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The Fulfillment of the Compliance Obligation by the Legal Person and the Consequences of its Infringement from the Criminal Law Perspective

Laura Stănilă[1]

Abstract

The fulfillment of the compliance obligation by the legal person is a new type of obligation arising in the modern economic context, the Romanian legislator bounding the legal entity with administrative and criminal sanctions in case of its infringement, even if there is neither a culture of compliance, nor a compliance legal system provided in the Romanian legal and social environment.

In Romania, courts tend to convict legal persons in an „automatic mode", the subjective element (mens rea) of a collective entity being extremely difficult to prove. Elements such as the fulfillment of the compliance obligation or meeting of the due diligence standard by the legal persons in carrying out their activity could be the key in avoiding „automatic" convictions founded exclusively on the rigid application of art. 135 of the Romanian Criminal Code.

Keywords: *criminal liability of the legal person, compliance obligation, due diligence, mens rea, organizational model.*

I. General aspects on the compliance obligation. Distinctions between compliance and due diligence. Lessons from US and Netherlands

The Anglo-Saxon term *„compliance"* may be defined simplistically as the observance of legal rules by the legal person agent. However, the term *„compliance"* means, in its complexity, the management of an information and communication system in order to protect the interests of the legal person insofar as it is exposed to the risk of breach of legal provisions. In other words, compliance is a type of relationship between the state – which, as a legislative authority, represents the general public interest in the protection of social values, establishing rules for carrying out activities, standards and levels of protection of these values – on the one hand, and the legal person (especially legal persons under private law) on the other hand, – which pursues its particular interest in carrying out an activity within the legal framework provided by the legislature. Compliance involves two actors – one active –

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the state – and one passive – the legal person – and results in „partial overlap of state interests with those of the legal person, in other words ensuring a balance between prevention and punishment of crimes in the general interest and risk management in the private interest[2]„.

From the state's point of view, compliance is assimilated to trying to influence, through regulation, management systems, so as to ensure better prevention, identification and punishment of violations of the law. Criminal compliance, as the term is understood here, uses the arsenal of criminal law, its procedure and its method of establishing sanctions for this purpose. If criminal law systems, insofar as they already encourage effective compliance management, sometimes seem helpless confronting offenses committed by a legal person, we must agree that it is very difficult to design a system that fully ensures effectiveness of management systems and capitalize the influence of corporate culture on the individual behavior of its agents.

In order to meet the standard of compliance, legal entities must establish compliance programs and strategies, in some countries the law requiring it. Thus, in US criminal proceedings, the effectiveness of a company's compliance program is assessed based on the factors listed in the *US Sentencing Guidelines*[3]. The task of

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[2] B. Fasterling, *Criminal compliance – Les risques d'un droit pénal du risque*, Revue internationale de droit economique, 2016/2 (t. XXX), p. 217.

[3] §8B2.1. Effective Compliance and Ethics Program – US Sentencing Guidelines:

„(a) To have an effective compliance and ethics program, for purposes of subsection (f) of §8C2.5 (Culpability Score) and subsection (b)(1) of §8D1.4 (Recommended Conditions of Probation — Organizations), an organization shall –

(1) exercise due diligence to prevent and detect criminal conduct; and

(2) otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

Such compliance and ethics program shall be reasonably designed, implemented, and enforced so that the program is generally effective in preventing and detecting criminal conduct. The failure to prevent or detect the instant offense does not necessarily mean that the program is not generally effective in preventing and detecting criminal conduct.

(b) Due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law within the meaning of subsection (a) minimally require the following:

(1) The organization shall establish standards and procedures to prevent and detect criminal conduct.

(2) (A) The organization's governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.

(B) High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program, as described in this guideline. Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program.

(C) Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program. Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program. To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.

assessing whether a corporation's compliance program has worked as well in practice as intended is time-consuming and, as such, an excessively resource-intensive exercise to impose on prosecutors and judges. Prosecutors and judges are required to assess the effectiveness of a compliance program in order to engage the criminal liability of the legal person.

An „effective" compliance program is an internal mechanism implemented by companies to detect and prevent criminal behavior that may occur within the corporation. Such a program operates continuously throughout the corporation. The program contains three basic elements – a formal code of conduct, an office and compliance officer, and a telephone line for employees.

Although the decision to implement a compliance program is usually made by the corporation itself, corporations in the US system sometimes have to implement compliance programs as part of criminal sentences. This measure is necessary to ensure that the internal structure of the corporation discourages future violations of the law[4]. Actually, this is quite an interesting approach of the American courts.

Compliance programs play a significant role in the investigation and conviction phase of the legal person in the US system. In an initial version, the *US Sentencing Guidelines* provided a reduction of the punishment of up to five times in some cases, in

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(3) The organization shall use reasonable efforts not to include within the substantial authority personnel of the organization any individual whom the organization knew or should have known through the exercise of due diligence, has engaged in illegal activities or other conduct inconsistent with an effective compliance and ethics program.

(4) (A) The organization shall take reasonable steps to communicate periodically and in a practical manner its standards and procedures, and other aspects of the compliance and ethics program, to the individuals referred to in subparagraph (B) by conducting effective training programs and otherwise disseminating information appropriate to such individuals' respective roles and responsibilities.

(B) The individuals referred to in subparagraph (A) are the members of the governing authority, high-level personnel, substantial authority personnel, the organization's employees, and, as appropriate, the organization's agents.

(5) The organization shall take reasonable steps –

(A) to ensure that the organization's compliance and ethics program is followed, including monitoring and auditing to detect criminal conduct;

(B) to evaluate periodically the effectiveness of the organization's compliance and ethics program; and

(C) to have and publicize a system, which may include mechanisms that allow for anonymity or confidentiality, whereby the organization's employees and agents may report or seek guidance regarding potential or actual criminal conduct without fear of retaliation.

(6) The organization's compliance and ethics program shall be promoted and enforced consistently throughout the organization through (A) appropriate incentives to perform in accordance with the compliance and ethics program; and (B) appropriate disciplinary measures for engaging in criminal conduct and for failing to take reasonable steps to prevent or detect criminal conduct.

(7) After criminal conduct has been detected, the organization shall take reasonable steps to respond appropriately to the criminal conduct and to prevent further similar."

https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2018/GLMFull.pdf, accessed on 23.02.2021.

[4] P.A. Wellner, *Effective compliance programs and corporate criminal prosecutions*, Cardozzo Law Review vol. 27: 1/ 2005, p. 502, www.friedfrank.com, accessed on 20.02.2021.

case of the existence of an „effective compliance program”[5]. Also, the existence of an effective compliance program could lead to the total exclusion of the prosecution of the legal person. Such an assessment of the corporation's general preventive measures as part of the conviction process differs entirely from the corporation's specific actions regarding the commission of the offense. In my opinion, the American model is extremely attractive and simple to apply and can be a starting point in the process of completing the relevant criminal legislation.

Although the obligation to comply has a legal source, there are situations in which even the scholars confuse *compliance* with *due diligence*, using the two notions with a synonymous meaning. It is therefore necessary to clearly establish the meaning of each notion and the existence of a relationship between them. In the view of all the above, we can conclude the following:

- *Due diligence* is a general and social standard that sets a reasonable level of caution in adopting conduct on the part of the individual. It represents the care that any social actor must show in his/her relations with others, being a direct consequence of the principle of non-laity (*neminem laedere*). It does not necessarily have a legal connotation, but it can be used in the logical operation of establishing the presence of the subjective element necessary for the existence of the crime/offense if the legal person is accused of committing such an act.
- *Compliance* is the observance of legal provisions and legal principles aimed for preventing harmful or prejudicial acts. This element has a legal connotation because certain sectoral activities are legally regulated and the legal person cannot function without complying them.
- *Compliance duty/obligation* is the obligation to comply, when such an obligation is expressly provided by law under legal sanction. In my opinion, when the law provides the obligation to comply for a legal person, its non-fulfillment is a clear proof of the guilt of the legal person, as its fulfillment is an effective defense that the legal person can successfully invoke in criminal proceedings. In the event of law linking a criminal sanction to the infringement of the obligation to comply, the provisions of the concurrent offenses will be applicable to the case.

As regards the relationship between *due diligence* and *compliance*, in my opinion, due diligence is not a component of the compliance obligation, both elements being the key in assessing the subjective position of the legal person in relation to the criminal act committed and its outcome. This differentiation between the two elements allows the existence of absurd situations in which a person may comply without being diligent (for example, a compliance program has been implemented but there is no concern for periodic verification of its application at the level of legal activity), as well as a person may be diligent without complying (in the event that a mandatory compliance program has not been implemented according to the law, e.g.

[5] *Idem*, p. 505.

no organizational structure has been established to create and implement this program and monitor its compliance), *but de facto* caution is exercised in carrying out current activity in order to prevent the commission of criminal deeds.

In fact, there are several differences between compliance and due diligence[6]:

a) Reactive vs. proactive – Compliance is usually required by a legislative or regulatory authority. Diligence is not mandatory, although it may be part of a legal person's policies and procedures.

b) Tactical vs. strategic – In the case of compliance, the obligation has a usually short deadline within which action must be taken to achieve clear and timely objectives; what is necessary is fulfilled within the time limit set by the legislative authority. In the case of due diligence, the risk assessment is comprehensive, the known and unknown aspects are analyzed, the objectives of the legal person are compared, the risks and the level of comfort are taken into account and a decision or action is taken.

c) Limited vs. unlimited – To verify compliance, there is a limited legal framework on the qualitative and quantitative aspects to be verified. In due diligence investigations, these restrictions do not apply.

d) Identifying the problem vs. creating a profile – Specific compliance checks aim at discovering what did not work in the activity of the legal person. The purpose of a due diligence investigation is to analyze good and evil in order to subsequently substantiate a decision based on the complete picture thus outlined.

e) Check list orientation vs. „Open-end" – the compliance check follows specific elements that it checks and „ticks" in a list, while the due diligence check aims to establish what happened, why it happened and what will happen next.

If a legal person acts observing the standard of diligence (caution) in carrying out its activity, this does not automatically lead to the conclusion that it will be excused for criminal liability. In the case of offenses committed by the legal person, its criminal conviction will depend on three pillars: the material element (deed – *actus reus*), e.g. a sufficient degree of involvement in the crime/offense; the subjective element (guilt – *mens rea*), e.g. a sufficient degree of intent or knowledge about its involvement in the commission of the crime/offense; and *the absence of any defense* that could either justify the involvement in the commission of the crime/offense or make it impossible to impute the deed. In the context of the criminal liability of the legal person, diligence or precaution is relevant for all three pillars of criminal liability, thus placing it at the center of the criminal liability of the legal person[7]. In systems that recognize the institution of criminal liability of the legal person, the employment of the criminal

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[6] M. Phelps, *Five differences between compliance and due diligence*, Marcy Phelps Inc., 5 August 2019, https://marcyphelps.com/five-differences-between-compliance-and-due-diligence/, accessed on 23.02.2021.

[7] This idea was presented also by G. Sluiter in *Due Diligence and Secondary Liability for Companies in Case of Causing or Contributing to Human Rights Violations*, 20.12.2018, Rethinking SLIC (Secondary Liability for International Crimes), www.rethinkingslic.org, accessed on 23.02.2020.

liability of the collective entity with legal personality depends in practice on determining whether the material acts committed by a natural person for or in connection with the legal person could be attributed to the latter.

There are certain categories of offenses – such as, for example, corruption – for which a theory of defense based on due diligence or fulfillment of the obligation to comply has been created in various states by case law and which may lead to a criminal exoneration of the legal person. Thus, in the United States, according to the theory of identification applicable to the criminal liability of the legal person, it is necessary that the control officer of the legal person (a.n. the compliance officer) had the subjective element of the crime of bribery. If this is proved, a presumption of guilt will operate for the legal person because, if the decision-making structure of the legal person has known, foreseen or neglected the prevention of committing such an act, it is obvious that the legal person has acted with guilt in respect of the same crime. There is also a Guide to Proceedings for Preventing Corruption by the US Department of Justice (*The MoJ Guidance*[8]) which sets out six principles that outline compliance with the law and the effects of legal compliance. When the legal person is accused of a corruption offense and it can be proved by the judicial bodies that the decision-making structure (management of the legal person) was aware of the risk and acted at least negligently in preventing it, the defense based on diligence or compliance invoked by the legal person would not be effective at all[9].

In the Netherlands, the standard of diligence has also been established by case-law. However, some Dutch criminal provisions (such as environmental or economic ones) contain such requirements regarding the due diligence standard[10]. The imposing of the criminal liability to the legal person based on the failure to fulfill the due diligence obligation for some crimes/offenses such as corruption, has no legal support, being necessary only to verify the fulfillment of the general conditions provided by law for the criminal liability of the legal person. Legal entities may voluntarily adopt a code of conformity in business activity, the Dutch doctrine arguing that such a document is of great importance in assessing the fulfillment of the due diligence obligation by a legal person. The lack of adequate supervision and control by the decision-making structure of the legal person could lead to the criminal liability of a legal person for a corruption offense committed by one of its employees. The Dutch Supreme Court[11], in a decision from 2003, established a set of criteria for engaging the criminal liability of the legal person. The Dutch Supreme Court has ruled that the criminal liability of the legal person depends on the circumstances of the case and

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[8] https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf, accessed on 22.02.2021.

[9] B. Meyer, T. van Roomen, E. Sikkema, *Corporate Criminal Liability for Corruption Offences and the Due Diligence Defence. A Comparison of the Dutch and English Legal Frameworks*, Utrecht Law Review, Volume 10, Issue 3 (June) 2014, p. 43.

[10] For example, the obligation of an aviation company to hire qualified personnel and to use appropriate equipment during a flight, provided by art. 1.3. of the *Netherlands Aviation Act.*

[11] B. Meyer, T. van Roomen, E. Sikkema, cited, p. 46-47.

whether the offense can be „reasonably" imputed to the legal person, this being possible if the unlawful conduct took place in the course of the legal entity. Such conduct may be penalized in one or more of the following circumstances[12]:

(1) the deed was committed by someone who is employed or works for the legal person;
(2) the act was part of the normal business activities of the legal person;
(3) the legal person benefited from the commission of the deed; and
(4) the legal person had the power to decide on the performance or not of the respective behavior and accepted this or a similar behavior.

These criteria are not seen as cumulative or exclusive, still are instruments or factors that determine the liability of the legal person in the Netherlands. The absence of one of the mentioned situations will not necessarily lead to the conclusion that the actions of the associates/employees cannot be attributed to the legal person. According to the fourth criterion, criminal liability can be established if the legal person has accepted the commission of the offense, which may be the case if the legal person has not acted with reasonable diligence to prevent it. Although the existence of adequate preventive measures cannot always be used to avoid the criminal liability of the legal person, it can be considered as an indication of the absence of the subjective element[13].

II. Is the compliance obligation explicitly provided by Romanian legislation?

In 1995, in a reference work of the Romanian criminal doctrine, the late prof. Gh. Antoniu spoke for the first time about the explicit and implicit elements used by the legislator to describe the content of the criminal act and showed that the implicit elements are those which would characterize the respective deed, being deduced rationally from all the other features or in relation to the features of close incriminations"[14]. It has also been shown that this procedure of the legislator to complete the explicit content of the legal description with implicit requirements can lead either to the amplification of the content of the legal description or to its restriction, by including in the content of the criminalization some negative implicit requirements[15]. The implicit requirements, whether positive or negative, can refer in the opinion of the cited author, both to the legal model of the deed and to that of guilt, the judicial body having an extremely delicate but at the same time complex task in interpreting the norm and to verify the correspondence of all the conditions of typicality to the elements of the concrete deed committed[16]. The obligation of compliance established by the legislator explicitly or implicitly for the legal person can

[12] *Idem*, p. 47.
[13] *Idem*, p. 48.
[14] G. Antoniu, *Vinovăția penală [Criminal Guilt]*, Ed. Academiei Române, București, 1995, p. 76.
[15] *Idem*, p. 76.
[16] *Ibidem*.

be analyzed as an implicit condition of subjective typicality, with positive or negative character, on its fulfillment depending on the existence of the subjective element in the case of the criminal responsible person.

In this sense, in the analysis of the content of the crime, the „evaluation elements" initiated by Jescheck[17] make it possible to extend the conditions or legal elements of the crime beyond the scope of those that can be identified by a simple observation and judgment, in the sphere of the intrinsic ones, which could not easily emerge from the observation of reality data and presuppose an evaluation by the judicial body[18].

Last but not least, in the German doctrine, but also in the Italian one, there was a discussion on the objective conditions of punishment – those elements provided by the criminalization norm whose existence is not conditioned by the agent's intention or fault and which are even mentioned by the art. 44 of the Italian Penal Code as follows: „When, for the punishment of the crime, the law imposes the existence of a condition, the offender is liable for the crime, even if the event, on which the existence of the condition depends, is not willed by him". The Italian Criminal Code does not in fact provide a definition of the objective conditions of punishment but, according to Italian doctrine, these are events that are not related to the wrongful conduct, being concomitant or subsequent to it, and which are not necessarily willed by the agent. The sanctioning of the criminal act depends on these conditions, where the law refers to them. Some consider them to be a constituent element of the crime, others, on the other hand, tend to consider them external to the crime, so their relevance is understood only in terms of punishment or the application of punishment. It is also customary to distinguish between intrinsic conditions which involve a further aggravation of the punishment, and extrinsic conditions, which do not concern the unlawfulness of the act.

The Italian doctrine specifies that these conditions work even if the external event is not intended by the agent, thus being conditions of objective liability, but specifies that only extrinsic ones would determine an objective criminal liability, while intrinsic conditions should be analyzed in terms of guilt, being necessary at least the guilt as a subjective position in order to be able to engage the criminal liability of the agent for the committed deed[19].

Needless to say, neither the law, nor the Romanian criminal doctrine recognize these institutions, although the recognition of their presence would facilitate the interpretative approach and would simplify the analysis of the presence of the subjective element necessary for the existence of the crime and its sanctioning.

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[17] H.H. Jescheck, *Lehrbuch des Strafrechts Algemeiner Teil*, Dunker und Humblot, Berlin, 1988, p. 242-243.

[18] The assessment of the significance of the action (e.g. the act is likely to alarm the victim in the case of art. 193 Romanian Criminal Code – RCC), of the result (e.g. be likely to endanger persons or property in the case of art. 253 RCC), or of some legal aspects (lack of the right in case of intrusion without right provided by art. 224 RCC. or non-existence of any right of material disposition in case of destruction of the property belonging to another – art. 253 RCC).

[19] R. Petrucci (coord.), *Codice penale esplicato. Spegato articolo per articolo. Leggi complementari*, XVIII edizione 2014, Gruppo editoriale Simone, p. 44-45.

In view of the above, what would the legal criminal value of the obligation to comply be? Implicit element of the crime, element of evaluation of the subjective typicality of the deed, or negative objective condition of punishment?

The obligation to comply with certain legal provisions governing the conduct of certain activities being sometimes established under criminal sanction, if failure to comply with this obligation and failure to comply with such legal provisions results in a dangerous or harmful result to which the law binds a criminal consequence, we should consider the obligation of conformity as either an element of evaluation of the subjective typicality, or an objective condition of punishment. However, compared to the Romanian criminal legal framework, the variant of the objective condition of punishment is excluded since the Romanian law does not provide for such an institution. Of course, the first option is also excluded, the concept of typicality being incompatible with the notion of implicit element of the crime, because it would violate the standards of predictability and clarity of the criminal law.

It therefore remains the variant of the element of assessment of subjective typicality that „shifts" the analysis and discussion from the theoretical to the practical, from the substantial law to the actual judicial process in which the judiciary must make every effort to establish, beyond any reasonable doubt not only the deed and its result, but also the subjective position of the agent who committed them and which can be deduced only from undoubted factual circumstances. However, the lack of an undoubted evidentiary basis regarding the objective and subjective aspects of the deed makes it impossible to impose the criminal liability to the agent (be he/she a natural or legal person), according to the principle *in dubio pro reo*[20].

Romanian law explicitly provides compliance duty in a limited number of cases, in the field of preventing money laundering and combating terrorist financing, as well as in the field of personal data protection. In the case of other activities, the obligation to comply can be deduced from the fact of the provision in the criminal law of some criminal sanctions for the intentional or culpable non-observance in some cases of those legal provisions. In other words, in my opinion, we can identify in the Romanian criminal legislation two types of compliance obligations according to the criterion of the express provision by the law: the explicit compliance obligation (see points a and b below) and the implicit compliance obligation (point c below):

a) the case of preventing money laundering and financing terrorist acts – Law no. 129/2019[21]; this normative act establishes the reporting entities (art. 5), the content and rules regarding the reporting obligations (art. 7-9), the measures for knowing the clientele (art. 10-17), the registers regarding the real beneficiary (art. 19), the compliance officer (art. 23-24), the obligation to assess the risks (art. 25). It is interesting that this normative act establishes a

[20] Art. 4 par. 2 of the Romanian Criminal Procedure Code: *„After all the evidence is presented in the case, any doubt persisting in the mind of the judicial bodies shall be interpreted in favor of the suspect or defendant."*

[21] Published in Official Monitor no. 589 from 18th July, 2019.

compliance strategy and the obligation to draw up a compliance plan, providing in art. 25 that reporting entities have an obligation to identify and assess the risks of money laundering and terrorist financing exposure, taking into account risk factors, including those relating to customers, countries or geographical areas, products, services, transactions or channels distribution. The assessments prepared for this purpose shall be documented, updated including on the basis of national and sectoral assessments and regulations or instructions issued by the authorities and shall be made available to supervisory and control authorities and self-regulatory bodies upon request. The evaluations performed are the basis of its own risk management policies and procedures, as well as in determining the set of customer awareness measures that are applicable to each client. Reporting entities operating through branches, agents or distributors in another Member State are required to ensure that they comply with the national law of that Member State concerning the prevention of the use of the financial system for the purpose of money laundering or terrorist financing. Where the provisions of this Act are more stringent, the reporting entities shall ensure that their branches, agents or distributors in another Member State also comply with these provisions.

b) in the case of the protection of personal data, there is an entire legal framework which establishes in conjunction the limits of the obligation to comply in this matter: Regulation (EU) 2016/679[22] on the protection of individuals with regard to the processing of personal data and on the free movement of these data and repealing Directive 95/46/EC (General Data Protection Regulation); Law no. 102/2005 regarding the establishment, organization and functioning of the National Authority for the Supervision of Personal Data Processing[23]; Law no. 190/2018[24] on measures for the implementation of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data and repealing of Directive 95/46/EC; Law no. 363/2018[25] on the protection of individuals with regard to the processing of personal data by the competent authorities for the purpose of preventing, detecting, investigating, prosecuting and combating crime or the execution of punishments, educational and security measures, and on the free movement of such data; Law no. 129/2018[26] for the amendment and completion of Law no. 102/2005 regarding the establishment, organization and functioning of the National Authority for the Supervision of Personal Data Processing, as well as for the abrogation of Law no. 677/2001 for the protection of individuals with regard to the processing of

[22] https://eur-lex.europa.eu/eli/reg/2016/679/oj.
[23] Republished in Official Monitor no. 947 from 9th November, 2018.
[24] Published in Official Monitor no. 651 from 26th July, 2018.
[25] Published in Official Monitor no. 13 from 7th January, 2019.
[26] Published in Official Monitor no. 503 from 19th June, 2018.

personal data and the free movement of such data. This law repealed Law no. 677/2001[27] for the protection of individuals with regard to the processing of personal data and the free movement of such data.

Thus, art. 10 of Law no. 190/2018 establishes the obligation to appoint the person responsible for personal data protection, art. 13 of Law no. 363/2018 establishes that the data operators are obliged to establish the organizational, technical and procedural measures in order to make available to the interested persons the following categories of information:

a) the identity and contact data of the operator;
b) the contact details of the data protection officer, as the case may be;
c) the purposes for which the personal data are processed;
d) the right to submit a complaint to the supervisory authority and its contact details;
e) the right to request from the controller access to personal data relating to the data subject or the rectification or deletion of such data or the restriction of their processing. According to art. 27 of the same normative act, the operator is obliged to keep records of all categories of processing activities under his responsibility. The operator is obliged to designate a person responsible for the protection of personal data (art. 40) to consult properly and in a timely manner in all aspects related to the protection of personal data (art. 41) etc. Non-compliance of the legal provisions regarding the protection of personal data constitutes contravention, still contraventions, as we recall, constitute criminal cases in the interpretation of the ECHR[28].

c) however, there are other legal provisions that establish certain obligations for legal entities and which do not include explicit provisions regarding the obligation to comply, but whose non-compliance attracts criminal liability: failure to take legal measures for safety and health at work – art. 349 RCC[29], non-compliance with legal measures for safety and health at work – art. 350 RCC[30], failure to combat diseases – art. 352 RCC[31] etc.

