UNIVERSITY OF TIMISOARA
FACULTY OF LAW

UNIVERSITY OF PÉCS
FACULTY OF LAW

JOURNAL OF EASTERN-EUROPEAN CRIMINAL LAW

No. 1/2023

Edited biannually by courtesy of the Criminal Law Departments within the Law Faculties of the West University of Timisoara and the University of Pécs

UNIVERSUL JURIDIC

2023

Universul Juridic Publishing House

Edited by Universul Juridic Publishing House

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The journal is indexed in databases SSRN, EBSCO, HeinOnline.

ISSN 2360–4964

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22 de ani 2001-2023 UNIVERSUL JURIDIC

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Cross-Border Gathering of E-Evidence: Different Legal Frameworks in European Union and Council of Europe

PhD Silvia Signorato*

Abstract

In a world of borders, the Internet has no borders. This is one of the reasons why the need for cross-border gathering of e-evidence is increasingly frequent. The article is aimed at identifying the legal instruments for cross-border collecting of e-evidence. For this purpose, the main legal sources of the European Union and the Council of Europe are analysed. Furthermore, the article is aimed at providing the reader with a roadmap for orientation in this matter. In this perspective, the following hypotheses are analysed: 1) The collection of publicly available e-evidence or for which there is consent to the collection and the relationship of these investigations with Article 32 of the Budapest Convention; 2) The collection of e-evidence with direct request to service providers based on the Second Additional Protocol to the Budapest Convention on Cybercrime of the Council of Europe, and the Regulation on European Production and Preservation Orders for electronic evidence in criminal matters; 3) The gathering of e-evidence on the basis of bilateral and/or multilateral agreements; 4) The gathering of e-evidence according to the European Investigation Order in criminal matters (EIO); and 5) The gathering of e-evidence in states where EIO does not apply.

Keywords: *cross-border collection of e-evidence; sources in matters of e-evidence in Europe; Second Additional Protocol to the Budapest Convention on Cybercrime; Regulation (EU) 2023/1543; Directive (EU) 2023/1544*

I. Introduction: a world of borders and collection of evidence across borders

In Europe, after many years of war, the peace of Westphalia was reached in 1648. This peace contributed to the identification of the concept of territory as circumscribed by borders. In particular, the border took on a double meaning: 'inclusive' for those who are within the border; 'exclusive' for those who are outside the border.

This distinction reverberates between the concepts of 'internal' and 'external' inherent in the collection of evidence in other countries. This distinction implies that the competent authorities can carry out investigations inside the territory of their state for the purposes of the prevention and repression of crime.

However, they cannot carry out investigations in the territory of other states. In fact, if it is necessary to gather evidence abroad, the judicial or police authority of the state must first of all verify whether its jurisdiction exists. If it exists, as a rule[1], it cannot

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gather evidence directly in another state, but will have to activate the judicial cooperation instruments in criminal matters[2].

At first glance, one might think that the member states of the European Union (later on, simply EU member states) could collect evidence in other States without activating the Police and judicial cooperation in criminal matters. This is because Article 3 of Consolidated versions of the Treaty on European Union provides for the creation of an area of freedom, security and justice without internal frontiers. However, this area is functional to the free movement of persons and has not yet been completed as regards the collection of evidence. As a result, since the borders between the member states still remain, it is necessary to resort to Police and judicial cooperation in criminal matters even if the collection of evidence has to take place in another EU member state.

II. E-evidence and data retention

Information and communications technology (ICT) is widespread and pervasive in every sector of human activity. Indeed, the distinction between online and offline now seems to tend to dissolve and be replaced by the 'OnLife dimension'[3].

An electronic evidence (or digital evidence), hereinafter simply e-evidence, is any probative information stored or transmitted in digital form. The growing pervasiveness of ICT implies that the need for cross-border collection of e-evidence often emerges as investigations are carried out[4].

In particular, it may happen that an e-evidence is located on a device located abroad; this is the case, for example, of photographs or digital documents stored on a computer located in another state.

More frequently, however, the e-evidence is found across the border not because the devices are abroad, but because the servers that people use to store information or to communicate through social networks are located abroad (this is the case of WhatsApp, Facebook, Mastodon, Telegram etc.). Consequently, even if the communication takes place between two people both located in the same state, the data are stored not only in the users' devices[5] but also in the foreign state in which the server is located.

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[1] Exceptions include the joint investigation teams provide by the Council Framework Decision of 13th of June 2002 on joint investigation teams (2002/465/JHA) and the regulations provided by Article 32 of the Convention of Budapest. See C. Rijken, G. Vermeulen G., (Eds.), *Joint Investigation Teams in the European Union. From Theory to Practice,* Springer, 2006, pp. 1-248.

[2] See W. Bogensberger, *Chapter 4. Judicial Cooperation in Criminal Matters*, in M. Kellerbauer, M. Klamert, J. Tomkin, (Eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, Oxford Academic, 2019.

[3] See L. Floridi, *The Onlife Manifesto*, in L. Floridi, (Ed.), *The Onlife Manifesto: Being Human in a Hyperconnected Era*, Cham, 2015, pp. 7-13.

[4] The importance of this kind of evidence is destined to increase more and more. Furthermore, new investigative possibilities (but also new issues) are related to the use of artificial intelligence (AI) for the collection of evidence. Discussions on the application of AI in collection of evidence can be found in S. Quattrocolo, *Artificial Intelligence, Computational Modelling and Criminal Proceedings. A Framework for A European Legal Discussion*. Springer, 2023; and in L. Stanila, *Living in the Future: New Actors in the Field of Criminal Law – Artificial Intelligence*, in *Legal Science: Functions, Significance and Future in Legal Systems II. The 7th International Scientific Conference of the Faculty of Law of the University of Latvia 16–18 October 2019*, Riga Collection of Research Papers, 2020, pp. 300-312.

[5] Moreover, only some data are stored in the users' devices.

Traffic data are considered so important for investigative purposes that states have specific data retention laws. Before introducing the concept of data retention, it is necessary to define the concept of traffic data; 'traffic data means any computer data relating to a communication by means of a computer system, generated by a computer system that formed a part in the chain of communication, indicating the communication's origin, destination, route, time, date, size, duration, or type of underlying service'[6].

The law that disciplines the type of data, the methods and the period of their retention for the purposes of prevention and prosecution of criminal offenses is called 'data retention'[7]. In particular, data retention is a concept different from 'data preservation' (or 'quick freeze') disposed against a suspect[8]. This is also because the data retention discipline is not about processing data from a suspect but from every person instead. Data retention is an important instrument when a crime is committed. For example, think of the importance that the localization data of the cell to which a subject's mobile phone is connected can have in order to understand whether he/she is the perpetrator of a crime (e.g. a murder or a robbery).

Given the importance that these data can have, the states impose their retention to the providers of publicly available electronic communications services or of a public communication network. There is, however, a problem because each state has specific data retention rules which may differ from those of other states. In particular, the most significant difference concerns the data retention periods. These differences certainly do not facilitate the prosecution of crimes. However, all data retention laws of all EU member states are characterized by a fundamental common factor: No data revealing the content of the communication may be retained pursuant to data retention. In relation to this, it should be noted that the distinction between communicative contents and non-communicative contents is not always clear[9].

Finally, it should be noted that the terms 'collection of evidence' and 'gathering of evidence' are considered to be equivalent here.

III. A different legal framework in the Europe of the European Union and in the Council of Europe one

In a world of ever faster dynamics, investigations should also be characterized by the rapid collection of evidence, even in cases where such evidence must be collected abroad.

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[6] See Article 1 of the Convention on Cybercrime of Council of Europe, 23.XI.2001.

[7] See H. Matsumi, D. Hallinan, D. Dimitrova, E. Kosta, P. de Hert, (Eds.), *Data protection and privacy: In transitional times.* Bloomsbury Publishing, 2023; S. Signorato, *Data retention, a balance between judicial requirements and the risk of illegality,* in Provincial Protector of Citizens-Ombudsman, Institute of Criminological and Sociological Research (Eds.), *Human Rights Protection "From Unlawfulness to legality"* (1), 2018, pp. 447- 456; S. Signorato, *Streamlining the Fight Against Child Sex Offenders Trough EU Regulation of IP address* in *Journal of Eastern-European Criminal Law* no. 1/2020, pp. 77-86; and S. Signorato, *Combating terrorism on the internet to protect the right to life. The regulation (EU) 2021/784 on addressing the dissemination of terrorist content online*, in Provincial Protector of Citizens, Ombudsman (Eds.), *Yearbook. Human rights protection. The right to life.* Vojvodina Provincial authorities Common Affairs Department Novi Sad, Republic of Serbia, 2021, pp. 403-408.

[8] See Article 16 of the Convention on Cybercrime, and European Commission (2011). *Report from the Commission to the Council and the European Parliament, Evaluation report on the Data Retention Directive* (Directive 2006/24/EC): 5.

[9] See L. Bachmaier Winter, *Criminal Investigation and Right of Privacy: The Case-law of the European Court of Human Rights and Its Limits*, in *Lex ET Scientia*, Juridical Series (II), 2009, p. 12.

Regarding this aspect, there are different attitudes in the various states. Some of them appear to be so xenophilic that, if the collection of evidence is requested by another state, they carry out this collection even more quickly than a collection relating to an investigation within the state. Conversely, other states tend to cooperate very little.

For this reason, Article 12.1 of the EIO provides that 'The decision on the recognition or execution shall be taken and the investigative measure shall be carried out with the same celerity and priority as for a similar domestic case and, in any case, within the time limits provided in this Article'.

The need for a fast collection of evidence emerges particularly in the case of e-evidence, given that such kind of evidence is easily alterable, perishable, and eliminated.

It is therefore necessary to verify whether, at a European level, there are sources that specifically regulate the cross-border collection of e-evidence.

In dealing with European sources, it must first be specified that, even if we often speak generically of Europe, it is instead necessary to distinguish between the European Union and the Council of Europe.

The European Union (EU) has legal personality and 27 states, named EU member states, belong to it. They are: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden. The EU has a complex structure. Specifically, there are four main decision-making institutions: the European Parliament; the European Council; the Council of the European Union; and the European Commission. There are also other institutions and bodies, which include the European Central Bank, and the European Court of Auditors. Finally, the EU's judicial body is the Court of Justice of the European Union.

There are many EU sources of law. Usually, they are distinguished either as primary legislation of the European Union or as secondary legislation of the European Union.

The following are part of the primary legislation of the EU: Treaty on European Union (TEU), Treaty on the Functioning of the European Union (TFEU), and their protocols; Charter of Fundamental Rights of the European Union[10]; Treaty Establishing the European Atomic Energy Community (Euratom), which is still in force as a separate treaty; international agreements; general principles of union law.

The following are part of the secondary legislation of the EU[11]: Regulations, Directives, Decisions, recommendations, and opinions. In particular, a regulation is a binding legislative act and must therefore be applied in all member states. Instead, a directive indicates the objectives to be achieved, and as a consequence member states must legislate in order to achieve those objectives.

The Council of Europe is a second European entity quite distinct from the EU. It is first of all essential to clarify that, beyond the lexical assonance, the Council of Europe and the Council of the EU are different organisations. In particular, the Council of the EU adopts EU laws and coordinates EU policies. Instead, the Council of Europe is an international organization which currently includes 46 European countries, namely: Albania; Andorra; Armenia; Austria; Azerbaijan; Belgium; Bosnia and Herzegovina;

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[10] See J.A.E. Vervaele, *L'applicazione della Carta dei Diritti Fondamentali dell'Unione Europa (CDF) in materia di giustizia penale: valore aggiunto alla CEDU?*, in *Ius* no. 2/2015, pp. 131-164.

[11] See R.E. Kostoris, *Sources of Law* in R.E. Kostoris, (Ed.), *Handbook of European Criminal Procedure*, Springer, 2018, pp. 25-26.

Bulgaria; Croatia; Cyprus; Czech Republic; Denmark; Estonia; Finland; France; Georgia; Germany; Greece; Hungary; Iceland; Ireland; Italy; Latvia; Liechtenstein; Lithuania; Luxembourg; Malta; Republic of Moldova; Monaco; Montenegro; Netherlands; North Macedonia; Norway; Poland; Portugal; Romania; San Marino; Serbia; Slovakia; Slovenia; Spain; Sweden; Switzerland; Republic of Türkiye; Ukraine; and United Kingdom.

The Council of Europe promotes democracy, human rights and the rule of law. It aims to facilitate the creation and dissemination of common and democratic principles based on the European Convention on Human Rights and other acts on the protection of individuals, such as the European Social Charter; the European Convention on the Suppression of Terrorism[12]; the Budapest Convention on cybercrime. The jurisdictional body is the European Court of Human Rights, which judges on the violation or non-violation of the articles of the European Convention on Human Rights.

Having clarified the distinction between the EU and the Council of Europe, it should be emphasized that, in the two corresponding European scenarios, the reference sources regarding the cross-border collection of e-evidence are different.

IV. Sources of e-evidence collection: European Union

Despite the need of e-evidence collection abroad, for a long time there were no specific instruments of police and judicial cooperation in e-evidence matters. There were only principles to comply with and rules on data retention whose history is very troubled.

In fact, the matter of data retention was governed by Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks (the so-called Data Retention Directive). This directive amended Directive 2002/58/EC. However, on 8 April 2014 the Court of Justice[13] declared the Data Retention Directive to be invalid due to the violation of the principle of proportionality, and also due to its failure to provide adequate safeguards.

Consequently, Directive 2002/58/EC of 12 July 2002 returned to being the reference source on data retention. However, this directive, which concerns the processing of personal data and the protection of privacy in the electronic communications sector (the so-called Directive on privacy and electronic communications), currently is partially obsolete.

In the absence of specific rules for the collection of e-evidence, its gathering takes place in accordance with the same rules envisaged for the cross-border collection of other types of evidence. Specifically, the reference discipline is the Directive 2014/41/EU of 3 April 2014 regarding the EIO[14].

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[12] See I.C. Paşca, *Is Terrorism an International Crime?* In *Journal of Eastern-European Criminal Law* no. 1/2020, p. 177.

[13] Court of Justice, 8 April 2014, Joined Cases C-293/12 and C-594/12.

[14] A discussion on the OEI can be found in M. Daniele, *Evidence Gathering in the Realm of the European Investigation Order: From National Rules to Global Principles,* in *New Journal of European Criminal Law*, 2014, p. 179ss.; S. Ruggeri, (Ed.), *Transnational Evidence and Multicultural Inquiries in Europe. Developments in EU Legislation and New Challenges for Human Rights-Oriented Criminal Investigations in Cross-border Cases*, Springer, 2014; L. Scomparin, A. Cabiale, *The Proportionality Test in Directive 2014/41/EU: Present and Future of a Fundamental Principle*, in *Eurojus* no. 2/2022, pp. 72-86.

It was only on 17 April 2018 that the Commission submitted two proposals: A Proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters[15]; and a Proposal for a Directive laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings[16].

On the one hand, the Regulation establishes that the judicial authorities can directly request e-evidence from service providers of other States and that the service providers must transmit the evidence within 10 days, or within a shorter time limit in emergency cases. Furthermore, the regulation provides that the judicial authorities can issue a preservation order aimed at imposing that foreign service providers not delete the data, so that they can also request it later. On the other hand, the Directive provides that the service providers that offer their services in the EU must appoint a legal representative or designate an establishment which must be physically present in the EU. This designation will allow the judicial authorities to send the e-evidence orders precisely to the designated subjects.

The Council of the EU adopted such a regulation and a directive on 27 June 2023. They are the Regulation (EU) 2023/1543[17] and the Directive (EU) 2023/1544[18] respectively. However, they are still not actually applicable. This is because such a directive enters into force on the twentieth day following that of its publication in the Official Journal of the European Union, but it must be implemented by legislations of the member states. Moreover, the Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union but it shall apply from 18 August 2026[19].

V. Sources of e-evidence collection: Council of Europe

As far as the Council of Europe is concerned, the reference rules on the matter are firstly those of the European Convention on Human Rights (ECHR).

In the investigative field, Article 8 of the ECHR is of particular importance. This provision generically refers to investigations that cause interference with the Right to respect for private and family life, without distinguishing between collection of evidence and collection of e-evidence. Specifically, Article 8 ECHR provides that such interference is lawful if it satisfies three requirements. First, it must be 'in accordance with the law'.

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[15] COM/2018/225 final – 2018/0108 (COD).

[16] COM/2018/226 final – 2018/0107 (COD).

[17] Regulation (EU) 2023/1543 of the European Parliament and of the Council of 12 July 2023 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings.

[18] Directive (EU) 2023/1544 of the European Parliament and of the Council of 12 July 2023 laying down harmonised rules on the designation of designated establishments and the appointment of legal representatives for the purpose of gathering electronic evidence in criminal proceedings.

