fejlődési irányok, avagy a tradicionális jogállami büntetőjog eróziója* [New directions of development or the erosion of the penal law of the traditional rule of law]. Magyar Jog 1997/6, p. 333.

[2] See: Nagy, Melánia, *A terrorizmus új irányvonalai* [New trends of the terrorism]. In: (eds.) Bendes, Ákos – Nagy, Melánia – Tóth, Dávid: Lépést tud-e tartani a jog a XXI. század kihívásaival? Pécsi Tudományegyetem Állam-és Jogtudományi Kar Doktori Iskola, Pécs, 2019. pp. 91-95.; Gál, István László – Nagy, Melánia, *Terrorist financing with special attention ISIS*. In: (ed.) Velisav, Markovic: Sprečavanje i suzbijanje nasilja: IX naučni skup Mreža 2018. Valjevo,Univerzitet Singidunum, Fakultet zdravstvenih, pravnih i poslovnih studija, 2018, pp. 27-29; Tóth, Dávid, *The history and types of terrorism*. Law of Ukraine 2014/1, pp. 1-12.

[3] See: Gál, István László, *Organized crime in Hungary*, Journal of Eastern European Criminal Law 2015/1, pp. 22-25.; Nagy, Zoltán – Tóth, Dávid, *Computer related economic crimes in Hungary*, Journal of Eastern European Criminal Law 2015/1, pp. 22-25;

a postmodern nightmare[4], guaranteed principles such as the principle of immediacy, the right of defence, 'fair proceedings' etc. have been breached.[5]

Ignoring the principle of contradiction, at least from certain points of view, and the legal institution of the witness protection considered as a magic substance against organized crime, at least at the beginning, both fit into this deflation of the principles of criminal proceedings.[6]

In the topic of witness protection numerous studies have been published both in the international and national scientific literature, although the number of those studies which attempt to approach the problem from the standpoint of the accused who the witness is defended against, is insignificant.

Below we would like to contribute to the question of witness protection with some reflections based on the standpoints and interests of the defence attorney[7].

II. The rules of witness protection in the code of criminal proceedings de lege lata

According to Csaba Fenyvesi[8] in the Hungarian criminal proceedings witnesses can be divided into four big groups concerning their protection and the defence:

- the so-called general witness
- the witness with closed data management
- the witness with closed name and data
- the specially protected witness.[9]

Those belong to the category of the so-called *general witness* who do not request and do not get any protection. (Csaba Fenyvesi places the victim in this group also.)

The witness with *closed data management* is the witness whose personal data [Criminal Procedure Code 85.§(2) par] with the exception of his or her name cannot be revealed to the defence attorney. The closed data management of the witness' can be requested the witness, by the lawyer representing the witness' interests or can officially be ordered [Criminal Procedure Code 96.§(1) par].

The witness with *closed name and data* is the witness whose personal data and whose name are also handled in a closed way. It can be ordered only in exceptional, justified cases.

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[4] Kertész, Imre, *A tanú védelemre szorul [a büntető eljárásban]* [The witness needs protection (in the criminal proceedings)]. Magyar Jog 1993/4, pp. 193-199.; Bócz, Endre, *A tanúvédelem és az Európa Tanács* [Witness protection and the Council of Europe]. Rendészeti Szemle 1993/8, p. 7.

[5] See: Stănilă, Laura, *Specific aspects ont he right to a fair trial in the recent caselaw against Romania*, Journal of Eastern European Criminal Law 2019/1, pp. 166-169.

[6] See: Stănilă, Laura, *To punish or to torture? About inhuman treatment in the recent view of the Strassbourg Court*, Journal of Eastern European Criminal Law 2017/2, pp. 256-259.

[7] Fenyvesi, Csaba, *A tanúvédelem és a védőügyvéd* [Witness protection and the defence attorney]. In: A tanúvédelem útjai Európában, Elméleti és gyakorlati szempontok a tanúvédelemben (ed.: Róth, Erika), Bűnügyi Tudományi Közlemények 4., Bíbor Kiadó, Miskolc, 2002, p. 81: Csaba Fenyvesi suggests the use of the phrase 'defence attorney' for the lawyer who undertakes the defence of the accused.

[8] Fenyvesi, Csaba (2002) *cited,* pp. 84-85.

[9] Herke, Csongor, *Büntető eljárásjog* [Penal procedural law]. Jogi Szakvizsga Segédkönyvek, Dialóg Campus Kiadó, Budapest-Pécs, 2007, pp. 76-77.

Provided the closed management of the witness' data is ordered, the witness remains anonymous during the whole criminal proceedings[10] although theoretically it cannot be excluded that the witness himself or herself requests the closed data management be uplifted.[11]

The witness' data, which are to be managed in a closed way, the document containing the closed data have to be put in an envelope stamped and marked with the round rubber stamp of the court and placed among the other documents of the folder separated person by person. The fact of the closed data management has to be written on the cover of the folder, on the envelope containing the closed data and in the register [Rules of Procedure of the Court 41.§ (1) par].[12]

The envelope containing the closed data can be opened only by the judge, the judge deciding over the request for legal remedy or the person following the judge's order, providing revealing the data is necessary to effectuate the act of proceedings. To the request of another person entitled to get to know the closed data, the envelope can be opened by the judge or the office. The fact, cause and time of the opening of the envelope have to be marked on the envelope containing the closed data [Rules of Procedure of the Court 41.§(3) par].

According to Zoltán Varga although in the Criminal Procedure Law 96.§ (1) item there is no reference to the Criminal Procedure Law 213.§ (2) par, it is evident that the last sentence of this paragraph orders about the placement of the copy of the record about hearing the specially protected witness as well.[13]

The *specially protected witness* is the person whose data and person are not known by the defence attorney. The witness can be declared specially protected, if:

- his or her testimony refers to the circumstances of a case of special importance
- the proof expected from the testimony cannot be substituted
- his or her person, abode, and the fact that the prosecuting attorney and the investigating authority want to hear him or her as a witness is not known for the accused and the defence attorney
- in case of revealing his or her person, either the witness' or his or her relative's safety, personal freedom would be subject to serious threat.

Declaring a witness specially protected creates a *special procedural situation* as the witness cannot be subpoenaed [Criminal Procedure Law 280.§ (3) par], cannot be heard in the trial [Criminal Procedure Law 280.§ (3) par] and cannot be directly questioned [Criminal Procedure Law 263.§ (3) par and cannot be confronted [Criminal Procedure Law 124.§ (2) par].

The legislator defined the conditions of declaring the witness specially protected conuctively. The legislator does not define the concept of a case of *special importance*, neither in the code of proceedings nor in its justification. To decide what can be considered as a major circumstance in a case of special importance always requires

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[10] Varga, Zoltán, *A tanú személyi adatainak zárt kezelése* [The closed management of the witness' personal data]. In: Kiss, Sándor – Lassó, Gábor – Szepesi Máziné, Erzsébet – Ruzsás, Róbert – Szebeni, László Székely, Ákos – Varga, Zoltán – Vaskuti, András: A büntetőeljárási törvény magyarázata [Interpretation of the penal procedural law] 1. kötet, KJK-Kerszöv Jogi és Üzleti Kiadó Kft., Budapest, 2003, p. 189.

[11] Farkas, Ákos, *A bizonyítás* [Proof], In: Farkas, Ákos – Róth, Erik: A büntetőeljárás [The penal proceedings]. KJK-Kerszöv Jogi és Üzleti Kiadó Kft., Budapest, 2004, p. 117.

[12] 14/2002 (VIII.1.) Ministry of Justice decree about the rules of judicial conduct of affairs.

[13] Varga, Z., *cited,* p. 189.

concrete discretion. According to Zoltán *Varga* it does not necessarily mean the graver classification of the criminal act or more serious penalty, but it refers to *the circumstances, reason, motive of the criminal act* and its offender's and the involved others' *person.*[14] In general it can be said that those criminal acts can be considered of special importance which are designated in the Criminal Procedure Code 16.§ (1) and the Act XXXIV about the police of 1994 article 97.§ (1) paragraph i) par. Based on these two places in the mentioned laws, we can say that mostly those crimes are of special importance where the law imposes a punishment *more serious than a five-year imprisonment,* independently of whether the case is litigated at first level by the local court or it belongs to the jurisdiction of the county court. Furthermore, the case can be considered of special importance if it *continuously occupies the public opinion or it disturbs public order*. Thus, some bases can be provided to declare special importance but, sharing Zoltán Varga's opinion, it can only be decided by examining the circumstances of the concrete case.

The testimony has to refer to the *essential circumstances of the case*, which can be relating to financial law and/or procedural law, i.e. the legal judgement of the action, the question of guilt.

According to the Criminal procedure Code 97.§ b.) par, another precondition is the **i***rretrievability* of the testimony. (The old Criminal Procedure Code – Act I about criminal procedure of 1973 – was slightly inconsistent[15] to use the concepts of 'proof' and 'means of proof' almost as synonyms, which inconsistency was corrected by the in force procedural code.[16]) From the point of view of irretrievability, the testimony of another witness is out of question, as in this case, although it is possible to disregard declaring the witness specially protected, the other may have to be declared specially protected due to it. Nevertheless, such a case cannot be excluded either where there are two witnesses available for the same fact, data or circumstance, but in case of one of them the preconditions of being declared specially protected are not given, because his or her name and abode have already been known by the accused and the defence attorney, as states Zoltán *Varga*.[17]

A special case of the irretrievability of the testimony can appear when there is a hearing of a *witness of child age*. The Criminal Procedure Code automatically restricts it, as a person under fourteen can only be heard as a witness if the evidence expected form their testimony cannot be substituted with anything else. [Criminal Procedure Code 86.§ (1)]. However, in accord with Gabriella *Kulcsár*, in the case of a **specially protected child-witness** we have to pay attention even more to the dangers of the distortion of information.[18]

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[14] Varga, Z., *op. cit.* p. 192.