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[27] Published in Official Monitor no. 790 from 12th December, 2001, presently repealed.

[28] *Case Anghel v. Romania*, ECHR, Judgment of 31st March 2008, http://ier.gov.ro/wp-content/uploads/cedo/Cauza-Anghel-impotriva-Romaniei.pdf, accessed on 10.04.2021.

[29] Art. 349 of RCC – Failure to take occupational health and safety measures

„(1) Failure to take any of the legal occupational health and security measures by a person who was charged with taking these measures, in case it results in the imminent danger of a labor accident or of an occupational disease, shall be punishable by no less than 6 months and no more than 3 years of imprisonment or by a fine.

(2) The act set out in par. (1) perpetrated out of negligence shall be punishable by no less than 3 months and no more than 1 year of imprisonment or by a fine".

[30] Art. 350 of RCC – Non-compliance with occupational health and safety rules

„(1) Non-compliance with the occupational health and safety rules by any individual, if this results in the imminent danger of a labor accident or of an occupational disease, shall be punishable by no less than 6 months and no more than 3 years of imprisonment or by a fine.

III. The compliance obligation and the *mens rea* of the legal persons. Legal valences of the compliance obligation

Arousen in the United States in the early 1970s, the organizational model conditions the guilt of the collective entity on its „personality." According to this model, the legal person is „a community (...) with its own attitudes, norms, expectations, morals and habits"[32] that can influence the conduct of individuals who lead or act within it. The legal person has its own identity[33] configured on concepts of *corporate culture* or *corporate ethos*. These elements are evaluated based on a whole set of factors such as the values that inspire and guide the activity of the corporation, the environment in which the business takes place, the configuration of the decision-making structure, the cultural background[34].

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(2) The same penalty shall apply to the act of resuming the operation of installations, machines or equipment before removing all the flaws and defects for which their operation was stopped.

(3) The acts set out in par. (1) and par. (2) perpetrated out of negligence shall be punishable by no less than 3 months and no more than 1 year of imprisonment or by a fine".

[31] Art. 352 RCC: Failure to combat diseases

„(1) Failure to comply with the quarantine or hospitalization measures ordered for the prevention or control of infectious diseases shall be punished by imprisonment from 6 months to 3 years or by a fine.

(2) Failure to comply with the measures regarding the prevention or control of infectious diseases, if the deed resulted in the spread of such a disease, shall be punished by imprisonment from one to 5 years.

(3) The transmission, by any means, of an infectious disease by a person who knows that he suffers from this disease shall be punished by imprisonment from 2 to 7 years and the prohibition of the exercise of certain rights.

(4) If the deed provided in par. (2) is committed negligently, the punishment is imprisonment from 6 months to 3 years or a fine.

(5) If by the facts provided in par. (1) and (2) the bodily injury of one or more persons has occurred, the punishment is imprisonment from 2 to 7 years and the prohibition of exercising certain rights, and if the death of one or more persons has occurred, the punishment is imprisonment from 5 at the age of 12 and the prohibition of exercising certain rights.

(6) If by the deed provided in par. (3) the bodily injury of one or more persons has occurred, the punishment is imprisonment from 3 to 10 years and the prohibition of the exercise of certain rights, and if the death of one or more persons has occurred, the punishment is imprisonment from 7 to 15 years and prohibition of the exercise of certain rights.

(7) If by the deed provided in par. (4) the bodily injury of one or more persons has occurred, the punishment is imprisonment from one to 5 years and the prohibition of the exercise of certain rights, and if the death of one or more persons has occurred, the punishment is imprisonment from 2 to 7 years and prohibition of the exercise of certain rights.

(8) The attempt at the crime provided in par. (3) shall be punished.

(9) Quarantine means the restriction of activities and the separation from other persons, in specially arranged spaces, of persons who are ill or suspected of being ill, in a manner that prevents the possible spread of infection or contamination".

[32] C. Stone, *Where the Law Ends. The Social Control of Corporate Behavior*, Harper & Row, 1975, p. 228.

[33] W. Ollins, *The Corporate Personality*, *apud*. C. de Maglie, *Models of Corporate Criminal Liability in Comparative Law*, in Washington University Global Studies Law Review, vol. 4, Issue 3 Centennial Universal Congress of Lawyers Conference – Lawyers & Jurists in the 21st Century, January 2005, p. 558.

[34] T.E. Deal, A.A. Kennedy, *Corporate Cultures*, 1982, Addison-Wesley, p. 13-15.

Based on the organizational model, the subjective element – guilt – necessary for engaging the criminal liability of the legal person must be sought in the relationship between the organizational scheme of the legal person and the act committed with guilt by the natural person. Thus, the act reflects the corporate culture, expectations, customs, rules and morals existing within the legal person and represents at the same time the consequence of the conduct of the decision-making structure that ordered, allowed, negligently tolerated or did not guiltily take the necessary measures to its prevention[35]. The organizational model requires a thorough assessment of the legal person's hierarchical structure, its business objectives, post-crime behavior and the existence of a compliance program in order to engage the criminal liability of the legal person[36].

In other words, the fulfillment of the compliance obligation, be it explicit or implicit and, I would add, a diligent and cautious attitude in the management of activity risks are elements that configure the subjective element of the legal person according to the organizational model, which is also the most modern one. The so-called „ethical infrastructure"[37] is an important component of both compliance and diligence, shaping their finality.

Failure to prove the subjective element by the judicial bodies and the pronouncing of a court decision indicating solely the content of article 135 RCC[38] or to only analyze the subjective element superficially does nothing but perpetuate an „occult objective liability"[39], the courts preferring a „practitioner" approach by which the legal person is permanently guilty of committing the crime, because it is easy to be accused and even easier to be obliged to repair the damage caused by the crime/offense...

The caselaw of some Romanian courts to charge the agent (in our case, the legal person) with subjective processes based on the experience of judges and not on the basis of the concrete circumstances in which he acted, or through the excessive use of the presumption of guilt and guilt, is quite disturbing

For example, a simple incursion on the court web portal revealed a whole series of decisions that do not analyze at all the subjective element in the case of the legal person, some of them limiting themselves strictly to the analysis of the

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[35] P.H. Bucy, *Corporate Ethos: A Standard for Imposing Criminal Liability*, Minesota Law Review 1991, vol. 75, p. 1101.

[36] P.H. Bucy, cited, p. 1095.

[37] A.E. Tenbrunsel, K. Smith-Crowe, E.E. Umphress, *Building Houses on Rocks: The Role of the Ethical Infrastructure in Organizations*, Social Justice Research, vol. 16(3), 2003, pp. 285-307.

[38] Art.135 RCC: Conditions for the criminal liability of legal entities

„(1) Legal entities, except for state and public authorities, shall be held criminally liable for offenses perpetrated in the performance of the object of activity of legal entities or in their interest or on their behalf.

(2) Public institutions shall not be held criminally liable for offenses perpetrated in the performance of activities that cannot be the object of the private domain.

(3) Criminal liability of legal entities does not exclude the criminal liability of the individual participating in the perpetration of the same act".

[39] G. Antoniu, cited, p. 191.

correspondence of the facts with the provisions of art. 135 RCC. – Decision no. 9 R/29.01.2013 Ialomița Court[40]; Decision no.1169/21.12.2020, Bacău Court of Appeal; Decision no. 1458/20.10.2020, Brașov District Court; Decision no. 119/A/07.04.2017, High Court of Cassation and Justice – Criminal Section; and so on.

To exemplify, by the Decision no.1169 / 21.12.2020, Bacău Court of Appeal states[41]:

> *„The court notes that the legal person has the quality of perpetrator of the investigated offenses, considering the special disposition of the regulation of the criminal liability of the legal person. Thus, according to art. 135 RCC, legal persons, except for the state, public authorities and public institutions that carry out an activity that cannot be the object of the private domain, are criminally liable for crimes committed in carrying out the object of activity or in the interest or on behalf of the legal person, and according to par. (2) of the same article, the criminal liability of the legal person does not exclude the criminal liability of the natural person who contributed, in any way, to the commission of the same crime. The relevant doctrine and jurisprudence in the matter – inspired by the French / Belgian doctrine from where the incriminating text in the Romanian law was inspired – showed that the crime is committed on behalf of the legal person when committed by its representative, which acts on behalf or in the interest of the legal person. Such an interest may consist in achieving or hoping to obtain a financial interest, whether it is to gain profit or to avoid losses. Moreover, it was decided that the offense is committed on behalf of the legal person whenever it is committed in the exercise of activities aimed at ensuring the organization, functioning or objectives of the legal person, even if it had no interest in committing the act and he made no profit. In the pending case, given that defendant acted as director / administrator of the legal person, it is noted that he acted in the realization of the object of activity of this company, but also in the interest and on its behalf – so that it will also attract the criminal liability of the defendant legal person, of course as an author. It has been judiciously argued in the doctrine – that due to the interconnections that exist between the liability of the legal person and the liability of the natural person who committed the crime, the legal person is liable in the same manner as its human agent, as perpetrator, instigator or accomplice. (…) For these reasons, it is appreciated that the acts of the defendant legal person, which did not take measures to remedy the sliding system defects of the access gate (defects of the metal rail and defective stop system) which led to the injury (120-130 days of medical care) of the left leg of one employee during working hours, meet the constitutive elements of the offenses of non-compliance with legal measures of safety and health at work, provided by art. 349 para. 1 and 2 RCC and Bodily injury by negligence, provided by art. 196 para. 2 and 3 RCC as concurrent offenses".*

[40] http://infodosar.ro/speta.php?id=18971.
[41] Decision no.1169 / 21.12.2020, Bacău Court of Appeal, available on www.sintact.ro.

By another decision – Decision no. 1458 / 20.10.2020 – Brașov District Court[42] has stated that, *„regarding the liability of the legal person, the court holds that in order to engage the liability of the legal person, according to art. 135 RCC, the following conditions must be met: – not to be a legal person exempted by law from liability, such as the state or public authorities or institutions that carry out an activity that cannot be the object of the private domain; – the crime/offense was committed in the realization of the object of activity of the legal person, in its interest or on its behalf; – the deed must have been committed with the form of guilt provided by law. Analyzing the evidence administered in the case, it is found that the conditions for engaging the criminal liability of the legal person are met, since it is a legal entity that is not exempted by law from criminal liability, the crime was committed in the purpose of activity of legal person (specific activity of recovery and capitalization of the waste resulting from the landfill). Although the committed deed engages the criminal liability of the defendant natural person, according to art. 135 paragraph 3 RCC, the criminal liability of the legal person does not exclude the criminal liability of the natural person who contributed, in any way, to the commission of the same act. Thus, the criminal liability of the natural person does not remove the criminal liability of the legal person either. Thus, the act of the defendant legal person not to take legal measures for safety and health at work with regard to the victim, which performed lucrative activities for the company on 20.10-21.10.2014 at the company's office, respectively at the former landfill in the Uzina II Zizin area, in essence, not to identify and assess the risk of landslides following the excavation, not to conclude and register at the Territorial Labor Inspectorate an individual employment contract, aspects that competed in the accident as a result of which the victim died, meets the constitutive elements of the crime of manslaughter provided by art. 192 para. 2 RCC and failure to take the legal measures of health and safety at work, provided by art. 349 para. 1 RCC".*

High Court of Cassation and Justice of Romania has stated in a caselaw decision[43] the following:

„Noting, therefore, that the defendants A., B., G., H., E., C., D. (natural persons), SC F. SRL Băilești (legal person) are the perpetrators of the deeds for which they were sent to court, and their guilt is proved beyond the reasonable doubt, with the evidence administered in the criminal investigation phase, including the statements of the defendants given before the court, by which they acknowledged the commission of the facts, as described in the indictment, and requested that the trial should take place according to abbreviated procedure (...), the Court found that the conditions of guilt required by law had been met, and

[42] Decision no. 1458 / 20.10.2020 – Brașov District Court, available on www.sintact.ro.

[43] Decision no. 119 / A / 07.04.2017, High Court of Cassation and Justice – Criminal Section, available on www.scj.ro.

there was sufficient information on the person of the defendants to allow the imposition of sentences".

I have emphasized on other occasions[44] the importance of arguing the subjective element in the case of imposing criminal liability of the legal person, showing that the identification of the case of incidence provided by art. 135 RCC as a sole motivation for imposing this this kind of criminal liability is insufficient and amendable by the ECHR.

In other words, it is presumed by the judicial bodies that, once the conditions of criminal liability provided by art. 135 RCC are identified, this automatically attracts the criminal liability of the legal person for the deed deduced to the court, the judicial bodies assuming the guilt of the legal person agent and thus establishing a tendency to practically extend the cases in which the accused legal persons are criminally liable. In the logic of some of the judicial bodies, the identification of one of the cases of criminal liability provided by art. 135 RCC. leads to the presumption that the legal person agent acted with the form of guilt provided by law, which is completely false.

This jurisprudential tendency to extend the scope of criminal liability of the legal person has been rightly criticized as not justified „arguing that, in this way, a better satisfaction of the interests of the civil party can be ensured, which can be more easily compensated if an offense is committed by the legal person"[45]. I totally agree with this doctrinal opinion, despite my stated position of supporting ab initio the introduction in Romanian criminal law of the institution of criminal liability of the legal person, adding only that a legislative intervention to introduce elements or conditions to practically facilitate the establishment of the subjective element and the immutability of the criminal act is more than ever appropriate.

The adoption of a diligent conduct or the fulfillment of the compliance obligation, as they are not expressly provided as conditions for engaging the criminal liability of the legal person in Romania could be capitalized as judicial mitigating circumstances under the conditions of art. 75 para. 2 lit. b) RCC – „circumstances related to the committed deed that diminish the gravity of the crime or the danger of the perpetrator" – but this would only attract a mitigation of criminal liability, and that of an optional nature. In the event that the court does not retain one of these elements as a judicial mitigating circumstance, it could capitalize it as a general criterion for individualizing the punishment under the conditions of art. 137 para. 3 thesis I RCC reported to art. 74 para. 1 lett. a) RCC. – „the circumstances and manner in which the

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[44] L.M. Stănilă, *Problema identificării elementului subiectiv în cazul răspunderii penale a persoanei juridice [The problem of identification of the subjective element in the case of criminal liability of the legal person]*, in Analele Universității de Vest din Timișoara. Seria Drept, 2015, no. 1:103-117, p. 111-112; L.M. Stănilă, *Dificultăți practice privind stabilirea vinovăției în cazul răspunderii penale a persoanei juridice [Practical difficulties in establishing guilt in the case of criminal liability of the legal person]*, in Revista de drept penal al afacerilor no. 1 January-March 2019, p. 80-108.

[45] V. Stoica, V. Dobozi, T. Colțan, *Tendințe jurisprudențiale în materia răspunderii penale a persoanei juridice [Jurisprudencial tendencies in the matter of criminal liability of the legal person]*, 31.03.2016, www.juridice.ro, accessed on 22.02.2021.

offense was committed (...)". However, even in this situation, the criminal liability of the legal person will be imposed whenever the judicial body manages to prove the incidence of one of the situations provided by art. 135 para. 1 RCC by which the criminal liability of the collective entity with legal personality can be imposed. However, there are solutions for Romanian case-law (fewer, which is true) in which the courts intuitively analyze the standard of diligence and even the obligation to comply in order to prove the immutability of the criminal act in the case of the legal person.

Thus, in the discussed case „Giulești Maternity", the court established that

„the legal person did not comply with the obligation to constantly monitor newborns in the Intensive Care unit of the Neonatology Department, did not take measures to organize the activity in order to ensure occupational health and safety, did not take the measures for organizing the activity of checking / overhauling the electrical installation and for training the unit staff on fire prevention rules, did not ensure proper inspection of the electrical installation, the lack of assistants in the medical service unit preventing the immediate finding of the fire and taking of rescue measures, resulting in the death of 6 newborns (...) and the bodily injury and endangering the life of 5 other newborns"[46].

It was established that the documents attesting to the organization of arson prevention were not updated, the intervention plans and storage of materials classified according to the law as dangerous were not finalized, in some technical spaces, such as the general electrical panel, materials that did not have connection with the operation of these spaces were stored. It was also shown that some electrical panels used uncalibrated electrical fuses, that no documents were presented attesting the checks that had to be performed in the case of utility installations and not all means of first aid, such as fire extinguishers, were checked within the established deadlines by the manufacturer. Although the Inspectorate for Emergency Situations had set a deadline for remedying these irregularities, the court found that there was no document certifying that these irregularities had been removed by that date.

In another case, the Bacău Court of Appeal followed the same direction of meticulous analysis of the compliance duty, even if it does not name it as such stating:

„In order to be in the presence of a liability of the legal person (...) it is necessary to identify deficiencies and failures of the legal person to act and, in particular, of the board of directors, shareholders, legal representatives, which would have created the premises for such negligent behavior of individuals, behavior that led to the explosion and related destruction. However, in the

[46] București Court of Appeal, second criminal section, decision no. 537/A/2.04.2015. Available on http://juri.ro/static/files/2015/noiembrie_2015/18/DOSAR_NR_25294_ANONIMIZAT.pdf, accessed on 22.02.2021.

present case, there are no such deficiencies, – poor organization, lack of control of employees, lack of equipment, adequate and necessary facilities for this activity etc. and more importantly, the indictment did not refer to a reckless or negligent conduct of the legal person such as those mentioned, but only retained the existence of the guilt of the employed natural persons, considered sufficient to impose the criminal liability for the SCE-ON Distribuție Romania SA (legal person indicted)"[47].

The Court found a number of elements favorable to the legal person: the cracked pipe was relatively new, was in the period of use established by the manufacturer, regular inspection activities were organized, there were service orders issued for this purpose, there was an organized system of supervision and control, a complex decision-making reporting and verification mechanism (district, operational center, branch, head office), reviews were carried out according to the technical rules in force (at intervals of 1 and 2 years), carried out monthly activities for the detection of gas leaks with the appropriate equipment, departments were set up for the registration and settlement of gas leakage notifications, effective action was taken in the areas and facilities concerned, no deviations from the regulations in force regarding design, execution and operation of gas supply systems etc.).

In the two case-law examples presented, the compliance duty is capitalized by the court as a condition for assessing the subjective typicality of the act committed by the legal person, and not as a mitigating circumstance or criterion of individualization and should have served as a model for the other courts for the assessment of the subjective element of the crime in the case of the legal person indicted.

IV. Conclusion

In the view of all presented above, we have come to the conclusion that a clear and general regulation of the obligation of compliance is needed, by which the legislator should establish the legal effects of the fulfillment by the legal person of the compliance obligation in relation to its criminal liability. I am convinced, however, that such a legislative intervention in Romanian criminal law would be welcomed and could be even more generous by referring to the standard of reasonable diligence in preventing the commission of crimes/offenses by the legal person. Thus, art. 135 para. 1 RCC. could be supplemented either by adding the phrase *„and did not act diligently or in accordance with the prevention of the criminal act committed",* or by inserting an additional paragraph providing clear instructions on the conditionality of the criminal offense for lack of diligence and / or compliance obligation. This would clarify many aspects that were not sufficiently understood by the courts and ensure compliance with the standards of clarity and predictability of criminal law. In other words, from a logical and implicit condition of the subjective typicality of a crime committed by the

[47] Decision no. 1294/2016/29.11.2016 of the Bacău Court of Appeal. Available on www.rolii.ro.

legal person, the obligation to comply would turn into an explicit negative legal condition of subjective typicality, which would remove the „occultism" of the criminal sanction of the legal person and could be used as an effective defense by the defendant in the criminal proceedings.

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New Hungarian Legislation on Money Laundering from 2021

István László Gál[1]

Abstract

In 2021, the Hungarian legislature completely rewrote the criminal law rules against money laundering. The new regulation also considers money laundering to be conduct that was not a crime at all in the past. The new regulation is unrealistic and antihuman in many respects, but we have to see that the latest Hungarian legislation is in line with international trends.

Keywords: *money laundering, reporting obligation, organized crime, Penal Code, AML, terrorist financing.*

I. The concept of money laundering and the economic impact of the nation

The criminological concept of money laundering is defined as illegal economic services under the guise of legal transactions, as a result of which the origin of the property acquired by the crime can be justified, freed from its recognizably illegal nature.

Any illegal activity involves a certain type of transactional cost, since the use of the proceeds of crime increases the risk of detection of the crime. These transaction costs can be reduced by a successful money laundering operation. The special economic importance of the activity is that it converts potential assets, which would be dangerous to spend without money laundering (thus being considered inactive capital in this respect), into actual purchasing power. In this sense, money laundering plays the role of an illegal monetary supply that meets the demand for money laundering services by individuals or groups committing income-generating crimes.

Money laundering returns criminal goods to the institutional system of the legal economy, fundamentally changes the functioning of the market in connection with organized crime, devalues the effectiveness and fairness of financial procedures, weakening the economy as a whole[2]. In addition, money laundering can be considered

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[2] *Recommendation No. 3/2002 of the President of the State Supervision of Financial Institutions to prevent terrorism and money laundering*, p. 1, available on www.pszaf.hu/ajanlasok/2002/3-2002.htm, accessed on 15 June 2003.

a necessary form of organized crime[3], which further increases its dangerousness. By carrying out various, often targetedly complex operations, persons and institutions involved in money laundering aim to ensure that money otherwise obtained illegally is earned as legal income for the outside world, in particular for public authorities, and can be used for further, whether legal or further illegal, activities. Money laundering as a phenomenon therefore presupposes at least one, but typically more, acts normally covered by organized crime, such as drug, prostitution, trafficking in human beings, illegal gambling, corruption or damage to public budgets, resulting in a significant amount of illegal income[4].

If we look at the macroeconomic effects, it should be noted that if the laundering of income from illegal sources begins to take on a significant scale in a national economy, it will become apparent even in the legal business sphere. This can have unforeseen consequences, since money laundering, as already mentioned, is not a for-profit activity and can therefore upset the balance in the legal sphere. While they are seemingly engaged in a legitimate economic activity, the money lathers are willing to offer the goods and services they sell at lower prices, but as buyers it is worth buying them at a higher price[5].

For those working legally, this process either leads to a deterioration in their standard of living, as they earn minimal income or try to compete with the commission of criminal offences (e.g. budget fraud)[6].

The potential social and political costs of money laundering, especially if left unexplored or not sufficiently serious, are very serious. Organized crime can infiltrate financial institutions; gain control over major economic sectors through investments, bribing senior officials and politicians; its acquired political and economic influence can weaken the social network, collective ethical norms and, ultimately, the democratic institutional system of society. In its most basic form, money laundering is inexpensively linked to the core activity that triggers it and ultimately stimulates the continuation of criminal activities as a 'positive feedback' mechanism.

If the underworld infiltments business, it will begin to impose its morals on its partners. The amount of money laundered may be as small as possible, which may already affect the national economy of each country. The greatest danger is the incorporation of offenders into economic, political power, businesses, financial services organizations[7].

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[3] Mayerhofe J., *Organized crime. Kriminalistik Verlag*, Heidelberg, 1996, p. 112.

[4] I. Ambrus, *Büntetőjog 2021 – a pénzmosás újrahangolt tényállása és a hálapénz kriminalizálása* [Criminal Law 2021 – Re-tuned facts of money laundering and criminalization of gratitude money], Büntetőjogi Szemle 2/2020, p. 4.