[19] See Article 34 of the Regulation (EU) 2023/1543, which provides that: '1. This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union. 2. It shall apply from 18 August 2026. However, the obligation for competent authorities and service providers to use the decentralised IT system established in Article 19 for written communication under this Regulation shall apply from one year after the adoption of the implementing acts referred to in Article 25. This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties'.

Secondly, the interference must be 'necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'. Thirdly, in accordance with a requirement elaborated by the European Court of Human Rights (ECtHR), the interference must respect the principle of proportionality[20].

In addition to the ECHR, the Convention on Cybercrime (or Budapest Convention)[21] plays an important role in the field of digital investigations. This Convention of the Council of Europe is open to signature also by states which are not parties of said Council.

It is the first international treaty on crimes committed via the Internet and other computer networks, and also provides investigative tools, such as the search of computer networks and interception. Currently, the 68 States that are signed up to the Convention on Cybercrime are the following: Albania; Andorra; Argentina; Armenia; Australia; Austria; Azerbaijan; Belgium; Bosnia and Herzegovina; Brazil; Bulgaria; Cabo Verde; Canada; Chile; Colombia; Costa Rica; Croatia; Cyprus; Czech Republic; Denmark; Dominican Republic; Estonia; Finland; France; Georgia; Germany; Ghana; Greece; Hungary; Iceland; Israel; Italy; Japan; Latvia; Liechtenstein; Lithuania; Luxembourg; Malta; Mauritius; Monaco; Montenegro; Morocco; Netherlands; Nigeria; North Macedonia; Norway; Panama; Paraguay; Peru; Philippines; Poland; Portugal; Republic of Moldova; Romania; San Marino; Senegal; Serbia; Slovakia; Slovenia; Spain; Sri Lanka; Sweden; Switzerland; Tonga; Republic of Turkey; Ukraine; United Kingdom; and United States of America[22].

Finally, at the level of the Council of Europe, the need for enhanced cooperation and disclosure of electronic evidence between states was felt. For this reason, negotiations took place from September 2017 to May 2021, which led to the formal approval on 17 November 2021 of the Second Additional Protocol to the Budapest Convention on Cybercrime.

VI. Focussing on the second additional protocol to the Budapest Convention on Cybercrime of the Council of Europe

There is no doubt that server providers now play a fundamental role also in the legal field. Not only do they allow communications, the exchange of messaging, video calls etc., but they also process information that can become evidence in a criminal trial.

The fact that service providers have such information at their disposal implies the need for their collaboration for investigative purposes. Consequently, the importance of co-operation between States and the private sector emerges. Indeed, not infrequently the private sector becomes essential for investigative purposes.

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[20] See T. Tridimas, *2438 The Principle of Proportionality*, in R. Schütze, T. Tridimas, T. (Eds), *Oxford Principles Of European Union Law: The European Union Legal Order: Volume I.* Oxford, 2018, pp. 243–264.

[21] Budapest, 23.XI.2001.

[22] The following states are not yet parties of the Convention on Cybercrime, but are signatories and invited to accede to it: Benin; Burkina Faso; Cameroon; Côte d'Ivoire; Ecuador; Fiji; Guatemala; Ireland; Kazakhstan; Kiribati; Korea; Mexico; New Zealand; Niger; Sierra Leone; South Africa; Timor-Leste; Trinidad and Tobago; Tunisia; Uruguay; and Vanuatu.

However, this co-operation is also characterized by problematic aspects, if only because the service providers operate according to business logic with secondary importance given to justice, which, of course, is instead the purpose of the investigations. Technology poses new opportunities, but also new challenges because it is always necessary to verify the compatibility of the collection of evidence with procedural safeguards[23].

It is important to underline that the co-operation of service providers is sometimes not only important, but fundamental. For this reason, there was the formal approval of the Second Additional Protocol to the Convention on Cybercrime on enhanced cooperation and disclosure of electronic evidence. In accordance with Article 1, 'The purpose of this Protocol is to supplement: a) the Convention as between the Parties to this Protocol; and b) the First Protocol as between the Parties to this Protocol that are also Parties to the First Protocol'.

This additional protocol provides that a competent authority, for the purposes of specific criminal investigations or proceedings, can make 'a request to an entity providing domain name registration services in the territory of another Party for information in the entity's possession or control, for identifying or contacting the registrant of a domain name'24. Moreover, the authority can request the disclosure of subscriber information25, and traffic data26. For its part, an entity that receives a request from an authority must transmit the requested information. It is also provided that an expedited disclosure of stored computer data be made available if an emergency occurs[27].

These are very important provisions which, at least in part, recall the Regulation on European Production and Preservation Orders for electronic evidence in criminal matters. However, we must not forget that, on the one hand, only the Regulation is binding in its entirety and directly applicable in all member states and that, on the other hand, the two legal instruments (regulation and additional protocol) have different application areas. This is because the Regulation applies in member states, while the Second Additional Protocol applies in states which are parties to it and which, as stated above, can also be non-member states. Finally, in the member states which are parties to the Second Additional Protocol, both the provisions of the Regulation and those of this additional protocol must be observed, with the clarification that they are characterized by a different cogency.

VII. Conclusions

In general, when in an EU country it is necessary to proceed with the cross-border collection of e-evidence (in another member state or in a non-member state), various scenarios may occur, including the following ones:

Case 1. E-evidence is publicly available or else there is consent to the gathering of evidence. The hypothesis in which it is necessary to carry out the collection of e-evidence

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[23] C. Cesari, Editorial: *O impacto das novas tecnologias sobre a justiça penal – um horizonte denso de incógnitas* in *Revista Brasileira De Direito Processual Penal*, no. 5(3)/2019, pp. 1167-1188.

[24] See Article 6 of the Second Additional Protocol to the Convention on Cybercrime.

[25] See Article 7 of the Second Additional Protocol to the Convention on Cybercrime.

[26] See Article 8 of the Second Additional Protocol to the Convention on Cybercrime.

[27] See Article 9 of the Second Additional Protocol to the Convention on Cybercrime. Such an additional protocol also provides specific rules about video conferencing.

in a state which is a party to the Convention of Budapest and where this e-evidence is publicly available or there is consent to gathering evidence is one of the easiest situations. Specifically, this hypothesis is governed by Article 32 of the Convention of cybercrime, which provides that 'A Party may, without the authorisation of another Party: a) access publicly available (open source) stored computer data, regardless of where the data is located geographically; or b) access or receive, through a computer system in its territory, stored computer data located in another Party, if the Party obtains the lawful and voluntary consent of the person who has the lawful authority to disclose the data to the Party through that computer system'.

Case 2: E-evidence to be requested from service providers. If the e-evidence is to be requested directly from service providers located in a state party to the Council of Europe, the Second Additional Protocol to the Budapest Convention on Cybercrime of the Council of Europe applies. In addition, if in the near future this request will be addressed to a service provider located in an EU member state, the Regulation (EU) 2023/1543 will also apply, i.e. the Regulation on European Production and Preservation Orders for electronic evidence in criminal matters, which will apply from 18 August 2026.

Case 3: Bilateral and/or multilateral agreements. If there are bilateral and/or multilateral agreements, the collection of e-evidence is carried out in accordance with the rules set out in these agreements.

Case 4: Collection of e-evidence in light of the European Investigation Order in criminal matters (EIO). This situation occurs if an EU member state should collect evidence in another EU member state that transposed the Directive 2014/41/EU regarding the EIO[28] into national law[29].

Case 5. Collection of e-evidence when EIO does not apply. If an EU member state has to collect evidence in a state where the EIO does not apply and in the absence of bilateral and/or multilateral agreements, the collection of evidence can only take place following a letter rogatory, which is based on the principle of mutual assistance.

Finally, it should be emphasized that hybrid situations can also occur. For example, it could happen that the collection of a certain type of evidence is governed by bilateral agreements, but both member states involved transposed the EIO into national law. In these cases, it is necessary from time to time to verify which instrument for transnational collection of evidence is to be used on the basis of the criteria established by international and EU law.

References

1. Bachmaier Winter, L. (2009). Criminal Investigation and right of privacy: the case-law of the European Court of Human Rights and its limits. *Lex ET Scientia*, Juridical Series (II),.

2. Bogensberger, W. (2019). Chapter 4 Judicial Cooperation in Criminal Matters. In Kellerbauer, M., Klamert, M., Tomkin, J. (Eds). *The EU Treaties and the Charter of Fundamental Rights: A Commentary*. Oxford Academic.

[28] Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014. This Directive was transposed into nation law of all EU member states, with the exception of Ireland and Denmark.

[29] For a discussion on Directive 2014/41/EU, see M. Daniele, *Evidence Gathering*, in R.E. Kostoris, (Ed.), *Handbook of European Criminal Procedure,* Springer, 2018, pp. 364-369.

3. Cesari, C. (2019). Editorial: O impacto das novas tecnologias sobre a justiça penal – um horizonte denso de incógnitas. *Revista Brasileira De Direito Processual Penal* 5(3).

4. Daniele, M. (2014). Evidence Gathering in the Realm of the European Investigation Order: From National Rules to Global Principles. *New Journal of European Criminal Law*.

5. Daniele, M. (2018). Evidence Gathering. In Kostoris, R.E. (Ed.), *Handbook of European Criminal Procedure*. Springer.

6. European Commission (2011). *Report from the Commission to the Council and the European Parliament, Evaluation report on the Data Retention Directive (Directive 2006/24/EC).*

7. Floridi, L. (2015). The Onlife Manifesto. In Florifi, L. (Ed.), *The Onlife Manifesto: Being Human in a Hyperconnected Era*. Cham.

8. Kostoris, R.E. (2018). Sources of Law. In Kostoris, R.E. (Ed.), *Handbook of European Criminal Procedure.* Springer.

9. Matsumi, H., Hallinan, D., Dimitrova, D., Kosta, E.,de Hert, P. (Eds) (2023). *Data protection and privacy: In transitional times.* Bloomsbury Publishing.

10. Paşca, I.C. (2020). Is Terrorism an International Crime? *Journal of Eastern-European Criminal Law* (1).

11. Quattrocolo, S. (2023), *Artificial Intelligence, Computational Modelling and Criminal Proceedings. A Framework for A European Legal Discussion*. Springer.

12. Rijken, C. – Vermeulen G. (2006) (Eds). *Joint Investigation Teams in the European Union. From Theory to Practice.Springer.*

13. Ruggeri S. (2014) (Ed.). *Transnational Evidence and Multicultural Inquiries in Europe. Developments in EU Legislation and New Challenges for Human Rights-Oriented Criminal Investigations in Cross-border Cases*. Springer.

14. Scomparin, L., Cabiale, A. (2022). The Proportionality Test in Directive 2014/41/EU: Present and Future of a Fundamental Principle. *Eurojus* (2).

15. Signorato, S. (2018), Data retention, a balance between judicial requirements and the risk of illegality. In Provincial Protector of Citizens-Ombudsman, Institute of Criminological and Sociological Research (Eds), *Human Rights Protection "From Unlawfulness to legality"* (1).

16. Signorato, S. (2020). Streamlining the Fight Against Child Sex Offenders Trough EU Regulation of IP address. *Journal of Eastern-European Criminal Law* (1), 77-86.

17. Signorato, S. (2021). Combating terrorism on the internet to protect the right to life. The regulation (EU) 2021/784 on addressing the dissemination of terrorist content online. In Provincial Protector of Citizens, Ombudsman (Eds), *Yearbook. Human rights protection. The right to life*. Vojvodina Provincial authorities Common Affairs Department Novi Sad, Republic of Serbia.

18. Stanila, L. (2020). Living in the Future: New Actors in the Field of Criminal Law – Artificial Intelligence. *Legal Science: Functions, Significance and Future in Legal Systems II. The 7th International Scientific Conference of the Faculty of Law of the University of Latvia 16–18 October 2019, Riga Collection of Research Papers*.

19. Tridimas, T. (2018). 2438 The Principle of Proportionality. In Schütze, R. – Tridimas, T. (Eds), *Oxford Principles Of European Union Law: The European Union Legal Order: Volume I.* Oxford.

20. Vervaele, J.A.E. (2015). L'applicazione della Carta dei Diritti Fondamentali dell'Unione Europa (CDF) in materia di giustizia penale: valore aggiunto alla CEDU? *Ius* (2).

Human Rights Approach to AI Governance in Today's Multicultural World

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Abstract

Human rights are international rules and values that can be used as a basic framework for AI governance, especially in today's multicultural world. But with today's fast changes and technological progress especially in the field of Artificial Intelligence it is assumed that if AI is not governed properly and with inadequate legislation than it can lead to breaking human rights, as well as it can create inequality and deny human rights globally. But if it used properly then it can promote *human rights, increase prosperity, and create a better future for us all. Therefore, in this paper will be discussed the positive outcomes and the negative consequences of proper or not proper use of human rights in AI governance in today's multicultural world.*

Keywords: *Human rights, Artificial intelligence, governance, multicultural world, and multiculturalism*

I. Introduction to multiculturalism

Multiculturalism is a movement with an aim to promote and safeguard ethnic populations and societies which are culturally diverse by promoting a policy of cultural diversity. Multiculturalism is not a new movement but it has been picking up attention since the late twentieth century. The term is used as an umbrella for the moral and political needs of disadvantaged groups, like African Americans, women, LGDB people, the disabled, immigrants, minorities, and the indigenous people[1]. Furthermore, multiculturalism protects the diverse society from social conflicts, promotes solidarity, and enrichment of cultures[2].

II. Human rights and multiculturalism

Multiculturalism has become a popular issue in international relations mostly due to the globalization and the technological advances, which led to cultural pluralism.

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[1] B. Choudhury, *Multiculturalism: Through the Prism of Human Rights* in *International Journal of Research in Humanities and Social Studies* Volume 3, Issue 1, January 2016, pp. 25-26, available at http://www.ijrhss.org/pdf/v3-i1/3.pdf (accessed on 22.12.2022).

[2] Serohin, V., *Multiculturalism: A Human Rights-Based Approach*, in Collective Monograph *The Issues of Improving Legal Knowledge in the XXI century: The Unity of Theory and Practice,* Liha Pres, 2019, DOI https://doi.org/10.36059/978-966-397-164-3/185-200.

The multicultural movement protects and reinforces the existence, respect, coexistence as well as the government policies of culturally diverse people. It is acknowledging and promoting the interaction, coexistence and equality in regards to supremacy of diverse cultural groups within a state. Multiculturalism from a political aspect it is associated with "identity politics," which implies or stands for recognition of differences. So, multiculturalism is the foundation for the harmonious functioning and existence of one modern state, that promotes cultural diversity, equity, and social creativity of diverse people[3].

As changes occurred in the modern state so did the International human rights underwent through cultural diversity changes. They have become more detailed, clear and acknowledged multiculturalism, which helped in the process of understanding and accepting cultural, linguistic and ethnic diversity. The International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) defines racial discrimination as: "Any kind of distinction, exclusion, restriction or preference based on race, color, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural life"[4].

Furthermore, Article 22 of the Universal Declaration of Human Rights (UDHR) discusses culture and dignity, by acknowledging that any person has the right to economic, social and cultural rights. Also, the United Nations Charter promotes international co-operation in all fields, as well as respect of human rights and fundamental freedoms (art. 13.2). Furthermore, the Charter has pointed out the direct relations between cultural rights, human dignity and freedom, and their interconnection with one another. This relationship has been also introduced in the International Covenant on Economic, Social and Cultural Rights, where it is explained that a free human being is the one that can enjoy its freedom without any kind of fear or a threat[5]. Therefore, the human rights of culturally diverse people are present and have been present for a long time, but it should be acknowledged that there was a need for their renewal due to the fast technological advances and globalization.

That is why in 2000, the Millennium Declaration was adopted by the UN General Assembly. This Declaration confirmed the existence of fundamental values like freedom, the freedom from fear of violence, oppression and injustice, the freedom for tolerance and respect for human beings in their diversity. It acknowledged that the differences between societies and people should be cherished and respected[6].

Moreover, in 2001 was created another international document this time at the UNESCO's General Conference. This document was the Universal Declaration of Cultural Diversity which confirms that culture is the leading piece in regards to identity, social cohesion, and even in economy. And if we want to have peace, stability and security then respect for different cultures, tolerance, dialogue, cooperation, trust and understanding are the key ingredients. The Declaration is intended to preserve multiculturalism as a precondition for protection of minority rights, as well as to serve as a guidance in

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[3] M. Kania, *Human Rights, Principles of Multiculturalism, and New Paths of Development in Latin America*, in Journal of American Studies 17 /2016, pp. 5-10, DOI: 10.12797/AdAmericam.17.2016.17.01, pp. 5-6.

[4] B. Choudhury 2016, *cited,* pp. 25-26.

[5] R. E. Gof, A. Momcilovic, *Respecting cultural diversity in ethics applied to AI: A new approach for a multicultural governance*, in Revista Misión Jurídica, Vol. 15, No. 23, Julio – Diciembre de 2022, p. 116.