[15] Tremmel, Flórián, *Magyar Büntetőeljárás* [Hungarian criminal proceedings]. Dialóg Campus Kiadó, Budapest-Pécs, 2001, p. 216.

[16] Tremmel, Flórián, *A büntetőeljárás alapelvei* [The principles of criminal proceedings]. In: Fenyvesi, Csaba Fenyvesi – Herke, Csongor – Tremmel, Flórián: Új magyar büntetőeljárás [New hungarian criminal procedure], Dialóg Campus Kiadó, Budapest-Pécs, 2003, p. 219; Varga (2003) *op. cit.*, p. 144.

[17] Varga, Z., *cited,* p. 193.

[18] Kulcsár, Gabriella, *A gyermek-tanúvallomások információtartalmának torzulási lehetőségei* [Possibilities of the distortion of information of child testimonies]. In: Informatika és büntetőjog (eds.: Gál, László István – Nagy, Zoltán András), PTE Állam-és Jogtudományi Kar Büntetőjogi Tanszék, Pécs, 2006, p. 119-132.

The **person, abode** of the witness ought to be **unknown**[19] for the accused and the defence attorney, otherwise the declaration of special protection would lose its purpose and sense. The aim of this decree is that the witness will not be identifiable or accessible. László *Korinek* draws attention to that unidentifiability may be a serious problem for the **notaries** as the notary can give information about the facts assessed in their official proceedings only after obtaining the client's statement exempting him or her from the duty of secrecy. Due to this exemption as a preliminary procedural act, his or her personality cannot remain concealed.[20]

The name can refer to surname, first name, nickname, by-name etc. From the abode it is indifferent whether that is the witness' permanent or temporary address, temporary (occasional) abode e.g. a hotel, a holiday home lent by a friend to use free of charge etc.

Provided the person of the witness is revealed, the *witness' or their relative's life, health, corporal inviolability, personal freedom* would be subject to *serious threat*. Revealing the person of the witness may mean that his or her data got exposed, furthermore it also includes the case when not the witness' data, but other distinctive feature such as their photo, portrait, or the fact they are lame in the left leg becomes known, and with possessing this information the witness can be identified.

The legislator expands the circle of those potentially endangered to the relatives of the witness. A relative is a relative of direct descendent and their spouse, a foster and adoptive parent, a foster or adopted child, a sibling, a spouse, a common-law wife/husband and, betrothed, the direct descendant and sibling of the spouse and the sibling's spouse. [Criminal Code 137.§ 6.]

For the concept of threat, the Criminal Code gives a declaratory statute, in accordance which when applying this law, in the lack of a different decree, threat means anticipating severe detriment which can evoke serious fear in the threatened person. [Criminal Code 137.§ 18.].

In the practice of law there is a known view, which we also think requires consideration, according to which the witnesses with closed data management and those with closed name/data in fact mean one single case group.

Providing the witness requests the closed management of his or her data, though it must seem heresy at first glance, the court is essentially bound to order it, as it could be hard to explain why to refuse a decree ordering closed data management.

III. Provisions of the Witness protection in the dimension of European legislative

We can read more about the issue of witness protection from a European point of view in the domestic literature[21], but briefly summarize the legal background in this

[19] The Procedure Code uses the denotation 'unknown'. [97.§ c. par.]

[20] Korinek, László, *Tanúvédelem, a közjegyző, mint védett tanú* [Witness protection, the notary as a protected witness], Közjegyzők Közlönye 2000/1, p. 10.

[21] See: Fenyvesi, Csaba, *Védő és tanú* [Defender and witness], Ügyvédek Lapja, 2001/1, 44-45. o.; Gáspárdy Gergely: *A tanúvédelem eszközei, modelljei* (I. rész) [Tools and modells of witness protection 1. Part]. Collega 1999. december-2000. január (III. évf. 12. szám), p. 16-25.; Karsai, Krisztina: *Az európai büntetőjogi integráció alapkérdései* [Fundamental questions of the european criminal law integration]. KJK-Kerszöv Jogi és Üzleti Kiadó Kft., Budapest, 2004, pp. 123-124.; Róth, Erika: *A*

regard, trusting that there are some readers for whom we can serve some novelties.

Convention on the Protection of Human Rights and Fundamental Freedoms, concluded under the auspices of the Council of Europe. Article 6 of the international legal instrument, entitled 'Right to a fair trial', contains the following provisions:

"1. Everyone has the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, and to give judgment… on the merits of the criminal charges against him. „

'(3) Any person suspected of having committed a criminal offense has the right – at least - to... (d) to question or put questions to witnesses in the prosecution and to summon and question witnesses on his behalf under the same conditions as summoned and questioned witnesses to the charges.[22]

According to the Convention there is a conflict between the interests of investigation (and those of witness protection) and *fair trial*. "Fair trial"[23] involves[24] allowing the witness or his counsel to ask questions to the witness, thus ensuring the principles of immediacy and publicity.

Several judgments of the European Court of Human Rights[25] have dealt with the right of the defendant to question and anonymous witnesses [e.g. Bönisch v. Austria (1985)[26], Unterpertinger v. Austria (1984), Delta v. France (1990), Kostovski v Netherlands (1990), Lüdi v Switzerland (1992), Doorson v Netherlands (1996)[27], and Van Mechelen and Companions v. The Netherlands (1997), Cheeses v. Greece (2002)[28]].

From the case law of the Strasbourg it is clear that a court basing a conviction solely on the testimony of anonymous witnesses who cannot be heard by the defense is in violation of Article 6 § 3d of the Convention.

Examining the jurisprudence of the European Court of Human Rights, Károly Bárd asks: "Should different standards be applied to the fairness of proceedings and other

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büntetőeljárás garanciái [Guarantees of the criminal procedure]. In: Emberi jogok [Human rights]. (eds.): Halmai, Gábor – Tóth, Gábor Attila. Osiris Kiadó, Budapest, 2003, pp. 703-735.; Marton, Melitta, *A tanúvédelem büntető eljárásjogi eszközrendszere Magyarországon* [Criminal procedure means of the witness protection in Hungary]. Diskurzus 2015/2, pp. 11-15.; Takács, Dóra, *Mit véd a tanúvédelem?* [What protect the witness protection?]. Börtönügyi Szemle 2011/4. pp. 49-53.; Tremmel, Flórián, *A tanúvédelem hazai körképe* [Inland panorama of the witness protection]. JURA 2008/1. pp. 144-149.; Rajmon, Balázs, *A tanúvédelem útja Európában* [The way of the witness protection in Europe]. Magyar Jog 2004/1, pp. 61-62.; Szabó, Krisztián, *A tanúvédelem eszközei a magyar büntetőeljárásban* [Tools of the witness protection in the hungarian criminal procedure]. Collectio Iuridica Univwersitatis Debreceniensis 2004/4, pp. 223-235.

[22] Szabó, Győző – Nagy, Gábor (eds.), *Emberi Jogi Füzetek* [Human rights books]. A Bírósági Határozatok Melléklete, 1999/1, Hvg-Orac Lap-és Könyvkiadó Kft. Budapest, 1999, p. 86.

[23] Trechsel, Stefan, *Why Must Trials be Fair?*, Israel Law Review, Volume 31, No. 1-3, Winter-Summer 1997, pp. 94-119.

[24] Gáspárdy, Gergely, *A tanúvédelem eszközei, modelljei* (II. rész) [Tools and modells of witness protection 2.Part]. Collega 2000.június-július (IV. évf. 3.szám), p. 16.

[25] See: Stănilă, Laura: *Artificial intelligence and human rights: a challenging approach ont he issue of equalitiy*, Journal of Eastern European Criminal Law 2018/2, pp. 19-23.

[26] See: Arlay Adrienn: A tanú szerepe a jelen büntetőjogában, avagy hogyan védi az 1998. évi XIX. törvény a tanút, In: Gellér Balázs-Hollán Miklós (szerk.): A Szervezett bűnözés arcai (Fiatal büntetőjogászok tanulmányai a szervezett bűnözésről), Rejtjel Kiadó, Budapest, 2004, p. 156.

[27] Tóth, Mihály: *A magyar büntetőeljárás az Alkotmánybíróság és az európai emberi jogi ítélkezés tükrében* [The criminal procedure in the mirror of the Constitutional Court of Hungary and the european human rights trial]. KJK-Kerszöv Jogi és Üzleti Kiadó Kft., Budapest, 2001, p. 178.

[28] Bán, Tamás: *Az Emberi Jogok Európai Bírósága határozataiból* [Decisions of the European Court of Human Rightss]. Fundamentum, 2002/2, p. 109.

fundamental rights, depending on the gravity of the crime being prosecuted?"[29] The Court does not allow derogations from 'the general standard of the fair trial due process on grounds of the interest of the community in the security of the prosecution of particularly serious criminals. The weight of the charge (accusation) cannot justify weakening the protection promised by the fair trial. However, the acceptable degree of restriction of other substantive rights is independent of the gravity of the criminal proceedings in question, provided, of course, that the right may be restricted at all.'[30]

Before Hungary became a member of the EU, it had to comply with several witness protection standards included in the mandatory acquis list. These were, to name but a few:

● *Council Resolution* of 23 November 1995 on the protection of witnesses in the fight against international organized crime[31]

● *Council Resolution* of 20 December 1996 on individuals who cooperate with the judicial process in the fight against international organized crime[32].

● *Council Framework Decision* of 15 March 2001 on the position of the victims in criminal proceedings[33].

[It is also worth noting the general proposal for a Council Decision establishing the specific Program "Prevention of and Fight against Crime" for the period 2007 to 2012 as "Non-legislative action" {SEC (2005) 436} Communication from the Commission to the Council and the European Parliament - Developing a strategic concept on tackling organized crime {SEC (2005) 724}.