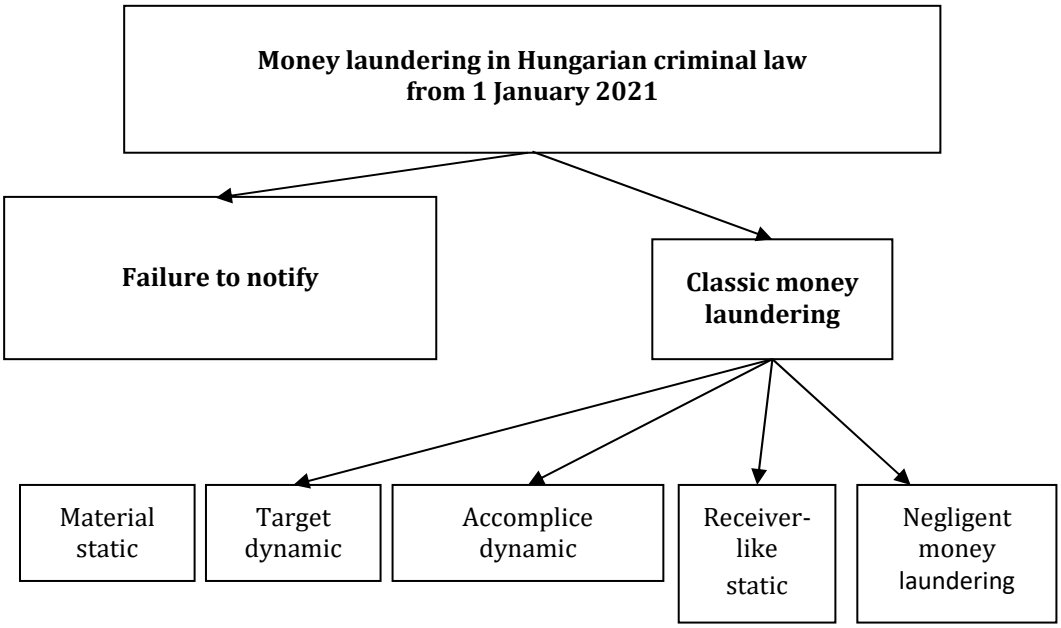
[5] If we walk around Lake Balaton with our eyes open and make a comparison with ourselves looking at the prices, we can conclude here and there that, taking into account the usual rents in the given area, it is unlikely that, for example, a particular business will be profitable. (Of course, this does not only lead to money laundering, it is also possible that the product was stolen or that the customs duty was „saved" on it...)

[6] J. Jacsó, *A pénzmosás elleni nemzetközi fellépés eszközei* [Instruments for international action against money laundering], Magyar Jog, no. 9/2000, p. 545.

[7] A. Farkas Ruralné, *A pénzmosásról* [On Money Laundering], Ügyészek Lapjai, Issue 21/1995.

We can therefore conclude that the increase in money laundering activities can also cause significant damage to the legal business sector of a region or country, disregarding the rules of fair market behavior, making economic competition impossible, and may also disrupt the monetary sphere and, in quite extreme cases, contribute to the decomposition of democratic institutions.

II. New rules on money laundering



According to the current criminal law definition, money laundering has five basic incidents. The five base case names can be indicated by the following names based on their main characteristics:

1) *material static money laundering*,
2) *targeted dynamic money laundering*,
3) *abetting dynamic money laundering,*
4) *static money laundering like receiver*.
5) *negligent money laundering*.

Furthermore, the criminological and criminal concepts of money laundering differ: the concept of criminology is defined as illegal economic services under the guise of legal transactions, which results in the origin of the property acquired by the crime becoming justified, freed from its recognizably illegal nature. The criminal

concept of money laundering is different. In the criminal sense, and it is appropriate to bear this in mind for the purposes of this professional opinion, any part of the economic concept of money laundering constitutes money laundering. In other words, the authority does not have to prove that the entire money laundering process has taken place, it is enough to implement any part of the economic concept of money laundering for an amount of illegal origin. Therefore, a single transfer to a bank account is enough, and this crime can be carried out in practice with a single economic event.

The distinction between static and dynamic money laundering was developed a decade ago and has been used by law enforcement practice ever since. In the case of static money laundering, the vast majority of the conduct committed does not involve a transformation of property, e.g. the property of criminal origin does not usually change shape during the commission. In the case of dynamic money laundering, on the other hand, the vast majority of the conduct committed also results directly or indirectly in the transformation of property, although this is not a criminal result of this crime, but only a distinctive feature in the criminological sense.

Negligent money laundering is, in my view, a separate case, e.g. the fifth type of money laundering, since it has its own facts and qualified cases, none of the first four intentional guilt shapes are negligent, although they are closest to the target dynamic.

Some of the figures under the money laundering regulations in force from 2021 can also be summarized in the upper diagram.

As of 1 January 2021, the current Hungarian legislation on money laundering provides as follows:

Section 399 (1) Any person who conceals or disguises the origin of assets derived from criminal activity, including any right on and the location of such assets, and any changes therein, is guilty of money laundering.

(2) Money laundering shall also include where a person is involved in receiving assets derived from criminal activity from others with intent to conceal or disguise the origin of the assets, including any right on and the location of such assets, and any changes therein, or in concealing, converting, transferring such assets, participates in the alienation of or uses such assets, performs any financial transaction or receives any financial service in connection with those assets, or makes the necessary arrangements to that effect.

(3) Money laundering shall also include where a person is involved in receiving assets derived from criminal activity from others, or in concealing, converting, transferring such assets, participates in the alienation of or uses such assets, performs any financial transaction or receives any financial service in connection with those assets, or makes the necessary arrangements to that effect:

a) with intent of aiding efforts to prevent the enforcement of confiscation and asset recovery ordered against others, or

b) with intent to prevent the enforcement of confiscation and asset recovery ordered against others.

(4) Any person who, in connection with assets derived from a criminal activity committed by others:
a) acquires, obtains the right of disposition over such assets, or
b) safeguards, conceals, handles, uses, consumes, converts, transfers, or participates in the alienation of such assets is also guilty of money laundering.
(5) The punishment shall be imprisonment for up to five years for a felony if the value involved in money laundering is below substantial value.
(6) The penalty shall be imprisonment between two to eight years if money laundering is committed:
a) in respect of a particularly considerable value; or
b) in respect of a substantial value
ba) in a pattern of business operation,
bb) by a service provider defined in the Act on the Prevention and Combating of Money Laundering and Terrorist Financing, by an officer or employee of such service provider in connection with the service provider's activities, or
bc) by a public official.
(7) The punishment shall be imprisonment between five to ten years if money laundering is committed:
a) in respect of particularly substantial value; or
b) in respect of particularly considerable value
ba) in a pattern of business operation,
bb) by a service provider defined in the Act on the Prevention and Combating of Money Laundering and Terrorist Financing, by an officer or employee of such service provider in connection with the service provider's activities, or
bc) by a public official.
(8) Any person who engages in preparations for money laundering is guilty of a misdemeanor punishable by imprisonment not exceeding one year.
(9) The abettor or aider shall not be prosecuted if he or she commits the criminal offense defined in Subsection (3) or (4) in respect of assets derived from a criminal activity he or she has committed.

Section 400 (1) Any person who is involved in concealing, converting, transferring assets derived from criminal activity committed by others, or participates in the alienation of or uses such assets, performs any financial transaction or receives any financial service in connection with those assets, or makes the necessary arrangements to that effect, and is negligently unaware of the true origin of the asset is guilty of misdemeanor punishable by imprisonment not exceeding two years.
(2) The punishment shall be imprisonment for misdemeanor for up to three years if the criminal offense defined in Subsection (1):
a) involves a particularly considerable or greater value;
b) is committed by a service provider defined in the Act on the Prevention and Combating of Money Laundering and Terrorist Financing, by an officer or

employee of such service provider in connection with the service provider's activities; or

c) is committed by a public official.

(3) Any person who voluntarily reports to the authorities and unveils the circumstances of commission shall not be prosecuted for money laundering as specified under Subsections (1) and (2), provided that the act has not yet been revealed, or it has been revealed only partially.

Interpretative Provisions

Section 402 (1)

(2) In the application of Sections 399-400, financial activities and financial services shall mean financial services and activities auxiliary to financial services, investment services and activities auxiliary to investment services, commodity exchange services, investment fund management services, venture capital management services, exchange services, central depository services, the activities of bodies acting as central counterparties, insurance services, reinsurance services, and the activities of independent insurance intermediaries, voluntary mutual insurance funds, private pension funds and institutions for occupational retirement provision.

The legal subject of money laundering is the public interest in the effectiveness of the fight against crime, in particular organized crime. In addition, trust in the state's financial institution system can also be considered a legal object in the alternative[8]. The object of the crime is property. Criminal material law has traditionally identified the scope of things as the object of money laundering, which has been extended by interpretative provision to a dematerialized instrument of pecuniary entitlement and dematerialized securities behaving in the manner of such a thing. These frameworks have become scarce in view of the new types of assets that have recently appeared, and new types of property (e.g. various forms of electronic data used for payment) have emerged not only in criminal law, but also in other branches of law as a disputed and under-regulated area of law. However, a common feature of such new assets is that the provision of them can still be regarded as a pecuniary advantage, including the pecuniary benefit of crime, and it is therefore absolutely necessary that criminal law should have an adequate set of instruments against them. With regard to the inclusion of new types of assets in criminal law, it should be pointed out, first of all, that, overall, those assets are not outside the scope of criminal law, since they may be the subject of confiscation under the general rules and may be the subject of a specific seizure in Be. (Criminal Proceeding). However, there is a contradiction between the fact that certain types of assets may be confiscated but not the subject of money laundering. In order to resolve this, it is appropriate to establish in the Special Section of the Hungarian

[8]T. Horvát, B. Kereszty, V. Maráz, F. Nagy, M. Vida, *A magyar büntetőjog Különös része*, [A Special Part of Hungarian Criminal Law], Korona Kiadó, Budapest, 1999, p. 670.

Penal Code flexible regulations capable of managing new types of assets in the context of money laundering. Since there is no general definition of property in the Hungarian Penal Code, only Article 76 of the Hungarian Penal Code defines certain assets subject to confiscation by means of a non-exhaustive list, the modification of the object of money laundering to property provides sufficiently flexible conditions for combating crime by new types of assets. The use of this concept also ensures compliance with international and European Union requirements[9].

In relation to the subject matter of the crime, we need to talk about one more issue, the problem of pre-acts. The thing referred to in the facts must result from the committing of a criminal act. Although the law no longer states that it must be a criminal act „according to this law", in my view it should at least mean acts ordered to be punished by the Hungarian Civil Code, it is not enough to be punished by the law of the place where the crime was committed. The law does not use the term 'crime', but the term 'criminal act', which implies that *money laundering can be established even if the perpetrator of the pre-act cannot be punished for any reason* (e.g. because of childhood or if the perpetrator has a pathological state of mind).

It is also irrelevant whether or not the basic offence falls under the jurisdiction of the State acting on the grounds of money laundering (as set out in Article 6 of the Strasbourg Convention also fixes.). Nowadays, it is more typical that the concealment of origin cannot happen on a different scale than on an international scale without the hope of success. It is therefore almost necessary that the country in which the main proceedings were committed and the place of origin concealment (partially) was different. The only important criterion is that the suspected pre-act should be an act threatened with deprivation of liberty in the country of committing and money laundering. (This may be particularly questionable in the case of offences detrimental to financial and foreign interests)[10].

The court gives its opinion on whether it is a criminal act. However, there is no need for the main proceedings to end with a final judgment, because if we had to wait for this in all cases, the evidence of money laundering would also be lost in the meantime. This line of thought is also supported by the fact that the Hungarian Penal Code does not refer to a criminal act as a pre-act, still refers to it as a criminal act.

The basic act must be a criminal act which must be proved in a regular manner. Evidence in a court system cannot be missed in criminal proceedings. In my view, the mere fact that a criminal offence has been reported in that country does not mean that it was actually a criminal offence, since there may be cases where proceedings are terminated in the absence of a criminal offence. The fact of the complaint does not in itself prove not only that the offence was committed, but also that a criminal offence with a much lower requirement was committed, as confirmed by the fact that the Criminal Procedure Act also speaks of suspicion or well-founded suspicion at the

[9] Explanatory memorandum to Bill T/9918.

[10] M. Tóth, *Gazdasági bűnözés és bűncselekmények* [Economic Crime and Crime], KJK-Kerszöv Jogi és Üzleti Kiadó Kft., Budapest, 2002, p. 358.

beginning of the criminal proceedings, at a time when a certain amount of data is already available. The basic act must therefore be demonstrated 'at some level' in the money laundering proceedings. It is not enough to assume, to think based on denunciations, but to prove that the money actually comes from a criminal act. Although Hungarian judicial practice has produced different, schematic decisions in the last few years, which are not compatible with the provisions of criminal material and procedural law, the practice of the Curia and the international treaties in force; in the view of the defense, in the present case we should return to the 'right track' even if this could mean additional work for the investigating authority in the future and even worse prosecution results for the public prosecutor's office.

A distinction should also be made between the completion and the finish of the offence, which may also be relevant for the basic or pre-act. For example, in the case of several crimes against property (fraud, theft), completion can only arise if the victim is permanently out of reach, as a result of which he has no chance of recovering or retaining it. As long as you have such an opportunity, we can only talk about an experimental course, even if the perpetrator has already completed his conduct, that is, the crime is finished.

In a decision of the Curia in a review procedure, the Curia stated that in the case of basic offences and money laundering, a real heterogeneous set of forms cannot be established, i.e. a criminal conduct cannot simultaneously exhaust the legal facts of the basic offence and money laundering (Kúria Bfv.I.830/2017/16.) In other words, money laundering with the basic crime should never, under any circumstances, be formal, but only in a material set: for this reason, the basic crime and money laundering must be isolated in space and time. After the end of the basic crime, it is possible to enter the money laundering course only in a separable way, first in the pilot course, and then in the stage of completion. Contrary to the legal regulations of some other states, Hungarian criminal law is currently not familiar with the category of autonomous money laundering, e.g. when unusual transactions without a basic act can also constitute money laundering. According to the Hungarian Penal Code, the basic crime must be based on the interpretation of the Curia, and this must be separate in time and space with money laundering[11]. In other words, the apparent set of forms will never be resolved by establishing money laundering.

The presentation of money laundering behavior is carried out by discussing the five basic types of facts in force from 1 January 2021 separately. After hearing the conduct of each type, the subjective side of the crime, as well as the qualified cases and the set-demarcation issues are presented in a consolidated way.

The first version is material static money laundering. Here, the vast majority of the committal behaviors do not result in a transformation of property in economic

[11] The same is confirmed by the Circular of the Deputy Attorney General for Criminal Law on money laundering: *„The object of money laundering is something arising from the basic act and therefore the commission of the ancillary deliberation is conceptually excluded until the commission of the basic act or of the sub-act constituting the basic act, which is suitable for independent criminal assessment, has been completed."* (Deputy Attorney General for Criminal Law No 1/2017 (VII. 31.) LÜ h. circular on the criminal aspects of prosecutorial practice in money laundering cases, par. 8).

terms (therefore static), and also a result position (e.g. a material offence in criminal terms), since the result of the crime is the permanent separation of the property of criminal origin from the origin of the culprit. The result is therefore that the origin of the property becomes covered and disguised. This shape is new in Hungarian criminal law and, in my view, will not have any significant practice. If the perpetrator successfully conceals the origin of the criminal property, he will avoid detection because of the result of the money laundering, e.g. the suspicion on which the criminal proceedings are based. And if the cover-up is not „effective," this shape cannot be determined because of the lack of results.

The conduct committed is as follows:

a) concealment of the origin of property means that sinful property becomes secret to the outside world,
b) the concealment of property contains an additional element compared to the previous one: it requires a concealing title by which the origin of the property appears to be legal.

The version in the second paragraph can also be called dynamic money laundering, since the vast majority of the behaviors committed result in a transformation of wealth in economic terms. The conducts committed are as follows (all conduct is related to the purpose, i.e. only for the purpose of concealing or concealing the origin of the property resulting from the criminal act, the right to property, the place of the property, their change may be factual):

- taking over of property of criminal origin from another means that the offender is placed in possession, i.e. he or she takes the property within his own disposal;
- concealment of property of criminal origin constitutes an act by which the property becomes physically inaccessible;
- in the context of the transformation of property of criminal origin, property is transformed, for example, one painting becomes cash or, for example, stolen parts are incorporated into another thing;
- in the case of the transfer of property of criminal origin, the property is removed from the possession of the offender and another person acquires the right of possession by contract or real act;
- assisting in the disposal of property of criminal origin means any assistance in the transfer by active conduct;
- the use of property of criminal origin means that the offender, for his or her own or other purposes, carries out a transformation of property on property of criminal origin, for example, the stolen money is used in whole or in part to purchase real estate;
- the content of financial activities, the use of financial services or the provision the thereon in connection with property of criminal origin is determined by the interpretative provision of the Hungarian Penal Code in Section 402(2). According to this, for the purposes of Articles 399 to 400 of the Hungarian Penal Code, in financial activities or the use of financial services, services,

commodity exchange services, investment fund management, venture capital fund management, stock exchange, CSD or CCP, or insurance, reinsurance or independent insurance intermediaries, or voluntary mutual fund, private pension fund or occupational pension service activity or its use shall be understood.

The perpetrator of the basic crime, or a third party, can commit this form. The principle basis for criminalizing dynamic money laundering is that the inclusion of something resulting from a criminal offence in a separate society, either from or per legal source, through operations carried out in the financial-economic sphere, is beyond what has already been assessed in the context of the basic act. This risk, which goes beyond the infringement of the legal object caused by the basic act, justifies the sanctioning of post-acts for the purpose of concealing origin by the perpetrator of the basic act, albeit narrowly. However, in the context of that fact, as a result of the prohibition of double assessment, only conduct for the purpose of concealing origin which is not necessarily inherent in the commission of the basic act may be awarded an independent criminal assessment[12]. In the opinion of some authors, the punishment of the perpetrator of a basic crime for money laundering is of concern in many respects. The dogmatics of Hungarian criminal law consider the category of *„unpunished after-actions"* to be one of the cases of the apparent material set. It should be acknowledged, however, that, in addition to the current legislation, this can also happen as a result of our international obligations, so the task of the practice is to narrow the scope of the facts by all means with regard to the perpetrators of the basic offences.

The version in the third paragraph can also be called abetting dynamic money laundering. Material abetting, e.g. the form of aiding and abetting in which the perpetrator contributes to the provision of the advantage of the crime, is related to the specialty, and cannot be established in a formal set. If both facts are carried out, money laundering shall be established, except in the case justified by law where the offender's sole purpose is to avoid criminal liability by destroying property resulting from the crime, which is also a means of physical proof. In such cases, aiding and abetting should also be established where the penalty for money laundering would be higher in the specific case. And if the perpetrator of the basic crime commits the destruction of the property (material means of proof) for that purpose, it shall be considered a criminal after-act.

This form is carried out by an offender who, by taking over, concealing, converting, transferring, assisting in the disposal, use, financial activity, use of, or disposal of property resulting from a criminal act, or who is involved in the confiscation or recovery of property against another person, or the confiscation of property against another person, or on-recovery. The success of the confiscation or

[12] Deputy Attorney General for Criminal Law 1/2017 (VII. 31.) LÜ h. circular on criminal aspects of prosecutorial practice in money laundering cases, par. 6.

recovery of property does not affect the determination of the completion of the offence.

The version in the fourth paragraph can also be called static money laundering of a receiver. As of 1 January 2021, the has disappeared from Hungarian criminal law, and this form of money laundering has taken over its role. Static money laundering of a receiver is committed by a person who acquires, acquires or retains, hides, manages, uses, converts, transfers or participates in the disposal of property arising from a criminal act committed by another person. The vast majority of the behaviors committed are static, e.g. they do not result in a wealth transformation.

It has been a contentious issue in the literature[13] so far whether the lawyer's fee, which the defense lawyer receives from the offender, where appropriate, from money obtained in connection with the commission of the offence, can be the subject of money laundering. If the lawyer knows that he is taking money from a criminal offence, he can launder money under Hungarian regulations in force from 2021. Similarly, a lawyer who accepts money as a lawyer's deposit that he knows is the result of a criminal offence should be held liable for money laundering. Another issue, of course, is that proving the consciousness of the perpetrator, the lawyer, will be extremely difficult.

In my view, the acceptance of an unfathomable amount of lawyer's fees, which is customary for a particular lawyer in a particular case, does not constitute money laundering, even if the lawyer could have foreseen that it was the result of a criminal offence (but he was lightly confident that it would not).

Section 400 (1) of the Hungarian Penal Code contains negligent money laundering, which is the fifth, independent type, since none of the previous four are negligent figures. It's got his own classified cases. The conduct of the perpetrators includes the behavior of static and targeted dynamic money laundering, but a very important element of the facts is that the offender is not aware of the origin of the property through negligence. Negligence can be negligent, but it can also be knowing negligence. In other words, it is not intentional money laundering, but the perpetrator, who suspects that property from a criminal act is behind it, could be investigated with due care, but fails to do so („he foresees the possible consequences of his conduct, but he is lightly confident that they will not be done"). This is typically the case if the suspected property is believed by the perpetrator to be money from tax evasion, which is not necessarily a criminal offence, or if the holder of the property only wants to hide his actual ownership quality, but later it turns out that the property comes from a crime.

All basic cases of money laundering in the case of both intentional and negligent versions are criminal offences for crimes exceeding HUF 50,000, and offences up to

[13] See more: L. Hombrecher, *Money laundering (§ 261 StGB) by criminal defense lawyers?* Aachen, 2001; W. Wohlers, *Geldwäschrei durch die Annahme von Verteidigerhonoraren – Art. 305. StGB als Gefahr für das Institutder Wahlverteidigung*, Schweizerische Zeitschrift für Strafrecht no. 2/2002, pp. 197-219.

HUF 50,000 (pursuant to Section 462 (1) g) of the Hungarian Penal Code); according to Section 177(1a) of Act I of 2012 on Offences:

> *Anyone who acquires, conceals or disposes of property resulting from theft, embezzlement, fraud, misappropriation, robbery, plundering, extortion or unlawful acquisition for the purposes of pecuniary gain of not more than HUF 50,000 shall commit an offence.*

It can be seen from the facts of the infringement that not all the shapes of money laundering, but only the static money laundering of the host nature have a form of misconduct, narrowing the scope of the pre-acts on the material side in a way reminiscent of the previous facts of the Hungarian Penal Code regulated as an economic activity, and also narrowing the scope of the subject's side with the aim.

The first two shapes of money laundering can be committed by anyone, including the perpetrator of the basic crime. The perpetrators of the abetting dynamic, the receiver-like static money laundering and negligent money laundering, e.g. the perpetrators of the other three basic cases, can only be other than the perpetrator of the basic crime. As an instigator and accomplice, the perpetrator of the basic crime cannot be punished in the case of dynamic, receiver-like static money laundering of an accomplice nature, and the last, e.g. negligent, formation cannot, by definition, be linked to either instigator or accomplice. To sum up the above, the perpetrator of material static and targeted dynamic money laundering can be either the perpetrator of the basic crime as a culprit, an instigator or an accomplice, but he cannot be punished in any way for the other three formations. In my view, even this regulation interferes with the humanism principle of Hungarian criminal law, since we refer to the apparent material set as one of the cases where we leave with impunity the after-act committed by the perpetrator in order not to expose his previous crime. Thus, traditionally, those who do not declare the undue benefit of bribery as income in their annual tax return are not penalized for budget fraud. If the perpetrator could avoid the realization of a crime only by exposing his previous crime, the latter offence should be left unpunished[14].

In the view of some authors, money laundering should also be treated as such a criminal after-action when it comes to laundering money from its own crime. The perpetrator, if he has made a greater profit from committing a crime, has two options. You can spend the money on your personal needs, but you'll have to take into account the risk of immediate busting (which is why perpetrators usually wait a few months before using the profits from the crime and don't even start spending suspiciously). The alternative is to try to launder the money, but you will also have to take into account that you will be held liable for at least two offences in the event of being caught. The current nature of money laundering fully complies with the requirements of EU Directive 2018/1673, still is not compatible with the traditional principles of

[14] J. Földvári, *Magyar büntetőjog Általános rész.* [Hungarian Criminal Law General Part], Osiris Kiadó, Budapest, 1997, p. 227.