[6] R. E. Gof, A. Momcilovic, *cited*, pp. 116-117.

creating cultural policies and instruments for promoting respect of cultural diversity, intercultural dialogue, as well as promote sustainable development in the world. To continue with, the political principles of multiculturalism are presented in Article 2 of this document where it is explained that in today's diverse societies, it is essential to ensure harmonious interaction among people with many different cultural identities, as well as encourage their willingness to live together. Furthermore, in the same document in Article 4 it is presented the role of multiculturalism in protecting and respecting human rights by stating that: "No one may invoke cultural diversity to infringe upon human rights guaranteed by international law"[7].

Therefore, it can be concluded, that multiculturalism is of crucial importance which can lead to many positive transformations but it can also lead to negative flaws like conflicts especially in marginalized ethnic societies. So far, in many aspects' multiculturalism has failed mostly due to extremism, radical populism, and xenophobia[8]. But even with the best encrypted rights and with the best policies these eccentric uprisings are inevitable due to the diverse societies we live in and which are changing very fast in a little paste of time. In 2012, the UN General Assembly adopted resolution 66/290 recognizing the right to live in freedom and dignity, a document that emphasizes that today's multicultural international community cannot be deprived of respect for its cultural diversity because if deprived, it can lead to breaches in peace and stability[9]. And even though there are many international documents that aim towards the respect for cultural diversity, which is crucial for security, human development, dignity, freedom, and cooperation, still these international documents are not enough to have the maximum respect for cultural diversity of all human beings[10]. People should learn to respect one another no matter their differences and if humanity learns this than the international norms and regulations will only act as reminders or as guiding principles not as sanctions. We need to realize as human beings that no matter how different we are, we are still the same, a human being. So, we need to cherish each other, help each other in our vulnerabilities and weaknesses because we all leave in states, communities, regions that are diverse in nature, culture, tradition, language and so on. And with the internet, the technological advances and communications, with the globalization, this "differences" that we discuss are taken advantage of, they are used usually to threaten and hurt people, instead to be used to promote and respect cultural diversity.

III. Human rights and ai in a multicultural world

After clarifying that cultural diversity is part of every human being and they cannot be separated, this leads to our other point in this paper, how are human rights affected and even disrespected with the drastic impact and influence of technology and Artificial Intelligence.

Our contemporary society even though it wants to cherish some traditional values and cultures it has been influenced and modernized very fast. The modernizing does not always have to be interpreted as bad. The new, modern era may be positive to

[7] M. Kania, *cited,* pp. 5-6.
[8] M. Kania, *cited,* pp. 5-6.
[9] R. E. Gof, A. Momcilovic, *cited*, pp. 116-117.
[10] R. E. Gof, A. Momcilovic, *cited*, p. 116.

humanity with all the discoveries in science, culture, art, philosophy[11]. Especially with the discoveries in Artificial Intelligence. In order to accomplish and feel the benefits of artificial intelligence (AI) an international cooperation is required in the governance and ethical standards and norms, while respecting the diverse cultural needs and priorities. And to be honest there are many hurdles to be overcomed in this respect due to the novelty of AI as well as due to the use and balance especially in the sphere of governance and the joint cultural cooperation on AI ethics. There are many misunderstandings between cultures and regions, even without using the AI, and by using it, the tensions are even bigger. But even where differences do exist, these differences do not have to necessarily prevent cross-cultural cooperation, because cooperation does not require achieving agreement on principles and standards, sometimes it is possible to reach agreement on practical issues[12].

Mutual cultural cooperation will be essential for the success of AI governance. The cultural cooperation is meant for different cultures working together on ensuring that AI is developed, deployed, and governed in society properly. By encouraging this cultural cooperation, it does not mean that all states should have the same norms, standards, and regulations but they can and should be applied to the standards and needs to different cultures. Or it can also be identified where it is necessary and which issues need global standards and where cultural variation is needed. But the "Cross-cultural" cooperation is needed due to AI global benefits, meaning sharing the advances and benefits with other countries, and ensuring that no one is neglected. Cooperation helps researchers to share expertise, resources, which helps in the faster progress, as well as on managing the ethical and safety issues that may arise. If there is no cooperation, there is a risk of competitiveness between states which will lead to underinvestment in safe, ethical, and socially beneficial AI development. Finally, international cooperation is also important to ensure that AI is applied successfully and respectfully[13].

Some scientist and policy makers view AI as a threat and others as a beneficial tool. Whatever the views, the concerns lead to the question of its governance and ethics. The need of a global governance in the sphere of AI is a necessity. Up until now the regulation has been built around the idea that human beings will remain in control over AI systems and applications, but until when this statement will be a reality it is questionable[14]. The European Union (EU) unlike other states is very descriptive of the governance that is influencing what is ethically acceptable and what is not. Meaning the EU is influencing the perceptions of setting the ethical standards of a trusted AI. And with this perception, it shapes the conduct of governance and the institutions. If this influence is beneficial, by setting guidelines for the use of AI, then it can be used as a powerful method for other means[15].

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[11] M. Kuznetsova, *Modernity in Multicultural World of the 21st Century*, in International Journal of Research in Engineering, IT and Social Sciences, Volume 7, Issue 5, May 2017, pp. 16-18, available at: https://www.academia.edu/35538957/Modernity_in_Multicultural_World_of_the_21_st_Century (accessed on 22.12.2022).

[12] S.S. ÓhÉigeartaigh, J. Whittlestone, Liu Yang, Zeng Yi, Liu Zhe, *Overcoming Barriers to Cross-cultural Cooperation in AI Ethics and Governance*, Philos. Technol. No. 33/2020, pp. 571-593, available at https://doi.org/10.1007/s13347-020-00402-x Springer. Available at: https://link.springer.com/article/10.1007/s13347-020-00402-x#citeas (accessed on 15.12.2022).

[13] *Idem.*

[14] R.E. Gof, A. Momcilovic, *cited*, pp. 112-114.

[15] E.R. Goffi, L., Colin, S. Belouali, *Ethical Assessment of AI Cannot Ignore Cultural Pluralism: A Call for Broader Perspective on AI Ethics*, in Arribat – International Journal of Human Rights Volume:

To continue with, the AI design, development, and deployment (AI-DDD) should be harnessed in such a way to reduce inequality and by adopting a human rights framework for AI-DDD, it offers the potential for the set of guidelines for AI. People all around the world in high- and low-income countries use and share AI applications' and share its benefits. AI can bring much more benefits to low-income countries and populations by promoting equal access to public services like health, education, social assistance. One scenario, that presents the benefits of AI is The United Nations Sustainable Development Agenda, adopted by the UN General Assembly in 2015 which is supported by 193 nations. This agenda includes 17 sustainable development goals (SDGs) to be achieved by 2030. The agenda challenges the states to make efforts to work on the SDGs, and with this enforces sustainability and prosperity, respect for human rights, equality, and dignity of people in the world. The main aim of the SDGs is to be applicable to all human beings. AI has potential to advance the SDGs, with its innovations, and with the process to produce them, and with this process to fertilize this global transformation. By harvesting the AI for the achievement of the SDGs could create an equal world[16].

SDG are one example where AI can be used for good and harvest equality in this multicultural world. But can human rights also help to guide and govern artificial intelligence (AI) or this idea is superficial? In 2018, United Nations investigators discovered that Facebook and its algorithms news promoted the circulation of hate speech. Also, some governments are using algorithmic systems to classify people. China is using algorithmic systems to categorize people by social characteristics, this system is called the Social Credit System which collects data on citizens and scores them and after that if they have not paid their debts, it shames them on screens where everybody can see them. Therefore, AI can be used for bed connotations and aspirations from governments, people and other actors as well. It is very easy to do this on purpose or even to do it unknowingly. But either way the misuse of AI can hurt human beings and their dignity. That is why human rights laws were established to have principles and mechanisms that will protect human beings from any kind of threat. Therefore, for AI to be used properly, the adoption of human rights in the AI governance is a necessity and it will provide the AI actors with guidance to preserve and respect human dignity and equality for all. Implementing human rights into AI governance can help anticipate mistakes before they even happen, it can help anticipate the possible harmful actions from different AI actors and guide them to develop policies for good use. Furthermore, AI accountability can be presented through human rights practice, like treaties, UN investigations, and other means and tools in order to monitor social impacts[17]. (Latonero, 5)

Therefore, AI governance can and should be guided by human rights. Because as mentioned previously there are a lot of examples where AI uses discriminatory

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1, Issue: 2, September 30, 2021 Available at http://www.humanrights.periodikos.com.br/article/6061f45aa953955f3e675902/pdf/humanrights-1-2-151.pdf (accessed on 15.12.2022), pp.155-156.

[16] D.E. Gibbons, *Toward a More Equal World: The Human Rights Approach to Extending the Benefits of Artificial Intelligence*, April 29th, 2021 in Artificial Intelligence (AI), Editorial & Opinion, Environment, Ethics, Human Impacts, Magazine Articles, Social Implications of Technology, Societal Impact. Available at: https://technologyandsociety.org/toward-a-more-equal-world-the-human-rights-approach-to-extending-the-benefits-of-artificial-intelligence/ (accessed on 22.12.2022).

[17] M. Latonero, *Governing Artificial Intelligence: Upholding Human Rights & Dignity,* Data & Society, 2018, p. 5, available at: https://datasociety.net/wp-content/uploads/2018/10/DataSociety_Governing_Artificial_Intelligence_Upholding_Human_Rights.pdf (accessed on 10.12.2022).

algorithms and systems. Such algorithms are for example the facial recognition systems, that has flaws regarding darker skin women and this is due to a lack of adequate algorithmic data which can and is producing cultural biases of colored people. Therefore, the policy makers working on technological advances and aspects on AI are faced with difficult job of applying standards, values, or norms in different social contexts. They need to balance the above when developing or deploying the new technologies. Also, they need to take into consideration the potential misuses and abuses, the consequences, biases in the sociotechnical systems. So, Human rights do and can provide policy makers with a basis to address values which is also very important for tech companies whose products will be used across the globe where different values and laws apply18. Also, as an addition for guidance to the policy makers can be promotion of education in all areas of the technological sector. There are already educational courses designed and used especially for students to obtain and learn about future competitiveness and problem solving through programming. And in the spirit of diversity, equality, and respect, the governments have been promoting this kind of education[19]. This kind of technology literacy and education can empower multicultural students because many people especially the indigenous are in a disadvantage due to their lack of resources, cultural education, living conditions and surroundings. Therefore, by being part of this educational process they can gain capabilities to overcome this and other limitations20. So, AI governance should be guided and reinforced by human rights in this multicultural world.

IV. Conclusion

It can be concluded that, AI is part of our every day life and we should use this as an advantage, to improve it, make norms, guidelines and AI governance that empowers all people, no matter their nationalities, culture, religion, color and so on. We are all the same, we are human beings that have the power to learn, use, govern and promote AI in our own advantage. We can create AI that promotes and protects human rights in this multicultural world.

References

1. Chia-Wei Tsai, Yi-Wei Ma, Yao-Chung Chang, Ying-Hsun Lai, *Integrating Multiculturalism into Artificial Intelligence-Assisted Programming Lessons: Examining Inter-Ethnicity Differences in Learning Expectancy, Motivation, and Effectiveness*, Front. Psychol., 13 June 2022, Sec. Educational Psychology, https://doi.org/10.3389/fpsyg. 2022.868698.

2. Choudhury, B., *Multiculturalism: Through the Prism of Human Rights* in *International Journal of Research in Humanities and Social Studies* Volume 3, Issue 1, January 2016, available at http://www.ijrhss.org/pdf/v3-i1/3.pdf (accessed on 22.12.2022).

3. Goffi, E. R., Colin, L., Belouali, S., *Ethical Assessment of AI Cannot Ignore Cultural Pluralism: A Call for Broader Perspective on AI Ethics*, in Arribat – International Journal of Human Rights Volume: 1, Issue: 2, September 30, 2021 Available at http://www.

[18] M. Latonero, *cited,* pp. 9-11.

[19] Chia-Wei Tsai, Yi-Wei Ma, Yao-Chung Chang, Ying-Hsun Lai, *Integrating Multiculturalism into Artificial Intelligence-Assisted Programming Lessons: Examining Inter-Ethnicity Differences in Learning Expectancy, Motivation, and Effectiveness*, Front. Psychol., 13 June 2022, Sec. Educational Psychology, https://doi.org/10.3389/fpsyg.2022.868698.

[20] *Ibidem.*

humanrights.periodikos.com.br/article/6061f45aa953955f3e675902/pdf/humanrights-1-2-151.pdf (accessed on 15.12.2022).

4. Gibbons D. E., *Toward a More Equal World: The Human Rights Approach to Extending the Benefits of Artificial Intelligence*, April 29th, 2021 in Artificial Intelligence (AI), Editorial & Opinion, Environment, Ethics, Human Impacts, Magazine Articles, Social Implications of Technology, Societal Impact. Available at: https://technologyandsociety.org/toward-a-more-equal-world-the-human-rights-approach-to-extending-the-benefits-of-artificial-intelligence/ (accessed on 22.12.2022).

5. Gof, R. E., Momcilovic, A., *Respecting cultural diversity in ethics applied to AI: A new approach for a multicultural governance*, in Revista Misión Jurídica, Vol. 15, No. 23, Julio – Diciembre de 2022, pp. 111-122.

6. Kania, M., *Human Rights, Principles of Multiculturalism, and New Paths of Development in Latin America*, in Journal of American Studies 17 /2016, pp. 5-10, DOI: 10.12797/AdAmericam.17.2016.17.01.

7. Kuznetsova, M., *Modernity in Multicultural World of the 21st Century*, in International Journal of Research in Engineering, IT and Social Sciences, Volume 7, Issue 5, May 2017, pp.16-20, available at: https://www.academia.edu/35538957/Modernity_in_Multicultural_World_of_the_21_st_Century (accessed on 22.12.2022).

8. Latonero, M., *Governing Artificial Intelligence: Upholding Human Rights & Dignity,* Data & Society, 2018, available at: https://datasociety.net/wp-content/uploads/2018/10/DataSociety_Governing_Artificial_Intelligence_Upholding_Human_Rights.pdf (accessed on 10.12.2022).

9. ÓhÉigeartaigh, S.S., Whittlestone J., Liu Yang, Zeng Yi, Liu Zhe, *Overcoming Barriers to Cross-cultural Cooperation in AI Ethics and Governance*, Philos. Technol. No. 33/2020, pp. 571-593, available at https://doi.org/10.1007/s13347-020-00402-x Springer. Available at: https://link.springer.com/article/10.1007/s13347-020-00402-x#citeas (accessed on 15.12.2022).

10. Serohin, V., *Multiculturalism: A Human Rights-Based Approach*, in Collective Monograph *The Issues of Improving Legal Knowledge in the XXI century: The Unity of Theory and Practice,* Liha Pres, 2019, DOI https://doi.org/10.36059/978-966-397-164-3/185-200.

The History of Cybercrime Legislation and Major Achievements

PhD Fabian Peter*

Abstract

The concept of information technology has changed and evolved in line with the independent development of the now interdisciplinary science. Although it is important to note that it is not to be confused with either computer science or cybernetics, even if, with regard to the types of offences covered by this thesis, it is not possible and not necessary to distract from the fact that a computer or computing devices are involved. Technical progress has taken us from the Abacus, through the Turing machine, to today's modern computer. Almost 30 years ago, IT tools and equipment began a process that has made them as ubiquitous in our lives as the invention of the wheel was in the history of mankind. It is imperative that such devices, the data stored in them or used by them, or their accessibility, become a socially protected asset and that certain forms of behaviour are criminalised by the legislator in order to protect them.

This is how information technology – along with other disciplines – has developed a permanent and close link with criminal law. The Hungarian legislation has developed in several stages a separate criminal law regime for information technology. In this thesis, I would like to describe this process, evaluate it through the results of my research and present the specific regulatory system, from the perspective of the expectations of the EU directives.

Two main categories of offences can be identified: the narrower category of information technology offences, where the information system is the object of the offence, i.e., the attack is directed against the computer, and the other category of offences, where the IT system is used as a tool to commit a "regular" crime (fraud, harassment etc.).

Keywords: *cybercrime, computer crime, internet, information system*

I. Introduction

We spend a significant part of our daily lives in the world of the internet, smart devices, we store our valuables in the cyberspace, and our human relationships are also focused on this special dimension. It is through such systems that the State keeps records of our data. It is undeniable that data has become one of the most valuable commodities, and therefore the most defensible and at very high risk. And the crimes once seen in science fiction stories are now not only a part of science fiction but have become a threat to us all.

What do we mean by information technology crime? There is no single definition, nor even a single name, but there is broad consensus that there are two main categories: one category includes offences where the object of the offence is the information system, i.e. the attack is directed against the computer ("cyber-dependent" offences), and the other category includes offences where the information system is the instrument of the offence, or, if you like, the information system is the medium in which the otherwise traditional offence (fraud, harassment, sexual assault etc.) is committed (so-called "cyber-enabled" crimes)[1]. The Hungarian Criminal Code in force – the 2012 Criminal Code[2] – uses the terminology of information technology offence, information system offence, referring to the fact that there is more than just a computer, as the instrument or object of the offence cannot be only the computer, but any information technology device (smartphone, tablet, printer, router etc.), equipment and interconnected system of such devices capable of communication and data transmission[3].