IV. Some problems concerning witness protection

Imre Németh states the scruples concerning the credibility of the protected witness[34] as follows.[35] According to his opinion, it can happen that a previous offender appears as a witness in later proceedings. The protected witness (the collaborating suspect) is under duress when concluding the bargain of the investigation: „one of the possibilities is that the investigation against him or her goes on with accusation and is convicted of committing a crime, while the other possibility is that he or she provides

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[29] Bárd, Károly, *Demokrácia – tisztességes eljárás – megismerés a büntető perben* [Democracy – fairt trial – recognition in criminal procedure]. In: Emlékkönyv Kratochwill Ferenc (1933-1993) tiszteletére – Tanulmánykötet (ed.: Farkas, Ákos) Bűnügyi Tudományi Közlemények 5. Bíbor Kiadó, Miskolc, 2003, pp. 83-84.

[30] Bárd, K., *cited,* pp. 86-87.

[31] Resolution of the Counsil of 23. November 1995. on the protection of witnesses in the fight against international organizem crime, Official Journal C 327, 07/121995 P. 0005-005.

[32] Coumsil Resolution of 20. December 1996. on individuals who cooperate with the judicial process in the fight against international organized crime.

[33] See: Róth, Erika, *A sértett szerepe a büntetőeljárásban – avagy mit kíván az Európai U*nió [Role of the victim in the criminal procedure – or what want the European Union]. In: Emlékkönyv Kratochwill Ferenc (1933-1993) tiszteletére, Bűnügyi Tudományi Közlemények 5., tanulmánykötet. (ed.): Farkas,Ákos. Bíbor Kiadó, Miskolc, 2003, pp. 43-45.

[34] Bócz, E., *cited,* p. 10.

[35] Németh, Imre: *A tanú nevének és személyes adatainak zárt kezelése a gyakorlatban és az ezzel kapcsolatos kérdések* [The closed management of the name and personal data of the witness in practice and referring questions]. In: (eds.) Gellér, Balázs – Hollán, Miklós: A Szervezett bűnözés arcai (Fiatal büntetőjogászok tanulmányai a szervezett bűnözésről), Rejtjel Kiadó, Budapest, 2004, pp. 111-113.

information and the prosecution against him or her stops, though on the basis of the information he or she provides there is prosecution going on against their accomplices."[36]

The judicial practice has given evidence of appropriate wisdom concerning the assessment of the testimony of the protected witness. The Supreme Court expresses in connection with the formal Criminal Code that „the cellmate's testimony incriminating for the accused has to be treated with increased foresight, as he or she may have an interest in making a testimony which, according to his or her judgement, can be advantageous for the investigator and may hope advantages for himself or herself; therefore it is reasonable to accept the cellmate's testimony as credible evidence if it is proven by other data or else it contains facts that could be gathered exclusively from the accused".[37]

During the criminal proceedings the authority may get in a difficult situation if the hearing of the protected witness is proposed. As the authority cannot reject the proposal referring to that the person of the witness to be heard is the same as the protected witness, thus how can the rejection be explained?

The *„principle of the equality of the arms"* expresses[38] the demand[39], according to professor Mihály *Tóth,* that on one hand the accuser and on the other hand the accused (and their defence attorney) have the same rights in the proceedings, the same possibilities, and the same means in the lawsuit to express their standpoint.[40] It may be unnecessary to expound how much the principle of the equality of the arms is breached in case of a protected witness.

The in force Criminal Code[41] does not contain expressis verbis the wording of *the principle of immediacy,*[42] but according to professor Tremmel, whose interpretation we share, it is possible to induce that with an inductive approach[43] and generalization form the details, with abstraction.[44] Applying the decrees of witness protection results in the damage of this principle which gives this essence of the trial, as clashing the

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[36] Németh (2004), *cited,* p. 111.

[37] BH 2000. 192

[38] Misi, László: *Európai mérce a rendőrségi eljárásokban, a büntetőeljárások nyomozati szakaszában* [European standard in police procedures, in the investigating phase of the criminal proceedings]. Rendészeti Szemle 2007/2, p. 104.

[39] Spitz, János: *Korreferátum Bánáti János „A védő szerepe a bizonyítási eljárásban" c. előadásához* [Supplementary paper to János Bánáti's lecture entitled 'The role of the defence attorney in the evidentiary procedures]. In: Huszonkettedik Jogász Vándorgyűlés, Sopron 2005.május.19-20. (ed.: Beninsné, Győrffy Ilona), Magyar Jogász Egylet, Budapest, 2005, p. 158.

[40] Tóth, Mihály: *A büntetőeljárás alapelvei* [The principles of criminal proceedings]. In: Bánáti, János – Belovics, Ervin – Csák, Zsolt – Sinku, Pál – Tóth, Mihály – Varga, Zoltán: Büntető eljárásjog, második, átdolgozott, hatályosított kiadás, (ed.: Tóth, Mihály), HVG-ORAC Lap-és Könyvkiadó Kft, Budapest, 2006, p. 43.

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[43] Tremmel, F., *cited,* pp. 99-100.

[44] Tóth (2006) *cited,* p. 41.

different testimonies is impossible and in most cases the documents of the investigation can only be used as evidence.[45] Flórián *Tremmel* thinks that „in proceedings where the preliminary proceedings have a big or bigger weight than the judicial proceedings (such a trial was i.e. the inquisitorial trial) the destiny of the evidence has often been decided in the preliminary proceedings and the judicial proceedings are there in fact only to confirm, attest the gained evidence. However, this attitude of administering evidence, this bureaucratic solution challenges the dispensing of justice, as it pushes the use of the nonverbal elements, moments, the metacommunicational processes in the background."[46]

Judit *Kovács* considers the achievement of the principle of immediacy[47] guaranteed, in contrast with other views of legal practice, in the case of interrogations in a videoconference[48] (of course the distinctive features which can help the witness' identification are technically 'distorted').[49]

In the scientific literature Zsolt *Szomora* draws attention to the so-called *„rules of the small state's evidence"*. The regulation has two purposes, on one hand it helps access to information during the investigation, on the other hand, it helps the prevention, impeachment of crimes in the stage of 'planning'.[50] In the legal practice of some countries it appears that the offender expansive and talkative with the authority may get special mitigation of punishment. [The Austrian Penal Code (StGB) 41.a § gives this mitigation to the offenders of criminal association,[51] criminal organization[52] and terrorist association[53] according to which punishment not reaching the smallest possible legal punishment may as well be imposed provided this mitigation corresponds to the proportion of the offender's crime and the revealed facts.[54]]

In case of an accomplice witness, taking into consideration that often they may be people with a criminal career i.e. when revealing a delictum connected to organized crime, what can guarantee that the person collaborating with the authority does not accuse or bear false testimony in the hope of penal mitigation?[55]

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[45] Tremmel, F., *cited,* p. 100.

[46] Tremmel, F., *cited,* p. 100.

[47]Ábrahám, Márta, *A német tanúvédelmi törvény, különös tekintettel a videotechnika alkalmazására a büntetőeljárásban* [The German Act of Witness Protection with special regard to applying video technology in the criminal proceedings]. Jogtudományi Közlöny 2001/7-8, p. 322.

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[51] StGB § 278 Kriminelle Vereinigiung.

[52] StGB § 278a Kriminelle Organisation.

[53] StGB § 278b Terroristische Vereinigiung.

[54] http://www.sbg.ac.at/ssk/docs/stgb/stgb_index.htm- 2007 February 6.

[55] Németh, I., *cited,* p. 112.

V. Witness protection in the new Hungarian Criminal Proceedings Code

In the regulation of the Hungarian criminal proceedings the possibility of individualization, considering the individual needs of the person participating in the criminal proceedings[56] have become more accentuated. This interpretation meets the requirements stated in both the relevant international legal documents and the scientific literature.

Since the adoption of the Hungarian criminal procedural code in 1998 the legislator has altered it 89 times and it has affected about 2000 paragraph places, thus there have been some coherence-disturbances in some cases in practice.

Due to partly these incoherences, the Hungarian legislator decided to make a new criminal procedure code. The Act XC of 2017 about the criminal proceedings will take effect on 1 July 2018. Chapter XIV of the new law with the title *'Ensuring special treatment in the criminal proceedings'* instructs about the rules of witness protection.

According to the criminal procedural law 81.§ (1) paragraph, the witness is considered a person requiring special treatment, if based on their personal features or the nature and circumstances of the crime subject to the proceedings, they are hindered in understanding, conveying, practicing the laws set in the criminal procedural code or discharging an obligation or effectively participating in the criminal proceedings.

The chapter wants to ensure with the regulations concerning special treatment on one hand the effectiveness of the individuals' rights, fulfilling their obligations, forbearance of their person, on the other hand it also contains protective means in case the life, health and personal freedom of the witness in connection with their participation in the penal proceedings may be exposed to severe danger, or that they practice their rights and obligations in accordance with the criminal procedural law without intimidation and manipulation.

Paragraphs 90-93 § of the criminal procedural code instruct about the specially protected witness. Declaring a person, a specially protected witness is possible only in case of those witnesses requiring special treatment to the proposition of the court or prosecution.

However, according to the new law it does not belong to the conditions (see 1.) that the person, abode of the witness be unknown for the accused and the defence attorney. The law extended the last condition to the state of intimidation arising from the revelation with the hearing as a witness.

In case of declaring a person a specially protected witness, provided the law does not order otherwise, the files concerning the proceedings (and proposals) with the participation of the witness have to be treated in a closed way among the files of the proceedings.

In case the declaration of a specially protected witness discontinues, the court discontinues the closed management of the referring files

The new law contains the circle of those people who can be present in the proceedings requiring the participation of a specially protected witness. Before the act of accusing, those who can be present are the prosecuting attorney, a member of the investigating authority, the court reporter, in a justified case an expert and consultant,

[56] Act XC of 2017 on the Criminal Proceedings. Reasons Chapter XV.

the assistant of the specially protected witness and other person necessarily affected in the proceedings. After the act of accusing, the proceedings are performed by a court of arbitration or by a commissioned judge, where the accused and the defence attorney cannot be present.