Hungarian criminal law. The latter, on the other hand, is no longer a primary consideration in the domestic legislation of the 21st century, as we are forced to adapt to the EU's expectations.

The first four shapes of money laundering can only be committed intentionally, of which dynamic money laundering is targeted only with direct intent because of the purpose in the facts. The other three intentional shapes can be committed with possible intent. In addition, there is a separate negligent case of money laundering, which can only be committed by an outsider, not by the perpetrator of the basic crime.

The legislator lists in sections 399 (6) and (7) of the Hungarian Penal Code the circumstances in which the danger to society of the first four intentional cases of money laundering increases to such an extent that the prospect of a more severe penalty (imprisonment ranging from two to eight years and imprisonment of five years to ten years) is justified. Qualified cases are as follows:

The penalty shall be imprisonment between two to eight years if money laundering is committed:

a) in respect of a particularly considerable value; or

b) in respect of a substantial value

ba) in a pattern of business operation,

bb) by a service provider defined in the Act on the Prevention and Combating of Money Laundering and Terrorist Financing, by an officer or employee of such service provider in connection with the service provider's activities, or

bc) by a public official.

That is, in the case of a crime over HUF 50 million, and in the case of a crime over HUF 5 million, this increased penalty applies if:

1. the committing is commercial[15]
2. committed by any service provider, its official or employee within the meaning of the AML Act The previous legislation only included the commission as a lawyer in the qualifying circumstances, but from 2021 the 18 different financial service providers listed in the AML Act, including the lawyer, are liable for a qualified case, but only if committed for a value above HUF 5 million.
3. commits money laundering by an official. The concept of official is defined in Section 459 (1) 11 of the Hungarian Penal Code

The penalty shall be imprisonment between two to eight years if money laundering is committed:

a) in respect of a particularly considerable value; or

b) in respect of a substantial value

ba) in a pattern of business operation,

[15] According to Section 28 of Section 459(1) of the Btk., a person who seeks regular profit by committing the same or similar offences is committing a commercial act.

bb) by a service provider defined in the Act on the Prevention and Combating of Money Laundering and Terrorist Financing, by an officer or employee of such service provider in connection with the service provider's activities, or

bc) by a public official.

In other words, the logic of qualified cases is the same here as in the previous case, only HUF 500 million and HUF 50 million are the two thresholds. In the case of a crime exceeding HUF 500 million, the penalty is imprisonment ranging from five years to ten years without further circumstances, while in order to commit a crime of more than HUF 50 million, it is necessary to have at least one of the additional conditions listed in points (a) to (c) in order for the maximum penalty for money laundering to apply to the offender.

Qualified cases of the fifth case, e.g. negligent money laundering:

a) committing a particularly high or higher value (e.g. over HUF 50 million),

b) as a service provider, official or employee of the service provider as defined in the Law on the Prevention and Prevention of Money Laundering and Terrorist Financing in connection with the activities of the service provider (e.g. one of the 18 service providers under the AML Act, including the lawyer, in accordance with previous regulations), or

c) committing acts as an official (pursuant to Section 459 (1) 11 of the Hungarian Penal Code).

Among the preparatory behaviors, the law previously only punished the agreement to commit money laundering, but from 1 January 2021 it will penalize all preparatory behavior. (Note that the person who agrees with the culprit on money laundering before committing the basic crime is responsible for providing psychological assistance to the basic crime instead of preparing.)

The law also defines a reason for eliminating criminality, only in relation to negligent money laundering (even in a case of default, even qualified case). This provision has been brought to life by promoting more effective anti-money laundering and the criminal policy objective of having a greater interest in exposing an unexplored or only partially detected act than in punishing the perpetrator. Therefore, if the perpetrator of negligent money laundering voluntarily reports or initiates such a complaint, he or she cannot be punished for money laundering. The court has no discretion: if the act has not yet been fully discovered, the complainant is exempted from liability.

III. Failure to report money laundering

The detailed rules concerning the obligation to notify are set out in the background standard to be presented later, Act LIII of 2017 (AML Act). This is Hungary fourth anti-money laundering law. In the event of non-compliance with other obligations under this Act, in severe cases, the supervising body may impose a fine on

the service provider, but failure to notify is a criminal offence, for which the manager, employee or family member of the service provider is *personally liable*, in the context of criminal proceedings.

In order to make criminal prosecution of money laundering and terrorist financing more effective, the legislator assigns the failure to report as a separate offence. In the course of their daily activities, financial service providers may obtain information which cannot be obtained from elsewhere, which is essential in the fight against the most serious crimes[16].

The regulation therefore assumes that bodies and entities investigating the large amounts of movement, mobility, investment and composition of material goods are able to filter out data indicating the commission of the underlying crimes by operating an appropriate system and reporting them is more important than the right or obligation to confidentiality[17].

In order to enforce the requirement of uniform interpretation of the law and of unambiguousness, which is certainly approachable in criminal law, the legislature states in the Hungarian Penal Code the offence of breaching economic secrecy:

Section 413 (2) Breach of trade secrecy shall not apply to any person:

b) who conveys information subject to the statutory reporting obligation prescribed by law in connection with the prevention and combating of money laundering and terrorist financing, insider dealing, market manipulation and the fight against terrorism, or who initiates such action, even if the report he filed in good faith has proved to be unfounded.

The point is therefore that anyone who reports money laundering or terrorist financing in good faith on the basis of a suspicion which he or she has subjectively expressed in the course of his work shall not be criminally liable even if the person notified by him has not committed any infringement and the reporting person has infringed his economic secret by making the notification. This provision was necessary in order to relieve persons subject to the background standard (Pmt) from the burden of 'double squeeze' (if it does not report, commits a criminal offence, even if it makes an unfounded report, this would be unacceptable). The imposition of the obligation to identify and notify does not limit the fundamental right of informational self-determination beyond the unavoidable and proportionate extent, and for years the Hungarian Penal Code has also stated that it does not prejudice the interests of protecting economic secrets (securities, banking, business etc.).

It is a centuries-old legal obligation for doctors in Europe, but it is also the case in the current Hungarian health law that a doctor, if the patient is found to have an injury

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[16] K. Auer, P. Osváth, *Törvény a pénzmosás megelőzéséről és megakadályozásáró* [Law on the Prevention and Prevention of Money Laundering], Pénzügyi Szemle, 1994.

[17] M. Tóth, *Gazdasági bűnözés és bűncselekmények* [Economic crime and crime], KJK-Kerszöv Jogi és Üzleti Kiadó Kft., Budapest, 2002, pp. 364-365.

obviously resulting from a crime (such as a gunshot wound), is legally obliged to report it to the police forces without delay. Over the centuries, society has become accustomed to this provision and takes it for granted, with which a fair majority is protected against criminals. The doctor is the first person to encounter such an injury, so his report may be invaluable to law enforcement[18]. Financial services organizations are, by definition, the front line of the fight against money laundering, the signals from them can assist the investigative authority, and the related criminal law situation seeks to increase the 'willingness to report' as an external 'incentive'.

Nevertheless, we note that some business service providers who live on the market still feel that the obligation to identify and report them puts them in an unfair position by having to choose between either fulfilling their statutory obligations and thus jeopardizing their own existence (for example, who would later hire an accountant who turns out to have already „spat" on someone) or break the law, and they may face up to three years imprisonment.

The new Hungarian Penal Code defines the non-notification obligation in the same way as the previous regulation:

> *Section 401 Any person who fails to comply with the reporting obligation prescribed by law in connection with the prevention and combating of money laundering and terrorist financing is guilty of misdemeanor punishable by imprisonment not exceeding two years.*

It is advisable to state right at the beginning of our analysis of the facts that the obligation to report does not constitute an obligation to report. Although the two concepts are often blurred in the public consciousness, many of the representatives of the professions concerned also misunderstand the relevant provisions of the regulation. In the event of a complaint, the complainant intends to initiate criminal proceedings against the person who has been reported in the event of a suspicion of a criminal offence. In our current law, as a general rule, the right to report is widely enforced, but the obligation to report is very limited. The narrowness of the obligation to report is characterized by the fact that either only very few cases are required by everyone to report (obligation to report citizens), or only the authorities and officials are obliged to report any crime that has come to their attention[19]. The current legislation does not impose any obligation on citizens or financial service providers to report!

The obligation imposed is notification, which means recording and transmitting unusual and unusual data, facts, persons and circumstances in an appropriate form to the investigating authority. From the point of view of the persons required to report, the following findings can be made:

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[18] L. Balogh, *A pénzmosás elleni fellépés nemzetközi összefüggései* [International context of anti-money laundering action], Számvitel, Adó, Könyvvizsgálat, 211, May 2003.

[19] F. Tremmel, *Büntető eljárásjog, különös és Kiegészítő rész* [Criminal Procedure Law, Special and Supplementary Section], Janus Pannonius University, Faculty of State and Law, Pécs, 1999, p. 7.

1. The obligation to notify is almost identical to the reporting obligation if the service provider becomes aware of money laundering in connection with its operation. In such cases, the notification made by it differs from the complaint in that the authority does not necessarily have an obligation to take action on this basis. On the other hand, if the service provider not only suspects, but also knows that a money laundering transaction is being carried out through him, he will be liable as a psychological accomplice for money laundering and not for failure to report (simply put, the service provider is also considered a money launderer).
2. The reporting obligation is broader than the obligation to report in that not only money laundering, but also suspicious circumstances suggesting it must be reported, regardless of whether money laundering is involved at all (this will then be investigated by the investigating authority).

The legal subject matter of the offence is the same as that of money laundering: the public interest in the effectiveness of the fight against crime, in particular organized crime. In addition, trust in the state's financial institution system can also be considered a legal object in the alternative[20]. There is no object of action, as this is a so-called pure default offence.

Committal behavior is a failure to report as required by law (the AML Act), which, by its very essence, can only be carried out by passive conduct. Notifications shall only be made in the event of data, facts or circumstances suggesting money laundering or terrorist financing. The AML Act tell us specifically in what cases.

All employees, managers or family members of the service provider who suspect money laundering are required to report. The subjects of the crime can only be them as perpetrators, so we can speak of a strange subject, the crime called delictum proprium.

The notification shall include:

a) a customer identification data collected by the service provider, and
b) a description of the data, facts or circumstances suggesting money laundering or terrorist financing[21] (details of the data, facts or circumstances on which the report is based) and
c) documents supporting the data, facts and circumstances on which the application is based, if available.

The crime can only be committed intentionally. In order to establish intentionality, it is necessary to prove that the perpetrator was aware that the

[20]Horváth Tibor, Béla Kereszty, Vilmosné Maráz, Ferenc Nagy, Mihály Vida, *A magyar büntetőjog Különös része.* [A Special Part of Hungarian Criminal Law], Korona Kiadó, Budapest, 1999, p. 670.

[21] Suspicious circumstances suggesting terrorist financing should be reported as well as suspicions of money laundering. The notification is mandatory for all service providers which are obliged to report money laundering even in circumstances involving money laundering. In essence, the system works in such a way that financial service providers continuously monitor transactions, and if the names of specific persons (on the prohibition lists) appear, they immediately report them to the NAV. The number of such announcements in Hungary is still very low.

transaction was unusual and, with this in mind, did not make a report. Note that in practice, proving intentionality is very difficult, almost impossible. It would have to be demonstrated that the perpetrator had a subjective suspicion, but he did not make a report.

Failure to notify shall not be subject to money laundering if the person who fails to report is involved in the money laundering itself, is punishable only for money laundering and failure to notify will be either a pre- or unpunished after-act. Note that failure to report is only possible as long as the service provider's employee, manager or family member suspects that money laundering is behind the transaction. Even if you know with certainty, you may already be an accomplice to money laundering by deliberately failing to report it.

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Thoughts on a Special Criminal Procedure

Robert Bartko[1]

Abstract

In 2015, Hungary was affected by the irregular migratory flow, which marked a beginning of a new era in the history of the European migration. Mass migration has created a major challenge for the authorities concerning the legal response. In many countries, including in Hungary, the public opinion relating to the irregular migration has forced the legislators to take the necessary measures against it in order to protect the public safety and the public health. In Hungary, among others the criminal law have been focused by the legislator. The first step was the construction of the physical border fence, and as a second stage the Hungarian Parliament adopted the legal framework on protection of the border fence mentioned.

In accordance with creating the crimes against the border barrier, a new special procedure has been inserted into the Hungarian Act on Criminal Procedure, which entered into force in 15 September 2015. The rules have been in force with few modifications even nowadays, however in the new Hungarian Criminal Procedure Code (hereinafter: Code). The aim of this scientific paper is to try to answer the following questions: (1) Was the amendment mentioned justifiable and reasonable measure?; (2) Is it necessary to keep it in our legal system also nowadays, or should it be repealed from the Code?

Keywords: *Hungarian border fence, irregular migration, border barrier, fight against the irregular migration in Hungary, migratory situation in Hungary, special criminal procedure on crimes against border barrier, Hungarian Act on Criminal Procedure.*

I. Introduction

In 2015, Hungary was affected by the irregular migratory flow, which marked a beginning of a new era in the history of the European migration. As a result of emigration, European countries have been forced to admit irregular migrants from the developing world in increasing numbers[2]. Between 2009 and 2010, about 100,000 illegal immigrants were caught in the act at the borders of the Member States each

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[2] A. Trriandafyllidou, T. Maroukis, *Migrants muggling: Irregular migration from Asia and Africa to Europe,* Springer, 2012, p. 1.

year[3]. In 2013, the total number of non-EU nationals intercepted at the border of EU Member States was 92,575[4]. As the migration crisis intensified, in 2014 this number had increased to 276,113 people at the pan-European level. This represented an increase of more than 138% compared to previous years[5]. This trend has not changed significantly in the recent years. In 2015 and 2016, the number of illegal immigrants entering the European Union rose to unprecedented levels. According to FRONTEX data, in 2015 the EU states recorded nearly 1,800,000 illegal border crossings at the height of the migration crisis, while in 2016 still extremely high, 511,047 irregular border crossings were detected[6].

Mass migration, not only because of its irregular nature, but also because of the unprecedented qualitative and quantitative transformation of the response to be given by some Member States, has created a major challenge not only for border control, but also for the internal law enforcement – and the public health authorities, furthermore, the other internal social organizations. In many Member States, including in Hungary, public opinion relating to the irregular migration has forced the legislators to take quick and effective actions against it. In Hungary – although the irregular migration is a multifaceted phenomenon[7], therefore the legal responses affect many parts of the internal legal system – among others the criminal law have been focused by the legislator.

However, criminalization is not a widespread response in the European Union. Typically, in Western European states, the illegal border crossing and the illegal residence are not considered as criminal offenses[8]. Although, there is a shift towards criminalization[9] of certain forms of illegal migration, it is not considered as a criminal offense in the domestic law of the most Member States. It is, of course, another question that according to the so-called „marginalization theory", illegal immigrants who are marginalized in the country of destination often drive their fate towards committing crimes[10], which should be judged in accordance with the substantive criminal law of that state.

It shall be emphasized that as a primary response to the phenomenon of illegal immigration itself, the criminal law action reacts more likely to that criminal activities based on illegal migration, such as trafficking in human beings, smuggling of human

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[3] C. Morehouse, M. Blomfield, *Irregular migration in Europe.* Migration Policy Institute, Washington DC, 2011, p. 8.

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[10] A. Leekers, et. al., *Crime among irregular immigrants and the influence of internal border control.* Crime Law SocChange 2012. Vol. 58. 2012, p. 17.

beings and related organized crime[11]. The illegal immigration has been used by the mentioned crimes in order to reinforce its status in the European Union, taking advantage of Europe's openness and its declared fundamental freedoms[12].

In accordance with the above-mentioned fact, in the political dialogue, illegal immigration is often regarded as a threat to state sovereignty as well as to public security, whereby the states have the right to protect their borders. The emphasis of the mentioned aspects is justified by the need on the one hand to respond to the conduct – videlicet the illegally enters the territory of a foreign state – itself, and on the other hand to the security challenges concerning the illegal stay[13].

Since the beginning of 2015, when the migratory pressure has intensified at the Hungarian-Serbian border, the idea of creating more effective legal measures against it, has become part of the political dialogue in Hungary. When the Act on amendment of Hungarian Criminal Code and the Criminal Procedure Code were adopted by the Parliament in connection with irregular migration in 2015 and when the constructions work of the border barrier finished, the legislator pointed out, that only by the installation of ever more serious facilities can be the external borders protected. The function of these items is not only to complete the state's self-defense but also to signal that the state has right to self-defense, and this right must be respected by everyone.

For the criminal-political reasons mentioned above new crimes[14] and a new special procedure has been inserted into the Hungarian Criminal Code and into the Hungarian Criminal Procedure Code, which entered into force in 15 September 2015. The rules have been in force with few modifications even nowadays, however in our new Procedure Code (hereinafter: Code).

In my scientific paper I am going to find the relevant answers to the questions mentioned earlier in the abstract, and for that I am going to use several statistical data made available by the Ministry of Interior and by the Office of Prosecutor General[15]. In order to facilitate the understanding I am going to use special theoretical aspects, that I can present my thesis more easily.

These aspects will be the following:

1. The data of crimes against border barrier committed since the rules came into force;
2. The connection between the procedural rules to be analyzed and the other special criminal procedural rules;
3. The data concerning the nationality of defendants;

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[11] V. Mitsilegas, *The Criminalization of Migration in Europe. Challenges for Human Rights and the Rule of Law*. Springer, 2015, p. 48.

[12] O. Galateanu, *Illegal Migration and the Migration Phenomenon at the Frontiers of Romania.* Contemporary Readings in Law and Social Justice. Vol 9 (2), 2017, p. 601.

[13] A. Spena, *A Just Criminalization of Irregular Immigration: Is it possible?* Criminal Law and Philos, Vol. 11, 2017, p. 354.

[14] These crimes are called crimes against the border barrier (unlawful crossing the border barrier, damaging the border barrier, obstruction on construction work of the border barrier).

[15] Nr. LFIIGA/506-7/2018, and Nr. LFIIGA/365-2/2020.

4. The relationship between the asylum and the criminal procedure;
5. The special rules relating to coercive measures.

II. The theoretical aspects

1. The data of crimes against border barrier committed since the rules came to force

Generally, it can be emphasized that the reason for creating a new special criminal procedure can be also confirmed by the criminal-statistical data. If a special crime – like crimes against border barrier – often appears in the criminal statistics – in order to ensure the principle of efficiency – giving special procedural items for the authorities can be considered as a reasonable measure. Therefore, examination of criminal-statistical data concerning the crimes mentioned (such as: unlawful crossing the border barrier, obstruction on constructions work of the border barrier and damaging the border barrier) is very important.

It shall be underlined that according to the statistics, – since the rules mentioned entered into force – now criminal procedure has been conducted by the Hungarian authorities due to obstruction on constructions work of the border barrier. According to my opinion the reason for criminalizing can be already questioned by the fact mentioned. In lack of perpetration of this crime in no circumstances does it have any reason to insert special procedural rules into the Code. If we have a look at the data relating to the other crimes against border barrier, the number of the crimes committed was decreased significantly in the past few years. The following table shows this well:

Year	Unlawful crossing the border barrier (Btk. 352/A.§)	Damaging the border barrier (Btk. 352/B.§)
2015	914	22
2016	2843	1543
2017	22	863
2018	16	115
2019 – October 2020	22	68

However, it must be underlined that the number of crimes committed does not coincide with the number of the criminal procedures. The number of the procedures conducted in 2015 accounted for 754, in 2016 made up 646, in 2017 decreased to 10. Furthermore, it is an interesting data, that the number of procedures did not increase in 2018 either. According to the information of the Office of Prosecutor General in 2018 accounted only for 5 cases which reached the judicial proceedings[16].

[16] According to the statistical data sent by the Office of Prosecutor General.

If we analyze the data summarized above by the table, we can agree with Zoltan Hautzinger's standpoint: „there is no reason for creating such elements of crime which have not practical applicability due to the possibility of uselessness"[17].

2. The connection between the procedural rules to be analyzed and the other special criminal procedural rules

Based on the statistical data sent by the Office of Prosecutor General, there were two other special procedure which were applied by the authorities in order to conduct the criminal procedures against defendants who committed crimes against border barrier. These were the arraignment (based on this special procedure the prosecutor can arraign the defendant to court within a short time from the perpetration of the crime), and the omission of the trial (in this criminal procedure the judge can make the sentence only on the file of the criminal case without holding a trial).

The relevant data is summarized by the following table:

Year	**Number of cases/number of defendants**	**Number of defendants arraigned to court**	**Number of the other procedures conducted based on the special rules on omission of the trial**
2015	754/780	766	2
2016	646/2134	2096	4
2017	10/20	5	0
2018	concerning the unlawful crossing the border barrier 5/11[18]	7	0

The data mentioned shows that the authorities – generally – conducted the criminal procedures against defendants, who committed a crime against border barrier, based on the rules of arraignment. Consequently, the rules of the special procedure mentioned before were more dominant in these criminal cases than the special rules analyzed in my paper. The significantly decreasing number of the criminal cases due to the crimes analyzed and the similarity between the special rules of the arraignment and of procedure due to a crime against the border barrier do not confirm the justification of the new special procedure created in 2015 as an legal

[17] Z. Hautzinger, *A migráció és a külföldiek büntetőjogi megjelenése.* AndAnn Kft, Pécs, 2018, p. 157.

[18] It shall be emphasized that the statistical data sent by the Office of Prosecutor General did not content any comparative data concerning the damaging the border barrier. The reason of this was that all of criminal procedures conducted by the authorities due to the crime mentioned did not reach the judicial stage, because these procedures were suspended by the prosecutors due to the unknown identity of the perpetrators.

answer to the migratory challenges. It shall be emphasized that in lack of the new rules inserted into the Act on Criminal Procedure in 2015, the procedural rules on arraignment would ensure the principle of efficiency in these criminal procedures.

3. The data concerning the nationality of defendants.

It shall be underlined that in the most of criminal cases conducted due to a crime against border barrier defendants weren't European citizens. They arrived mostly from Algeria, Morocco, Somalia, Afghanistan, Iraq, Iran, Pakistan and Syria. Therefore, the right to use of native language is a very important principle in these cases. Namely, the number of the criminal cases decreased significantly for the past few years, there is no reason for limiting this right according to the special rules. It shall be underlined that according to the general rules of the Code translation of decisions and other official documents to be served is obligatory excepting the right to waiver the written translation. However, this exception is not applicable on accusation and on conclusive decisions. Nevertheless, according to the special rules analyzed in my paper, the defendant has right to waiver the translation of the accusation and the judgment as well, however, the translation in writing of the other conclusive decision is still obligatory.

So low is the number of this criminal cases due to a crime against border barrier, that enforcing the right to use the native language according to the general rules would not cause too many costs to the state. With regard of the number of the criminal cases conducted due to the crimes analyzed, there is no reason creating further special procedural rules concerning the crimes against the border barrier[19].

4. The relationship between the asylum – and the criminal procedure.

The former Act on Criminal Procedure (Act XIX of 1998, hereinafter: Act)) was in center of several criticisms based on that fact that the Act mentioned did not ensure the consistency between the criminal procedure and the asylum rules. This Act did not content any special rules for the case if the defendant soke for asylum. The Article 832. Par. (1) of the new Code intends to correct this anomaly with that regulation which makes it possible to suspend the criminal procedure – but only after the accusation – in the case if defendant seeks for asylum. However, this legal solution cannot be considered an appropriate legislative answer. If the validity of the whole special procedure is questioned, the rule mentioned is unjustifiable as a special rule. Namely – according to the general rules –, it would be possible to suspend the procedure because of an asylum application already during the investigation too for that reason, that the result of the asylum procedure would have effect on criminal procedure as well.

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[19] In this topic mentioned see for further information: R. Bartko, *Az anyanyelv használatához való jog eróziója az illegális migráció elleni küzdelemben*, Eljárásjogi Szemle 4. sz., 2017, pp. 24-28; Balasz et al., *Büntetőeljárás alá vont fiatalkorúak eljárási jogainak érvényesülése az Európai Unióban,* Ügyészek Lapja 3-4. sz., 2017, pp. 87-141; E. Cape, *Effective criminal defence in Europe. Executive Summary and Recommendations.* Antwerp-Oxford-Portland, 2010, p. 8.