II. International institutional history overview

The first important milestone in the international fight against cybercrime was the initiative of the Organisation for Economic Co-operation and Development (OECD), when an ad hoc committee was set up by the organisation between 1983 and 1985[4], which analysed the experience of European countries with computer-related crime and called for comprehensive legislation in its report "Computer related Crime: Analysis of legal Policy"[5]. In 1996, Belgium and France drafted a multilateral agreement on the Internet, setting out the principles that could guarantee the protection of users' data. This effort is another indication that cybercrime was becoming a growing problem during this period. In 1998, Germany was one of the first countries to set up an independent internet police force (Zentralstelle zur Bekampfung der Internetkriminalitat) within the Federal Criminal Police Office (Bundeskriminalamt)[6].

The next major step in the international legislation was the Council of Europe's expert report[7] published in 1989 and the Recommendation (R89/9) adopted on the basis of it. The latter has defined a catalogue of computer-related offences, with a minimum list of offences that Member States must punish and an optional list of offences that they can penalize at their discretion. The minimum list includes: (1) computer fraud; (2) computer forgery; (3) damage to computer data and programs; (4) illegal

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[1] J. Clough, *Principles of cybercrime*, Cambridge University Press, 2015, pp. 10-11.

[2] Act C of 2012 on the Criminal Code (hereinafter referred to as the "Criminal Code").

[3] K. Sorbán, *Viruses and zombies in criminal law. Criminal substantive and procedural issues of information system and data breaches*, in Medias Res 2/2018, issue 8, pp. 369-386.

[4] The 1980s was a defining period for IT. While in 1980 there were less than 1 million personal computers in the world, by 1985 there were more than 30 million computers with the Ms-DOS operating system installed. According to estimates, this means that the total number of computers was over 40 million.

[5] A. Bequai, *Computer-related crime*, European Committee on Crime Problems, Strasbourg, 1990. Available at: http://www.oas.org/juridico/english/89-9&final%20report.pdf.

[6] A permanent internet connection between Germany and China was established back in the 1980s! In the early 1990s, more than 40 million personal computers were sold worldwide every year. The White House and the Vatican has been connected to the Internet and a US court ruling declared that domain names had real property value.

[7] The Select Committee of Experts on Computer-related crime of the Committee on Crime Problems.

entry; (5) unlawful obtaining of secrets; (6) unlawful copying of proprietary computer programs; (7) unlawful copying of semiconductor topographies. The elements of the optional list are: (1) unauthorised alteration of computer data or computer programs; (2) computer espionage; (3) unauthorised use of a computer with intent to cause damage; (4) unauthorised copying and use of proprietary programs[8].

One of the important venues for international action against cybercrime is Budapest, where the Council of Europe adopted the Convention on Cybercrime (Budapest Convention) on 23 November 2001[9], the first multilateral convention to define the relevant concepts (service provider, computer system, computer data etc.) and to make criminal substantive and procedural recommendations to the State Parties.

In 2005, the Council of the European Union adopted Framework Decision 2005/222/JHA on attacks against information systems, with the aim of establishing a "common approach" to the constituent elements of the offences and the applicable sanctions[10]. The Framework Decision was replaced by Directive 2013/40/EU, which established the minimum standards for the constituent elements of computer-related offences and sanctions, and Member States undertook to criminalise – "at least in the most serious cases" – the following offences: unlawful access to information systems, unlawful interference with a system, unlawful interference with data and unlawful acquisition of data, as well as conduct that aims to produce, distribute or otherwise make it available for use the means necessary to commit these offences (computer programs, passwords and access codes etc.)[11].

In 2019, Directive 2019/713/EU on combating fraud and counterfeiting of cash-substitute payment instruments was adopted. While the Directive aims to harmonise the criminal law offences relating to cash substitutes, the EU legislator intends that the provisions of the Directive should also apply to virtual payment instruments (cryptocurrencies), provided that they can be used for payment[12]. Under the Directive, Member States will criminalise the fraudulent use of cash substitutes, offences relating to the fraudulent use of tangible and intangible cash substitutes, information systems fraud (which can be committed with regard to cash, monetary value and virtual payment instruments), the preparatory and ancillary conduct related to these offences, and attempted offences of all of the above offences.

III. Information technology offences under the current criminal code

The Hungarian legislator has placed information technology offences in the stricter sense in two separate chapters with the Criminal Code: in Chapter XLIII we find the unlawful acquisition of data (Section 422 of the Criminal Code), the unauthorised use

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[8] N. Mezey, *Cybercrime* (jogiforum.hu), 2007, available at https://www.jogiforum.hu/files/publikaciok/mezey_nandor-szamitogepes_bunozes%5bjogi_forum%5d.pdf.

[9] Act LXXIX of 2004 on the proclamation of the Council of Europe Convention on Cybercrime, signed in Budapest on 23 November 2001.

[10] Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems.

[11] Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA.

[12] Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 combating fraud and counterfeiting of cash-substitute payment instruments and replacing Council Framework Decision 2001/413/JHA. PE/89/2018/REV/3. OJ L 123, 10.5.2019, pp. 18-29.

of unmanned aircraft (Section 422/A of the Criminal Code), and two offences against information systems, the violation of information systems or data (Section 423 of the Criminal Code) and the circumvention of technical measures ensuring the protection of information systems (Section 424 of the Criminal Code). One additional offence is covered by Chapter XXXVI on offences against property, namely fraud committed by using an information system (Article 375 of the Criminal Code)[13].

1. Fraud using an information system

Fraud committed using an information system – as the name and its place in the system suggests – is essentially a crime against property, a fraudulent offence against property interests. However, there is an important difference compared to normal fraud: while misleading or deceit is a necessary element of normal fraud, in case of fraud using an information system regulated under Section 375 of the Criminal Code, the fraud is committed without deceiving a natural person.

The offence has two forms, malicious misuse of data and misuse of an electronic cash substitute payment instrument. In the first case, the object of the offence is the information system itself or any of its components, or the data relevant to the information system.

The law punishes any conduct that may be capable of influencing the information system and that may cause damage: it is punishable if the offender enters data into the system, changes the data managed in the system, deletes or makes it inaccessible, or influences the operation of the information system by any other action.

Data entry can be the uploading of facts, information or programs, and can be done both online (for example, through electronic intrusion, known as hacking) and offline (for example, by manual data entry, typing or copying from a storage medium). Changing the data practically means modifying, adding, overwriting, or possibly partially deleting the data, while deleting the data means permanently and completely destroying the data. Disabling means that the perpetrator – temporarily or permanently – prevents the authorised person from accessing the data stored on the system (e.g., password protection, but also the installation of malicious software).

The offence is intentional and purposeful, and the offender seeks to obtain unlawful gain. However, this also means that although the offence can only be committed with a direct intent, for the harm to occur, probable intent is also sufficient. Unjust enrichment is not an element of the offence. It is a result linked crime; the result is the damage caused by the unlawful interference with the information system. It is common for the perpetrator to access a financial system and manipulate the bank account balances of customers, for example by transferring funds from one account to another without authorisation: the balance in the victim's account is then reduced and the damage is the loss of value in the customer's funds.

However, according to some authors (e.g., Miklós Hollán), in certain cases the loss of profit may also be relevant, so it would be more appropriate to consider the material loss as a result rather than the loss – as the legislator has already done in the case of "normal" fraud, indicating in the interpretative provisions that the unpaid consideration for the service provided should also be considered as loss. Accordingly,

[13] The chapter (in addition to the footnotes) is based on the following sources: Krisztina Karsai (2021): Major Commentary to Act C of 2012 on the Criminal Code; Explanatory Memorandum to Act C of 2012 on the Criminal Code.

currently the Criminal Code provides different protection depending on whether the offender commits the offence by deceiving a natural person or by making any operation on an information system. It would be appropriate to apply the interpretative provision extending the concept of damage (Section 373(7) of the Criminal Code) also to fraud committed using an information system[14].

As regards the different stages of the offence under Section 375 of the Criminal Code, the offence is completed when the damage has occurred. If the perpetrator has started to interfere with the information system but the damage has not yet occurred, he/she will be liable for attempted interference. The offender can be anyone, the law does not set any special criteria.

The offence has two forms, malicious misuse of data and misuse of an electronic cash substitute payment instrument. The main difference between the two forms is the object of the offence, which in this case is the counterfeit, falsified or unauthorised acquisition of an electronic cash substitute, whether issued domestically or abroad. The Criminal Code defines what constitutes an electronic cash substitute payment instrument in its interpretative provisions, partly by reference to the Credit Institutions Act: the offence can be committed – among others – on a bank card, credit card, electronic voucher, electronic money, such as Erzsébet vouchers or Széchenyi holiday cards[15]. As opposed to this, fraudulent conduct committed on paper (not electronic) cash substitutes is not covered by Section 375 of the Criminal Code, but is listed under normal fraud.

The forms of the criminal offence are the use of a counterfeit, falsified or unauthorised electronic cash substitute payment instrument or the acceptance of payment by such an instrument. Use can mean withdrawing money from the ATM; making a bank transfer; making a purchase at a POS terminal; making an online purchase.

If the perpetrator is in lawful possession of the payment instrument in question (for example, because the victim entrusted it to him), he/she is committing embezzlement by using it without authorisation. Unlike under the previous rules, it is no longer a criminal offence if the cash substitute is used by the holder without authorisation (for example, the cardholder tried to pay after the expiry date of the card).

2. Prohibited data mining

The legal offence of unlawful data mining is intended to protect the right to privacy and the rights derived from it (such as the right to private secrets, the right to personal data, the right to economic and business secrets, the right to privacy in the private home, the right to privacy of correspondence) as established in the Constitution. There are three basic offences: the first is the actual illicit acquisition of data, the second is the covert acquisition of data by an undercover investigator, and the third is the illicit use of data. It is a matter of interpretation whether the offence of using a drone is to be regarded as the fourth type of offence, but the legislator has regulated in a separate section the case where the offender uses an unmanned aircraft to observe the home or other premises of another person, or the fenced area belonging to them, and at the same time records what happens there.

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[14] M. Hollán, T*he use of services without an intention to pay and criminal law – A dogmatic and legal policy analysis at the dawn of empirical research*, Magyar Jog, 4/2019, pp. 207-208.

[15] Section 6(1)(55) of Act CCXXXVII of 2013 on Credit Institutions and Financial Undertakings.

The legislator basically penalizes the use of secret methods and means which law enforcement authorities are only authorised to use by the authorisation of a judge or a minister: secretly searching another person's home, recording what happens in another person's home using a technical device etc. Strictly speaking, only Section 422(1)(e) of the Criminal Code is related to information systems: the offender "secretly intercepts data handled in an information system and records the intercepted data by means of a technical device". Illegal access to the information system is not an element of the offence: for example, if the offender takes a photograph or screenshot of a computer screen of the right holder, taking advantage of the rightsholder's temporary absence.

3. Information system or data breach

The breach of an information system or data is already a purely information technology crime[16], which the law defines in three forms: unauthorised access, obstruction of operation and misuse of data. In all three cases, the object of the offence is the information system.

In the first form (Section 423(1) of the Criminal Code) the offender unauthorisedly (1) enters the information system, or (2) remains in the information system exceeding the limits of his/her access rights or violating them and does this by violating or circumventing the technical measures intended to ensure the protection of the information system. In the first case, the offender does not have access rights, but in the second case he/she does (e.g. as an employee). It is essential that the information system (network, computer, computer system) is protected by password, code or any other suitable means and that the protection is active. How the unauthorised perpetrator obtains the necessary access data is irrelevant: by social engineering, by hacking, by exploiting the negligence of the authorised person (who, for example, stores the username and password in a prominent place next to the monitor), by using a code recognition program[17].

The offence is intentional but not purposeful, neither profit nor harm is a prerequisite, i.e., the law only punishes mere hacking. If the perpetrator carries out further – now intentional – operations (deleting data etc.) after the unauthorised access, a more serious form of the same offence is committed[18].

The offence may be committed by exceeding the limits of the right of access or by remaining in the system in breach of it. The Criminal Code does not define what is meant by "exceeding the limits of the authorisation" and under what conditions this is punishable. However, in a specific case, the Supreme Court pointed out that exceeding the limits of the authorisation only constitutes a criminal offence if the perpetrator did so by violating or circumventing the technical measures protecting the system. In itself, therefore, "going beyond the limits of the authorisation does not rise to the level of danger required by the first terminology"[19].

In case of the second form (Section 423(2)(a) of the Criminal Code), the offender obstructs the operation of the information system without authorisation or in

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[16] K. Mezei, *The regulatory challenges of cybercrime in criminal law*, Ügyészek Lapja 4-5/2019. Available at: http://ugyeszeklapja.hu/?p=2592.

[17] K. Mezei, *cited.*

[18] *Idem.*

[19] BH2017. 392. (Kúria Bhar. I. 537/2017.)

violation of the limits of his/her authorisation, while the offender of the third form (Section 423(2)(b) of the Criminal Code), the perpetrator changes, deletes or makes inaccessible the data in the same way. What is meant by data is defined in the Criminal Code. Changing the data can mean either changing the content or the format, or partially deleting it. Erasure is achieved by destroying even a single piece of data. As a result of making the system inaccessible, the data remains hidden from the right holder for a shorter or longer period of time or even permanently.

While it is possible to perform these behaviours individually and manually (by typing in the command), automated operations are now commonplace, and can cause significant harm to a large number of users in a short period of time. Malware is self-replicating, capable of reaching and infecting millions of systems simultaneously (e.g., the *WannaCry* ransomware). A botnet network can be used to launch targeted attacks against multiple systems simultaneously, causing them to shut down completely, but it may also be that it is not a disabling attack, as the botnet controller can gain access to the device and its connections. Botnets can be used for phishing, distributed denial of service (DDoS) attacks, sending spam. They can change the content of a website or overwrite it with their own content[20].

Website corruption, program or data manipulation can be cost-effectively resolved, and data can be copied or modified without loss of quality and without being detected. Malware attacks (spyware, ransomware, computer viruses etc.) target outdated/ inadequately protected systems, exploiting the users' unsuspecting nature (for example, opening an e-mail with a malicious attachment is enough)[21]. Some malware families (such as *WannaCryptor)* infect all systems in their path, others launch targeted attacks, for example against a specific country or its financial, administrative etc. systems (such as *Petya* or *Industroyer*, the latter attacking unprotected industrial control systems used in the electrical grid, including in Ukraine)[22].

It also applies to the offence under Section 423(2) of the Criminal Code that it can only be committed intentionally and purposefully. This is relevant in the case of botnet attacks, in that the owners of remotely controlled, zombie-like systems are not actually aware that their machines are infected, so their perpetrator status is not even an issue. The perpetrator is the botherder, the owner of the master machine, who not only interferes with the operation of the information system targeted by the attack, but also with all the information systems that are infected and ordered to perform the overload attack[23].

The second and third forms of the offence (obstruction and misuse of data) are more serious if the offence involves a significant number of information systems. The Criminal Code does not provide guidance on what is meant by "significant number" in this respect, leaving the interpretation to the courts. An example of a qualified case is a DDoS attack, where the perpetrator launches a DDoS attack from a network of hundreds

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[20] P. Sabanal, *Thingbots: The Future of Botnets in the Internet of Things*, Security Intelligence, 20 February 2016, https://securityintelligence.com/thingbots-the-future-of-botnets-in-the-internet-of-things/.

[21] B.-J. Koops, *The Internet and its Opportunities for Cybercrime*, Tilburg School Legal Studies Paper, Series No. 9/2011, pp. 740-741.

[22] A. Cherepanov, *Industroyer: Biggest threat to industrial control systems since Stuxnet,* www.welivesecurity.com. ESET. 12 June 2017 Available at: https://www.welivesecurity.com/2017/06/12/industroyer-biggest-threat-industrial-control-systems-since-stuxnet/

[23] K. Sorbán, *cited*, p. 378.

of thousands of computers infected with a virus against the attacked website and the infrastructure behind it[24]. However, it is a qualifying case in all cases if the act is directed against the information system or data of a public interest enterprise (Section 423(4) of the Criminal Code).

Concerning this aspect, the Hungarian legislation does not fully comply with the EU rules, as Directive 2013/40/EU states that in the case of attacks against critical infrastructure of the European Union or of a Member State, it is justified to establish more severe legal consequences. The EU concept of critical infrastructure is broader than that of a public interest undertaking under the Criminal Code, which does not cover health and social welfare institutions[25].

IV. Circumvention of a technical measure meant to protect an information system

The offence detailed in Section 424 of the Criminal Code is a sui generis preparatory and auxiliary offence, which is related to fraud committed using an information system (Section 375 of the Criminal Code) and to illicit acquisition of data by means of an electronic communications network or device (Section 422(1)(d) of the Criminal Code), and thirdly, the infringement of an information system or data (Section 423 of the Criminal Code).