A significant innovation is that the presence of the specially protected witness in the proceedings can be ensured via telecommunicational means, provided it does not result in the revelation of their person. In order to ensure the anonymity, the distinctive features of the witness are distorted with technical devices. It can only be proposed that those present may ask questions and the witness can refuse to make a testimony to data with which it is possible to conclude his name, address, abode.

The law instructs about the regulations of making a record of the proceedings with the participation of a specially protected witness and of managing its extract and of using the testimony as means of proof. The record has to be managed in a closed way, the extract contains exclusively the members of the court, prosecution and investigating authority present, the fact of the declaration of special protection and the description of the proceedings. These regulations strengthen those intentions that the person and availability of the specially protected witness remain concealed.

It is important to mention that the new criminal procedure code devotes a whole chapter (XV) to the protection of the data handled in the proceedings.

The specially protected witness takes part several times in the so-called *Protective Programme* as their safety can only be guaranteed with this.

VI. Final reflections

In the legal practice there is a known view that recently there have been efforts to try to get the members of the circle of the suspected criminals with compromises, bargains to testify against their accomplices in the hope of mitigation.[57] Naturally there may arise doubts with the coverage of reality of such testimonies, as in case of a serious action for the accused nothing can be expensive enough to have their delictum judged more favorably. The oppressive weight of the proceedings, the exposed situation may make the witness testify in a way that can be unpleasant for him or her in later stages of the case.[58]

For the defence the cooperation between the protected witness and the authority is not transparent as they can see only a minute when unfolding the documents. The questions that can be asked only in writing do not help check the coverage of reality of the testimonies and the interrogation via a closed-circuit telecommunicational network cannot help either. What would be preferable is if all witnesses should come before the court, and all witnesses could directly be questioned.

After the testimony, in case it is necessary, the witness could get into the witness protection program, respectively such a possibility could also appear already during the investigation.

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[57] See: Gál, László István: *Economic Bribery as a Part of Economic Criminal Law and a Concomitant of Political Corruption*. Journal of Eastern-European Criminal Law 2014.1. pp. 22-27; Tóth, Dávid, *A korrupciós bűncselekmények szabályozásának története Magyarországon* [Regulation history of the corruption crimes in Hungary]. Büntetőjogi Szemle 2015/3. pp. 107-109.

[58] See: Gál, László István: *Economic policy, criminal policy and economic crimes,* Journal of Eastern-European Criminal Law 2019.1. pp. 100-103.

In the case of the 'simple (general) witness' or the witness with closed data management, the already functioning separation of the witness and the accused would be preferable, say the witness would meet the accused only in the court-room, the witness is waiting in a separate room, arrives and leaves separately. In most of the cases this closed name and data management is sufficient to protect the witness' security.

The institution of the protected witness may result in undesired phenomena, as the investigating authority can hardly say no to a testimony promising results, especially in criminal cases occupying the citizens and the mass media and often considering and weighing what may have motivated the witness in the course of the investigation fails to come about.

In case of crimes with several perpetrators in particular legal institutions [i.e. rejecting denunciation Criminal Procedure Code 175.§ (1), (2)], at least according to some views of legal practice, now and again there can be seen efforts that a suspect would rather be exempted if he or she provides firm evidence concerning the other perpetrators.

The damning testimony against himself or herself and others may mean serious evidence. Naturally the collaborating accused may be forced to meet his accomplices as a witness. Declaring the witness protected, or the closed data management can provide security, though in case the person of the witness is revealed for the accused, and hearing the witness is submitted in the form of a proposal of proof before the court, does the court use due care if they make the person of the witness indubitable? Is it disputable if the court subpoenas and questions the witness originally declared a protected witness before the defence attorneys, and then they bring the witness who got into a difficult situation as a result, face to face with the accused? Obviously in the course of the investigation the witness wanted to reach the status of the protected witness, but the proceedings took a turn and the hearing of the witness became 'necessary'. The not thoroughly considered administration of the case can ruin the status of the witness with closed name and data, and the witness may even lose more due to the difficulty of the evidence during the proceedings. There is the danger that the witness who lost their protected status and became known makes a testimony that cannot be practically appraised and 'withdraws' their former statements.

It can also happen that the collaborating-accused witness wrongly considers himself or herself a protected witness, though he or she has been provided with only closed data management, which could later give him or her little security.

Solving witness protection suffers from a peculiar problem. According to Flórián Tremmel[59] a requirement is that the accused get to know the source of testimony, say the witness from top to toe, together with his or her personal data, as a real person; the other requirement is that the authority provide full protection for the witness in the sometimes excessive length of the proceedings (and perhaps after that as well). These two contrasting interests cannot be reconciled, the predominance of either the first or the second interest happens.

According to Zoltán Varga in recent years attempts to intimidate the witnesses have become more frequent. However, this tendency can be seen not only in case of the so-called accusing but in general that of the witnesses, as who is accusing and who

[59] Tremmel, F., *cited,* p. 240.

is a witness for the defence[60] turns out only after making the testimony, after instituting the proceedings of evidence.[61]

We still consider prevalent the statements of Ákos Farkas and Erika Róth which they published one and a half decades ago in the columns of Magyar Jog [Hungarian Law]: „We do not consider acceptable if the right of the defence to be present in questioning the witness in the course of the investigation is diminished, or if personal data are declared 'closed matter' in connection with all criminal acts, or if in the trial the testimony is read up or the interrogator of the witness is questioned. Both of them violate the constitutional right to defence and the rights to defence as stated in the Convention for the Protection of Human Rights and Fundamental Freedoms Article 6 III. paragraph d) item."[62]

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Corruption Criminal Offenses as Predicate Economic Crimes to Money Laundering

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Abstract

The paper assumes that corruption offenses, as one of the typical phenomenological forms of economic crime, represent predicate crimes to money laundering. Therefore, the principal goal of the paper is the examination of the causal link between money laundering and corruption criminal offenses. In order to questioning the validity of the starting hypothesis, in the first part of the paper, it is analyzed the international and European legal framework concerning corruption offenses as predicate crimes to money laundering. After analyzing the relevant provisions of the named legal framework, it seems that the next step is the process of considering the most common phenomenological forms of corruption offenses as predicate crimes to money laundering. However, since there are numerous phenomenological forms of corruption offenses, in this paper, it will be analyzed only the following: 1) abuse of office; 2) soliciting and accepting bribe as well as making bribe; 3) influence peddling and 4) embezzlement. Finally, the last part of the paper is dedicated to analyzing the methods of laundering the proceeds arising from corruption offenses, according to the criteria of the entity through which money is laundered. Considering the variety of phenomenological forms of money laundering arising from corruption offenses, as well as the concealment in the placement and integration of laundered money into legal financial flows, in the concluding considerations some recommendations, for implementing a proactive approach in the process of detecting this crime, are provided.

Keywords: *corruption offenses, predicate crimes, money laundering, economic crime*

I. Introduction remarks

Money laundering means the process of conversion or transfer of illegally derived property, by concealing or disguising the illicit origin of that property, as well as eliminating traces of its acquisition, possession or use in order to integrate laundered proceeds into legal financial flows.[1] In that context, it should be noted that money laundering has three stages of execution:

1) placement of illegally derived property into financial flows;
2) concealment of the source of acquisition or possession of that property and

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3) integration of laundered proceeds into legal financial flows. During the placement phase, perpetrator inserts the proceeds derived from corruption criminal offenses in the financial system, through e.g. gambling activities.[2] This stage is followed by the next one, known as concealing stage, when illegally derived proceeds flow through financial system, by the realization of a numerous of different forms of transactions, such as cases of fictitious sale and purchase, fraudulent contracts, use of trusts, companies and similar specialized forms of legal entities whose role is to assist in the transfer of illegal proceeds to the desired destination.[3] Finally, in the last phase, so-called integration stage, occurs the unification of illegal proceeds derived from corruption offenses with legal proceeds in financial system, through the investment of proceeds derived from corruption criminal activity in e.g. the real estate market, purchase of luxury goods, import-export business ventures, jewelry trade.[4]

When it comes to the proceeds derived from corruption criminal offense, it should be noted that property subject to money laundering may derive from any criminal activity, including proceeds derived from corruption offenses.[5] In other words, corruption offenses can be predicate crimes to money laundering, which implies that laundered proceeds may derive from some corruption crime. In this regard, the main goal of this paper is to explain the causal link between money laundering and corruption criminal offenses with a focus on the analysis of relevant international and European framework as well as the most common phenomenological forms and modus operandi of corruption offenses recognized as predicate economic crimes to money laundering.

II. International and european framework regarding corruption criminal offenses as predicate economic crimes to money laundering

At the UN level, money laundering has begun to attract the attention of decision-making stakeholders since the late 1980s, when the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* was adopted in Vienna in 1988, sanctioning, among other things, acts of laundering of proceeds of crime derived from illicit traffic in narcotic drugs and psychotropic substances.[6] However, in this sense, it should be noticed that the main limitation of this Convention is related to the fact that it recognized only criminal offenses concerning illicit traffic in narcotic drugs and psychotropic substances as predicate crimes to money laundering. In other words, according to this Convention, corruption offenses had not been recognized as predicate crimes to money laundering.

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[2] Srbljanovic, R., et. al., *Money Laundering typologies in the Republic of Serbia*. OSCE Mission to Serbia, Belgrade, 2013, 11.

[3] Royal Institution of Chartered Surveyors, *Countering bribery, corruption, money laundering and terrorist financing*. Royal Institution of Chartered Surveyors, London, 2019, 3.

[4] Reed Q., Fontana A. „Corruption and illicit financial flows-the limits and possibilities of current approaches" *Chr. Michelsen Institute U4 Issue* No.2. 2-13.

[5] UNODC, *Money laundering and financing of terrorism*. UNODC, Vienna, 2009, 12;Bošković A., Pavlović Z., „Special Evidentiary Actions in the Function of Combating Organized Crime in Serbia", *Journal Of Eastern ¬European Criminal Law*, No.1. 2015, 41.