Therefore, it has no reason for creating special rule, on the one hand if it can be applied only during the judicial proceedings and on the other hand if this special rule narrows unreasonably the application of a legal institution.

5. The special rules relating to coercive measures.

It shall be emphasized that special rule concerning the coercive measures due to the crimes against border barrier is not regulated by the new Code, the rules concern only several questions relating to their execution. However, the questions mentioned shall be regulated in the penal law, and not in the criminal procedure law. The regulation of different rules would be reasonable in the case when the legislator regulates different forms of the coercive measures in this chapter, or different conditions to be applied by application of this measures. Therefore, we can conclude that – because of these rules – it is not justified to maintain a special procedure in the Code.

III. Conclusions

With reference to the change of migratory routes, the number of the crimes against border barrier has decreased for the past few years in Hungary. Only a few criminal procedures due to the crime mentioned have been conducted since 2017. Furthermore, it is fact, that never was a procedure conducted by the authorities due to the obstruction the constructions work of border barrier. Therefore, not only does the opportunity of decriminalization arise, but also the claim for repealing of the special rules. The general procedural legal frame ensures for the authority to conduct criminal procedures efficiently against defendants who committed a crime against border barrier. Therefore, according to my opinion the special procedural rules relating to crimes against border barrier should be repealed by the legislator. In order to prove this statement, hereby I am going to show some examples as a conclusion of my scientific paper.

1. There is no reason regulating by special rules the consolidation and severance of criminal cases relating to crimes against border barrier, because it is also possible according to the general rules, and these rules make the procedural opportunities more flexible for the authorities For example, in that case if more than one defendant is involved in the same criminal case, or the defendants have joint examination and the consolidation is deemed justified due to subject or the participants of the proceedings or for other reason.
2. According to the new Code the crimes analyzed shall fall under the jurisdiction of the court located at the seat of the county court. With reference to the statistics concerning the procedural data due to the crimes against the border barrier, this regulation has also no reason. The procedure against the crime mentioned were generally conducted before that court whose seat is located at that area where the crime against the border barrier has been committed. Furthermore, because the prosecutors started the judicial proceedings mostly

based on the rules of arraignment, in practice the applied rule related to the jurisdiction of the court was same as the general one. The general rules related to not only the competence, but also the jurisdiction of the court ensure the appropriate procedure due to the crime mentioned.

3. According to the Article 829 of the Code the participation of the defense counsel is obligatory in the criminal procedure concluded due to a crime against border barrier. If we have a look at the statistical data, we can see, that generally the defendants committed a crime mentioned above were not European citizens, therefore, they do not speak Hungarian. According to the general rule (Art. 44, lett. d), the participation of the defense counsel is obligatory in case, when the defendant does not speak Hungarian. Therefore, there is no reason for repeating the general rule under the section of this special procedure.
4. Finally, there is no reason for regulating further special rules related to the other special criminal procedure (for example, the arrangement, the omission of the trial, criminal proceedings against juvenile defendant) when the object of a criminal procedure is a crime against border barrier. In case of repealing special rules related to the crimes against border barrier, the other above-mentioned special procedure could ensure the efficiency and the rapidity of criminal procedure.

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Children in Terrorism

Nagy Melánia[1]

Abstract

Recently, the world watched in horror as an armed group of young children from Islamic terrorist organizations, dressed in combat gear, marched through the streets of Beirut, chanting their willingness to die for their leader or god[2]*. The role of children in various armed conflicts dates back a long way.*

The children soldiers in the XXth century were known, as members of the Hitlerjugend organization. However, in addition to the Germans, the British, the Americans, also used minors for violent actions. Nowadays, the topicality of the topic, though, has been revived by the Islamic State terrorist organization. The highest child mortality rate was reported in Aleppo, where more than 2,000 children died as a result of the attack.

There are many examples in history of the involvement of child soldiers, but by 1990 this problem had been pushed into the background. The change is largely due to a study by Mozambican politician Graça Machel, who, at the request of the then UN Secretary-General, developed his work „Impact of armed conflict on children"[3]*. He pointed out that children and women could be future targets for various extremist movements. Several EU Member States have confirmed that the number of their nationals, especially women and children, increased in various camps and prisons in March 2019 in north-eastern Syria*[4]*. There are currently 10 countries where it is common practice for children to participate in or join the struggle. These are Afghanistan, Central African Republic, Congo, Iraq, Somalia, Yemen, Myanmar, Nigeria, South Sudan and Syria*[5]*. In my study, I focus on the participation of children in violent groups.*

Keywords: *children, armed conflict, victim, terrorist organization.*

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[2] M., Nagy, *Női terrorizmus*, PhD disszertáció, 2020, Pécs, p. 46.

[3] C.E. Gal, *Elrabolt ártatlanság – az Iszlám Állam gyerekkatonái*, Magyar Rendészet 5/2018, p. 93.

[4] European Union Terrorism Situation and Trend report (TE-SAT) 2020, European Union Agency for Law Enforcement Cooperation 2020, p. 48. Available at https://www.europol.europa.eu/activities-services/main-reports/european-union-terrorism-situation-and-trend-report-te-sat-2020, accessed on 30.08. 2020.

[5] https://theirworld.org/news/10-countries-where-child-soldiers-are-still-recruited-in-armed-conflicts, accessed on 28.10.2020.

I. Introduction

In today's armed conflicts on civilians becoming victims shows much higher numbers, as in previous centuries events. In World War I, 20 civilian casualties affected 1 civilian casualties, while in the 1990s, 90% of civilian casualties were affected[6]. As a result, children are also increasingly victims of such conflicts. Even if they are not „directly" affected by the negative consequences of the clash, the effects of „indirect" factors occur.

Among other things, hunger, malnutrition, inadequate health care, epidemics[7] and, consequently, vulnerability to extremist movements and thus the emergence and performance of child military missions.

War and children, for most of us, the combined use of these terms is unthinkable. Unfortunately, this is by no means a new phenomenon, with many historical antecedents, and continues to be used as a proven trend by various extremist movements[8]. This seems to be confirmed, as until then, groups that had not previously used children on the front had adopted this approach in new and never-before-seen ways[9]. Children's participation is very often coercive, but more and more voluntary. There are still extremely high numbers of young people in the armed conflicts that still take place today, according to a 2016 estimate, their number reaches 300,000, 40% of whom are girls[10].

Research shows that the participation of minors is most prevalent where opposing parties wage war not according to internationally accepted norms of warfare but consistently ignoring *jus in bellum*[11]. My main characters are children who fight in adult battles. Children who fight for the purposes of adults[12]. Children who – as children soldiers were formulated – rob their childhood[13].

II. Defining the concept of *child*

For many centuries, children were not allowed to participate in various legal transactions as legal entities, due to the fact that the minor was considered the

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[6] G. Machel, *Impact of Armed Conflict on Children. Report of the expert of the Secretary-General*, Ms. Grac'a Machel, submitted pursuant to General Assembly resolution 48/157, point 24, p. 9.

[7] Z. Csapo, *Nemzetközi jogi védőháló a fegyveres konfliktusokban érintett gyermekek oltalmára*, PhD értekezés, Pécs, 2009, p. 5.

[8] E. Cardeli, M. Bloom, S. Gillespie, T. Zayed, B. Ellis, *Exploring the Social-Ecological Factors that Mobilize Children into Violence*, Terrorism and Political Violence, 2019, p. 1.

[9] G. Machel, *The Promotion and Protection of the Rights of Children: Impact of Armed Conflict on Children*, United Nations General Assembly 51st session, Item 108, August 26, 1996, p. 1.

[10] https://www.goldininstitute.org/grassroots-solutions/child-soldier-map, accessed on 14.11.2020

[11] N. Pajter, *Gyermekkatonaság*, Migráció és Társadalom, 1/2018, p. 27.

[12] Z. Csapo, *Nemzetközi jogi védőháló a fegyveres konfliktusokban érintett gyermekek oltalmára*, PhD értekezés, Pécs, 2009, p. 3.

[13] I. Beah, *A Long Way Gone: Memoirs of a Boy Soldier*, Nyitott Könyvműhely, Budapest, 2008, p. 5.

property of the father[14]. There was no sensitivity to the pup either, the number of child mortality was very high in the Middle Ages, so the parents showed a kind of distancing from them. The little ones were treated in the same way as adults after the age of 6 and 7, respectively[15]. Artistic representations also support the spirituality of the age, as they mostly present children as small adults.

In 1989, the UN General Assembly unanimously adopted the Convention on the Rights of the Child (Resolution 44/25), which states that a child is a person who has not reached the age of eighteen, unless he or she has reached the age of majority under national law[16]. Despite the creation of the concept, there is still no unity on this issue in all parts of the world. Indeed, even today there is a huge difference between a child living in Europe and a minor living in an African tribe. While in Western civilization, a young person under the age of 18 is uniformly considered a child, this is not so clear in other societies (e.g., Africa, Asia). Tribal customs are very strongly present in these countries, serving as a basis for inaugurating a 12-13 year-old offspring into an adult. Typically, at a young age, they become breadwinners, marry and start a family. Another reason for the discrepancy is the length of life expectancy in the world. An 18-year-old has a different status in a society where 40-50 is typical, while where it is 70-80[17].

III. History of child soldiers

If we look back at the historical antecedents, we can already find records in the Bible and in Greek mythology about the armed service of children. These are considered to be the story of David, who is the king of Israel, Saul, it was the squire, and Hylas is who fulfilled faithful service to Heracles[18].

Going further in history, Sparta deserves a highlight. It is a well-known fact about Spartans that the children born here were part of a very special upbringing. They lived together with their child peers in a so-called „flocks". They gave them a gun in their hands and taught them the smallest details of their use. The principles of education were grouped around order, discipline, and rigor. Education is primarily focused on physical fitness, with a focus on theoretical training. The move to adulthood took place in the framework of a cruel pig. Whips were dropped on the initiated child at the age of 17, who had to endure the abuse without sound, if he did not, he was ashamed and struck by being returned to the minors. Sparta merit mention as yet, however, that only men have become *conscripts* after 18 years.

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[14] E. Vegh, *Gyermekkatonák – a Sierra Leone-i polgárháború igazi áldozatai*, https:// btk.ppke.hu/uploads/articles/6414/file/vegheszter.pdf accessed on 14.11.2020.

[15] N. Faix, *A gyermeki jogok kialakulása a nemzetközi jogban és az igazságszolgáltatásra gyakorolt hatásuk*, Eljárásjogi szemle, 4/2016, p. 1.

[16] Egyezmény a Gyermek Jogairól, http://www.unicef.hu/gyermekjog-egyezmeny.jsp, accessed on 14.11.2020.

[17] E. Vegh, *Gyermekkatonák – a Sierra Leone-i polgárháború igazi áldozatai*, https://btk.ppke.hu/uploads/articles/6414/file/vegheszter.pdf accessed on 14.11.2020.

[18] Z. Csapo, p. 13.

We can also find many sources about the details of the Middle Ages. The boys, who were meant to be knights or even the „king" of the battlefields, were torn from their parents 'house at the age of 6-7 and fell into the hands of their master. They served here until they were 14 years old, where they learned all the tricks of weapon rotation. By the age of 14-15, the young people had become „war prods" by this time, they had also mastered the handling of heavier weapons and had regularly taken part in various campaigns from their lords. By the age of 18-21, the most distinguished had been able to be knighted in a solemn ceremony.

The prevailing practice in the Ottoman Empire is the *devsirme* system, which is a Turkish term and the means of it is collecting. In Europe, the word has become synonymous with „blood donation" and „child donation". It was not intended to serve any purpose other than to gather Christian children to replace the Janissary army. Initially, 14-15. In the 16th century, boys aged 7-8 were collected in exchange for a „blood donor", later this age limit was pushed much higher. The parents tried to get their children back with various tricks. They were sometimes bought out or circumcised to be considered Muslim. Early marriage was also common, as only unmarried women were recruited, but they were usually hidden in mountains and piles. The admitted boys were classified into different groups. According to the studies of Paul Fodor, those who were circumcised and the prettiest, smartest were taken to the Sultan's palace school and the strongest were given the necessary education in the palace garden. The remaining boys were placed with Turkish landlords, where they immersed themselves in the acquisition of religion. The members of the first group had an easy life, but this could no longer be said of the other two groups, as many of them did not even reach the age of 10[19].

Child soldiers are also associated with Bonaparte Napoleon's troops. Initially, they did not perform combat tasks, but were present as drummers and assistants. Later, however, the number of infantry dropped so much that little boys were replaced[20]. The various records of the age also support the reality of these cruel deeds. Metternich said to Bonaparte in June 1813 at the Imperial Headquarters: „I handed over his troops. It's just a baby"[21].

Germany's Hitlerjugend (HJ) troops were a particularly famous organization under Hitler's leadership from 1926 to 1945. „The future is in the hands of those who have youth"[22] – admitted the „Führer". He also created his military team of Hitlerjunge. The children were „Aryans," that is, „racially pure, they were German youths with blond or blond-brown hair and blue eyes and a proper head shape. His group leader was Baldur von Schirach, who later said in the Nuremberg trial: „*The sin I have to present to God and the German people is to… teach German children in honor of a man who committed murders in millions. That's all I can bring to my excuse*"[23].

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[19] F. Pál, K. Hegyi, M. Ivanics, *Török és tatár hódítók*, Kossuth Könyvkiadó, 1993, p. 19.

[20] Z. Csapo, cited, p. 22.

[21] A. Castletot, *Napóleon. Európa Könykiadó*, Budapest, 1999, p. 535.

[22] B.R. Lewis, *Hitlerjugend: a nácik ifjúsági szervezete békében és háborúban*, 1933-1945, Hajja, Debrecen, 2001, p. 7.

[23] B.R. Lewis, cited, p. 143; Csapo, Z. cited, p. 27.

The organization operated on the basis of Nazi ideology and very soon grew into a militaristic movement. The conditions were characterized by strict subordination, they had their own badges, flags and uniforms. The number of members has increased year by year. HJ, which numbered 1,200 in 1923, had surpassed 3 million by 1933, and by 1939 had approached 8 million. This included the Bund Deutscher Mädel (German Girls' Association), the Jungvolk (Young People) and the Jungmädelgruppen (Young Girls Groups). The trainings started from an early age after the age of 6. From the age of 10, they joined the Jungvolk organization, which was practically a forerunner of HJ. They were members of the HJ from 14 to 18 years old, it was no secret that Adolf Hitler's soldiers were trained here. At several HJ units, voluntary entry declarations into the SS were filled out as a „birthday present"[24] Young people began to be indoctrinated at the age when they were most receptive. In many cases, re-education was so effective that children turned against their parents if they did not profess a Nazi ideology. Members were taught the basics of Nazi ideology, emphasizing, among other things, the range of „main enemies": Jews, gypsies, communists, homosexuals. Many of the members lost their lives in World War II. The Allies called them the „baby division". Many times he was completely shocked by the fact that teenage puppies were facing them in full military equipment. The boys 'religion was Nazism and Hitler was their prophet. Alfons Heck recalled his childhood in the 1980s as follows: *„I belonged to Adolf Hitler in both body and soul"*[25]. In the zone after the war, a large number of HJ soldiers were disappointed and realized how wrong he had been for many years[26].

Nor did the ideology of Italy and Mussolini despise the operation of youth organizations like Hitler. He considered the moral, physical and spiritual education of the young generation to be one of the tasks of fascism[27]. He envisioned to achieve this educational trichotomic goal on three levels: 1. racial protection in the national mother and infant care association, 2. spiritual education in school, 3. physical, moral and military education in youth organizations[28]. The youth organization became known as Balilla. His story is related to a little boy named Gian Battista Perasso whose nickname was named after his movement Balilla. The boy began throwing stones at the Austrian soldiers in the War of the Austrian Succession on December 5, 1746, thus starting the struggle that ended with the expulsion of the Austrians from Italy. A statue was also erected in honor of the boy. The Act of 3 April 1926 established the Opera Nazionale Balilla (O. N. B.), which operated as a legal entity. Similar subsidiaries were also grouped under Balilla and all other factions were disbanded[29]. In 1930,

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[24] L. Tilkovszky, *Anton Holzträger: A Hitler-Jugend harci bevetése az utolsó háborús hónapok zűrzavarában*, Századok, 6/1996, p. 1602.

[25] https://mult-kor.hu/hitlerhez-tartoztam-testben-es-lelekben-hogyan-nevelt-a-hitlerjugend-fanatikusokat-egy-nemet-generaciobol-20171212, accessed on 15.11.2020.

[26] Lewis, B.R., cited, p. 42.

[27] *„Uno dei compiti fondamentali del Fascismo é l'educazione spirituálé, morálé e fisica delle giovani generazioni*". Marzolo, R., *Organizzazioni giovanili in Italia*, p. 7; Gauder, A., *Az olasz ifjúság szervezete*, Nevelésügyi szemle, 7-8/1945, p. 165.

[28] J. Mester, *Az olasz nevelés a XIX*, és XX. században, pp. 296-327.

[29] A. Gauder, cited., p. 165.

youth assault teams were formed with the aim, as a final step, to prepare young people between the ages of 18 and 21 to join the party. In 1937, the Balillas and the Assault Troops were unified and the G.I.L. (Gioventú Italiana del Littorio) Youth Section of the National Fascist Party. His tasks were published in:

1. Intellectual, sports and military training.
2. Primary and secondary school physical education.
3. Arranging courses.
4. Social care (camping, holidays, holidays, medical treatment etc.).
5. Travel (tourism, foreign, sea etc., trips, scholarships)[30].

An outside observer might have thought that there was only one physical education taking place in youth organizations, but after many years it was proven that the movement were self-conscious cultivators of Mussolini's triple slogan. *„Credere, obbedire, combattere, that is, to believe, to obey, to fight. Believing in the moral values created by the fascist state. Obey the knowledge of spiritual leaders; shaping and willing the future. Here the authoritative principle of the total view of the state emerges on the plane of youth. To fight, to fight for the realization of the Empire Romanum, is the teleological element. It all means physical discipline, the fight against comfort[31]".*

IV. Child soldiers nowadays

The Islamic State recognized that potential male perpetrators could raise suspicions during the terrorist attacks, so new assassins had to be selected. This is why it turned primarily to women and juveniles. Their innocence and weakness easily divert the attention of law enforcement authorities, and thanks to this, the success of a terrorist act can be effectively ensured. ISIS has opened offices to recruit children, with two such offices operating in two Syrian cities; al-Mayadin and al-Bokamal, where ISIS is working to attract children living in the territory of the Islamic State[32]. According to some authors, „the role of children in the' caliphate 'is the culmination of the phenomenon of child soldiers[33]". A report for the period from 1 May to 31 October 2015 confirmed that the Islamic State had successfully recruited 1,227 adolescents, including adolescents aged 9 to 15, in various parts of Mosul[34]. The formation of the youth wing of terrorists has become a feature, the young people of ISIS are referred to as „Fityan Al Islam" (Islamic boys)[35]. Mia Bloom and John Horgan differentiate

[30] *Idem*, p. 168.

[31] *Idem*, p. 170.

[32] K. Anderson, *„Cubs of the Caliphate" The Systematic Recruitment, Training, and Use of Children in the Islamic State*, available at https://www.ict.org.il/UserFiles/ICT-Cubs-of-the-Caliphate-Anderson.pdf accessed on 28.10.2020.

[33] N. Benotman, N. Malik, *The Children of Islamic State*, The Roméo Dallaire Child Soldiers Initiative, Dalhousie University, 2016, p. 23.

[34] C.E. Gal, cited, p. 93. https://theirworld.org/news/10-countries-where-child-soldiers-are-still-recruited-in-a.rmed-conflicts, accessed on 28.10. 2020.

[35] N. Benotman, N. Malik, cited, p. 22.

categories among joined minors: some are children of foreigners involved in the fight or children of supportive locals, but the organization also regularly increases the number of children found in the orphanages it controls, in addition to minors forcibly taken from parents and those also the stray children who volunteer for ISIS[36]. Involving minors has many benefits for a terrorist organization. Among other things, providing less food, lower wages, their immaturity contribute to their quick engagement, making them quick to prove loyalty, and easy to shape because they have fewer pre-formed visions and beliefs that recruiters need to reverse or change[37]. The moral judgment of young people is very easy to shape and influence. They do not need as much brainwashing as adults. Many reasonably behaving people cling to strange and cruel views simply because they have been firmly implanted in their brains early in their lives[38].

The young generation also represents the future of a radical group, which is why leaders consider early indoctrination and armed training to be extremely important, because the soldiers and leaders of the future will develop from them. In schools, the curriculum is almost nothing more than an accurate, precise mastery and understanding of Islamic doctrines. Classes are intertwined around religion and learn the process of prayer on a daily basis, but instead the curriculum also includes a description of Mohamed's life and monotheism. They start religious education for them as little children that most children don't even understand what it's all about. A boy named Mohammed recounted that although he understood the concept of fasting and the importance of prayer, he did not understand the word „unbelievers" and why they should be fought[39]. Of course, this is to the detriment of learning other necessary information, as students cannot even study classical subjects such as mathematics, social sciences, history, geography.

The school week runs from Sunday to Thursday, where girls and boys go to separate classes. Primary school is 5 years old, high school lasts 4 years, compulsory schooling is strictly adhered to, as children who do not attend religious education will be harder to shape[40]. Children are also present in physical education classes on a daily basis, but this does not take place in the traditional way either, as they learn to shoot, box and fight[41]. These factors threaten the healthy physical, moral, and emotional development of children and will later be unable to contribute constructively to society[42].

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[36] J. Horgan, M. Bloom, *This Is How the Islamic State Manufactures Child Militants*, VICE News RSS, July 8, 2015.

[37] *Child Soldiers*, War Child, http://www.warchild.org.uk/issues/child-soldiers; Machel, G., cited, p. 13.

[38] S.H. Cardoso, *Inside the mind of a suicide bomber*, in *Dying to kill: The mind of the terrorist*, available on https://www.dana.org/article/dying-to-kill/ accessed on 27.01.2020.

[39] K. Anderson, cited.

[40] *Education in the Shade of the Caliphate*, Islamic State Wilayat Raqqa,, https://archive.org/details/ta_rq (2020.10.30.)

[41] *Race Towards Good*, Islamic State al-Hayat Media Center, https://archive.org/details/fstbqo_alkeeraat. Accessed on 30.10. 2020.

[42] N. Benotman, N. Malik, cited, p. 28.

Indoctrination beginning in schools is intensifying in training camps where children between the ages of 10 and 15 are taught Saria. Their training consists of several stages, almost identical to the training of adults. The location of the training usually takes place in abandoned training camps set up for them, far from their place of residence, which can also be found in Mosul, Aleppo and Rakka, for example. Young people need to undergo very intense physical training to increase their endurance. They are taught the most basic combat tactics as well as the use of weapons. Their practical applicability is practiced on various babies.

The third part of the training is psychology influence, as part of which they have to perform as spectators in public executions. The purpose of this is to break the resentment against violence, to reshape it, and to silence the conscience[43]. Once all three steps have been successfully completed, they have the opportunity to complete the task assigned to them, which can be a suicide bombing or front-line armed service on the side of a veteran fighter. Once the children of the Islamic State have completed their training, a graduation ceremony will be held for them, where the new graduates will march in public, in full uniform and arms. Their trainers line up the graduates and start beating them with sticks, symbolizing the unity of strength and discipline. The goal of the ISIS trainings is strikingly similar to the goal of the infamous Hitler Youth program – to create perfect, loyal, and obedient soldiers for the future[44]. One warrior said, *„It was a very difficult camp. We received very serious training. There were dense days: prayer, practice (use of firearms, religious teachings) followed by military studies, then further Sharía courses, then rest, prayer. Between the afternoon prayers, they were not allowed to sleep, they came into our tent and fired into the sky and were sent to guard a ditch. We often fell asleep in this ditch because we were so tired"*[45]. *„These young people, in most cases, are literally cruel killing machines that execute literally all instructions*[46]*".*

V. Conclusion

In my study, I wanted to point out the role of child soldiers in different eras of history as well as in the Islamic State, which is playing an active role today. It can be seen that putting minors on the battlefield is not new, the change lies in the way of training.