Directive 2013/40/EU also provides for the penalisation of preparatory or facilitating offences related to information technology offences. This is based on the realisation that cybercrime has become an industry in its own right, with the software, tools and even the skills needed to launch attacks available on the online black markets of the dark web, and even complete botnet infrastructures.

The offence is committed by anyone who, "for the purpose of committing the offences referred to above, creates, transfers, makes available, obtains or places on the market a) a password or computer program, or makes available to another person b) the economic, technical or organisational knowledge of the creation of a password or computer program".

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[24] S. Gyányi, *Ddos attacks and how to defend against them*, Hadmérnök Special Issue. Robot wars 7. A scientific conference. 27 November 2007. Available at: http://hadmernok.hu/kulonszamok/robothadviseles7/gyanyi_rw7.html.

[25] Section 459 of the Criminal Code: "21. Public interest undertaking:

a) public utilities,

b) public transport,

c) electronic communications networks,

d) logistics, payment and IT centres and facilities operated by the universal postal service provider in order to fulfil its public interest tasks,

e) a plant producing war material, military equipment, or the energy or raw materials for plant use".

Critical infrastructure is defined by Council Directive 2008/114/EC as "assets, systems or parts thereof located in a Member State which are essential for the performance of vital social functions, health, safety, security, economic and social well-being of its people, and the disruption or destruction of which would have significant consequences in a Member State if it were to fail to continue to perform those functions". Council Directive 2008/114/EC of 8 December 2008 on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection (Text with EEA relevance). OJ L 345, 23.12.2008, pp. 75-82. Available at: https://eur-lex.europa.eu/legal-content/HU/TXT/?uri=celex%3A32008L0114.

Accordingly, the offence has two elements, the first being the creation, transfer, acquisition, distribution or making available to others of a program (code, password etc.). Acquisition means that the offender obtains possession of the program, transfer means giving it to a third party. Placing on the market has a broader meaning than sale, sale for consideration, most commonly understood as transfer to several persons. Making the program (code, password etc.) available to others, which is possible even through passive behaviour (the perpetrator leaves a password in an office used by others, in a place visible to all, such as a piece of paper pinned to a monitor).

In this case the offender is actively involved in the creation of the program (code, password etc.), while in the second case the offender is not actively involved, but only provides the knowledge needed to create the program (code, password etc.). The knowledge transferred can be theoretical or practical, and in terms of its content it can be technical, economic, organisational, or knowledge needed to crack code, write programs etc. The provision of knowledge that does not relate to the creation of the program, which is not factual (e.g., the name of the program, a description of how it works). The provision itself can be realised by active or passive conduct, and whether it is free of charge or for consideration is irrelevant to the offence.

The offence can only be committed intentionally and with a specific purpose, i.e., to commit the offences listed above. The Criminal Code, however, defines a ground for decriminalisation, but only for the perpetrator under Section 424(1)(a) of the Criminal Code: if the person discloses his/her activity to the authority – before the creation of the program (code, password etc.) is notified to the authority in charge of the criminal case – he/she will not be punished. However, it is essential that the perpetrator cooperates with the authorities after his/her report, and hands over what he/she has made and provide assistance to establish the identity of the other persons involved in the making.

V. Conclusion

There is no single, universally accepted definition of offences involving information systems, and even the name is uncertain. The literature distinguishes between two types of offences in this area, in addition to the narrower information technology offences, there are also offences where the information technology system is the instrument of a “normal" crime. The Criminal Code regulates the latter category of offences, fraud committed using an information system, under the heading of offences against property, and dedicates a separate chapter to "real" information technology offences. The Hungarian legislation is basically in line with the relevant EU directive, but – as I have pointed out – some provisions need to be amended (or at least clarified).

References

1. Bequai, A. (1990), *Computer-related crime*, European Committee on Crime Problems, Strasbourg. Available at: http://www.oas.org/juridico/english/89-9&final%20 report.pdf

2. Cherepanov, A. (2017), *Industroyer: Biggest threat to industrial control systems since Stuxnet*, www.welivesecurity.com. ESET. 12 June 2017 Available at: https://www.welivesecurity.com/2017/06/12/industroyer-biggest-threat-industrial-control-systems-since-stuxnet/

3. Clough, J., *Principles of cybercrime*, Cambridge University Press, 2015, pp. 10–11.

4. Gyányi, S. (2007), *Ddos attacks and how to defend against them*, Hadmérnök Special Issue. Robot wars 7. A scientific conference, 27 November 2007. Available at: http://hadmernok.hu/kulonszamok/robothadviseles7/gyanyi_rw7.html

5. Hollán, M. (2019), T*he use of services without an intention to pay and criminal law – A dogmatic and legal policy analysis at the dawn of empirical research*, Magyar Jog, 4/2019, pp. 207–208

6. Karsai, K. (2021), *Major Commentary to Act C of 2012 on the Criminal Code; Explanatory Memorandum to Act C of 2012 on the Criminal Code*. Available: Complex Legal Directory.

7. Koops, B.-J., *The Internet and its Opportunities for Cybercrime*, Tilburg School Legal Studies Paper, Series No. 9/2011, pp. 740–741.

8. Mezei, K. (2019), *The regulatory challenges of cybercrime in criminal law*, Ügyészek Lapja 4-5/2019. Available at: http://ugyeszeklapja.hu/?p=2592

9. Mezey, N. (2007), *Cybercrime* (jogiforum.hu). https://www.jogiforum.hu/files/publikaciok/mezey_nandor-szamitogepes_bunozes%5bjogi_forum%5d.pdf

10. Sabanal, P. (2016), *Thingbots: The Future of Botnets in the Internet of Things*, Security Intelligence, 20 February 2016. https://securityintelligence.com/thingbots-the-future-of-botnets-in-the-internet-of-things/

11. Sorbán, K. (2018), *Viruses and zombies in criminal law. Criminal substantive and procedural issues of information system and data breaches*, in Medias Res 2/2018, issue 8, pp. 369–386.

12. Council Framework Decision 2005/222/JHA of 24 February 2005 on attacks against information systems.

13. Council Directive 2008/114/EC of 8 December 2008 on the identification and designation of European critical infrastructures and the assessment of the need to improve their protection (Text with EEA relevance) OJ L 345, 23 December 2008, pp. 75–82. Available at: https://eur-lex.europa.eu/legal-content/HU/TXT/?uri=celex% 3A32008L0114

14. Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA.

15. Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 combating fraud and counterfeiting of cash-substitute payment instruments and replacing Council Framework Decision 2001/413/JHA. PE/89/2018/REV/3.OJL 123, 10.5.2019, p. 18–29.

16. Act LXXIX of 2004 on the proclamation of the Council of Europe Convention on Cybercrime, signed in Budapest on 23 November 2001.

17. Act C of 2012 on the Criminal Code (hereinafter referred to as the "Criminal Code") and the Explanatory Memorandum to Act C of 2012 on the Criminal Code.

18. Act CCXXXVII of 2013 on Credit Institutions and Financial Undertakings.

Jurisdiction in Criminal Trials in Romania

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Abstract

The present study aims to provide an introduction into the system of criminal courts and their jurisdiction in Romania. The approach is an attempt to accommodate foreign public audience with the peculiarities of the national criminal justice system.

Keywords: *function, jurisdiction, courts, judges, criminal trial*

I. Introduction

In accordance with Article 3 para. (1) of the Criminal Procedure Code (`CPC`) "the following judicial functions shall be exercised in criminal proceedings:

a) the function of criminal prosecution;

b) the function of ruling on the fundamental rights and freedoms of the person during the criminal proceedings;

c) the function of verifying the legality of the referral or non-referral of the case before a court;

(d) the function of trial".

The function of trial is the most important one, belonging to the magistrate-judge called upon to rule a decision on the merits of the criminal process. Article 3 para. (7) CPC states that: "The trial shall be conducted by the court in legally constituted panels". This text is the expression of the constitutional rule in Article 126 para. (1), according to which "justice shall be administered by the High Court of Cassation and Justice and by the other courts established by law", i.e. first instance courts (*judecătorii*), tribunals, courts of appeal, military courts [see also Article 2 para. (2) of the Law no. 304/2022 on judicial organisation[1].

The separation of powers within the judicial system is based, as seen below, on a material (seriousness of the offence) or personal (status of the offender) criterion. These criteria structure the judicial system vertically, namely in courts of different degrees of jurisdiction.

II. Functional jurisdiction of the Romanian Courts

1. Functions (functional jurisdiction) of the first instance court

This court lies at the bottom of the pyramid of the judicial system and has two functions (Article 35 CPC):

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[1] O. J. no. 1104 of 16 November 2022.

- it judges at first instance;
- it rules on other cases specifically provided for by law.

The first function, to judge at first instance, is shared with all the other courts in the system. As will be shown below, both tribunals and courts of appeal, as well as the High Court of Cassation and Justice, have first instance jurisdiction. In order to delimit *ratione materiae* between the courts, additional (jurisdiction) criteria have been introduced. Thus, from a substantive point of view, the first instance court (*judecătorie*) tries all offences regardless of their nature and seriousness, except those ascribed by law to the other courts. Although the law does not lay down criteria *ratione personae*, this court tries any person, irrespective of his or her status, except in situations where a particular quality of the person is required by law to give jurisdiction to another court. In brief, the jurisdiction of this court is determined by a general provision, which gives the court a full jurisdiction with regard to first instance proceedings. This means that if an offence is provided for in a special law, without indicating which court has jurisdiction, this court will have jurisdiction.

The second function, that of ruling upon a case, must be distinguished from the judgment itself. To rule upon a case means, in legal semantics, something other than to judge. Essentially, to adjudicate concerns the merits of the case, i.e. the resolution of the criminal situation at issue. To rule on a case means to pronounce a decision in matters that go beyond the merits of the case, such as those relating to preventive measures, enforcement of a criminal sentence, rehabilitation, release on probation etc.

2. Functions (functional jurisdiction) of the Tribunal

This court, as a court of second instance, has three functions (Article 36 CPC):
- it tries at first instance;
- it exercises the prerogatives of a court of review on matters not related to the merits of the case;
- it decides other cases specifically provided for by law.

The power to judge at first instance is shared *ratione materiae* with the first instance court (*judecătorie*), according to the seriousness of the offence. Thus, in principle, less serious offences fall within the jurisdiction of the first instance court and more serious offences fall within the jurisdiction of the tribunal. The criterion is not a strict one, but is shaped by the current demands of criminal policy. Thus, the following fall within the jurisdiction of the tribunal:

(a) offences provided for by the Criminal Code in Article 188 to 191 (intentional offenses against life), Article 209 to 211 (slavery, trafficking in persons and minors), Article 254 (aggravated destruction), Article 256[1] (crimes against property with extremely serious consequences), Article 263 (trafficking in migrants), Article 282 (torture), Article 289 to 294 (corruption offences), Article 303 to 304 (disclosure of state and official secrets), Article 306 to 307 (illegal obtaining and misappropriation of funds), Article 309 (corruption and service offences with particularly serious consequences), Article 345 to 346 (non-compliance with the regime of nuclear, radioactive and explosive materials), Article 354 (transmission of AIDS), Article 360 to 366 (offences against the security and integrity of information systems and data) and Article 367 (establishing an organised criminal group);

offences committed with malice aforethought resulting in the death of a person (assault occasioning death, rape, robbery, deprivation of liberty followed by the death of the victim etc.);

(b) offences for which the D.I.I.C.O.T.[2] or the D.N.A.[3] has conducted the criminal investigation, if they are not assigned by law to other higher courts;

(c) money laundering offences and tax evasion offences referred to in Article 9 of Law no. 241/2005 on preventing and combating tax evasion[4];

(d) offences in respect of which the criminal investigation has been carried out by the European Public Prosecutor's Office under Council Regulation 2017/1939/EU of 12 October 2017 implementing a form of enhanced cooperation in relation to the establishment of the European Public Prosecutor's Office (EPPO);

(e) other offences ascribed by law within its jurisdiction[5].

As regards jurisdiction *ratione personae*, any person, irrespective of his or her capacity, participating in the commission of an offence for which the court has express jurisdiction shall be tried by that court, except in cases where by law a particular capacity of the person necessarily entails the jurisdiction of a higher court.

The Tribunal also concentrates limited prerogatives of control. Although at present, due to the change in the procedural architecture, the courts of appeal have general powers of judicial review on the merits, tribunals have also retained such a prerogative. However, this prerogative does not relate to the merits of the case, but to the settlement of conflicts of jurisdiction between first instance courts within its jurisdiction, where the tribunal is a common superior court, and to the settlement of appeals against decisions handed down by the first instance courts in cases provided for by law (pre-trial detention, rehabilitation, release on probation etc.).

Finally, the tribunal also rules on other cases specifically provided for by law, e.g. the abstention statement of the judge of the first instance court when no judge can be appointed within the court to decide on this statement [Article 68 para. (8) CPP].

3. Functions (functional jurisdiction) of the Court of Appeal

The Court of Appeal, as a court of the third degree, has four functions (Article 38 CPC):

- it judges at first instance;
- it hears appeals;
- it exercises the prerogatives of a court of review on matters not related to the merits of the case;
- it rules on other cases specifically provided for by law.

The power to judge at first instance is shared *ratione materiae* with the first instance court and the tribunal, according to the seriousness of the offence. The most serious offences in the criminal legislation, in terms of the applicable criminal sanctions, fall within the jurisdiction of the courts of appeal, namely the offences provided for by the Criminal Code in Article 394 to 397 and Article 399 to 412 (offences against national security, with the exception of the offence of high treason), those provided for by

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[2] Literally, the Directorate for Investigation of Organised Crime and Terrorism, a specialised subsidiary of the National Prosecution Service.

[3] Literally, the National Directorate for Investigation of Corruption Offences, a specialised subsidiary of the National Prosecution Service.

[4] O. J. no. 672 of 27 July 2005.

[5] The offences of outrage (Article 257 of the Criminal Code) and judicial outrage (Article 279 of the Criminal Code) do not fall within the express jurisdiction of the tribunal, even though they include murder in their constitutive content. For discussion, see F. Ciopec, *Observații privind un caz de competență a tribunalului în materie penală* [Observations on a particular case of criminal jurisdiction of the tribunal], in Annals of the West University of Timișoara, Law series no. 2/2014, pp. 21-26.

Article 438 to 445 (offences of genocide, against humanity and war), to which are added the offences concerning the national security of Romania, provided for in special laws (e.g. Law no. 51/1991 on the national security of Romania[6], republished).

As regards jurisdiction *ratione personae*, the courts of appeal have special jurisdiction for the following offences:

- offences committed by judges of the first instance courts and tribunals and by prosecutors of the Public Prosecutor's Offices attached to those courts;
- offences committed by lawyers, notaries public, bailiffs, financial controllers of the Court of Auditors and external public auditors;
- offences committed by heads of religious communities organised under the law and other members of the High Clergy who are at least of the rank of archpriest or equivalent;
- offences committed by assistant magistrates of the High Court of Cassation and Justice;
- offences committed by members of the Court of Auditors, the President of the Legislative Council, the Ombudsman, the Deputy Ombudsman and the Police Superintendents.

Courts of appeal are courts with general jurisdiction to hear appeals against first instance court judgments and tribunal judgments. The CPC has concentrated judicial review (appeal – as an ordinary remedy) in the jurisdiction of the courts of appeal. Previously, the tribunals used to exercise this prerogative, rendering meaningless the expression "courts of appeal", established as appellate courts since 1993. After 2014, criminal litigation before the courts of appeal has increased substantially since courts of appeal started to act as institutions capable of ensuring a unified judicial practice in the territorial legal area over which they exercise jurisdiction.

Courts of appeal also exercise, in a similar way to tribunals, the functions of supervisory courts in matters not related to the substance of the criminal dispute, i.e. they settle conflicts of jurisdiction between courts within their jurisdiction, when they are joint superior courts, as well as appeals against tribunal decisions in cases provided for by law (pre-trial detention etc.).

Finally, the courts of appeal also have special, but not exclusive, jurisdiction to address applications for the transfer of a case from one court to another, in situations established by law.

4. Functions (functional competence) of the High Court of Cassation and Justice

The High Court of Cassation and Justice sits at the top of the judicial pyramid, exercising supreme control over criminal law enforcement and criminal procedure in Romania. Its powers are as follows (Article 40 CPC):

- it judges at first instance;
- it rules on appeal;
- it exercises exclusive prerogatives in the administration of justice;
- it exercises the prerogatives of a court of review on matters not related to the merits of the case;
- it decides other cases specifically provided for by law.

The jurisdiction of the Supreme Court to judge at first instance is limited *ratione materiae* to only one offence, that of high treason (Article 398 of the Criminal Code), committed by the President of Romania or by a member of the Supreme Council of

[6] O. J. no. 190 of 18 March 2014.