[6] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 20 December 1988, United Nations, Treaty Series, vol. 1582.

Therefore, it should be mentioned that criminalization of the laundering of proceeds of crime received broader significance from 2000 when the *United Nations Convention against Transnational Organized Crime* was adopted in Palermo, since it did not only limited criminal offense of money laundering to the proceeds derived from illicit traffic in narcotic drugs and psychotropic substances, but also has extended the provision to include the wide range criminal offenses as possible forms of predicate crimes to money laundering, especially those related to the area of organized crime.[7] In this respect, the additional significance of this convention is recognition of corruption criminal offenses as one of the predicate offenses to money laundering, in the form of promising, offering or giving bribe on the one hand, as well as soliciting or accepting bribe, on the other hand.

Although the United Nations Convention against Transnational Organized Crime has established the link between money laundering and corruption offenses, the comprehensive recognition of corruption offenses as the form of predicate economic crimes to money laundering was introduced by the *United Nations Convention against Corruption* adopted in New York in 2003, prescribing as standalone crime laundering of proceeds derived from corruption criminal offenses.[8] In this sense, it should be mentioned that this Convention has prescribed a wide range of corruption crimes including the following:

a) bribery of national public officials (Article 15);

b) bribery of foreign public officials and officials of public international organizations (Article 16);

c) embezzlement, misappropriation or other diversion of property by a public official (Article 17); g) trading in influence (Article 18);

d) abuse of functions (Article 19);

f) illicit enrichment (Article 20);

e) bribery in the private sector (Article 21) and g) embezzlement of property in the private sector (Article 22).

On the other side, when it comes to the Council of Europe's framework regarding recognition of corruption criminal offenses as the form of predicate economic crimes to money laundering, it should be emphasized that there are two main legal acts (Pavlović, 2018: 58).[9] Firstly, there is *Criminal Law Convention on Corruption* adopted in 1999 in Strasbourg which has prescribed as standalone criminal offense - money laundering of proceeds from corruption offences, meaning under this crime the following phenomenological forms of corruption crimes such as:

a) active bribery of domestic public officials (Article 2);

b) passive bribery of domestic public officials (Article 3);

c) bribery of members of domestic public assemblies (Article 4);

d) bribery of foreign public officials (Article 5);

e) bribery of members of foreign public assemblies (Article 6);

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[7] United Nations Convention against Transnational Organized Crime, New York, 15 November 2000, United Nations, Treaty Series, vol. 2225. V. Cvetković, „U susret izmenama zakona o oduzimanju imovine proistekle iz krivičnog dela", *Bilten vrhovnog kasacionog suda*, br. 2, 2016, 35-36.

[8] United Nations Convention against Corruption, New York, 31 October 2003, United Nations, Treaty Series, vol. 2349.

[9] Pavlović Z., „Institucionalni kapaciteti Srbije za suprotstavljanje organizovanom kriminalu, terorizmu i korupciji", *Zbornik radova sa naučne konferencije Finansijski kriminalitet. (ur. J.Kostić, A.Stefanović)* Institut za uporedno pravo i Institut za kriminološka i sociološka istraživanja u saradnji sa Pravosudnom akademijom. Beograd, 2018, 58.

f) active bribery in the private sector (Article 7); g) passive bribery in the private sector (Article 8);

h) bribery of officials of international organizations (Article 9);

i) bribery of members of international parliamentary assemblies (Article 10);

j) bribery of judges and officials of international courts (Article 11); and

k) trading in influence (Article 12).[10]

Finally, considering the issue of money laundering derived from corruption criminal offenses, relevant legal act at the Council of Europe level represents the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism* adopted in Warsaw in 2005, which has recognized criminal offenses of bribery as well as embezzlement as predicate economic crimes to money laundering.[11]

III. The most common phenomenological forms of corruption offenses as predicate economic crimes to money laundering

Depending on the nature of corruption offenses, money laundering can be manifested through various phenomenological forms of execution (Financial Conduct Authority, 2013: 3).[12] However, the most typical manifestations of money laundering derived from corruption offenses are the following:

1) abuse of office;

2) soliciting and accepting bribe as well as making bribe;

3) influence-peddling and

4) embezzlement.

First of all, it should be noted that *abuse of office* as predicate crime to money laundering includes perpetrator's acts of abusing of office or authority, exceeding the limits of his official authority or dereliction of duty with intent to acquire for himself or another natural person or legal entity any benefit, or to cause damages to a third party or seriously violate the rights of another. In this regard, an illustrative example of abuse of office is the case of a general director of a state-owned company who, through abuse of his or her official position, acquired for himself benefit by making a fictitious contract with a foreign company concerning the purchase of equipment, without the intention of implementing it. Instead of that, the perpetrator, after the transfer of money to a bank account of a foreign company falsely intended for the payment of the agreed equipment, was transferred it to its own non-resident accounts that were opened in numerous foreign countries for the purpose of using that money for purchase of real estate and motor vehicles, thereby committing money laundering derived from a corruption crime.[13]

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[10] Criminal Law Convention on Corruption, Strasbourg, 27.I.1999, Council of Europe Treaty Series-No. 173.

[11] Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, Warsaw, 16.V.2005, Council of Europe Treaty Series -No. 198.

[12] Financial Conduct Authority, „Anti-Money Laundering and Anti-Bribery and Corruption Systems and Controls" Financial Conduct Authority, London, 2013, 3.

[13] Pantelić J., et.al. *Money Laundering typologies- Money Laundering case studies*, OSCE Mission to Serbia, Belgrade, 2015, 57-58.

On the other hand, in the context of *soliciting and accepting bribe as well as making bribe*, the process of money laundering derived from corruption offenses can be explained through two successive stages.[14] The first stage involves arranging the transfer of money or gifts to the recipient of the bribe in exchange for authorizing the execution of some kind of service, e.g. for the right to use certain state resources, a perpetrator pays the fee to the corrupt official for that service. In the next phase, the bribe giver transfers funds appropriately to the bribe recipient, from the modus operandi such as payment of cash services fees, through more complex methods such as depositing funds into the accounts of the bribe recipients that are opened in his home country in the name of a fictitious natural or legal person, to those the most complex which involve the transfer of funds outside the home country of the recipient of a bribe through e.g. shell companies and trusts, by making electronic money transfers to accounts opened in offshore countries where the origin of illicit proceeds can be easily concealed, with the aim of investing such laundered proceeds into a legal activity.

Furthermore, predicate crime of money laundering may be the *influence-peddling* where a domestic or foreign official, solicits or accepts, makes a promise or an offer, or gives either directly or through a third party a reward or any other benefit for himself or another in order to use his official or social position or his real or assumed influence to intercede for the performance or non-performance of an official act or to intercede for performance of an official act which should not be performed or for non-performance of an official act which should have been performed. For example, this may be the case with an official who requires from a legal entity that seeks to invest in a particular business to agree in advance on the distribution of profits that is expected, in order to influence through his or her official or social position to get that legal entity business. Finally, phenomenological forms of money laundering derived from corruption offense can be embezzlement.[15] In this sense, it should be noted that this offense covers cases in which a perpetrator appropriates money, securities or other movables entrusted to him by virtue of office or position in government authority, enterprise, institution or other entity or store with the intent to acquire for himself or another unlawful material gain. Thus, for example, in the first stage a person who is an employee in a government agency, appropriates money entrusted to him for the implementation of environmental contracts in the field of waste water management with the intent to acquire for himself or another unlawful material gain, committing thus criminal offense of embezzlement. Subsequently, in the second stage perpetrator commits money laundering by e.g. transferring the proceeds derived from embezzlement, as a corruption crime, into fictitious third-party accounts in foreign countries.[16]

IV. Modus operandi of corruption offenses as predicate economic crimes to money laundering

Due to the complexity as well as a variety of modus operandi of money laundering derived from corruption offenses, it is almost impossible to point out all existing

[14] Ivanov E., „AML/CFT and Anti-Corruption Compliance Regulation: Two Parallel Roads?“ Laxenburg: International Anti-Corruption Academy, *Research Paper Series* No. 2, 2018, 6.

[15] FATF, *Laundering the Proceeds of Corruption*. FATF, Paris, 2011, 16.

[16] Ferguson G., *Global Corruption*, University of Victoria, Victoria, 2018, 308-311.

methods of execution. Therefore, it will be analyzed only those ways of execution according to criteria of the most commonly used entities in the process of money laundering derived from corruption offenses.[17] According to the abovementioned criteria, the following analysis includes entities such as:

1) offshore legal entities;
2) domestic legal entities;
3) domestic financial institutions;
4) guardians of the financial system;
5) mediators.[18]

In the context of entities used in the process of money laundering derived from corruption offenses, firstly, it should be noted that *offshore legal entity* represents one of the most frequent subjects used for committing this offense, due to numerous reasons such as low level of control of financial transactions, anonymity manifested in the process of transferring of illegal proceeds, low taxes and favorable policy climate in offshore jurisdiction, that all together create an ideal environment for concealing the origin of obtained proceeds.[19]

Besides, a standalone way of committing money laundering derived from corruption offenses is through *domestic legal entities*, which may include e.g. corporations, partnerships and foundations. In this context, an illustrative example is the case of a Spanish lawyer accused of suspicion of setting up and managing offshore companies in tax free offshore jurisdictions, while at the same time opening real estate companies in his home country, but on behalf of a foreign company established with the aim of money laundering, that controlled the ownership of companies established in Spain. This fact allowed the perpetrator to place money into the bank accounts of offshore companies in order to transfer it to companies established in the host country for the purpose of integrating that money into legal real estate sales. Money laundering was facilitated in this case because of the lack of identity between bank account users in offshore companies and companies in Spain. On the other hand, perpetrators often use *domestic financial institutions* as a way of committing money laundering derived from corruption offenses. In this regard, it should be mentioned the example of a former President of the Philippines who was charged with money laundering derived from bribery. Precisely, in order to cover up the increase in proceeds derived from corruption activities, the perpetrator had deposited illegal funds in a special account opened in the name of a fictitious person in a domestic financial institution, after which he began investing money in legal activity, which in this case was the purchase of real estate. Therefore, the key point of this case is related to the fact that the defendant by using a domestic financial institution, was able to transfer, conceal and invest illegally derived proceeds in legal activities. Moreover, money laundering derived from corruption offenses can also be manifested through the use of *guardians* of the financial system who represent persons whose role is to protect the functioning of the system from any misuse, including from corruption criminal activities. In that context, the guardians may include lawyers, notaries, trusts, company service providers, real estate agents and accountants. The

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[17] Reed Q., Fontana A., *op. cit.,* 14; Livescu I., *The link between Money Laundering and Corruption Is the fight effective?,* Tilburg University Law School, Tilburg, 2017, 36-45.