Advances in technology have produced spectacular innovations in this area as well, perhaps making it even easier to spread extremist ideas. The goal remains ideological training and transformation to secure the future of the organization. It is

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[43] C.E. Gal, cited., p. 106.

[44] C. Vinograd, B. Ghazi, A. Cheikh Omar, *ISIS Trains Child Soldiers at Camps for 'Cubs of the Islamic State.*

[45] K. Anderson: *„Cubs of the Caliphate" The Systematic Recruitment, Training, and Use of Children in the Islamic State*, https://www.ict.org.il/UserFiles/ICT-Cubs-of-the-Caliphate-Anderson.pdf, accessed on 28.10.2020.

[46] D. Szijj, *Az „új" háborúk hozadéka: a gyerekkatonaság modernkori formái. Nemzet és Biztonság*, 5/2010, p. 32.

perceptible that we have not been able to find a solution to this problem for centuries, all of which leads to innocent children continuing to play adult games.

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Terrorism, Targeted Killings and the Right to Life

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Abstract

The right to life concerns the prerogative that belongs to any human being to exist as such, once a part of the world. Over the centuries, most religious and philosophical movements around the world have strongly condemned any act that harms the life of a human being. In the modern age of war, technology plays an increasingly important role in strategic thinking, leading to a change in the way operations are conducted around the globe.

The biggest change in the new technological environment is the increasing use of clandestine operations, the so-called target killings, which in recent decades have been largely considered of dubious legality. In this regard, as will be seen, some consider targeted killings to be „executions" or „extrajudicial killings", while others consider these operations to be legitimate acts of war carried out as part of the state's inherent right to self-defense.

Keywords: *terrorism, human rights, the right to life, targeted killings, international humanitarian law.*

I. The Right to Life – European Regulations

There is no doubt that terrorism attacks democracy and the rule of law, that it seeks to destroy human rights through violence and by spreading fear among the civilian population. On the other hand, although counter-terrorism measures are crucial, they can also threaten several rights and freedoms.

Specifically, state-imposed counter-terrorism actions often involve violations of many fundamental human rights, including the right to life.

Article 2 of the European Convention on Human Rights governs the right to life, stating that:

„*1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.*

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

a. to in defense of any person from unlawful violence;

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b. in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

c. in action lawfully taken for the purpose of quelling a riot or insurrection"[2].

It is also necessary to mention the fact that through art. 1 of Protocol no. 6 of the European Convention on Human Rights, the death penalty has been abolished, and no person can be sentenced to such a punishment or executed.

At the same time, according to art. 3 of the Additional Protocol mentioned above, no derogation from its provisions is allowed, even in the cases prescribed by art. 15 of the European Convention on Human Rights.

However, according to art. 2 of Protocol no. 6 of the European Convention on Human Rights, a state may provide in its law for the death penalty for acts committed in time of war or imminent danger of war. Such punishment shall be applied only in the cases provided for by that legislation, the State concerned being required to communicate to the Secretary General of the Council of Europe the provisions related to that legislation.

At the level of the European Union, the right to life is guaranteed by the provisions contained in art. 2 of the Charter of Fundamental Rights, according to which „*(1) Everyone has the right to life. (2) No one may be sentenced to death or executed*".

The right to life concerns the prerogative that belongs to any human being to exist as such, once a person comes into the world. Over the centuries, most religious and philosophical movements around the world have strongly condemned any act that harms the life of a human being. International human rights law, in turn, has sought to find effective ways to ensure respect for this sacrosanct right through several treaties and practices aimed at protecting human life against the arbitrary action of states[3].

The right to life, which protects the human value on which all other fundamental rights and freedoms are grafted, is therefore the „most fundamental" right of the person, this expression belonging to the UN Human Rights Committee[4].

The use of lethal force was first examined in detail in the judgment of the Grand Chamber in McCann and Others v. The United Kingdom, which concerned the UK security forces' shoot to kill policy in relation to alleged IRA terrorists in Gibraltar. The Court held that these actions violated the European Convention on Human Rights at least because the UK's forces could have taken alternative action instead of killing them[5].

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[2] https://www.echr.coe.int/Documents/Convention_RON.pdf, accessed on 22.03.2020.

[3] R. Chiriță, *Convenția europeană a drepturilor omului. Comentarii și explicații* [European Convention on Human Rights. Comments and explanations], Ed. 2, CH Beck Publishing House, Bucharest 2008, p. 31.

[4] UN Human Rights Committee, Suarez de Guerrero, decision of 31 March 1982, UDHR 1982, p. 341.

[5] ECHR Judgment in *McCann and Others v. The United Kingdom*, available at http://www.globalhealthrights.org, accessed on 26.11.2021.

In its jurisprudence[6], The European Court of Human Rights has ruled that Article 2 of the European Convention on Human Rights governs an absolute, fundamental right from which no derogation is permitted. Together with art. 3 of the Convention, it enshrines one of the core values of the democratic societies that make up the Council of Europe. At the same time, it was argued that this right represented the supreme value on the scale of human rights internationally[7].

The objective of the European Convention on Human Rights, as an instrument for the protection of individuals, requires that these provisions be interpreted and applied by the signatory states so that the guarantees conferred by the provisions of the foregoing are practical and effective.

When complaints are formulated invoking the violation by the authorities of the provisions of art. 2 of the ECHR, the Strasbourg court is obliged to undertake an extremely rigorous examination, which will be based on all the material made available by the parties involved in the proceedings before the Court, and, if it deems it necessary, based on evidence. which the court itself will obtain[8].

At the same time, in the considerations of the judgments ruled, the Court reiterated that the obligation of the signatory states to protect the right to life, provided by art. 2 of the European Convention on Human Rights, in conjunction with the general duty of the authorities prescribed by art. 1 of the Convention to recognize to any person under their jurisdiction the rights and freedoms defined in Title I of the Convention, imposes the need for a formal investigation whenever an individual is violently killed[9].

II. Targeted Killings and the Right to Life

In the modern age of war, technology is playing an increasingly important role in strategic thinking, leading to a change in the way operations are conducted around the globe. The biggest change in the new technological environment is the increasing use of clandestine operations, the so-called targeted killings, which in recent decades have been largely considered of dubious legality.

Following the terrorist attacks of September 11, 2001, the United States, Russia, Pakistan, and other NATO member states have openly adopted targeted killings, as they are considered part of the main instruments of counter-terrorism operations.

The attack on Osama Bin Laden in the Pakistani camp is the best example of this strategy, but the problems raised by the new technique have much wider implications.

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[6] ECHR Judgment in *Tahsin Acar v. Turkey*, paragraphs 209-210, available at https:// hudoc.echr.coe.int/eng#{„tabview": [„document"],"itemid":[„001-61698 „]}, accessed on 22.03.2020.

[7] ECHR judgment in Streletz, Kessler and Krenz, available on https:// jurisprudentacedo.com/ Streletz-KesslersiKrenzc.-Germania-si-K.-HW-c.-Germania-Principiul-legalitatii-incriminarii-si-pedepsei-penale.-Succesiune-de-state.html, accessed on 22.03.2020.

[8] ECHR Judgment in *Tahsin Acar v. Turkey*, paragraphs 209-210, available at https://hudoc. echr.coe.int/eng#{„tabview":[„document"],"itemid":[„001-61698 „]}, accessed on 22.03.2020.

[9] ECHR judgment of 27 September 1995 in McCann and Others v. The United Kingdom, available on www.hudoc.echr.coe.int, accessed on 22.03.2020.

Thus, is it right for nations that have suffered from high-profile terrorist attacks to respond, in a form of self-defense – as the US authorities do, with the murder, without trial, of those suspected of terrorism? Are there certain criteria to consider when a person is placed „legitimately" on the list of those to be targeted? And if so, what are these criteria and who is entitled to establish them? Finally, can targeted killings be in any way legally and morally justified?

Regarding the answers to the questions stated above but also about whether persons suspected of committing acts of terrorism should be considered as combatants at risk of *„legal"* killing under the laws of war, or civilians protected by international humanitarian law, there is no common ground.

In this regard, as will be seen, some consider targeted killings as „executions" or „extrajudicial killings", while others see these operations as legitimate acts of war carried out as part of the state's inherent right to self-defense.

III. Examples of Targeted Killings

As shown, some states have adopted for some years policies that allow the use of so-called „targeted killings", including in the territories of other states. Such policies are often justified by the fact that they are a needed and legitimate response to terrorist threats and to the challenges of „asymmetric warfare", but they have had the effect of extending the legal limits applicable to the use of inter-state force.

Even though the term „targeted killing" has been increasingly invoked lately, there is no definition of the notion in international law. The term came into common use in 2000, after Israel unveiled a so-called „targeted killing" policy of alleged terrorists in the Occupied Palestinian Territories.

Although there is no definition of the term in international law, the UN Special Rapporteur described extrajudicial or arbitrary executions as:

> *„intentional, premeditated and deliberate use of lethal force, by a State acting through its agents or by an organized group in armed conflict against a specific individual who is not in the custody of the perpetrator*[10]*"*.

In other words, *targeted killing* is the premeditated, intentional killing of a uniquely identified individual. Moreover, it should be noted that, at the time of the killing, the person concerned does not pose an imminent threat to the life of other members of society.

Targeted killing was also defined as

> *„the intentional killing of a specific civilian who cannot be reasonably captured and who is directly involved in hostilities, carried out with the*

[10] Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, available at https://www2.ohchr.org ›A.HRC.14.24.Add6.pdf, accessed on 02.03.2020.

authorization of the state in the context of an international armed conflict or non-international armed conflict"[11].

Another author who addressed the complexity of this definition stated that

„*targeted killing is the intentional killing of a suspected terrorist or a group of suspected terrorists, committed with government approval and exercised when they cannot be arrested by reasonable means*"[12].

The great problem of the above definition is the use of the term „terrorist", which has so far not received a definition that is unanimously accepted by the international community due to differing views on the subject. As a result, the definition simply lacks the distinction needed to determine who is being targeted. On the other hand, by referring to the targeting of terrorists, the definition seeks to provide a sense of moral acceptability. However, in our view, a certain person can, legally, acquire the attribute of terrorist only when an independent and impartial court establishes this in a trial in which all the procedural guarantees were provided to the accused.

While the above definitions have limited the scope of what constitutes targeted killing, other authors have given broader definitions.

Such a definition is given by Thomas Hunter who argued that targeted killing is

„*the preventive and deliberate killing of a person or persons known to be a clear and current threat to the security and safety of a State through membership in terrorist groups*"[13].

It is important to note that, although the above definitions of targeted killing sometimes contain different elements, they tend to limit the scope of the term to either armed conflict or suspected terrorists or group of suspected terrorists, whether they are persons known to be a clear and current threat to the security and safety of a State, ***or a*** subject of international law.

Also, the killing itself is always done with *intention and premeditation. These conditions regarding* intention and premeditation refer to the fact that such an action as the one under analysis is performed with the intention of killing the person concerned, this intention being based on a conscious choice, not on the use of force in an impulsive, reckless manner.

However, regardless of the elements contained in the definitions, given that it is a deprivation of life, the target killing is a controversial practice that raises some human rights issues.

In this regard, *intended* killing or target killing is sometimes also called „*extrajudicial killing*", which denotes the idea that it is illegal. A targeted killing must

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[11] G. *Solis, Targeted Killings and the Law of Armed Conflict*, Naval War College Review, Vol 60, No. 2, p. 127.

[12] W. Jason Fisher, *Target Killing, Norms and International Law,* 2007, p. 715.

[13] Th. Byron Hunter, *Targeting Killing: Self-Defense, Preemption and The War on Terrorism*, 2009, p. 3.

also be distinguished from an assassination, which is unanimously accepted as an illegal practice. In addition, the context in which the targeted killing takes place must be taken into account, as must the nature of the targets.

Unlike the killing by combatants – including snipers, of enemy combatants in a theater of war, in the case under analysis, the targets are precisely identified; in other words, these targets are not simple combatants, anonymous enemies identified only by their uniform. An individual identified in a targeted killing operation is a person about whom there is detailed information, collected in advance, about his or her role in an armed conflict or terrorist organization.

Furthermore, the targets in the case of the so-called *„targeted killings"* do not pose an imminent threat at the time of their killing.

As related to the above, we note that, in the light of the provisions of the European Convention on Human Rights, a *targeted killing is considered an arbitrary act and, like any deprivation of life, violates Article 2* of the European Convention on Human Rights.

Targeted killings, as arbitrary acts, are characterized by inadequacy, injustice, lack of predictability, reasonableness, necessity, proportionality, and the absence of a trial carried out under legal conditions. This means that even if there is a legal basis, the legal basis of the measure must be precise: the law must strictly control and limit the circumstances in which a person may be deprived of their life by the state authorities.

Then, states must take appropriate measures to protect individuals from deprivation of life by other states operating in their territory or in other areas under their jurisdiction – especially if the individual is particularly vulnerable due to a specific threat, for example, prominent public figures. Therefore, a targeted killing committed by one state in the territory or jurisdiction of another state may give rise to liability for both states.

It should also be added that exceptional measures leading to deprivation of life must be accompanied by effective institutional guarantees. Such safeguards are described in relation to law enforcement operations, including mandatory reporting, review and investigation, as well as procedures to ensure that operations are properly planned so as to minimize the risk of loss of other lives as well.

Therefore, such safeguards are an absolute need in the case of targeted killings. This is because states must take appropriate measures to establish the truth about the events leading to the killing of a person, including the reasons and legal basis for such acts and the procedures used by state forces before, during and after the date on which the deprivation of life took place. Also, information about the investigation and its findings should be made public, although, in the case of targeted killings, public disclosure is usually limited, citing security considerations[14].

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[14] F. Shaheed, *Targeted Killing and the Right to Life: A Structural Framework*, 6 February 2019, available at https://www.justsecurity.org/62485/targeted-killing-life-structural-framework/, accessed on March 8, 2020.

An extreme case of a targeted killing was the attack on Salah Shehadeh, the leader of Hamas' military wing, Iz Adin al-Kassam, considered to be responsible for numerous attacks on Israeli soldiers and civilians.

Following the Gaza operation of 22 July 2002, in addition to Shehadeh, another 16 people were killed, amongst which 15 civilians, including 9 children, Shehadeh's wife and son, and hundreds more were injured when an Israeli Defense Force plane dropped a 1-ton bomb above a house in a densely populated area of Gaza[15]. In view of the public crisis, the Israeli Defense Forces have carried out an investigation into this attack.

The decision of the Supreme Court of Justice of Israel on the targeted killing, delivered on 14 December 2006, (HCJ 769/02) reviewed, reformulated and revised the regulatory framework and instructions for the implementation of the targeted killings[16].

The ruling stated that Shehadeh's terrorist activity classified him as a civilian directly involved in hostilities and that the threat he posed to the lives of the citizens of Israel and all the territories under his control was certain, immediate and significant.

At the same time, Shehadeh's classification as a *„target",* carried out by the Israeli Security Agency (ISA), was assessed as professional, based on concrete information and in accordance with the principles of Israeli and international law. It was therefore noted that the method used by the Israeli army to assassinate the perpetrator of terrorist attacks against the civilian population is legal provided that certain human rights restrictions are met, namely: verification and proof of information on the identity of terrorists, investigation of the circumstances of terrorist attacks, attempting to apply legal arrest procedures rather than the use of lethal force[17].

The Supreme Court has ruled that Israel is involved in an international armed conflict with Palestinian terrorist organizations and that the targeted killing of Shehadeh was aimed at ending its terrorist activity[18].

The report prepared following the investigation also noted that *„There were also shortcomings in carrying out the attack, caused by the available information and the assessment of that information, regarding the presence of civilians near Shehadeh, who was in an operational hideout"*[19]. The Commission concluded that the serious side effects of the action against Shehadeh, in which uninvolved civilians, women and children were killed and many others were injured, were disproportionate.

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[15] A. Meyerstein, *The Israeli Strike Against Hamas Leader Salah. Shehadeh*, Crimes War Project (Sept. 19, 2002); S. Krebs, *Rethinking Targeted Killing Policy: Reducing Uncertainty, Protecting Civilians from the Ravages of both Terrorism and Counterterrorism*, 44 Fla. St. UL Rev. 943, 2018, available on https://ir.law.fsu.edu/lr/vol44/iss3/2, accessed on 03.03.2020.

[16] Supreme Court of Israel, Public Committee against Torture in *Israel v. Government of Israel*, HCJ 769/02, 13 December 2006, at http://elyon1.court.gov.il/files, accessed on 03.03.2020.

[17] *Ibidem*.

[18] I. Dragoman, D. Ungureanu, *Treaty on International Humanitarian Law*, Ed. Universul juridic, Bucharest, 2018, p. 116.

[19] *Findings of the investigation into Salah's death Shehadeh*, 2 August 2002, available at http://www.mfa.gov.il/mfa/government/communiques/2002/, accessed on 21.03.2020.

The Commission stated that if it had been able to predict the seriousness of the collateral damage that actually resulted, the operation would not have been authorized[20].

The above case exemplifies the fact that, although theoretically the targeted killings should involve precision and accuracy, in reality, a great number of victims of such operations are innocent civilians.

Another case that provoked extensive debate among international public opinion was the one from October 2006, when a CIA drone killed 69 children, the youngest victim being a seven-year-old child, at a religious school in Chenegai, Pakistan. Another 80 civilians were injured on that occasion. This attack, although considered one of the worst incidents of the entire campaign in which drones were used, was at the same time one of the least reported[21].

Regarding the role and importance of technology in thinking about how to carry out operations on „targeted killings", we must remember the November 27, 2020 assassination of the scientist who led the Iranian nuclear program – Mohsen Fakhrizadeh.

The blow was carried out by Israeli agents using a machine gun controlled via a remote satellite (outside Iran) by a human operator.

Advanced technology allowed the weapon to take into account the time between the intervention of the operator and the pistol actuation so that the recoil of the pistol could be adjusted accordingly, and biometric facial recognition techniques were used to avoid hitting Mr. Fakhrizadeh's wife, who was standing in the front passenger seat of the car, or other passerbyers[22].

Although it is considered that the use of lethal force against a person can be justified in case of an immediate threat to the lives of others and if no other options are available to deal with the threats, in the abovementioned case Mohsen Fakhrizadeh, despite his involvement in Iran's nuclear program, did not pose such a threat.

In the same vein, we should not ignore the drone strike carried out by the US military in Kabul on August 29, 2021, allegedly performed against terrorists who were planning a second attack on the international airport. The aftermath of this attack shows that 10 civilians including a humanitarian worker and seven children were killed. The US military later admitted that it had made a „tragic mistake"[23].

The abovementioned examples allow us to distinguish as characteristics of targeted killing that the purpose of the action is to kill and not to capture or arrest the persons concerned and that operations take place despite the fact that there is no imminent threat from anyone to the target.

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[20] *Ibidem*.

[21] Available at https://www.thebureauinvestigates.com ›stories, accessed on 03.03.2020.

[22] M. Milanovic, *The Law and Tech of Two Targeted Killings-EJIL: Talk!,* available at https://www.ejiltalk.org › the-l., accessed on 26.11.2021.

[23] Available at https://www.cnbc.com/2021/09/17/us-airstrike-in-kabul-last-month-killed-10-civilians-including-seven-children-pentagon-says.html, accessed on 27.11.2021.

IV. Moral considerations regarding the use of targeted killing

Despite some states' arguments in favor of the moral admissibility of targeted killings in theaters of war, in the general context of the ongoing armed conflict between liberal democracies and non-state terrorist groups, various other considerations have been expressed against such operations.

First, the killing of terrorists in theaters of war gives rise to moral problems given the difficulty of differentiating them from innocent civilians. Also, such killings have the potential to increase threats against the perpetrator, which means that they are both morally and pragmatically unjustified.

Some of the arguments against targeted killings take into account practical considerations, such as the inefficiency and excessive cost of such operations, given that they are often followed by other acts of terrorism and therefore tend to escalate the conflict. In this regard, it was found that the targeted killings fail to deter potential terrorists and do not lead to a decrease in terrorist attacks, given the fact that there will always be other people willing to sacrifice their life for a cause that they consider sacred.

Despite these arguments, many appreciate that the targeted killings of leaders of terrorist entities is, in principle, morally permissible[24].

Regarding the legal regulations of such operations, provisions enshrined in the Charter of the United Nations, domestic law or humanitarian law have been invoked.

While Article 2 (4) of the Charter of the United Nations prohibits the threat or use of force by one state against another, two exceptions are relevant to answering the question of whether or not the killing in question is lawful: 1. when the use of force is carried out with the consent of the host state; and 2. when the use of force is used for self-defense in response to an armed attack or imminent threat and if the host State is unwilling or unable to take appropriate action.

The Charter of the United Nations regulates „Actions Relating to Threats to the Peace, Violations of the Peace and Acts of Aggression" in Chapter VII[25], ruling that only the Security Council can determine what such threats to the peace are and, consequently, can decide on the measures that must be taken to maintain or restore peace. The only exception is that provided for in Article 51 of the Charter of the United Nations and refers to the inherent right to individual or collective self-defense in the event of an armed attack on a member of the United Nations.

At the beginning of the third millennium, there were discussions related to the extensive interpretation of art. 51 of the Charter of the United Nations, arguing that states can exercise anticipatory and preventive attacks and even preventive wars, without a previous act of aggression and without the need for the reaction of the alleged victim to be proportional to the attack.

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[24] S. Miller, *Shooting to Kill: The Ethic of Police and Military Use of Lethal Force,* Oxford University Press, 2016, Chapter 9.

[25] Articles 39-50 of the Charter of the United Nations available on http://www.anr.gov.ro/docs/legislatie/internationala/Carta_Organizatiei_Natiunilor_Unite_ONU_.pdf, accessed on 15.01.2021.

As such, many nations have cited Article 51 of the Charter of the United Nations as the basis for their right to take unilateral military action, citing the hypothesis of individual self-defense, with or without approval of the Security Council. Besides, the Security Council admitted by resolutions no. 1368 and 1373 of 2001[26] that an armed attack also refers to a terrorist attack. It should be noted that Resolution no. 1368 of 12 September 2001 was given on the background of the emotional impact of the New York tragedy. For this reason, the tone of the convention is harsh, critical and directly calls for the participation of states, both for catching suspects, for involvement in the fight against terrorism and for the adoption of anti-terrorist legislation for this purpose.

In the context of armed conflict, according to the rules of the international humanitarian laws, a „targeted killing" is legal only when the target is a „combatant" or „fighter" or, exceptionally, a civilian, but only during the period in which he or she is directly involved in hostilities.

Moreover, the killing must be militarily necessary and the use of force must be proportionate, so that the military advantage is considerably greater than the expected damage to nearby civilians. Measures must also be taken to prevent mistakes and to minimize harm to civilians.

In the context of the above, it can be seen that, in order to legally qualify targeted killings, it is necessary to determine the way in which terrorism is approached: as a crime or as an act of war.

On the one hand, there are states adopting a strategy that focuses on law enforcement and the punishment of individuals who have committed acts of terrorism and whose guilt must be proved in court of law, as a result of a public trial in which the defendant can benefit from the protection of all procedural guarantees.

On the other hand, if terrorism is regarded as an act of war, it is clear that there will no longer be the same legal constraints as in peacetime, including the use of deadly force.

From the perspective of human rights, the targeted killing by the state could be argued to be legal only if there are no other means to prevent a threat to the lives of citizens and to the national security of the state.

At the same time, the requirement of proportionality, which limits the level of force considered to be admissible in relation to the threat posed by potential targets, and the requirement of necessity, which imposes an obligation to reduce the level of force used, must be complied with.

One last issue that needs to be clarified in relation to targeted killings refers to an event that took place in early 2020, on 3 January 2020, when a US drone killed General Qassem Soleimani, the head of the Iranian Quds force in Baghdad, Iraq. Most commentators agreed that the killing of Soleimani was illegal, as was the use of force

[26] Resolution no. 1373 adopted by the Security Council at its 4385th meeting on 28 September 2001, published in the Official Gazette of Romania, in force from December 3, 2001 to July 14, 2005, being repealed by Law no. 206/2005 available on: https://www.unodc.org/pdf/crime/terrorism/res_1373_english.pdf, accessed on 15.01.2021.

against Iraq from an *ius ad bellum* perspective. Instead, the United States claimed that it was an action taken in the exercise of its inherent right of self-defense, in response to a growing series of armed attacks by the Islamic Republic of Iran and Iran-backed militants, and in a letter to the UN Security Council the US invoked art. 51 of the Charter of the United Nations, motivated by the fact that Iran and the Sunnis in particular were planning imminent attacks on the United States[27].