National Defence. Law no. 535/2004 on preventing and combating terrorism also brought within the jurisdiction of the Supreme Court the prosecution of terrorist offences (Article 40 of the special law).

Ratione personae, the supreme court tries at first instance offences, regardless of their nature, committed by Romanian senators, deputies and members of the European Parliament, members of the Government, judges of the Constitutional Court, members of the Superior Council of Magistracy, judges of the High Court of Cassation and Justice and prosecutors of the Public Prosecutor's Office attached to High Court of Cassation and Justice, as well as judges of the Courts of Appeal and prosecutors of the Public Prosecutor's Offices attached to Courts of Appeal.

The High Court of Cassation and Justice rules on appeals against criminal judgments handed down at first instance by the courts of appeal, the Military Court of Appeal and the Criminal Division of the Supreme Court, sharing jurisdiction to exercise judicial review on the merits with the courts of appeal.

The High Court of Cassation and Justice has exclusive jurisdiction to hear appeals in cassation against final criminal judgments, appeals in the interest of the law (sitting in a panel of 21 judges), as well as appeals against non-final judgments or judicial acts of any kind which cannot be challenged in any other way and where the course of the proceedings have been interrupted before the courts of appeal.

The High Court of Cassation and Justice, retains exclusive jurisdiction over applications for a preliminary ruling on questions of law (sitting in a panel of 9 judges), applications for a renewal of judgments of the High Court of Cassation and Justice (in the Joint Sections) and may refer to the Constitutional Court for review of the constitutionality of laws before their promulgation (Article 27 of Law no. 304/2022 and Article 11(a) of Law no. 47/1992 on the organisation and functioning of the Constitutional Court[7], republished).

All these prerogatives are related to the unique role of the Supreme Court within the national judicial system: a court called upon to ensure the unified interpretation of criminal law and criminal procedure. This objective is achieved both *inter partes*, as a court of cassation, by hearing appeals aimed at the annulment of final judgments handed down by the courts of appeal, and *erga omnes*, as a court of justice, by deciding appeals in the interest of the law and applications for preliminary rulings on issues of criminal law and criminal procedure.

The High Court of Cassation and Justice resolves conflicts of jurisdiction in cases where it is the joint superior court of the conflicting courts, requests for transfer of a case from one court to another (which are not within the jurisdiction of the courts of appeal), as well as appeals lodged against decisions handed down by the courts of appeal in cases provided for by law (pre-trial detention etc.).

In brief, as to its name, the Supreme Court is a High Court because it has exclusive jurisdiction to try offences committed by state's officials and it is a court of cassation because it has exclusive jurisdiction to hear appeals in cassation, while it is a court of justice because it delivers criminal justice as a court of last resort.

5. Functions (functional jurisdiction) of the military courts

The military court system is a parallel judicial system to that of the civilian (criminal) courts. In principle, this system is organised on the basis of personal jurisdiction

[7] O. J. no. 807 of 3 December 2010.

determined by the status of the participants in a crime, i.e. the military members of the national armed forces and other categories of persons governed by a militarised regime (e.g. policemen, financial guard commissioners, members of the intelligence services, military firemen etc.).

Recent years' legislative developments have considerably reduced the persons falling under the jurisdiction of military courts. Firstly, Law no. 360/2002 on the status of police officers[8] demilitarised the police force, making them civil servants. The commissioners of the Financial Guard also became civil servants, as a result of O.U.G. no. 91/2003 on the organisation of the Financial Guard[9]. Then, as of 1 January 2007, in Romania, during peacetime, the execution of compulsory military service was suspended and the military service was switched to voluntary service (Article 12 of Law no. 395/2005[10]).

Criminal litigations involving military personnel have thus decreased considerably, judging by the fact that the workload of a judge in ordinary courts was more than 15 times that of a judge in military courts between 2012 and 2015[11]. The abolition of military courts has thus been questioned, being argued that their reduced workload involves unnecessary budgetary resources, as both financial and human resources could be used in the ordinary courts, which are very busy. In addition to the argument of reduced activity, other arguments are added. Military judges, as the Romanian judicial system is constructed, do not seem to meet the guarantees of independence and impartiality. Military careers, like the budget of military courts, belong to the military system, not the justice system.

Moreover, the practice of the European Court of Human Rights has also raised questions about the independence of military judges where such courts exist[12]. Last but not least, in the European Union, many Member States do not have military courts, but specialised panels in ordinary courts.

However, the new criminal procedure legislation retained the military court system, still reorganised it. Thus, the Territorial Military Court, a court of equivalent rank to the civil tribunal, was abolished and the military courts of Bucharest, Cluj, Iaşi and Timişoara became equivalent in rank to the first instance courts (Article 20 of Law no. 255/2013 for the implementation of Law no. 135/2010 on Criminal Procedure Code[13]). After the reform, a military court will judge at first instance all offences committed by military personnel up to and including the rank of colonel, with the exception of those given by law to the jurisdiction of other courts (Article 37 CPC).

The Military Court of Appeal will try at first instance offences concerning the national security of Romania provided for in the Criminal Code and in special laws committed by military personnel, offences committed by military court judges and military prosecutors of the military prosecutor's offices, as well as offences committed by generals, marshals and admirals. As an appellate court, it will hear appeals against criminal decisions rendered by the military court (Article 39 CPC).

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[8] O. J. no. 440 of 24 June 2002.

[9] O. J. no. 712 of 13 October 2003. The Act was approved by Law no. 132/2004 (O. J. no. 372 of 28 April 2004).

[10] Law no. 395/2005 on peacetime suspension of compulsory military service and transition to voluntary military service (O. J. no. 1155 of 20 December 2005).

[11] (*http://www.evz.ro/soc-csm-propune-desfiintarea-instantelor-militare.html*) posted on 19 June 2016.

[12] E.Ct.H.R., case-law *Maszni vs Romania*, decision of 21 September 2006, para. 56, 59 (*www.hudoc.echr.coe.int*).

[13] O. J. no. 515 of 14 August 2013.

6. Territorial jurisdiction of the courts

Another criterion used to separate courts' jurisdiction is the territorial criterion, which distinguishes courts of the same level horizontally. In this area, there are distinct provisions for offences committed on national territory and abroad respectively.

In the first case, jurisdiction according to territory is determined, in order, under the Article 41 CPC:

(a) by the place where the offence was committed (the place where all or part of the criminal activity took place or where its consequences occurred);

(b) by the place where the suspect or defendant was caught;

(c) by the place of residence of the suspect or accused natural person or, where applicable, the place of business of the suspect or accused legal person, at the time when the offence was committed;

(d) by the place of residence or, where appropriate, the place of business of the damaged person.

Where an offence has been committed in the jurisdiction of more than one court, any one of them has jurisdiction to try it. Where two or more courts are referred to simultaneously, jurisdiction shall lie with the court established in the order of priority indicated above. Where none of the places indicated is known or where two or more courts are referred in succession, jurisdiction shall lie with the court first seized.

An offence committed on a Romanian-registered ship shall be subject to the jurisdiction of the court where is located the first Romanian port in which the ship anchors, unless otherwise provided by law. An offence committed on a Romanian-registered aircraft shall fall within the jurisdiction of the court where is located the first landing place on Romanian territory. If the ship does not anchor in a Romanian port or if the aircraft does not land on Romanian territory and jurisdiction cannot be determined on the basis of the order of priority established under Article 41 CPC, jurisdiction shall lie with the court first seized.

For offences committed abroad, where Romanian law is applicable by virtue of the principles of personality, reality or universality (Article 9 to 11 of the Criminal Code), jurisdiction is determined according to the rules of Article 42 CPC:

- offences shall be tried by the courts where the residence[14] of the defendant (natural person) is located or, as the case may be, the place of business of the defendant (legal person) is located;

- if the defendant does not live or, as the case may be, does not have his or her place of business in Romania, and the offence falls within the jurisdiction of the first instance court, it shall be tried by the First Instance Court of Sector 2 Bucharest (special jurisdiction) and by the court having jurisdiction in the Municipality of Bucharest according to the seriousness of the offence or according to the status of the person (i.e. the Bucharest Tribunal and the Bucharest Court of Appeal), unless otherwise provided by law.

By Law no. 6/2021 on measures enforcing Council Regulation 2017/1939/EU of 12 October 2017 implementing a form of enhanced cooperation in relation to the establishment of the European Public Prosecutor's Office (EPPO)[15], it was established

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[14] Article 42 para. (1) CPC also refers to the suspect's home. This is a legislative oversight as long as the suspect cannot be tried before the court, and therefore cannot determine the court's jurisdiction.

[15] O. J. no. 167 of 18 February 2021.

that in the case of offences for which prosecution has been carried out by the European Public Prosecutor's Office under the EPPO Regulation, territorial jurisdiction is vested to:

- Bucharest, Cluj, Iaşi and Timiş tribunals – as regards first instance proceedings which are not given by law to the jurisdiction of other courts according to the status of the person;
- the courts of appeal of Bucharest, Cluj, Iaşi, Timişoara – as regards the hearing of appeals against criminal judgments rendered at first instance by the tribunals referred to in the above point, as well as the hearing at first instance where jurisdiction according to the status of the person is conferred to the courts of appeal;
- the High Court of Cassation and Justice – as regards trials at first instance and appeals where its jurisdiction is based on the status of the person.

7. Functions (functional jurisdiction) of the Judge of Rights and Liberties

Article 3 para. (5) CPC stipulates that the acts and measures in criminal proceedings which restrict the fundamental rights and liberties of the person shall be ordered by the judge designated for this purpose, except in the cases provided for by law. This judge, called the Judge of Rights and Liberties (JRL), is a new player in Romanian criminal procedure. His role is designed to give effect to Article 1 para. (2) CPC and Article 8 CPC, according to which: "the rules of criminal procedure aim to ensure the efficient exercise of the powers of judicial bodies while guaranteeing the rights of the parties and other participants in the criminal process, so that the provisions of the Constitution, the founding treaties of the European Union, the other European Union regulations on criminal procedure and the covenants and treaties on fundamental human rights to which Romania is a party are respected" and, respectively, "the judicial bodies are obliged to conduct the criminal prosecution and trial with respect for procedural guarantees and the rights of the parties and the subjects of the proceedings (...)".

The criminal process is the theatre of sometimes dramatic confrontations between the public interest, which is concerned with the timely and complete establishment of facts and the punishment of persons who have committed offences, and the private interest, which is concerned with ensuring an effective defence able to remove or at least mitigate the charges. In this respect, the criminal trial represents a legal restriction of fundamental rights and freedoms, equivalent to a genuine hardship for them [Article 53 para. (1) of the Constitution]. The balance between these two equally important objectives in the process must be ensured from the outset of the criminal proceedings, namely the investigation stage. The public prosecutor, who is almost absolutely sovereign at this stage, does not enjoy the guarantees of independence required for being appointed as a magistrate within the meaning of the case-law of the European Court of Human Rights[16].

It was thus necessary to introduce a judge in the investigation phase, with the role of dealing with all requests, proposals, complaints, appeals or any other referrals concerning:

(a) preventive measures;

(b) precautionary measures;

(c) provisional security measures;

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[16] E.Ct.H.R., case-law *Pantea vs Romania*, decision of 3 June 2003, para. 237-238 (*www.hudoc.echr.coe.int*); case-law *Vasilescu vs Romania*, decision of 22 May 1998, para. 40-41 (*www.hudoc.echr.coe.int*).

d) acts of the public prosecutor, in the cases provided for by law;

e) the authorisation of searches, the use of special surveillance or investigation methods and techniques or other evidentiary procedures in accordance with the law;

f) the procedure of early hearing;

g) other situations expressly provided for by law (Article 53 CPC).

The JRL is not an investigating judge, in the sense that he does not conduct the criminal investigation, which remains the exclusive competence of the judicial police and the prosecutor. There are exceptions to this rule. The procedure of early hearing (Article 308 CPC) is an investigative procedure that derogates from the above-mentioned rule and is applied when there is a risk that the injured person, civil party, civilly liable party or witness could not be heard during the trial for objective reasons (imminent death, chronic illness, permanent departure abroad etc.) and when it is therefore necessary to preserve evidence in advance for the trial.

The main task of the JRL is to ensure that fundamental rights and freedoms (the right to liberty and physical safety, the right to property, the right to private life and the inviolability of the home and correspondence etc.) are respected. The JRL may also intervene to censure the inefficiency of the criminal investigation by having the power to rule on the appeal concerning the duration of the trial (Articles 488^1-488^6 CPC).

The territorial jurisdiction of the JRL is determined according to the criteria assigned to the court to which he belongs. By way of exception, derogations are provided for whereby an alternative territorial jurisdiction is established between the JRL of the court which would have jurisdiction to hear the case at first instance and the JRL in whose jurisdiction the prosecutor's office is located [Article 140 para. (1) CPC, Article 147 para. (1) CPC, Article 158 para. (1) CPC, Article 168 para. (2) CPC]. In matters of preventive or house arrest, alternative territorial jurisdiction lies with the JRL of the court which would have jurisdiction to hear the case at first instance or with the JRL within whose jurisdiction the place where the offence was committed or the prosecutor's office is located [Article 219 para. (1) CPC and Article 224 para. (2) CPC].

8. Functions (functional jurisdiction) of the Preliminary Chamber Judge

Article 3 para. (6) CPC provides that the preliminary chamber judge shall rule on the legality of the indictment and the evidence on which it is based, as well as on the legality of decisions not to refer a case to trial, in accordance with the law. The Preliminary Chamber Judge (PCJ) is also a new player in criminal proceedings in Romania.

The Constitutional Court held in a *dictum*[17] that "[...] in the light of the procedural powers entrusted to the preliminary chamber judge, in the context of the separation of judicial functions under the above-mentioned law, the Court concludes that it is incumbent upon him to verify the legality of the referral or non-referral for trial and that, in the legislator's conception, this new procedural institution belongs neither to the criminal prosecution nor to the trial, being equivalent to a new phase of the criminal trial".

This new phase has two objectives. On the one hand, to verify the legality of the referral ordered by the prosecutor and the legality of evidence and the procedural acts carried out by the prosecution. From this point of view, the preliminary chamber judge is a legality filter separating the investigation phase from the trial phase. In brief,

[17] Constitutional Court Decision no. 641 of 11 November 2014 (O. J. no. 887 of 5 December 2014), para. 27.

the innovation introduced by the CPC is a positive one, as the trial should not begin if there are legality flaws in the evidence gathered during the prosecution phase. Here the CPC is consistent with the principle of separation of judicial functions. The public prosecutor and the judicial police are responsible for carrying out the object of the criminal prosecution, e.g. gathering the necessary evidence on the existence of offences, identifying the persons who have committed an offence and establishing their criminal liability, in order to refer the case to trial [Article 285 para. (1) CPC], the preliminary chamber judge checks the referring to trial (indictment) and orders the trial to begin, and the sitting judge rules upon the case.

Check of legality refers strictly to formal legality, namely regularity [Article 346 para. (3)(a) CPC]. The formal conditions of the indictment, as an act of bringing defendants before the court, are laid down in Article 328 CPC. The finding of an irregularity may lead to the return of the case to the prosecutor, if it will be impossible for the court to determine the act and the person who have been referred for trial.

What is missing from the control exercised by the PCJ is the censorship of the indictment from the point of view of its substantial consistency (merits), e.g. how well-founded the indictment is from the evidentiary point of view. Romanian law is not seriously concerned with this essential component of a proper prosecution. Article 285 CPC refers to the determination of "whether or not it is appropriate to refer the case to trial", without explaining what this assessment consists of. Article 327 CPC sets out a number of criteria for the referral for trial, namely when it is established that:

- the legal provisions guaranteeing the truth have been respected;
- the criminal prosecution is complete;
- there is the necessary and legally supplied evidence;
- it is clear from the investigation files that the offence exists, was committed by the accused and the latter is criminally liable.

These criteria, even if not entirely capable of setting a standard of proof required to be met in order for the case to be referred to trial, are nevertheless elements capable of constituting a standard for verifying the consistency of the indictment. Resistance of performing such filter, however, comes from PCJ itself, recruited from among former and current judges. They often share the same vision, incompatible with the different functions they are supposed to exercise. This situation is not attributable to the judges, but to the law, as long as the principle of separation of judicial functions has been infringed by allowing the PCJ to participate to trial as a sitting judge [Article 3 para. (3) CPC]. It follows that the PCJ is not yet in line with his function of censoring the indictment, a natural function in the original system of the pre-trial chamber. Thus, in the adversarial system, the role of the Pre-Trial Chamber (Indictment Chamber) is to block evidentially inconsistent indictments, considering that there is a need to control abuses by the prosecution. As a result, under the national law, it is not within the PCJ's jurisdiction to check the completeness of the criminal investigation, but rather the responsibility of the trial judge.

The second objective of the pre-trial chamber is to check the decisions not to prosecute or to waive prosecution ordered during the investigation phase.