[18] Ferguson G., *op. cit.,* 316-321.

[19] FATF, 2011, *op. cit.,* 23.

guardians play their role in the process of concealing the illegal origin of proceeds in order to invest them in legal activities and thus integrate them into the financial system. Therefore, instead of implementing the measures they are obliged to undertake in order to protect the financial system from negative influences, the guardians use their knowledge and influence to help money launderers to conceal the origins of proceeds derived from corruption criminal offenses.[20]

In the sense, it should be mentioned the case of a former Zambian president accused of money laundering derived from embezzlement of state money.[21] The key characteristic of case is related to the fact that the perpetrator used the legal services of a law agency and its lawyer as the guardian of the financial system for transferring embezzled money into the accounts of clients of that law agency, from where, with the help of that lawyer, money was transferred to other accounts opened in host as well as foreign countries with the aim to integrate it into legal financial flows through the purchase of property for state needs.[22]

Finally, the common way to commit money laundering derived from corruption offenses includes the use of *mediators*. In terms of the use of mediators, it should be pointed out the case of a former Nicaraguan president who was accused of money laundering derived from the embezzlement of state money. Precisely, in this case the perpetrator firstly had established a legal entity in Panama on behalf of his wife to whom accounts he had transferred money with the help of his friend, a tax officer, in order to conceal the origin of the proceeds and use that proceeds to invest money in legal activities, which was the sale of helicopters. From all the above-mentioned stems the fact that the perpetrator, in this case, used his wife and his friend, a tax officer, as mediators in the process of money laundering derived from embezzlement of state money.[23]

V. Concluding remarks

In the fight against money laundering derived from corruption offenses, it is observed that the competent authorities are confronted with numerous challenges in the process of detecting this criminal offense because of the complexity and variety of phenomenological forms of execution as well as due to the concealment in manifesting of modus operandi. Besides that, when it comes to the issue of international and European framework concerning money laundering derived from corruption offenses it should be noticed that although required normative steps have already been taken, it still lack completely implementation of adopted international standards.

Furthermore, one of the commonly recognized challenges in this area concerns the lack of comprehensive cooperation between competent institutions dealing with money laundering derived from corruption offenses. In addition, the next one challenge is related to duplication of administrative structures that often have the

[20] Ferguson G., *op. cit.*, 316.

[21] FATF, *Specific Risk Factors in Laundering the Proceeds of Corruption*, FATF, Paris, 2012, 20.

[22] FATF, 2011, *op. cit.*, 20-21.

[23] Gordon R., *Laundering the Proceeds of Public Sector Corruption*, Case Western Reserve School of Law Cleveland, 2009, 38-39; The Egmont Group, *Egmont Cases, Financial Analysis Cases 2011 – 2013*, The Egmont Group, Canada, 2014.

same or very similar competencies in combating money laundering derived from corruption offenses, thereby causing difficulties in the process of the establishment whose jurisdiction falls under a particular task. This all together contributes to delaying in detecting this crime in a timely manner, thus allowing corrupt officials to place, conceal and integrate proceeds derived from corruption offense in the legal financial flows. In this sense, it is necessary to establish an inter-institutional link between the competent authorities dealing with anti-money laundering policy, enabling them to define and identify their roles, scope and limits of competences.

Moreover, when it comes to the existing challenges in this area it should be pointed out that there is the absence of available staff trained to fight against money laundering cases, as well as a lack of technical capacity and adequate equipment. Therefore, in this regard, it should be mentioned that significant financial investment in the process of improvement of technical capacity, as well as organizing of thematic training for officials from competent bodies regarding the ways of suppression of cases related to money laundering derived from corruption offenses, represent required steps in the context of establishment of better conditions for detection of this crime.

Finally, an inevitable recommendation in the sense of the fight against money laundering derived from corruption offenses is related to the duty of the competent authorities to collect statistics on risk assessments and vulnerabilities of individual sectors to money laundering in order to make easier to official to recognize the most common ways of execution as well as the applied methods of money laundering derived from corruption offenses.

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21. UNODC, (2009) *Money laundering and financing of terrorism*, UNODC, Vienna.

22. Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, Warsaw, 16.V.2005, Council of Europe Treaty Series-No. 198.

The Money Laundering in Republic of Serbia – Law and Criminal Policy

Dr. Dragan Jovašević

Abstract

Nowadays, crimes committed against the property belonging to other natural and legal persons (and even to entire states) seem to be predominant in the structure of criminality on both – national as well as international level. When committing these crimes, individuals, groups and organizations perform their criminal activities with the intention to obtain illegal material gain. However, that does not appear to be enough for them and, therefore, these offenders attempt to "legalize" money and other financial gain they obtained in an illegal manner i.e. to „insert" them into legal circulation (to "create" a legal ground for their obtaining). On the other hand, the perpetrators of these criminal offences also need to hide the real sources of money and material gain obtained in such way. That is the reason why not only individual states but also the entire international community realized how dangerous these criminal activities and groups and individuals who commit money laundering and hide money and financial gain obtained by criminal offences are. So, international law and national criminal law of Serbia prescribe criminal responsibility for money laundering as a criminal offence for which strict punishments can be imposed in order to prevent and suppress these socially hazardous activities.

Keywords: *criminal offence, money, property, hiding the sources, legal ground, floatation (putting into circulation), guilt, punishment, international standards, Serbia*

I. Money laundering as problem in Serbian Criminal Law

Passing the Law on Prevention of Money Laundry in September 2001[1] Republic of Serbia (former Federal Republic of Yugoslavia) joined a large number of states which have united in their effort to prevent and repress the most dangerous forms and types of organized crime related to property as a very serious security problem which knows no borders between states even between continents. Crime in general, and organized crime in particular crosses the borders of some states and becomes the international security problem of wide proportion with the tendency to penetrate further in all spheres of society.

Individuals, groups and organizations have only one aim – gaining illicit property gain or unlawful profit. Such a gained property has to be legalized in order to be used within legal financial flows in the country but also abroad. But legalization of money does not neutralize the motives and aims of criminal activities which represents the

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basis of security endangering.[2] In such a way these persons undertake various measures and activities aimed at 'laundering' illicitly gained money and other values (securities, value markings, and other) with the assistance of financial, investment, banking, stock exchange and other organizations and institutions and thus acquire healthy and legal basis for them.

II. Money laundering as criminal offence in international law

In order to repress these unlawful activities on the international level there has been norm-setting of law and obligations of certain states in undertaking adequate measures, means and procedures for prevention and repression of money laundry. Many international laws have been passed which precise unlawful activities and certain types and forms of money laundering as well as measures and procedures by national legislations in repression of this occurrence. In European law money laundering has been given a status of independent criminal offence, but this crime has been known by many other national criminal legislations.

The term 'money laundering' originated in America in the middle of last century. The terms means various activities by criminals and criminal groups aimed at legalization of money gained by criminal activities.[3] The criminals launder money by various financial activities, financial transactions, investments and stock exchange activities in order to conceal the true origin of money and thus make it legal part of capital market. In this way they have the possibility to use normally and freely the unlawfully gained money and market it in business relations and commercial business in general both in their country and abroad.

The international community[4] has early realized the amount of social danger in money laundry operations and has therefore undertaken a large number of activities in order to prevent and repress the unlawful activities as efficiently as possible. In the 1980s the intensifying of fight against illicit production and trafficking of narcotics brought about the ideas for coordinated activities on the international level in order to repress money laundering. Namely, the aim of these activities was directed at disabling, prevention and interrupting the organizations and activities of some crime organizations involved in illicit trafficking of narcotics, primarily the Columbian cartel.

Having realized the real danger from organized crime of the international character which knows no political, state and ideological borders between nations, states and continents, the international community begins to develop a strategy for general fight against the most dangerous types of crime – trafficking with narcotics, white slavery, weapons etc. - all connected closely to money laundering. Many international legal acts have been passed to this effect. These are[5]:

1) UN Convention against illicit trafficking with narcotics and psychotropic substances passed in 1988 in Vienna,

2) Convention on laundering, search and confiscation of criminally gained profit dated November 8, 1990, Strasbourg,

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[2] Jovašević D., *Criminal Law, General Part*, Belgrade, 2017, p. 156.
[3] Jovašević D., *Lexicon of Criminal Law*, Belgrade, 2011, pp. 481-482.
[4] Petrović B., Jovašević D., *International Criminal Law*, Sarajevo, 2010, pp. 107-111.
[5] Jovašević D., *International Criminal Law*, Niš, 2010, p. 98.

3) 1991 Directive for prevention of use of financial system for money laundering,

4) 1993 Cypruss Communique and

5) UN Convention against transnational organized crime passed December 12-15, 2000, in Palermo.

These international acts establish a legal basis for governing of incriminated behavior related to money laundering in national criminal legislation and regulation of criminal sanctions.[6] It is therefore very important how individual national legislations deal with criminal-legal aspect of money laundering, all the more so as many solutions included in the said international legal acts are incorporated in the solutions of national criminal legislations[7].