An unanswered question concerns the legality of using force against Iraq because by killing Soleiman, the US used force not only against Iran but also against Iraq. The Trump administration has not formulated any legal justification for the use of force in Iraqi territory and against the five Iraqi citizens who were with Soleimani, which raises additional questions about the legality of the attack in the context of *ius ad bellum* and the legality of killing Iraqis in relation to human rights law.

Currently, there is a real risk that the doctrine of the so-called „*Global War on Terror*" will further erode the foundations of the international human rights framework. Furthermore, preventive military action, against a threat that has not yet materialized and is uncertain over time, the doctrines of states or security organizations based on the idea of preventive war, are contrary to the principles of international law, paving the way for errors and abuses without contributing to peace and international security.

Also, the killings carried out on the territory of other states raises issues related to sovereignty because in accordance with Article 2 (4) of the UN Charter, a state is prohibited from using force in the territory of another state. Therefore, when a state commits a targeted killing on the territory of another state with which it is not in armed conflict, the former violates the sovereignty of the latter.

In our view, the targeted killings are only justifiable in the context of an armed conflict, and therefore the international humanitarian law must govern the use of such operations. International humanitarian law, in turn, requires states to demonstrate the existence of an international armed conflict, involving two or more states, regardless if one party denies the existence of a state of war, or the existence of a non-international armed conflict, when the state of prolonged armed violence exists between organized forces. Due to the existence of only two forms of armed conflict, as mentioned in international humanitarian law, the notion of „*war on terror*" cannot be a sufficient justification for the practice of targeted killings.

The conclusions can only be that the policies and practices of states that use targeted killings are illegal and that they violate one of the fundamental human rights, that of not being arbitrarily deprived of one's life. We emphasize that, although thousands of civilians and suspected terrorists have been killed in such actions, the effectiveness of using these methods in disrupting terrorist activity is minimal.

Accordingly, we believe that the illegal use of lethal force against persons suspected of terrorism should be replaced by bilateral cooperation of States so that those responsible for planning or carrying out terrorist attacks are brought to justice

[27] BBC News, *Qasem Soleimani: US kills top Iranian general in Baghdad air strike*, 3 January 2020, https://www.bbc.com/news/world-middle-east-50979463, accessed on 04.03.2020.

and prosecuted for the crimes they committed, in fair and public trials and, if found guilty, convicted.

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The Catalogue and Principles of Adjudicating of Penal Measures in the Polish Petty Offences Law – *De lege lata* and *de lege ferenda* Comments[1]

Piotr Gensikowski[2]

Abstract

In the Polish petty offences law penal measures constitute, in addition to the penalties, a main form of penal response to the perpetrator's committing a prohibited act. The role of penal measures in the petty offences law depends on the correct formulation of their catalogue, as well as on the correct determination of the principles concerning their adjudication.

The purpose of this article is to assess whether de lege lata shaping of the catalogue of penal measures and the rules concerning their adjudication is optimal, or whether it requires de lege ferenda certain changes.

Keywords*: the petty offences law, penal measures, principles of adjudicating.*

I. Introduction

In the Polish petty offences law penal measures provided in art. 28 of the act of 20 May 1971 – petty offences code[3] (quoted further as p.o.c.) constitute, in addition to the penalties specified in art. 18 p.o.c., a form of penal response to the perpetrator's committing a prohibited act. They may only be applied to a person legally recognized by the court as the petty offence perpetrator, and therefore may only be included in a conviction handed down by the court. The scope of penal measures in the petty offences law does not include not only penalties specified in art. 18 p.o.c., but also obligations which the court may impose on the offender by imposing a penalty of restriction of liberty under art. 22 points 1 and 2 p.o.c.[4]. Measures of social influence accompanying waiver of punishment (art. 39 § 4 p.o.c.) should also be distinguished

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[3] Journal of Laws of 1971, No 12, pos. 14; consolidated text in Journal of Laws of 2019, pos. 821 with changes.

[4] See Gensikowski, P. in Daniluk, P. (ed.), *Kodeks wykroczeń. Komentarz*, Warsaw 2019, pp. 175-176; Lucarz, K., Muszynska, A., *Środki karne* in Daniluk, P. (ed.), *Reforma prawa wykroczeń*. Vol. I, Warsaw 2019, p. 266.

from punishment measures, as the implementation of the former is voluntary[5]. Similarly, the scope of penal measures does not refer to measures of social influence (art. 41 p.o.c.), which may be imposed by non-judicial bodies[6]. The doctrine rightly points out that repressive measures in the form of penalty points applied to vehicle drivers or wheel-locking devices do not constitute punitive measures[7]. The prerequisite for imposing the penalties provided for in art. 96 § 1 of the act of 07 July 1994 – Construction Law[8] is the commission of acts causing professional liability, therefore the doctrine rightly does not treat the said measures as penal measures for petty offences[9].

The catalogue of penal measures in the law of petty offences is regulated in art. 28 § 1 p.o.c., but it is not exhaustive. The rules for imposing these measures are laid down in art. 28 § 2 p.o.c. and the directives for their level in art. 33 p.o.c. and art. 34 p.o.c. In view of the current formulation of the catalogue and the principles of imposing penal measures, they fulfil the following functions[10]. Among these measures, we can distinguish those that have a preventive function, such as a driving ban. Some of these measures also have an educational function, such as making the judgment public[11].

There are also criminal measures in the law of petty offences which have a restitutionary function to compensate the victim for the damage caused by the petty offences committed. This function is primarily the obligation to remedy the damage.

Undoubtedly the role of penal measures in the petty offences law depends on the correct formulation of their catalogue, as well as on the correct determination of the principles concerning their adjudication. Therefore, the following study should present the current formulation of the catalogue of penal measures in the Polish petty offences law, as well as the applicable principles of their adjudication. The purpose of presenting these issues is to assess whether *de lege lata* shaping of the catalogue of penal measures and the rules concerning their adjudication is optimal, or whether it requires *de lege ferenda* certain changes.

II. The catalogue of penal measures

By classifying penal measures according to where they are regulated in the petty offences law, we can distinguish between codex or non-codex penal measures. The

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[5] See Gubinski, A., *Odszkodowanie w kodeksie wykroczeń*, Zeszyty Wykroczeń, 1980, No 1, p. 33 and Lucarz, K., Muszynska, A., cited, p. 266.

[6] See Nowicka, I., Kupinski, R., *Stosowanie środków oddziaływania wychowawczego w sprawach o wykroczeni*a, Prokuratura i Prawo, 2004, No 7-8, p. 147.

[7] See Bojarski, T., in Bojarski, T., (ed.), *Kodeks wykroczeń. Komentarz*, Warsaw 2015, p. 106.

[8] Consolidated text in Journal of Laws of 2020, pos. 1333 with changes.

[9] See Grzegorczyk, T., in Grzegorczyk, T., (ed.), *Kodeks wykroczeń. Komentarz,* Warsaw 2013, p. 133 and Lucarz, K., Muszynska, A., cited, p. 266.

[10] See further Gensikowski, P., cited, p. 176.

[11] See further Daniluk, P., *Podanie wyroku do publicznej wiadomości w polskim prawie karnym sensu largo,* Warsaw 2020, p. 325.

cited division is due to the fact that penal measures are regulated in the p.o.c. and in non-code law.

The catalogue of the first type of penal measures has been specified in art. 28 § 1 points 1-5 p.o.c. and includes driving bans, forfeiture of objects, punitive damage, obligation to compensate for damage and making the judgment public in a special way. However, due to the regulation provided for in art. 28 § 1 point 6 p.o.c., the catalogue of penal measures quoted herein is of an open nature. The catalogue of non-codex penal measures in the petty offences law is quite limited[12] and includes: the ban on entering mass events provided for in art. 65 section 1-2a of the act of 20 March 2009 on the safety of mass events[13], permanent withdrawal of angling or underwater angling license provided for in art. 27a section 4 point 3 of the inland fisheries act of 18 April 1985[14], prohibition to submit an offer to a call for tenders provided for in art. 27 section 3 of the cited act on inland fishing, disqualification from engaging in professional activities provided for in art. 15 § 4 of the decree of 05 July 1946 on the performance of technical-dental activities[15].

Current approach of the catalogue of penal measures in the petty offences law *de lege lata* raises doubts in doctrine. Firstly, it is pointed out in the literature[16] that this solution differs from the provisions provided for in art. 39 § 1 of the act of 6 June 1997 – penal code (quoted further as p.c.)[17], where the catalogue of penal measures is closed. Moreover, it is stressed that the solution currently provided for in art. 28 § 1 p.o.c. does not correspond to the meaning attributed to the general part of this code[18]. The cited reservations now lead to consequences that are difficult to accept. As an example, the doctrine points in this context to the prohibition of entry to a mass event, which, not being listed in the catalogue specified in art. 28 § 1 p.o.c., may be imposed not only for petty offences provided for in the above cited act on the safety of mass events, but also for acts included in the specific part of the code. As a result of this approach, perpetrators of certain petty offences from the special part of the p.o.c. may be subject to a penalty measure which is not provided for in the code itself[19]. The current solution provided for in the petty offences law regarding the ban on entering mass events is further complicated by the fact that in the criminal law concerning offences since 2009 the code catalogue of penal measures has been supplemented by the ban on entering mass events. As a result, since then another inconsistency has arisen in the legal system, as the same penal measure at one time acquires the status of a code penal measure and at another time it is treated as a non-code penal measure[20].

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[12] In this way Lucarz, K., Muszynska, A., cited, p. 266.
[13] Consolidated text in Journal of Laws of 2019, pos. 2171.
[14] Consolidated text in Journal of Laws of 2019, pos. 2168 with changes.
[15] Journal of Laws of 1947, No 27, pos. 104 with changes.
[16] See Lucarz, K., Muszynska, A., cited, p. 267.
[17] Consolidated text in Journal of Laws of 2020, pos. 1444 with changes.
[18] See Lucarz, K., Muszynska, A., cited.
[19] See Lucarz, K., Muszynska, A., cited.
[20] See Lucarz, K., Muszynska, A., cited, p. 267.

For these reasons, *de lege ferenda* a postulate was put forward to standardize penal measures in the petty offences law, following the example of measures provided for in art. 39 p.c., in a closed catalogue[21]. In addition *de lege ferenda* it is proposed to amend the wording of art. 28 § 1 p.o.c. by regulating therein only those penal measures which show a connection with the petty offences provided for in the special part of the code[22]. This amendment should be accompanied by a solution supplementing the catalogue of penal measures in the code by a prohibition to attend a mass event[23].

The demands cited should be considered fully justified. In the case of their implementation, the standardization of the catalogue of penal measures in the petty offences law would correspond to the penal law concerning criminal offences. In the latter case, the catalogue of penal measures regulated in art. 39 p.c. is closed and their subject matter corresponds to provisions of the special part of this code, which does not stand in the way of regulation of other penal measures in non-code law. Not only the postulate to give a closed character to the catalogue of penal measures, but also the postulate to supplement this catalogue with the ban on entry to a mass event should be considered justified. In this case, the imposition of this measure would be permissible in the first instance in respect of certain petty offences provided for in the special part of the code. The inclusion of the above ban to the catalogue of penal measures provided for in art. 28 § 1 p.o.c. would not, of course, exclude the possibility to impose it on perpetrators of petty offences specified in the above mentioned act on the safety of mass events[24].

III. Principle of determinacy of penal measures

In addition to the above-mentioned changes concerning the inclusion of a catalogue of penal measures in the petty offences law requires revision the existence of the principle of determinacy of penal measures. *De lege lata* ruling on penal measures in the petty offences law depends on a specific legal basis. The lack of a specific legal basis provided for in the special part of the petty offence law makes it impossible to pronounce a penalty measure. This principle is reflected in the content of art. 28 § 2 of p.o.c., according to which the court may adjudicate such a measure if the act enables or requires making such an adjudication. The above-mentioned principle is in force not only on the grounds of p.o.c., but also in the non-code petty offences law.

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[21] See Bojarski, M., Plonska, A, *O większą elastyczność środków oddanych do dyspozycji sędziemu w prawie o wykroczeniach* in Jedrzejewski, Z., Krolikowski, M, Wiernikovski, Z., Żoltek, S. (ed.), *Między nauką a praktyką prawa karnego. Księga jubileuszowa Profesora Lecha Gardockiego*, Warsaw 2014, p. 18.

[22] See Lucarz, K., Muszynska, A., cited, p. 267; Wala, K., *Konieczność nowelizacji części ogólnej Kodeksu wykroczeń*, Prokuratura i Prawo, 2014, No 3, pp. 121-123.

[23] See Lucarz, K., Muszynska, A., cited, p. 268.

[24] See Lucarz, K., Muszynska, A., cited, p. 268.

This conclusion results from the content of art. 48 of p.o.c., according to which the provisions of the general part of p.o.c., and therefore also art. 28 § 2 p.o.c., apply to petty offences provided for in other acts, unless these acts contain provisions to the contrary. Having regard to the content of art. 28 § 2 p.o.c. penal measures under Polish petty offences law may be either optional or obligatory, which depends on the content of the expressions used by the legislator in the provision of a special part of p.o.c. or an extra-codex provision.

The first of the above situations occurs in the case of the use by the legislator of the expressions „may be adjudicated", e.g. the obligation to repair damage in the case of an intentional petty offence to damage someone else's property (art. 124 § 4 p.o.c.). On the other hand, an obligatory judgment of a criminal measure takes place when the legislature uses the expression „shall adjudicate" in the provision of a special part of p.o.c. or an extra-codex provision, for example a reference in the case of a tree theft petty offence (art. 120 § 3 p.o.c.).

As argued in the doctrine, the rationale for the introduction of this principle was based on guarantee considerations relating to the need to protect the perpetrator against undue interference by the sentencing authority. It has been stressed that the inconvenience of penal measures can be considerable and sometimes exceeds the inconvenience of penalties. Therefore, in order to prevent excessive use of such measures of penal repression, the legislator, according to its own judgement, has indicated cases of petty offences which, due to their nature or severity or preventive impact, deserve to be covered by the possibility or obligation to award such measures[25]. In view of these guarantee considerations, however, the doctrine rightly points out that, at present, the risk of unjustified imposition of punitive measures has been considerably reduced due to the fact that adjudication in petty offences cases has been entrusted to the courts[26].

In this context the adoption of principle provided for in art. 28 § 2 p.o.c. means that the court is deprived of full discretion in their application[27]. In the absence of a provision stipulating that a particular type of penalty measure may be imposed, the authority is bound by an absolute prohibition to rule on it, even if it considers it *in concreto* appropriate and expedient to do so[28]. It is rightly pointed out in the case law that ruling on a penal measure for the petty offences contrary to the rule under art. 28 § 2 p.o.c. is not admissible even if the perpetrator requests its ruling and the public accuser accepts the request[29]. Therefore, the doctrine *de lege ferenda* proposes to loosen the unnecessary rigors restricting the use of penal measures in the petty offences law so far, including the abandonment of the principle expressed in art. 28 § 2 p.o.c.[30].

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[25] See Marek, A., *Prawo wykroczeń (materialne i procesowe)*, Warsaw 2012, p. 85.

[26] See Lucarz, K., Muszynska, A., cited, p. 270.

[27] See Lucarz, K., Muszynska, A., cited, p. 269.

[28] *Ibidem*.

[29] See judgment of the Supreme Court of 28 August 2002, WK 28/2002, OSNKW 2002, No 11-12, pos. 108.

[30] See Lucarz, K., Muszynska, A., cited, p. 271.

IV. Absence of the possibility of extraordinary mitigation of penal measures

In addition to the above-mentioned comments it should be considered whether changes require the absence in the petty offences law of the possibility of extraordinary mitigation of penal measures. Having regard to the present citation of the catalogue of penal measures, it should be pointed out that they can be of indefinite, timely or one-off nature.

The permanent withdrawal of a fishing card or an underwater fishing card provided for in art. 27a section 4 point 3 of the cited act on inland fishing[31] is of unlimited duration. Penal measures adjudicated for petty offences may also be of a timely nature, and this is the case in the case of a driving ban, which is adjudged for a period from 6 months to 3 years (art. 29 § 1 p.o.c.). Other penal measures adjudicated for petty offences are of a one-off nature, and such a situation is present in the case of penal measures specified in art. 28 § 1 points 2-5 p.o.c., for example forfeiture of objects, punitive damage, obligation to compensate for damage, making the decision on punishment public. Bearing in mind the above division of penal measures, it should be noted that *de lege lata* there is no possibility of extraordinary mitigation of the term penal measure. The use of the expression „penalty" in art. 39 § 1 and art. 39 § 2 p.o.c. argues that the institution of extraordinary mitigation of punishment in the petty offences law does not refer to penal measures in the meaning of art. 28 p.o.c.[32]. In case law it is also aptly pointed out that the presented position is supported by the lack of a hierarchy of penal measures[33]. For these reasons, *de lege lata* it is not possible to impose a penalty measure of a driving ban for a period shorter than 6 months[34]. The regulation allowing for the application of the institution of extraordinary mitigation of punishment to criminal measures is not provided for in the criminal law on criminal offences either. For this reason, there seems to be no need for the regulation of extraordinary mitigation of punishment in the case of petty offences, and thus criminal acts with an inherently less negative social impact than criminal offences, the regulation of extraordinary mitigation of punishment was more far-reaching[35].

V. Penal measures and other reaction measures

In addition to the above considerations, it is important to consider the relevance of the rules for sentencing penal measures in relation to other reaction measures provided for in the petty offences law. In this regard the possibility provided for

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[31] Consolidated text in Journal of Laws of 2015, pos. 652.

[32] See also Raglewski, J., *Model nadzwyczajnego złagodzenia kary w polskim systemie prawa karnego (analiza dogmatyczna w ujęciu materialnoprawnym)*, Kraków 2008, p. 339.

[33] See judgment of the Supreme Court of 9 November 1992, II KRN 178/92, not published.

[34] See for example judgment of the Supreme Court of 26 September 2001, IV KKN 219/01, not published.

[35] See Gensikowski, P., *Zasady wymiaru kary i środków karnych,* in Daniluk, P. (ed.), *Reforma prawa wykroczeń.* Vol. I, Warsaw 2019, p. 361.

de lege lata of imposing penal measures alongside penalties does not need to be amended. In the petty offences law penal measures may be adjudicated in addition to the penalty listed in the catalogue specified in art. 18 p.o.c. However, there is no obstacle to a court ruling a criminal measure as an accompanying reaction to more than one sentence imposed on the perpetrator.

This may be the case if the criminal measure is passed in addition to a custodial sentence and a fine passed under art. 24 § 2 p.o.c. In the Petty offences law, the criminal measure may also be the only measure passed against the perpetrator, since the said measure may be passed in instead of punishment within the framework of the institution of withdrawal from punishment (art. 39 § 1 p.o.c.). In the latter case, the court, by issuing a negative decision on the penalty consisting in waiving it, shall impose on the perpetrator a penal measure provided for in the provisions of the special part of p.o.c. or the extra-codex regulations. The function of renouncing the imposition of a penalty combined with the imposition of a penal measure is to create the possibility to impose this measure in a situation where the court deems the imposition of only this measure to be appropriate and sufficient to achieve the objectives set forth in art. 33 p.o.c.[36].

The circumstances of a given case may, however, speak in favor of imposing only a penal measure on the perpetrator, in order to express the sense of justice (for example forfeiture) or to have a positive impact on the environment of the perpetrator (for example making the sentence public). Also, in the case of a complete refusal to impose a penalty, the directives provided for in art. 33 p.o.c. may speak in favor of imposing a penal measure on the perpetrator[37]. The waiving of a penalty may be accompanied by the imposition of an optional or mandatory penalty. There is no obstacle to imposing more than one penalty measure in addition to the waiver of the punishment[38]. The said measure may be imposed only if its prerequisites set forth in the provisions constituting the basis for their imposition are met. For this reason, the possibility of imposing, in addition to the waiver of punishment, a penal measure when the law does not allow it should be excluded. It seems that this refers to those cases, where the provisions of p.o.c. or non-code provisions of the petty offences law make adjudication of a penal measure conditional on punishing the perpetrator. The literature aptly points out that we are dealing with such a situation in the case of art. 27 section 2 of the cited above inland fisheries act, where the condition for the pronouncement of a penal measure of publicity is the punishment of the petty offence specified in art. 27 section 1 of that act. The waiver of punishment is not a punishment for a petty offence, and therefore, in the cited case, it is not possible to pronounce the said penal measure[39].

The literature has questioned the advisability of the existence of a variant of the institution provided for in art. 39 § 1 of the code consisting in the possibility of a

[36] See Gensikowski, P., *Kodeks wykroczeń*, cited, p. 236.
[37] See Gensikowski, P., *Kodeks wykroczeń*, cited, p. 236.
[38] See Gensikowski, P., *Kodeks wykroczeń*, cited, p. 236.
[39] See Gensikowski, P., *Kodeks wykroczeń*, cited, p. 236.

criminal measure coupled with waiver of punishment being imposed on its own. It has been argued that this solution leads to an internal contradiction in the sphere of the assessment of punishment, since on the one hand it gives grounds to treat the perpetrator more leniently, allowing for the complete abandonment of punishment, and on the other hand, on the basis of the same premises, it gives the possibility to impose a penal measure which may be more severe than the punishment. For these reasons, a proposal has been made in doctrine *de lege ferenda* to shape the waiver of punishment, as named, as a genuine alternative to punishment, consisting solely of the possibility of abandoning any repression against the perpetrator[40].

The proposal made does not merit consideration. It should not be forgotten, however, that the function of the waiver of the imposition of a penalty combined with the imposition of a measure is to provide for the possibility to impose this measure in a situation in which the court deems that the imposition of only this measure is appropriate and sufficient to achieve the objectives set out in art. 33 p.o.c. The circumstances of a particular case may, however, justify imposing a criminal measure on the offender solely in order to reflect the sense of justice (for example forfeiture) or to have a positive impact on the offender's environment (for example making the sentence public)[41].

Application of the penalty waiver provided for in art. 39 § 1 p.o.c. and the decision to impose a penalty measure is *de lege lata* conditional on a determination of whether there is „an accident deserving special consideration". In the light of the disposition of art. 39 § 1 p.o.c. the above-mentioned accident occurs, if it is supported by factors of a subjective (personal characteristics and conditions of the perpetrator) or objective nature (nature and circumstances of the act)[42].

The catalogue of circumstances which make it possible to accept the above-mentioned accident is closed. In the doctrine a correct view was expressed, according to which both groups of circumstances should be considered together when assessing whether an accident deserving special consideration is involved, and one group cannot be in contradiction with the other[43].

Acceptance of the above standpoint does not mean, however, that both groups of circumstances have to jointly support the fact that we deal with an accident deserving special consideration. The use of the alternative functor „or" in art. 39 § 1 p.o.c. argues that in order to assess whether the case is an accident deserving special consideration, the listed criteria do not have to occur jointly[44]. Thus, in order to assess whether there is a case deserving special consideration, it is sufficient that it is supported by one group of circumstances listed in art. 39 § 1 p.o.c. and the other group of circumstances

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[40] See Szumski, J., *Środki alternatywne wobec kary za wykroczenia (w związku z projektem kodeksu wykroczeń)*, Państwo i Prawo, 1992, No 12, p. 78.

[41] See Gensikowski, P., *Zasady wymiaru kary i środków karnych*, cited, p. 363.

[42] See Gensikowski, P., *Zasady wymiaru kary i środków karnych*, cited, p. 237.

[43] Bojarski, T., *Kodeks wykroczeń. Komentarz,* op. cit., p. 122.