This prerogative was gained following the decision[18] of the Constitutional Court, which, in interpreting Article 21 of the Fundamental Law on access to justice, ruled that "the law does not provide for any legal remedy against the decision rendered to

[18] Constitutional Court Decision no. 486 of 2 December 1997 (O. J. no. 105 of 6 March 1998).

the complaints filed with the first prosecutor or the superior prosecutor. However, the acts and measures taken by the public prosecutor in the course of the criminal proceedings must be subject not only to hierarchical control within the Public Prosecutor's Office, but also to control by the courts. Therefore, a person who is dissatisfied with the outcome of his complaint within the Public Prosecutor's Office has the right, under Article 21 of the Constitution, to apply to the courts to defend his rights, freedoms and legitimate interests. Attention must also be paid to the provision of Article 21 para. (2) of the fundamental law that states «No law may restrict the exercise of this right». Accordingly, the provisions of Article 278 of the former Code of Criminal Procedure are unconstitutional in so far as they close off the possibility for a person who is dissatisfied with the outcome of his complaint by the Public Prosecutor's Office to bring an action before the courts". The decision had a praetorian character, configuring a control over the acts of the prosecutor, the Court itself acknowledging that "of course, it would be necessary for the legislator to intervene, regulating the right of the person to apply to the competent court, when he or she is dissatisfied with the solution given to his complaint against the acts of the public prosecutor".

The Constitutional Court's ruling was important because it ensures the pre-eminence of the principle that justice is done only by the courts. The prosecutor, although a magistrate under national law, is not an absolute sovereign in the investigation stage and does not have a monopoly on whether a person needs to be investigated or not.

According to Article 340 para. (1) CPC: "The person whose complaint against the decision not to prosecute, issued by order or indictment, has been rejected in accordance with Article 339, may lodge a complaint, within 20 days from the date of communication, with the preliminary chamber judge of the court which would be competent, according to the law, to judge the case in first instance". As a consequence:

- when the criminal prosecution has not been initiated, the PCJ may uphold the complaint, quash the contested decision and refer the case to the prosecutor to initiate or complete the criminal investigation, or, where appropriate, to initiate the criminal prosecution and complete the criminal investigation [Article 341(6)(b) CPC];
- where criminal prosecution has been initiated, the preliminary chamber judge may uphold the complaint, set aside the contested decision and refer the case to trial, when the evidence legally submitted is sufficient [Article 341(7)(c) CPC].

In the case of decisions to waive prosecution, the control procedure is no longer a provoked one, but automatic. According to Article 318 para. (12) CPC: "The order to waive prosecution, verified in accordance with para. (10), shall be copied, where appropriate, to the person who made the complaint, the parties, the suspect, the injured person and other interested persons and shall be forwarded for confirmation, within 10 days from the date it was issued, to the preliminary chamber judge of the court which would be competent, according to the law, to judge the case in first instance". After verifying the legality and merits of this decision, the PCJ may grant or reject the request for confirmation made by the prosecutor. If he rejects it:

- annuls the decision to waive prosecution and refer the case back to the prosecutor to initiate or complete the investigation or, as the case may be, to initiate the prosecution and complete the investigation, or
- annuls the decision to waive prosecution and orders dismissal of the case.

Under the provisions of Article 54 CPC, the PCJ also deals with other situations provided for by law:

- verifies the legality and the merits of the order to reopen the criminal proceedings [Article 335 para. (4) CPC];

- decides on issue to maintain or not preventive measures during the pre-trial chamber (Article 207 CPC);

- orders the special confiscation or the destruction of certain documents if the prosecutor has issued a decision not to prosecute or waive prosecution (Article 5491 CPC);

- decides on issuing, confirming, replacing or terminating the provisional safety measures provided for in Article 109 or Article 110 of the Criminal Code if the prosecutor has decided not to prosecute [Article 246 para. (13) CPC].

References

1. Ciopec, F., *Observații privind un caz de competență a tribunalului în materie penală* [Observations on a particular case of criminal jurisdiction of the tribunal], in Annals of the West University of Timișoara, Law series no. 2/2014, pp. 21-26.
2. Law no. 395/2005 on peacetime suspension of compulsory military service and transition to voluntary military service (O. J. no. 1155 of 20 December 2005).
3. *http://www.evz.ro/soc-csm-propune-desfiintarea-instantelor-militare.html*) posted on 19 June 2016.
4. Constitutional Court Decision no. 486 of 2 December 1997 (O. J. no. 105 of 6 March 1998).
5. O. J. no. 440 of 24 June 2002.
6. E.Ct.H.R., case-law *Maszni vs Romania*, decision of 21 September 2006, para. 56, 59 (*www.hudoc.echr.coe.int*).
7. E.Ct.H.R., case-law *Pantea vs Romania*, decision of 3 June 2003, para. 237-238 (*www.hudoc.echr.coe.int*); case-law *Vasilescu vs Romania*, decision of 22 May 1998, para. 40-41 (*www.hudoc.echr.coe.int*).
8. O. J. no. 712 of 13 October 2003.
9. O. J. no. 672 of 27 July 2005.
10. O. J. no. 807 of 3 December 2010.
11. O. J. no. 515 of 14 August 2013.
12. O. J. no. 190 of 18 March 2014.
13. Constitutional Court Decision no. 641 of 11 November 2014 (O. J. no. 887 of 5 December 2014), para. 27.
14. O. J. no. 167 of 18 February 2021.
15. O. J. no. 1104 of 16 November 2022.

Certain Questions of the External, Internal and Criminal Investigation of the Criminal Offences Affecting the Financial Interests of the European Union – Results and Conclusions of a Hercule III Project*

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Abstract

The main objective of this paper is to present the most important conclusions and findings of the "Certain questions of the external, internal and criminal investigation of the criminal offences affecting the financial interests of the European Union (fraud, corruption, money laundering and other illegal activities against the financial interests of the EU) with special focus on the role of OLAF, EPPO, Eurojust, and Europol" project which was coordinated by the University of Miskolc, Faculty of Law. In the framework of the project a practice-orientated comparative research was carried out, one international conference, three international workshops, a final international Summer Academy and a closing conference with book presentation were organised, based on the results of which the Hungarian project team formulated several conclusions and recommendations.

Keywords: *European criminal law, protection of the financial interests of the European Union, external, internal and criminal investigation, European Public Prosecutor's Office, OLAF, Eurojust, money laundering, criminal compliance*

I. Introduction – short presentation of the "EUINVESTIGUNIMISKOLC – 101015428" Hercule III Project

The general objective of the HERCULE III PROJECT (– EUINVESTIGUNIMISKOLC[1]) was to clarify the role and methods of external, internal and criminal investigation serving the protection of the financial interests of the EU with special focus on the activities of the EU agencies (EPPO, OLAF, Eurojust, Europol) and local authorities of EU Member States and their cooperation.

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* This publication was funded by the European Union's HERCULE III programme. The content of this publication represents the views of the authors only and is his/her sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

[1] "Certain questions of the external, internal and criminal investigation of the criminal offences affecting the financial interests of the European Union (fraud, corruption, money laundering and other illegal activities against the financial interests of the EU) with special focus on the role of OLAF, EPPO, Eurojust, and Europol", HERCULE III PROJECT (Nr. 101015428 — EUINVESTIGUNIMISKOLC); see the web site of the project: https://euinv.uni-miskolc.hu/en.

The main aim of the project was to pursue a complex, practice-oriented comparative research in connection with the most relevant questions of the external, internal and criminal investigation of the criminal offences affecting the financial interests of the European Union with special regard to the role of OLAF, EPPO, Eurojust and Europol. In connection with this, the main objective of the project was to raise awareness in the branches of legal professions that are involved in the protection of the financial interests of the EU by organizing special trainings and dissemination of studies on the aforementioned issues. In Hungary and in the participating countries, the importance of our topic is not fully known, neither among the practitioners, investigating authorities and academics, nor in legal education. This project was inspired by our former success, which provided the background for our application and helped to build up this present activity. In our former project, HERCULE III[2], we created a network and worked out the structure, methods and organization of our work, which proved useful and efficient.

In connection with this general objective, the specific objectives of the project were the following: improvement of the awareness of the legal professions involved in the protection of the financial interests of the EU through the organization of international conferences, workshops, meetings and trainings; improvement of cooperation between EU agencies and Member States' (MS) local authorities, practitioners and academics; comparative analysis of the legal regulations and practices of the participating MS; exchange of information and best practices; use of the results in legal education; elaboration of proposals for the future activities.

The most important results of the project are the following: to provide a comprehensive overview of the problems of external, internal and criminal investigation of irregularities and crimes affecting the financial interests of the EU and to present the role of OLAF, Eurojust, Europol and EPPO as well as the local authorities of the MS and also to collect best practices; to raise awareness of legal professions (judges, prosecutors, investigative authorities) involved in judging cases against the financial interests of the EU; raising awareness of legal professionals in detecting fraudulent acts and other crimes related to the financial interests of the EU; possible use of the results of our work and best practices in the research and legal education; creation of a scientific network with practitioners and academics of the MS involved in the project to exchange best practices.

The project was coordinated by the University of Miskolc, Faculty of Law. The Hungarian project team included Prof. Dr. Ákos Farkas (university professor, project manager), Prof. Dr. Judit Jacsó (university professor, project coordinator), Prof. Dr. Erika Róth (university professor, project member), Dr. Andrea Jánosi (associate professor, project member) and Dr. Bence Udvarhelyi (assistant professor, project coordinator).

In order to make the work more successful and efficient, practical and academic experts from eight Member States (Austria, Croatia, Germany, Greece, Hungary, Italy, Poland and Romania) were involved in the project: Chief Prosecution Office, HU (Prof. Dr Péter Polt, Chief Public Prosecutor of Hungary), Hungarian Judicial Academy, HU (Dr György Senyei, president), National Tax and Customs Administration of B.-A.-Z. County, HU (Csilla Kovácsné Fecz, director; Tamás Jármai, head of the department), Hungarian Financial Intelligence Unit, HU (Dr Gábor Simonka, head), LeitnerLeitner

[2] "Criminal law protection of the financial interests of the EU – Focusing on money laundering, tax fraud, corruption and on criminal compliance in the national legal systems with reference to cybercrime". HERCULE III PROJECT (Nr. 786253 – HUUNIMISKOLCPFI); see the web site of the project: https://hercule.uni-miskolc.hu/EN.

Partner Budapest, HU (Márta Siklós), University of Heidelberg, DE (Prof. Dr Dr h.c. Gerhard Dannecker), Public Prosecutor's Office of Mannheim, DE (Kai Sackreuther Public Prosecutor), Vienna University of Economics and Business, AU (Prof. Dr Robert Kert, head of institute), University of Linz, AU (Prof. Dr Richard Soyer, head of institute), University of Thessaloniki, GR (Assoc. Prof. Dr Theodoros Papakyriakou), University of the International Studies of Rome (Assoc. Prof. Dr Vincenzo Carbone), University of Oradea, RO (Assoc. Prof. Dr Christian Mihes dean, Assoc. Prof. Dr Diana Cirmaciu), University of Zagreb, CR (Prof. Dr Zlata Durdevic head of the institute, Assoc. Prof. Dr Marin Bonačić, Assoc. Prof. Dr Zoran Burić), Jagiellonian University of Cracow, PL (Assoc. Prof. Dr Beata Baran).

The following professors contributed to the summary sessions: Prof. Dr iur. Frank Meyer (University of Heidelberg), o. Univ. Prof. Dr. Wolfgang Brandstetter (Vienna University of Economics and Business, Institute for Austrian and European Economic Criminal Law, Judge, Constitutional Court Austria), Prof. Dr Dr h.c. mult. Hans-Heiner Kühne (University of Trier), Prof. Dr Kai Cornelius (University of Hamburg).

II. Main events of the project

In order to achieve the aforementioned objectives, we organized *one international conference*, *three international workshops,* a *final international Summer Academy* and a *closing conference with book presentation*. These organizations can be summarized as follows.

The *Opening Conference* of the project with the title *"The Role of Investigation in Criminal Procedure – European Dimensions"* was organized in the University of Miskolc on the 31th May 2021. Due to the COVID-19 pandemic, the Opening Conference was held online via Zoom. The aim of the *Opening Conference* was the practice-oriented discussion of the main questions and various special forms of external, internal and criminal investigation of irregularities and criminal offences affecting the financial interests of the European Union through the presentation of the good practices of the Member States. Almost 200 participants took place at the Opening Conference (members from the academic sphere, judges, prosecutors, lawyers, notaries, persons employed by customs, police forces or other law enforcement agencies, persons employed by local or regional authorities and law students and PhD students).

Following the Opening Conference *two international workshops* were organized. The scope of the workshops was narrower than the Opening Conference, since 30-40 participants (the project partners and some practitioners) participated in them. These events enabled the local practitioners to share their experiences on the subject topics.

The first workshop with the title *"The Criminal Tax Procedure under the Influence of Consensual Elements"* was organized on 15th November 2021 by the University of Miskolc Faculty of Law (Research Centre for European Criminal Law of the Faculty of Law of the University of Miskolc) and the University of Heidelberg. Due to the COVID-19 pandemic, the first workshop was held online via Google Meet System.

The second workshop with the title *"Criminal Investigation of Offences against the Financial Interests of the European Union"* was organized on 11th April 2022 by the University of Miskolc Faculty of Law (Research Centre for European Criminal Law of the Faculty of Law of the University of Miskolc) and the University of Zagreb. Due to the COVID-19 pandemic, the first workshop was held online via Google Meet System.

The originally planned closing event of the project was a *Summer Academy* with the title *"The Institutional and Instrumental Framework of International Criminal Cooperation in order to Increase the Efficiency of Investigation of Criminal Offenses affecting the Union's Financial Interests with special focus on OLAF, Eurojust, Europol and EPPO"* which was held on 19-21th June 2022 at the University of Miskolc. The event was organized by the Faculty of Law of the University of Miskolc (the Research Centre for European Criminal Law of the Faculty of Law of the University of Miskolc) and the National Office for the Judiciary. During the organization of the Summer Academy, the Hungarian project team had several professional discussions with the co-organizer, the National Office for the Judiciary in Budapest about the objectives and the program of the Summer Academy. The aim of the Summer Academy was to discuss basic questions related to the criminal law protection of the European Union's financial interests, primarily through a practice-oriented discussion of the best practices of the Member States. At the conference, the domestic and foreign cooperation partners of the project, as well as domestic and foreign theoretical and practical experts held lectures. The Summer Academy was organized with personal attendance, but online accession was also provided for those who were not be able to attend the conference in person. Judges, public prosecutors, lawyers, persons employed by customs, police forces or other law enforcement agencies, persons employed by local or regional authorities and members of the academic spheres attended at the Summer Academy. With the personal and online attendance, more than 150 participants attended the Summer Academy.

After the Summer Academy, on 21 June 2022, a closing workshop was organised for the cooperation partners. The main aim of the workshop was the overview of the results of the project and to organise a round table discussion for the elaboration of the conclusions and recommendations of the project.

Originally, the action would have been ended with the Summer Academy and the publication of the final volume. However, due to the COVID-19 pandemic, we the fulfilment of these objectives became extremely difficult. Because of the travel and other restrictions prescribed by the national laws and the regulations of the University we cannot organize the Opening international conference and the two international workshops in a personal way, but these events were organized online. From the planned four events, only the final Summer Academy could be organized personally, with great success either. Although the conferences and workshops were successful, the online events could not substitute the advantages of the personal organizations. The lack of the personal meeting made the creation of scientific relations and establishment of scientific networks with practitioners and academics of the Member States involved in the project in order to exchange best practices extremely difficult. Due to these reasons we to request the prolong the deadline of the project with six months, until the end of March 2023 and the European Commission approved our request. However, we did not only want to postpone the termination of project, but we also planned to organize additional events as well.

On the one hand, we have organised a personal international workshop on 4-6th December 2022. The *3rd international workshop* with the title *"Conclusion and recommendation of the Hercule EUINVESTIGUNIMISKOLC project"* was organised in the University of Heidelberg and the Hungarian project staff and the cooperation partners from the other Member States took part. The most important aim of the workshop was to finalize and discuss the final conclusions and recommendations of the projects which is planned to be published in several scientific and other journals.

The second additional event of the project was a *closing conference with book presentation*. The *"Presentation of the final volume of the certain questions of the external, internal and criminal investigations of criminal offences affecting the financial interests of the European Union – Hercule III EUINVESTIGUNIMISKOLC project"* was organized on 13th February 2023, by the University of Miskolc Faculty of Law (Research Centre of European and International Criminal Law) and the National Office for the Judiciary (Hungary), at the National Office for the Judiciary (Assembly Hall). Almost 80 participants took part in the book presentation, both from the academic and the practical sphere.

After the closing conference and book presentation, an additional closing dissemination workshop was organised at the University of Miskolc. The *"Closing event of the Hercule III EUINVESTIGUNIMISKOLC project and the presentation of the volume "External, internal and criminal investigations of criminal offences affecting the financial interests of the European Union"* was organised on 29th March 2023 at University of Miskolc, Faculty of Law. Law students as well as professors and lecturers from the University of Miskolc took part at the event.