1988 UN Convention against illicit trafficking with narcotics and physchotropic substances (known as Vienna Convention) which was accepted by more than a hundred stated, our being among them[8], provides for the obligation of signatory countries to incriminate many activities connected to drug trafficking within their national legislation as well as to treat laundering of such earned money as criminal activity. Article 3 of the Convention defines the concept of money laundering as criminal offence. According to the definition this crime exists when the following activities are undertaken with premeditation (on purpose):

1) conversion or transfer of property knowing that the property is the result of committed crime in order to conceal illicit origin of the property;

2) assistance to any person involved in commitment of such a crime in order to avoid legal consequences of these activities;

3) hiding or concealing the true nature, source, location, availability and movement of derived ownership rights or property knowing that the property is the result of committed crime;

4) gaining, possession or use of goods or things or values (knowing at the time of its receipt) that are the result of illicit trafficking of narcotics;

5) collusion in order to commit, attempt, assist, instigate, facilitate or advise to commit crime of trafficking with narcotics including money laundering.[9]

In this way the crime of money laundering has been defined by many activities including preparatory activities, attempt and even the complicity (instigation, assistance or organization of criminal association) as the activities of commitment. This extends the sphere of punishable behavior making it equal to commitment. Knowledge, consciousness, intention or purpose as subjective elements of psychological nature must exist as important constituting elements of this crime. The Convention has not defined the kind and amount of penalty but left that to national legislations.

The other important act in this field is the Convention on laundering, search, seizure and confiscation of profit gained by criminal activities which was passed by the Council of Europe on November 8, 1990, in Strasbourg.[10] This Convention also defines the obligation

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[6] Jovašević D., *Commentary of Criminal Code of the FR Yugoslavia*, Belgrade, 2002. pp. 312-315.

[7] Jovašević D., Ikanović V., *International Criminal Law,* Banja Luka, 2015, pp. 101-105.

[8] Official Gazette FRY - International agreements, No.14/1990.

[9] Glimore W.C., *International Initiatives in the Field of Money Laundering*, Butterworths Journal of International Banking and Financial Law,1995, p. 260.

[10] This Convention was ratified by the Federal Assembly FRY on their Session dated July 02. 2002. The text of the Convention was published in the Official Gazette of FRY, International Agreements, No. 7/2002, July, 03. 2002.

of signatory countries of this international organization to include the crime of money laundering in their respective national legislations. The characteristics of this crime are defined identically as by the Vienna Convention with the difference that in this case there is a tendency to take away and confiscate complete property gained not only by unlawful activities related to narcotics, but also related to terrorism, trading white slavery, weapons and criminal acts by which a great profit is made.

Article 6 of the Convention defines the concept and characteristics of crime of money laundering which consists of intentional undertaking of one or several of the following activities:

1) conversion or transfer of property knowing that the property is the result of committed crime in order to conceal or present untruly the origin of property or assisting an individual involved in commitment of predicative crime in order to avoid legal consequences for his acts;

2) concealing or untrue representation of legal nature, source, location, use, movement of rights or property in relation to the property knowing that the property is the result of committed crime;

3) gaining, possession or use of property knowing at the time of receipt that it is the result of criminal activities;

4) participation, collusion or conspiracy in order to commit, try to commit and assist, instigate or facilitate and advise to commit any crime.

The problems of undertaking efficient measures for prevention and repression of money laundering were also included in the UN Convention against transnational organized crime with two additional protocols: The Protocol for prevention, repression and punishment of trading with human beings, especially women and children and the Protocol against smuggling of migrants by land, sea or air. The latter international legal acts were passed at the Conference sponsored by the United Nations in December 2000 in Palermo.[11]

Article 6 of this Convention titled ''Criminalization of criminally gained profit laundering'' defines the concept and characteristics of the crime of money laundering which all signatory countries are obliged to include in their national criminal legislation.

Article 7 of the Convention also provides for the measures for fighting against money laundering and defines the subjects, activities and procedures by competent national authorities regarding prevention and repression of various forms and types of money laundering.

In 2005, the Council of Europe adopted the new Convention on Money Laundering, Investigation, Confiscation and Confiscation of Profit from Crime and the Financing of Terrorism (Warszawa). The preamble to this Convention explicitly states: "in the modern world, it is necessary to combat serious crimes that are becoming a serious international problem, and which requires modern and effective methods at the international level.'' In Article 1 of the Convention, the term "profit" is defined as directly or indirectly obtained, through the commission of criminal offenses, property in the sense of tangible and intangible, movable or immovable property, securities or assets which speak of ownership or interest in such property.

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[11] This Convention with additional protocols was ratified by the Federal Assembly on their Session of June 22, 2001. The text of the Convention and additional protocols was published in the Official Gazette of FRY, International Agreements, No. 6/2001, June 27, 2001.

Article 9 defines the crime of money laundering in the same way as the 1990 European Convention. The novelty in relation to earlier decisions is reflected in the fact that criminal prosecution for the criminal offense of money laundering can be undertaken irrespective of the fact that the perpetrator was previously convicted of a predicate crime from which illicit profit arose.

III. Money laundering in the criminal law of Serbia

First code - The Law on prevention of money laundering Federal Republic of Yugoslavia passed in September 2001, and effective as of July 01, 2002, defines the concept of money laundering, the manners, procedures, activities, forms and types of manifestations and includes many measures, procedures and approaches by competent authorities or persons having an obligation to detect, prevent and suppress the activities by natural and legal persons related to concealing of unlawfully gained money and other property gain.

The money laundry includes depositing of money gained by performing illicit activities on the accounts with banks or other financial organizations or institutions or otherwise putting such money into legal financial operations. According to law this crime may be committed in two manners as follows:

1) by depositing money on the account and

2) by putting money into legal financial operations.

For the existence of this criminal offence several cumulative conditions must be fulfilled[12]. They must be either depositing of money on the account with banks or other financial organizations or institutions or otherwise putting such money into legal financial operations. In order to be legally relevant, these activities must refer to the money which may appear in one of the following forms: as cash, effective foreign currency or other finances. What is important is the fact that the money was gained by performing illicit, unlawful activities such as: grey economy, illicit trade in arms, narcotics or psychotropic substances and other illicit activities.

The perpetrators of these incriminated activities according to law may be domestic or foreign natural or legal persons.

In addition to the legally specifically stated activities by which a criminal offence of money laundering can be committed, but also other illicit gains, the activities on assisting with money laundry are also incriminated. These activities include all actions and procedures by which one provides for, contributes, facilitates, makes conditions or assumptions for money laundry. The activities enabling money laundry include the following:

1) concealing or hiding the origin of money or place where it was deposited or concealing the purpose of use of property and all rights resulting from performing an illicit activity;

2) exchange or transfer of property resulting from performing illicit activities;

3) acquiring, possession or use of property resulting from performing illicit activities, and

4) concealing of illicitly gained public property or public capital on the occasion of property transformation of a company.

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[12] Jovanović Lj., Jovašević D., *Criminal Law, Special Part*, Belgrade, 2003, p. 156.

In order to be able to deal with money laundry or enable it in any of the specified manners, we need to have the activities undertaken and directed at the money which was illicitly gained. Illicitly gained money is the money gained in an unlawful manner either as cash money or cash equivalent in domestic or foreign currency, stocks and bonds and other payment facilities in domestic or foreign currency as well as property (rights and things) bought with such money.

Article 4 of this law includes a range of general, specific and special measures and activities aimed at detecting and preventing of money laundry on the occasion of taking, exchanging or changing money or when concluding business transactions regarding property or during any other dealing with money or property which can make the opportunity for money laundry. All those various dealings with money are called transactions by law. The transactions at that do not include specifically the following activities: withdrawing cash from the current or giro account, savings account or some other account, or withdrawing effective foreign currency from foreign currency account or foreign currency savings account.

Article 5 of the Law on prevention of money laundry defines the subjects of detecting and preventing of money laundry. It defines them as persons having an obligation. These are: legal persons and their responsible persons. As persons having an obligation for various measures and activities on prevention of money laundry are: banks and other financial organizations, companies of postal, telegraphic and telephone traffic, other companies and cooperative societies, government agencies, organizations, funds, institutes, institutions as well as other legal persons financed partially or completely by public revenues, the National Bank of Serbia, insurance companies, stock exchange, stock brokers and other subjects involved in transactions with money and stocks and bonds, precious metals and precious stones, exchange offices, pawn-shops, casinos, poolrooms, slot-machine clubs and organizers of prize games and other games of chance, as well as other legal and natural persons which purchase and sell debts and claims or deal with financial transactions.

Criminal offence - responsibility and punishment- ''Money laundering'' in law system of the Republic of Serbia have provided two law rules: 1) The Law on Prevention of Money Laundering and Financing of Terrorism (2017) and 2) Criminal code (2005).

According to this law the criminal offence of 'money laundry' takes three forms: basic, specific and serious. This solution is using in law of Republic of Serbia. The Criminal Code[13] in 2005. has provided special criminal offence: Money laundering in Article 245[14].

The basic form of this criminal offence carries prison sentence from six months to five years. It exists when any of the mentioned activities which are contrary to the provisions of this law is undertaken by which money is deposited with a bank or other financial organization or institution or is otherwise included into legal financial circulation in order to do legal economic or financial activities if the money is the result of a criminal activity. The awareness, knowledge of a perpetrator that the money is the result of some or any criminal activity is the basis for criminal liability of

[13] Official Gazette of the Republic of Serbia, No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 114/2011, 121/12, 104/2013, 108/2014, 94/2016 and 35/2019.

[14] Jovašević D., *Criminal law, Special part*, Belgrade, 2018. pp. 187-188.

this person. Even the attempt to commit this crime (in case of intentional starting of any activity directed at money laundry) is punishable by law.

However, the criminal offense of money laundering referred to in Article 245 and two more serious, qualified forms of manifestation, for which fair punishment is prescribed.