[44] Radecki, W., in Bojarski, M., Radecki, W. (ed.), *Kodeks wykroczeń. Komentarz*, Warsaw 2016, p. 398; Grzegorczyk, T., *Kodeks wykroczeń*, cited., p. 175; Raglewski, J., *Model nadzwyczajnego złagodzenia kary w polskim systemie prawa karnego*, cited, p. 331.

does not oppose it[45]. Making the possibility of waiving the imposition of a penalty combined with the imposition of a penalty measure conditional *de lege lata* on the existence of special circumstances is questionable in doctrine[46]. The above mentioned narrow definition of the aforementioned basis for a self-imposed penalty measure prevents an individualized response to the perpetrator, adapted to the type of petty offence committed and the personality of the perpetrator[47]. For this reason, it is *de lege ferenda* proposed to broaden the possibility of a self-imposed penalty measure, including the introduction into the petty offences law of the institution provided for in art. 59 p.c.[48].

However, the acceptance of the proposal is opposed to the scope of regulation of the institution of waiver of punishment in the petty offences law. Taking into account the linguistic interpretation of art. 39 p.o.c., there is no doubt that the said institution refers to any type of petty offences provided for in the provisions of the special part of the code, as well as in non-code provisions.

Therefore, due to such broad possibilities of application of the institution of waiving the punishment, it does not seem necessary to increase them further by resigning from the formula of „a case deserving special consideration" as a basis for this institution[49].

In addition to the above comments, it should be pointed out that the possibility to waive the imposition of a criminal measure, provided for in the current shape of art. 39 § 1 p.o.c., does not seem to need to be changed either. In the current form of the petty offences law, under the institution of waiver of punishment provided for in art. 39 § 1 p.o.c., the court may not only agree to impose a penalty measure, but also agree to impose a penalty combined with waiver of a penalty measure[50]. Such a solution should be regarded as fully justifiable, as it cannot be excluded that the circumstances of a given case will support the fact that in order to achieve the objectives set out in art. 33 p.o.c. it is not necessary to impose a penal measure on a perpetrator, as they will be achieved by imposing a penalty on him[51].

VI. Rules on sentencing penal measures

In addition to the above-mentioned comments it should be considered whether changes require rules on sentencing penal measures in the petty offences law. By virtue of the reference provided for in art. 33 § 5 p.o.c. the directives for the

[45] See Gensikowski, P., *Kodeks wykroczeń*, cited, p. 237.

[46] See Szumski, J., *Środki alternatywne wobec kary za wykroczenia*, cited, p. 78; Lucarz, K., Muszynska, A., cited, p. 271.

[47] Lucarz, K., Muszynska, A., cited, p. 271.

[48] Lucarz, K., Muszynska, A., cited, p. 271.

[49] See Gensikowski, P., *Zasady wymiaru kary i środków karnych*, cited, p. 364.

[50] See Grzegorczyk, T., *Nowela do prawa wykroczeń. Komentarz*, Kraków 1999, p. 33; Gensikowski, P., *Samoistne odstąpienie od orzeczenia środka karnego w prawie wykroczeń*, Przegląd Sądowy, 2008, No 5, p. 148.

[51] See Gensikowski, P., *Samoistne odstąpienie,* cited, p. 148-149.

assessment of penal measures in the petty offences law, as well as the circumstances to be taken into account in their assessment, are set out in art. 33 § 1-4 p.o.c. In art. 33 § 1 p.o.c. the legislator regulates three sentencing directives that apply accordingly when sentencing penal measures. According to this provision, the court, when imposing a penalty measure, must take into account the directive of justice, as well as the directives for individual and general prevention.

The first directive requires the court to take into account the degree of social harm caused by the petty offence when imposing a criminal measure. The second directive requires the court, when imposing a penalty measure, to take into account the preventive and educational aims that the measure is intended to achieve for the perpetrator.

The third directive makes it necessary to take into account the objectives of the criminal measure in terms of its social impact. The quoted inclusion in art. 33 p.o.c. of a catalogue of directives for the imposition of a penalty measure requires completion. The point is that in this provision reference to the culpability of the perpetrator as a directive for the assessment of penalty measure has been omitted. The doctrine expresses the view that such a solution was not necessary due to the petty nature of the petty offences, as well as the content of art. 33 § 2 p.o.c., which emphasizes the significance of the degree of perpetrator's guilt as one of the circumstances influencing the penalty measure imposed for the committed petty offence[52]. However, it is impossible to agree with this position. The lack of emphasis in art. 33 § 1 p.o.c. on the directive of proportionality of measure penalties to the degree of guilt of the perpetrator negates the fundamental principle of responsibility for the petty offences, namely responsibility on the basis of guilt provided for in art. 1 § 2 p.o.c.[53]. Moreover, the lack of reference in art. 33 § 1 p.o.c. to guilt as a directive for the assessment of penalty measure is in conflict with the content of art. 33 § 2 p.o.c., where it is indicated that the court, imposing the penalty measure, should take into consideration, *inter alia*, the degree of guilt of the perpetrator[54].

Finally, the court, while imposing a penalty measure, must take into consideration the degree of social harm caused by the act, and the determinants of such an assessment pursuant to art. 47 § 6 p.o.c. are also subjective circumstances, such as the form of intention, motivation of the perpetrator, type of infringed precautionary rules and the degree of their infringement[55].

The lack of prominence in art. 33 § 1 p.o.c. of the directive of proportionality of the penalty measure to the perpetrator`s fault is inconsistent with the solution functioning in penal law concerning crimes, where the aforementioned directive is expressed in art. 53 § 1 p.c. For these reasons it should be proposed *de lege ferenda* to amend art. 33 § 1 p.o.c. by emphasizing in this provision the directive of proportionality of the penalty measure to the degree of guilt of the perpetrator[56].

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[52] See Bojarski, T., *Kodeks wykroczeń*, cited, p. 113.
[53] See Gensikowski, P., *Zasady wymiaru kary i środków karnych*, cited, p. 344.
[54] See Gensikowski, P., *Zasady wymiaru kary i środków karnych*, cited, p. 344.
[55] See Gensikowski, P., *Kodeks wykroczeń*, cited, p. 215.
[56] See Gensikowski, P., *Zasady wymiaru kary i środków karnych*, cited, p. 345.

In addition to supplementing the catalogue of directives for the imposition of a penalty measure, the provisions of p.o.c. determining the catalogue of mitigating circumstances and aggravating circumstances to be taken into account in the assessment of a penalty measure should also be amended.

*De lege la*ta in art. 33 § 3 p.o.c. the legislator formulated a catalogue of mitigating circumstances while assessing the penalty measure and in art. 33 § 4 p.o.c. he formulated a catalogue of aggravating circumstances while assessing the penalty measure.

The introduction of such a solution was intended to facilitate adjudication by members of bodies adjudicating in petty offences cases[57]. In this context it should be recalled that since the entry into force of the 1971 codification of petty offences law, petty offences cases have been decided by petty offences boards, often by persons without higher legal education. However, since 17 October 2001, after the new procedural regulation of petty offences proceedings came into force, the situation has changed, as petty offences cases have been taken over by the courts. Therefore, a proposal to repeal provisions of art. 33 § 3 and 4 p.o.c. seems to be *de lege ferenda* justified.

The introduction of such a solution would be systemically consistent with the content of art. 53 p.c. If, however, in cases concerning offences with an assumedly large negative social impact legislator did not introduce solutions in art. 53 p.c. specifying a catalogue of mitigating and aggravating circumstances when assessing penalties measures, it seems that there is no need for such solutions in cases concerning petty offences with an assumedly smaller negative social impact than crimes[58]. The analyzed proposal to repeal the provisions of art. 33 § 3 and 4 p.o.c. was already envisaged in the draft of the Petty Offences Code of February 1991, prepared by the Team for the Unification of the Solutions of the Criminal Law and the Petty Offences Law, which – despite the positive assessment expressed in the doctrine[59] – did not become a binding law.

VII. Conclusions

The above considerations prove that, in the first place, changes are required in the formulation of the catalogue of penal measures in the petty offences law. In this context first of all *de lege ferenda* there is a need to standardize penal measures in the petty offences law, following the example of measures provided for in art. 39 p.c., in a closed catalogue. This amendment should be accompanied by a solution supplementing the recent catalogue of penal measures in m.c. by a prohibition to attend a mass event. Moreover, the doctrine *de lege ferenda* proposes to loosen the

[57] See Gubinski, A., *Okoliczności łagodzące i obciążające*, Zeszyty Wykroczeń, 1978, No 6, p. 38.

[58] See Gensikowski, P., *Zasady wymiaru kary i środków karnych*, cited, p. 346-347.

[59] See Gubinski, A., *Projekt kodeksu wykroczeń – wprowadzone zmiany, stosunek do zasad kodeksu karnego,* in Bojaarski, T., Mozgawa, M., Szumski, J. (ed.), *Rozwój polskiego prawa wykroczeń*, Lublin 1996, p. 41.

unnecessary rigors restricting the use of penal measures in the petty offences law so far, including the abandonment of the principle expressed in art. 28 § 2 p.o.c. The current formulation of this principle leads to unacceptable consequences. The adoption of principle provided for in art. 28 § 2 p.o.c. means that the court is deprived of full discretion in their application. In the absence of a provision stipulating that a particular type of penalty measure may be imposed, the authority is bound by an absolute prohibition to rule on it, even if it considers it *in concreto* appropriate and expedient to do so. In addition to these proposed changes the recent inclusion in art. 33 p.o.c. of a catalogue of directives for the imposition of a penalty measure requires completion. *De lege ferenda* art. 33 § 1 p.o.c. should be amended by emphasizing in this provision the directive of proportionality of the penalty measure to the degree of guilt of the perpetrator. In addition to this proposal the provisions of p.o.c. determining the catalogue of mitigating circumstances and aggravating circumstances to be taken into account in the assessment of a penalty measure should be *de lege ferenda* repealed.

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How Was the Romanian Criminal Judicial Process Digitized?

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Abstract

The present study is not intended to provide an exhaustive analysis of the Romanian criminal justice system during pandemic, the author trying to express some opinions on some very debated issues in the Romanian doctrine and jurisprudence.

The author provides a pragmatic approach, starting with the analysis of some current Romanian procedural regulations, and answers to the question in the title of the study.

Keywords: *digitization, criminal process, summons, electronic signature, videoconference.*

I. Introduction

The end of 2019 and the beginning of 2020 meant a change of life for Romania and for the entire World. Not because humanity has never experienced another pandemic, but because the one generated by the new COVID-19 virus has proven to be more destructive than the previous ones, not only from a medical point of view. The pandemic generated by the new coronavirus took us by surprise and we do not refer only to justice, but to all sectors of social life.

In terms of justice, March 2020 meant a blockage of the Romanian judicial system. The trials were suspended, with some exceptions, which showed and demonstrated that the Romanian judicial system was far from a modern one, ready for a transformation or a technical transition, which would have made it both attractive and safe for the participants.

The timid attempts to regulate by the two presidential decrees[2], which established and subsequently extended the state of emergency, remained only at the theoretical stage. Some judges were happy when the decrees ceased to be applied, as they did not have the necessary resources to implement the aforementioned provisions. The only gain following the state of emergency was, apparently, the scheduling of the files during a court hearing, an operation that continued with many imperfections.

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[2] Decree of the President of Romania no. 195/2020 on the state of emergency, published in the Official Monitor no. 212 of March 16, 2020 and the Presidential Decree no. 240/2020 on the extension of the state of emergency on the territory of Romania, published in the Official Monitor no. 311 of April 14, 2020.

Evidently, the modernization of the criminal judiciary system is necessary for many other reasons, not only for those expressed above. The new COVID-19 pandemic was just a pretext to speed up this process of modernization, of transition. We are not supporters of the complete robotization and computerization of justice, we do not support the disappearance of the classic ways of exercising the legal professions, on the contrary, but at the same time we believe that justice must rise to the level of development of society.

What does the modernization of the criminal judiciary system actually mean from the perspective of those briefly presented above?

Or how do we transpose social (or physical?) distance into the administration of justice? The simplest answer is: by communication through electronic means, by electronic file and, respectively, by conducting the judicial process through videoconference. Simple, but at the same time complicated, customized by types of proceedings, respectively criminal and non-criminal (civil, administrative, professional).

What tools does the procedural law offer today and how should its possible directions of change be addressed?

II. The criminal trial

2.1. Romanian Code of Criminal Procedure[3]

In criminal proceedings, many issues are sensitive. Thus, if the participant in the criminal proceedings indicates an e-mail address for summons and communication, the judicial body is obliged to summon him and communicate the documents regarding the judicial procedure in this manner.

The difference from the non-criminal judicial process is that, in the criminal proceedings, once this method has been chosen, which is regulated exclusively at the discretion of the person to be summoned, the judicial body has no other possibility to communicate with the person concerned other than by electronic correspondence.

According to art. 81 of the Romanian Criminal Procedure Code – *The rights of the injured person*

> – *„In the criminal proceedings, the injured person has the following rights: (...) d) the right to be informed, within a reasonable time, about the status of the criminal investigation, at his/her express request, conditioned by the indication of an address on the territory of Romania, an electronic messenger or e-mail to which this information is communicated".*

From the manner in which the text of art. 81 of the Romanian Criminal Procedure Code is written, it would result that the injured person may indicate only an e-mail or

[3] Law no. 135/2010, published in the Official Monitor no. 486 of July 15, 2010.

electronic messenger, and not the address on the territory of Romania, and will be informed only through this type of communication.

Art. 92 of the Romanian Criminal Procedure Code refers to the rights of the suspect's lawyer and the defendant providing in paragraph (2) that the suspect's or defendant's lawyer may request to be informed on the date and time of the act of criminal investigation or of the hearing conducted by the judge of rights and freedoms. The notification may be performed by telephone, fax, e-mail or other similar means, a report in this regard being mandatory to be concluded. In this case, however, the choice of the method of communication belongs to the criminal investigation body, regardless of the information provided by the suspect's or defendant's lawyer.

According to art. 257 paragraph (5) of the Romanian Criminal Procedure Code, the summons may be sent by e-mail or by any other electronic messaging system, with the consent of the person summoned.

The text regulates the possibility of summoning, respectively summoning a person before the criminal investigation body by e-mail, if the summoned person has given his consent in this regard.

Another interesting provision is that of art. 259 paragraph (9) of the Romanian Criminal Procedure Code, according to which

> *„if the suspect or defendant lives abroad, for their first hearing the summons shall comply with the stipulations of international criminal law applicable to the relation with the requested state. In the absence of such stipulation or in case the applicable international law allows it, the summons shall be sent by registered mail. In that case the recipient's signature on delivery of the registered letter or the refusal to take delivery of said letter shall be deemed proof of completion of the summons procedure. For their first hearing, the suspect or defendant shall be informed in the summons that they have the right to indicate a mailing address on the territory of Romania, an e-mail address or an electronic messaging address where they wish to receive all communication concerning the trial. In case they fail to comply, the communications shall be sent to them via registered letter again, and the receipt for that letter from the Romanian postal service, listing the documents being mailed, shall serve as proof of completion of the procedure."*

Also, paragraph (13) of the same article states that *a summons sent via e-mail or a system of electronic messaging shall be sent to the electronic address or coordinates indicated to the judicial body for that purpose by the summoned person or by their representative.* Again, in this case the indication by the suspect or defendant residing abroad of an e-mail address obliges the judicial body to summon him/her and to send him/her all communications regarding the process by e-mail.

Art. 289 paragraph (5) states that the complaint in electronic form meets the formal conditions only if it is certified by electronic signature, in accordance with the legal provisions. By the phrase *„complaint in electronic form"*, the Romanian legislator meant the complaint sent by e-mail (e-mail), which is valid as a way of notifying the criminal investigation body, only if it is signed with electronic signature, under the

conditions of Law no. 455/2001[4]. At the same time, the validity of the electronic signature, of the certificate issued, can only be verified by accessing the complaint sent by e-mail, without being printed. After printing, the electronic signature becomes a simple photo, with no legal value. From this perspective, it may be necessary to add a condition, namely the need to certify in a report the electronic signature applied in accordance with the law, for complaints sent by e-mail, since between the person receiving e-mail and, which, has the possibility and may verify the validity of the electronic signature and, respectively, the person which will process the respective complaint, there is no identity.

According to the of the Romanian Criminal Procedure Code, prosecution and judicial investigation may be conducted by videoconference, a set of provisions expressly referring to this modern way of communication:

- *art. 106 par. (2): A detained person may be heard at the detention facility through videoconference, in exceptional situations and if judicial bodies decide that this does not harm the proper conducting of the trial or the rights and interests of the parties.*
- *art. 204 par. (7): The challenge of the appeal is ruled in the presence of the defendant, unless he is unjustifiably absent, has disappeared, is evaded or due to ill health, due to force majeure or necessity cannot be brought before the judge. It is considered that the defendant deprived of liberty is also present if, with his consent and in the presence of the chosen or ex officio defense counsel and, as the case may be, of the interpreter, participates in ruling the challenge by videoconference at the place of detention.*
- *art. 235 par. (3):* The defendant is heard by the Judge for Rights and Liberties in respect of all reasons on which the proposal to extend the pre-trial arrest term is based in the presence of a retained or court appointed counsel. The hearing of the defendant may be conducted with his consent and in the presence of a lawyer chosen or appointed ex officio and, as the case may be, of an interpreter, also by videoconference, at the place of detention.
- *art. 364 par. (1): The case will be adjudicated in the presence of the defendant. Bringing the detained defendant to trial is mandatory. It is considered that the defendant deprived of liberty is also present if, with his consent and in the presence of the chosen or appointed ex-officio defense counsel and, as the case may be, of the interpreter, participates in the trial by videoconference at the place of detention.*
- *art. 364 par. (4): (...) If the detained defendant has requested to be tried in absentia, the court may order, on request or ex officio, that the defendant be able to draw conclusions during the hearings and be given the opportunity by videoconference in the presence of the defense counsel chosen or appointed ex officio.*

[4] Republished in the Official Monitor no. 316 of April 30, 2014.

By analyzing the above legal texts, first of all we notice that, in the criminal process, unlike the non-criminal one, the use of videoconferencing is expressly regulated. Secondly, we note that this means of distance communication is permitted only under certain conditions, namely:

- only the detainee, deprived of his liberty, can participate in the criminal proceedings by videoconference;
- sometimes, in certain cases, the consent of the person deprived of liberty is required to participate in the criminal proceedings by videoconference (art. 204 para. 7 Romanian Code of Criminal Procedure, art. 235 para. 3 Romanian Code of Criminal Procedure, art. 364 para. 1 Romanian Code of Criminal procedure), sometimes not, the court deciding on the use of this method of conducting the criminal process, establishing the existence of exceptional cases and considering that this method does not affect the proper conduct of the process or the rights and interests of the parties (art. 106 para. 2 Romanian Code of Criminal Procedure, art. 364 para. 4 of the Romanian Code of Criminal Procedure);
- the chosen or ex officio lawyer and, as the case may be, the interpreter, must be present.

Restricting the right to participate in criminal proceedings by videoconference only to the detainee is a measure that clearly opposes the digitization of the judicial process. We consider the intervention of the Romanian legislator necessary, in the sense of regulating the right of option of each participant in the criminal judicial process to use the videoconference.

In order for the solution not be arbitrary, we consider the consent of the detainee to use the video conference necessary. Moreover, the extension of the right to use video conferencing to other participants in criminal proceedings must be a measure which also implies the consent of the person concerned.

With regard to the need for the presence of the chosen or ex-officio lawyer (and of the interpreter, as the case may be), in court practice the interpretation has been crystallized that the chosen or ex-officio lawyer (and the interpreter, as the case may be) must be physically present near the defendant in state of detention, at the place of detention. Otherwise, it has gone so far as to consider that the right to defense has not been respected, which would lead to the absolute nullity of the judgment thus rendered. This interpretation is wrong and restrictive, in our opinion. As long as the detainee is considered to be present at the trial, if he/she participates by videoconference, we do not see why the lawyer in turn cannot be considered present by the same technological means or in the hypothesis that he/she is in the courtroom. There is no provision of the law requiring the lawyer to be physically present with the detainee.

On the other hand, according to the provisions of art. 351 para. 1 of the Romanian Code of Criminal Procedure, the case shall be tried by the court established according to the law and shall be debated in the court oral, direct and adversarial session, and according to the provisions of art. 350 para. 1 the trial takes place at the headquarters

of the court. Or, as long as the judge, the prosecutor and the clerk are in the courtroom, it is natural for the lawyer to be able to sit there as well. The case file is also in the courtroom. During the judicial investigation, situations may arise that require the study of documents, or the submission of documents to the file. However, if the lawyer (or the interpreter, as the case may be) were required to be present at the place of detention, outside the courtroom, the proper conduct of the criminal proceedings would obviously be affected, as would the rights and interests of the parties.

Apparently, the criminal judicial process is (more) technological than the non-criminal one, in the sense that it allows any person, participant in the process, to choose if the communication with the judicial body takes place by e-mail or by classical means, respectively postal correspondence, procedural agent. The use of video conference is also regulated, with the limits already specified.

2.2. Law no. 114/2021[5] on some measures in the field of justice in the context of the COVID-19 pandemic

By this normative act adopted with a slight delay compared to the beginning of this period, the Romanian legislator regulates the possibility of ordering measures necessary for the functioning of justice as a public service in order to prevent and combat the effects of the COVID-19 pandemic. The first shortcoming is found in art. 1 para. 2, which stipulates that the measures regulated by this law can be ordered only for reasons generated by the COVID-19 pandemic. The benefits of technologization of the judicial process are obvious and should not be abandoned with the end of the pandemic.

In criminal cases, the consent of the litigant in order to communicate the procedural documents by e-mail is presumed, and the judicial bodies will request, where appropriate, urgently, by telephone, the indication of e-mail addresses for the communication of those documents. If objective reasons prevent the use of e-mail, the other means of communication provided by law shall be used.

The use of videoconferencing exclusively for persons deprived of their liberty and in pre-trial detention is left to the discretion of the judicial body, which will establish that the videoconference does not affect the flow of the process or the rights and interests of the parties. For all other participants in the criminal proceedings, the use of video conferencing can only be allowed with their consent. This possibility will be made known to them at the first hearing or, as the case may be, by a notice communicated by telephone, e-mail or other such means which ensure the transmission of the notice and confirmation of receipt, the person being asked if he/she agrees in this sense.

From a technical point of view, videoconferencing is carried out by means of audiovisual telecommunication that allow the verification of the identity of the parties and guarantees the security, integrity, confidentiality and quality of the transmission,

[5] Published in the Official Monitor no. 457 of April 29, 2021.

the recording of the hearing being mandatory. Videoconferencing is not used in the case of a hearing during a criminal investigation, in the trial of cases with juvenile defendants, of those related to judicial rehabilitation, nor when the court declares the court hearing as non-public.

III. Conclusions

Trying to summarize, we can conclude that the digitalization of the judicial process is prevented primarily by the lack of permissive legislative regulations in this direction, regulations that, without abdicating the principles of the judicial process, without creating the possibility of violating the fundamental rights of the litigant, should clearly establish the legal frame of the use of electronic means in the judicial process. This conclusion does not contradict the above, the existing regulations, especially those in criminal proceedings, needing to be improved in the future.

Secondly, there is a need for a proper endowment of all the courts in Romania, as well as the prosecutor's offices, accordingly (stable, secure and strong internet connections, modern terminals, data storage cloud systems, electronic signatures).

Thirdly, the direction of development and modernization of the criminal judicial system must be unitary and reach the territory from the center. We will give only three current examples that support this need:

- the first electronic file application used by the courts was made by the Cluj Court of Appeal. The second application was made by the Arad Tribunal. Currently, the Timişoara Court of Appeal (and not only) uses both applications, an unnatural situation;
- courts (within the same court of appeal) have different rules for sending correspondence by e-mail, especially regarding the size of the files;
- electronic files are accessed on different links, created individually by each court in the country that administers them.

Fourthly, the participation of each person in the judicial process and we have in mind here the judge, the prosecutor, the clerk, the lawyer, the expert, the witness, the interested party, the defendant, must be possible by videoconference, both in criminal proceedings and in the non-criminal one, by using a modern, safe, certified technology, which would represent, as we stated before, a guarantee of the observance of the principles of the due process, of the fundamental rights and freedoms of the litigant.

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