The first serious form of the act (paragraph 2) exists if the enforcement action has been taken in respect of money and property the value of which exceeds the amount of RSD 1,500,000. The value of the object on which the offense is committed in any form of manifestation is a qualifying circumstance. It is determined on market terms at the time the enforcement action is taken. For this offense, one to ten years' imprisonment and a fine are cumulatively prescribed.

Another serious form of offense (paragraph 4) for which a sentence of imprisonment of two to twelve years is cumulatively prescribed and a fine exists if the enforcement action is taken in a group. A group within the meaning of Article 112, item 22 of the Criminal code is composed of at least three persons who are connected for the purpose of perpetual or occasional commission of criminal offenses which do not have to have defined roles of their members, continuity of membership or a developed structure.

The perpetrator of the crime of money laundry can be natural person (domestic or foreign citizen), but also the responsible person as legal person who knew or was obliged to know or could have known that the money is the result of criminal activities.

In addition to criminal offence carrying very severe penalties, Article 28 of the law includes economic torts of a legal person or his/her responsible person, as well as the tort of an entrepreneur included in Article 29 of the law.

And finally regarding the efforts which our country has recently undertaken in order to root out the money laundry is passing the Law on organization and jurisdiction of state institutions on suppression of organized crime.[15] This law governs establishing, organization, jurisdiction and powers of special government bodies – the Belgrade District Court, Special Prosecutor's Office, Special Service for suppression of organized crime established as part of the Ministry of Interior and Special Detention Unit within the Department for Execution of Penal Sanctions of the Ministry of Justice in order to detect and prosecute perpetrators of criminal offences having the elements of organized crime where money laundry is included as well.

The Law on Prevention of Money Laundering and Financing of Terrorism[16] of 2017 in Article 2 defines the concept of money laundering. Money laundering is thus considered to be the following details: a) conversion or transfer of property acquired through the commission of a criminal offense, b) concealment or inaccuracy of the true nature, origin, location, movement, disposition, ownership or right in connection with property acquired through the commission of a criminal offense and v) the acquisition, possession or use of property acquired through the commission of a criminal offense. It follows from the above definition that this Law also defines in a uniform manner the concept, elements, characteristics of beings and characteristics of the criminal offense of money laundering as well as the Criminal Code.

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[15] Official Gazette of the Republic of Serbia, No. 42/2002, 27/2003 i 39/2003.

[16] Official Gazette of the Republic of Serbia, No. 113/2017.

IV. Criminal policy of courts for money laundering offenses

In the following presentations, we will analyze the scope, dynamics and structure of economic crimes in the Republic of Serbia in the period 2006-2014 (ie, until the beginning of the implementation of the Criminal Code), as well as the place and participation of the criminal offense of money laundering in the structure of economic criminal offenses.

Table 1. Share of economic crimes in total criminal offenses committed in the Republic of Serbia in the period 2006-2014

	Total criminal offenses	Economic offenses	%
2006	105.701	2.868	2,71
2007	98.702	2.663	2,70
2008	101.723	3.099	3,04
2009	100.026	3.131	3,13
2010	74.279	2.479	3,34
2011	88.207	2.957	3,35
2012	92.879	3.221	3,47
2013	91.411	3.397	3,72
2014	92.600	3.347	3,61

From the above data we can see that economic crimes in general, in a very small percentage, participate in the total crime in the Republic of Serbia. This percentage ranges from a minimum of 2.70% in 2007 or 2.71% in 2006 (ie, immediately beginning the implementation of new criminal legislation), to a maximum of 3.72% in 2013, or 3, 61 5 during 2014.

Otherwise, in absolute terms, the least amount of economic crimes was committed, and 2,663 were committed in 2007. These offenses experience their maximum manifestation in practice in 2013 with 3,397 criminal offenses, or in 2014 with 3,347 criminal offenses. However, there is a gradual trend of an increase in the number of committed criminal offenses from the initial 2,868 cases in 2006 to 3,347 in 2014.

Table 2. Participation of the criminal offense of money laundering in commercial enterprises crimes in Serbia

	Economic offenses	Money laundering	%		
2006	2.868	4	0,14		
2007	2.663	12	0,45		
2008	3.099	15	0,48		
2009	3.131	8	0,25		
2010	2.479	34	1,37		
2011	2.957	23	0,77		
2012.	3.221	21	0,65		
2013.	3.397	3	0,08		
2014.	3.347	9	0,27		

This table gives us a picturesque overview of the extremely small number of committed (ie reported crime of money laundering because the dark crime rate is extremely high here) of crimes in the observed period. It so happened that only three criminal offenses of this kind were violated in 2013 or four criminal offenses in the year 2006, while most of these offenses were reported in 2010 (34 offenses), or in the following 2011 (23 offenses), to decrease by the end of the observed period. And in percentage terms, these acts participate modestly in the number of economic crimes committed, from a minimum of 0.08% in 2013 or 0.14% in 2006 to a maximum share of 1.37% in 2010.

In order to effectively combat crime in general, society has at its disposal various means, measures and procedures, most notably a system of criminal sanctions and powers of the public prosecutor's office in prosecuting perpetrators of criminal offenses.[17] Such is the situation with the suppression of economic crime, and within it criminal offenses of money laundering, for which cumulative sentences of imprisonment of different duration (depending on the form of manifesting the act) and a fine are prescribed.

Table 3. How to solve money laundering offenses in Serbia in the period 2006-2014

	Number of charges	Dismissed application	Suspension of investigation	Defendant	
2006	4	2	0	0	
2007	12	8	1	1	
2008	15	3	0	4	
2009	8	1	0	6	
2010	34	5	0	0	
2011	23	1	1	4	
2012	21	1	1	2	
2013	3	2	0	1	
2014	9	6	0	1	

The quality and efficiency of prosecuting perpetrators of money laundering offenses in the Republic of Serbia in the period 2006-2014 are best illustrated by the above data. From the statistics available, it appears that very few have been charged in relation to the otherwise small number of reported persons for the crime of money laundering. In the two observed years - 2006 and 2010 of the reported persons, none were indicted, while one reported person was effectively and indicted during 2007, 2013 and 2014. The highest number of accused persons for this crime, six in 2009, three quarters of the total number of reported persons.

The above data indicate an extremely small number of suspensions of investigations into this criminal offense under the Code of Criminal Procedure for prescribed reasons. Thus, only one suspension of the investigation was recorded during 2007, 2011 and 2012, while in the other observed years no suspensions of the investigation against the reported person for the criminal offense of money laundering were recorded.

[17] Bošković A., Pavlović Z., *Special Evidentiary Actions in the Function of Combating Organized Crime in Serbia*, Journal of Eastern European Criminal Law, No.1. 2015

However, a large number of dismissed criminal charges for this crime can be observed. The absolute maximum of denials of criminal charges was recorded during 2007 - eight rejections (three quarters of the number of criminal charges filed) or six rejections of criminal charges during 2014 (out of nine filed - therefore, two thirds of the filed were rejected by authorized public prosecutor) for a reported crime of money laundering.

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The last part of the presentation about the criminal offense of money laundering and the efforts undertaken in the Republic for the purpose of its effective and quality suppression relate, as it is logical, to the analysis of the effectiveness of criminal proceedings in terms of the type and measure of the imposed penalties and other criminal sanctions against their perpetrators. by the competent courts. In fact, there is a concrete individualization of the high, cumulatively prescribed, penalties for perpetrators of the criminal offense of money laundering, as well as the severity, or mildness, of the criminal policy of the courts, which indicates the degree of rule of law and the level of the rule of law.

Table 4. Sentences imposed on perpetrators of criminal offenses money laundering in the Republic of Serbia in the period 2006-2014

	2-3 years imprison ment	6 months-1 year imprison ment	3-6 months imprison ment	2-3 months imprison ment	Secondary sentence	Conditional sentence
2006						
2007						
2008		1				
2009			2	2		
2010						1
2011		2				
2012	1	1			1	
2013		1				
2014		1	1	1		

Although it is a serious international and economic crime that is related to a previous (predicate) crime that acquired unlawful material gain by concealing it, in the criminal policy of the courts, extremely mild sentences (when imposed) are prevalent, that is. other criminal sanctions.

Thus, the legislator prescribes the cumulative application of imprisonment and a fine for this criminal offense, but in 2012 only in one case did the court impose a fine as a side punishment to the perpetrator of the crime of money laundering.

In 2010, even in one case, a suspended sentence was imposed for this offense.

A sentence of two to three years' imprisonment was imposed only once during 2012.

Of the other sentences, the most frequently imposed sentence is imprisonment for a term of six months to one year – but very rarely, one each during 2008, 2012, 2013 and 2014.

A sentence of two to three months' imprisonment was extremely rare - once in 2014, or in two cases in 2009.

V. Conclusion

The increase of new and various forms of criminal offences has been noticed recently especially those which include the international element, i.e. the element of organized crime. Crimes when perpetrators have the purpose of obtaining some illicit property gain for themselves or for some other person take special part within them. But this gain is not the purpose in itself but has to be legalized or laundered by putting money or other property into legal circulation. The international community, but also the individual countries are faced with the problem of suppression of the money laundry or concealing the origin or money gained by committing crime. The Serbia (former Federal Republic of Yugoslavia) joined these tendencies and in September 2001 passed a special Law on prevention of money laundry and in October 2005. passed new Criminal Code of the Republic of Serbia.

This law dealing with money laundry in our country provides for a wide range of preventive measures and procedures directed at detection, prevention and suppression of various activities of money laundry or assistance with money laundry and this law is supposed to lead our country into a circle of other contemporary states which try to put a stop to this dangerous social evil by organized, systematic and continuous activities of various social subjects. It is certain that in this fight the repressive measures – sanctions for criminal offences, economic torts and torts - cannot be completely efficient.

The preventive measures take special place here especially those trying to remove the conditions which lead to situations that illicitly, i.e. unlawfully gained money is put into legal financial and economic flows in various manners through various financial and other transactions. Naturally, this is the fight where every country should count on the assistance of other countries, even the whole international community, in the same way as crime which does not know the borders between countries.

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