The results of the research and the international conferences and workshops was published in English volume by Wolters Kluwer Publisher after the Summer Academy. In the volumes, the extended and edited versions of the lectures at the Opening Conference, the two international workshops and the Summer Academy were published[3].

III. Conclusions of the project

Based on the project results, the consultations between the cooperation partners and the presentations of the international conferences and workshops organized within the framework of the project, as well as after extensive consultations with the foreign cooperatives, we have reached the following conclusions[4].

A) General Conclusion in connection with criminal investigation of the criminal offences affecting the financial interests of the European Union

The Treaty of Lisbon can be considered an outstanding event in the history of the protection of the financial interests of the European Union. Criminal law is now an explicit part of the objective to "offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with respect to external border controls, asylum, immigration and the prevention and combating crime" [Art. 3 (2) EU Treaty]. Under Art. 82 of the Treaty on the Functioning of the European Union (TFEU), judicial cooperation in criminal matters is now explicitly based on the principle of mutual recognition. The powers of the EU legislative are broad: Initiatives may, inter alia, "d) facilitate cooperation between

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[3] A. Farkas, G. Dannecker, J. Jacsó, (eds.), *External, internal and criminal investigation of the criminal offences affecting the financial interests of the European Union*, Wolters Kluwer, Budapest, 2022. The volume can be downloaded from the website of the project: https://euinv.uni-miskolc.hu/files/20573/Hercule_tanulmanykotet_fedel_beliv_1_502old.pdf.

[4] See: G. Dannecker, A. Farkas, J. Judit, *Conclusion and recommendation of the project*. In: A. Farkas, G. Dannecker, J. Jacsó, (eds.), *External, internal and criminal investigations of criminal offences affecting the financial interests of the European Union*, Wolters Kluwer Hungary, Budapest, 2022, pp. 490-502. (https://euinv.uni-miskolc.hu/study).

judicial or equivalent authorities of the MSs in relation to proceedings in criminal matters and the enforcement of decisions" [Art. 82 (1) a) TFEU].

Since 1 December 2009, when the Treaty of Lisbon entered into force, the Union has adopted many significant measures involving on cooperation in criminal matters. Several framework decisions have been updated as directives, and the EU has also made significant progress in procedural cooperation, such as the Directive 2014/41 on the European Investigation Order and the Regulation EU 1939/2017 on the European Public Prosecutor's Office, which represents a milestone in the investigation of crimes against the EU's financial interests.

B) Special Conclusion in Connection with the EPPO

The appearance of the EPPO was a paradigm change in the EU. Direct enforcement is defined as an enforcement where a Union body has the power to make decisions regarding prosecution and/or sentencing. One relevant form of direct enforcement mechanisms is the European Public Prosecutor's Office. The EPPO does not represent the Member States but takes decisions that are in the best interest of the European Union as a whole. The EPPO co-operates with national authorities, but the latter work in a subordinate position. Decisions are taken at a European level. Establishing an EPPO required that a new criminal system also had to be set up. This is accompanied by a loss of national sovereignty. Therefore, we must respect the decision of the Member States whether they want to participate or retain their sovereignty. We must recognize that the EPPO as such should not be a goal in itself and to remind ourselves why the idea for an EPPO came about. Initially, it was meant to fill the gap in situations in which Member States did not enforce legislation. If the EPPO is to be an answer to that problem, its structure should follow from that. This is the perspective of the European Union.

A contrary perspective is that Member States act independently in the area of criminal law and are loyal to the European Union, but renounce integration and opt for a Europe of different speeds, as intended in the European Treaties. This is the perspective of some Member States of the European Union.

The EPPO is not necessarily the only mean for the protection of the financial interests of the EU. Therefore, the question has to be explored whether it is really just a matter of perspective, European or national, to leave prosecution to the EPPO or national prosecutors' offices, or whether a certain openness with regard to future developments can be beneficial. This requires the development of empirical methods to measure efficiency.

In the following, 10 theses concerning EPPO will be put forward:

For the EU, the protection of financial interests under criminal law is a basic condition for the existence and functioning of the European Union: the credibility of the European Union is at stake! Therefore, the European Public Prosecutor's Office, which is responsible for the prosecution of criminal offenses directed against the financial interests of the European Union, was and is a central concern of the European Union, even if not all Member States are participating in it.

1. The creation of the European Public Prosecutor's Office has two fundamental objectives, which are legitimate:

a) The harmonization of substantive criminal law and criminal procedural law is to be complemented by a single law enforcement agency at the European Union level to address deficits in law enforcement that have resulted from the fragmentation of the European judicial area.

b) Furthermore, the European Union should be freed from its dependence on the Member States and enabled to act on its own to prosecute financial crimes.

2. The creation of a European Public Prosecutor's Office with the agreement of all Member States was politically unachievable. Several countries, Denmark, Ireland, Poland, Sweden and Hungary, were not prepared to partially renounce their national sovereignty in the area of criminal prosecution.

It is not necessary for the non-participating Member States to join the EPPO if there are sufficient methods and instruments to protect the financial interests of the EU and if there is well functioning cooperation between national authorities and the EPPO. The cooperation has to be effective – checks and controls need to be inserted. The efficiency of the cooperation between the EPPO and the non-participating Member States has to be evaluated only after some cases have been closed.

3. Therefore, full integration was abandoned and the path of enhanced cooperation was chosen, which allows at least nine Member States to establish an enhanced cooperation on the basis of a draft regulation.

However, enhanced cooperation under Article 20 of the Treaty on European Union (TEU) is only an "emergency instrument" for different forms and degrees of participation in the European Union. Therefore, it would be wrong to see the EPPO as an example of successful and accomplished integration. The EPPO is probably rather the admission of a deficient protection of the financial interests of the European Union by the Member States.

4. Nevertheless, the EPPO fulfills an important task. It has to work towards integration and help to ensure that

a) the level of law enforcement and sanctions is harmonized throughout the European Union;

b) cooperative forms of collaboration are developed with non-participating states;

c) the EPPO as a special authority develops convincing solutions for law enforcement in the area of EU financial protection law;

d) the European Public Prosecutor's Office initiates and constructively accompanies a moderate system change, taking into account, on the one hand, the needs of EU law and, on the other hand, national peculiarities, traditions or approaches to criminal policy;

e) friction between participating states is avoided and that the cooperation with non-participating states works.

In this respect, the EPPO can act as an important role model and contribute to other member states deciding to join this model.

5. Enhanced cooperation respects the competences, rights and obligations of the non-participating Member States. The non-participating states are not bound by the Regulation on the European Public Prosecutor's Office. However, this does not mean that there would be no cooperation relations between them and the European Public Prosecutor's Office. The non-participating Member States are obliged to cooperate loyally with the European Public Prosecutor's Office in accordance with Article 4 (2) TEU and must support it to the extent necessary to effectively combat Union fraud.

6. A central concern of enhanced cooperation between individual Member States must be that their cooperative ventures be open to all others, insofar as they wish to participate actively in this policy on a smaller scale. So far, the Europe of different speeds has been limited to the fact that Member States can join the pioneers.

7. In addition, it should be considered that Member States that have committed themselves to loyal cooperation and are developing functioning models in this regard can equally serve as role models for other non-participating Member States that do

not yet wish to participate in enhanced cooperation but are willing to engage in effective loyal cooperation. Such action by non-participating states is not legally obligatory, but may be called for from the point of view of legal politics.

8. The establishment of a genuine European criminal prosecution authority is at least a small milestone in the development of European criminal law. However, it is not possible to speak of a supranationality of criminal justice in the narrow sense. For that, the European Public Prosecutor's Office is too closely tied to the national legal systems in terms of substantive and procedural aspects. There is no independent Union criminal law and no independent criminal procedural law. The European Public Prosecutor's Office applies national criminal law and national procedural law. Therefore, the EPPO is not an expression of successful integration, but rather an example of loyal cooperation of non-participating states with an EU institution.

9. However, the discussions about a possible extension of the mandate of the European Public Prosecutor's Office to other transnational offenses, especially in the field of terrorism, indicate that a further expansion of European prosecution cannot be ruled out for the future. Then the non-participating states will have to ask again whether they are willing to participate in the EPPO under the new conditions or prefer to continue a loyal cooperation with the EPPO.

At the same time, the European Union takes over all fields of politics. And here we need strong constitutional concepts when we want to reach a balanced legal order. This speaks for a European Union of different speeds.

C) Special conclusions in connection with other institutions

1. Since 28 June 2022 the European Regulation on the European Union Agency for Law Enforcement Cooperation (Europol) was modified[5] The innovations particularly concern the relationship between Europol and the EPPO.

2. The relationship of Europol, OLAF and Eurojust to the EPPO is regulated in Art. 20a of the Europol Regulation, Art. 12g of the OLAF Regulation and Art. 50 of the Eurojust Regulation respectively. The contents of these provisions are essentially the same: Europol, OLAF and Eurojust maintain close relations with the EPPO, whereby these institutions and the EPPO act within the scope of their respective competences. The aforementioned provisions repeat the content of Article 102 (1) sentence 1 of the EPPO Regulation, which contains the corresponding regulation for the EPPO.

3. The modalities for cooperation between Europol and EPPO must be laid down in a working agreement. Such an agreement has been in force since January 2021, and another agreement has been concluded for secure communication channels between Europol and EPPO. Europol, OLAF and Eurojust cooperate with the EPPO at its request by providing information and analytical support. The cooperation is limited to the duration of the investigation procedure.

4. It is specified how Europol, OLAF and Eurojust respectively have to provide information to the EPPO. The EPPO will be given indirect access to the data processed by Europol, OLAF or Eurojust on offences falling within their competence in the form of a hit/no hit procedure. In case of a hit, Europol is informed and initiates the

[5] Regulation (EU) 2022/991 of the European Parliament and of the Council of 8 June 2022 amending Regulation (EU) 2016/794, as regards Europol's cooperation with private parties, the processing of personal data by Europol in support of criminal investigations, and Europol's role in research and innovation, OJ L 169, 27.6.2022, pp. 1-42.

procedure for the transfer of the information. The relevant information provider, i.e. the Member State, the Union body, the third country or an international organization, provides for restrictions on access or use of the information. Europol, OLAF or Eurojust are bound by these. In addition, only those data triggering a hit that are relevant to the EPPO's request may be disclosed.

5. Europol, OLAF and Eurojust are obliged to report to the EPPO. Any criminal conduct that could fall under the jurisdiction of the EPPO must be reported. The Member State concerned must be informed of such a report. The latter must then contact the EPPO to fulfil its own reporting obligation under the EPPO Regulation.

6. Cooperation between Europol, OLAF and Eurojust is regulated in Art. 21 of the Europol Regulation. Here, Europol's duty to notify OLAF has been extended (Para. 8). If, in the course of processing information relating to a specific criminal investigation or project, Europol discovers that information is relevant to a possible illegal act detrimental to the Union's financial interests, Europol must forward this information to OLAF without delay, unless the supplier of the information has provided for a restriction on its use in accordance with Article 19 (2) of the Europol Regulation. The Member State concerned shall also be informed of such forwarding.

7. Overall, the cooperation between the EPPO, Europol, OLAF and Eurojust is detailed and appropriately regulated.

D) New Development in the fight against money laundering

1. The fight against money laundering is of great importance for the protection of the financial interests of the European Union, since this financial crime can also affect the EU's financial interests. The substantive criminal law is harmonized in this area, which in theory could facilitate prosecution, but in practice there are still many problems.

We can see in the fight against money laundering a good example of the *multi-institutional approach* we need for the effective protection of the financial interests of the European Union.

2. In July 2021, the European Commission presented a package of legislative proposals to strengthen anti-money laundering and countering the financing of terrorism (AML/CFT) rules of the European Union. This proposal of the European Commission is an important step in the field of harmonization of anti-money laundering in the EU. With the adoption of the new "AML/CFT rulebook", the EU regulatory and enforcement framework will be more uniform, more detailed and stricter.

3. Combating money laundering will remain in the hands of EU Member States, but the Anti-Money Laundering Authority (AMLA) will monitor, support and coordinate the application of EU regulations. AMLA will play a central role in supervising the obliged entities' compliance with the AML/CFT rules. It will also enhance cooperation among national Financial Intelligence Units (FIUs)[6]. The new organization will help to ensure that AML/CFT rules are applied more effectively and consistently in the Member States of the European Union[7].

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[6] https://eucrim.eu/news/aml-package-ii-commission-proposes-aml-regulation/ (last visited 9 October 2022).

[7] Proposal for a Regulation of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010, COM/2021/421 final.

4. In October 2022, Eurojust published a report on money laundering[8]. Its aim is to support national authorities in the investigation and prosecution of cross-border money laundering offenses. The report[9] gives an overview of the expected legal and practical problems and possible solutions[10]. The report focuses on certain selected issues: (i) predicate offenses; (ii) complex money laundering schemes; (iii) financial and banking information; (iv) asset recovery; (v) cooperation with third countries; (vi) cooperation with the European Public Prosecutor's Office; (vii) potential conflicts of jurisdiction and ne bis in idem issues; and (viii) spontaneous exchange of information. Eurojust identified legal and practical challenges in money laundering cases. The 10 most relevant *legal and practical challenges*[11] and several best practices[12]. were identified in the report ó:

5. Some of the practical problems are related to the substantive criminal law of money laundering. In line with the Eurojust report, we need also to highlight the problem of identifying the *predicate offence* in the case of money laundering, the main important issues are the *dual criminality and self- self-money laundering.* These can lead to difficulties in prosecution and judicial cooperation when money is laundered across multiple jurisdictions. Proof is particularly difficult when the suspected illicit property, presumably acquired through criminal activity, cannot be linked to a specific predicate offence. Another important question is whether the perpetrator of money laundering can compensate the victim of the predicate offence. If compensation is possible, what legal effect it has. We consider that substantive legal harmonization is necessary in these areas as well. EU legislation must take into account international standards, in particular the recommendations of the the Financial Action Task Force[13] (FATF)[14].

6. The *6th AML/CFT Directive* establishes the *definition the predicate offences* ("criminal activity"[15]) of money laundering, it should be sufficiently uniform in all Member States. In addition to the general rule adapted to the penalty clause (deprivation of liberty or a detention order for a maximum of more than one year), the Directive contains a catalog of offences, that qualify as predicate offences. Member States may require that the relevant conduct constitutes a criminal offence under the national law of the other Member State or of the third country where it was committed (*dual criminality*), but this rule does not apply to 6 predicate offences defined in existing Union law (e.g., participation in an organised criminal group or corruption)[16]. Nevertheless, there are differences in national law in relation to the requirements. The

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[8] European Union Agency for Criminal Justice Cooperation: Eurojust Report on Money Laundering Criminal Justice Across Borders October 2022. https://www.eurojust.europa.eu/publication/eurojust-report-money-laundering (last visited 05 November 2022).

[9] https://www.eurojust.europa.eu/sites/default/files/assets/eurojust-report-money-laundering-2022.pdf (last visited 05 November 2022).

[10] The report is based on an analysis of cases registered at Eurojust between 2016 and December 2021. During this period, Eurojust registered 2,870 cases in its case management system, with a steady increase over the years.

[11] Report on Money Laundering Criminal Justice Across Borders October 2022, pp. 2-3.

[12] Report on Money Laundering Criminal Justice Across Borders October 2022, pp. 3-4.

[13] The FATF is an inter-governantal and policy maker body that aim to prevent money laundering and terrorist financing.

[14] International standards on combating money launderinng and the financing of terrorism & proliferatio. The FATF Recommandations adopted by the FATF Plenary n Februar 2012. Udapted March 2022. https://www.fatf-gafi.org/publications/fatfrecommendations/documents/fatf-recommendations. html (30.11.2022).

[15] Article 2 Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law. OJ L 284, 12.11.2018, pp. 22-30.

[16] See Article 3(4) Directive (EU) 2018/1673.

crime of money laundering is typically cross-border in nature. The Member States should assist each other as much as possible, and it is necessary to ensure better international cooperation, including with third countries. *"Differences between the definitions of predicate offences in national law should not hinder international cooperation in criminal proceedings regarding money laundering"*[17]. Problems can arise, however, especially with *tax crimes* committed in other Member States. The regulation of tax crimes varies among Member States.

7. Furthermore, the use of *cryptocurrencies* in the conntext to money laundering is specific problem that requires further financial expertise and resources. Freezing and confiscating assets acquired through a crimine is an important anti-money laundering tool. Problematically, practitioners are still not sufficiently familiar with regulations and money laundering methods discussed by AML/CFT. Training of practitioners could be useful.

8. Certain Union authorities and bodies have specific tasks or mandates in preventing and combating money laundering. *The cooperation* between *law enforcement, public prosecutors' offices, and financial intelligence units (FIU)* is essential to an efficient system for tackling money laundering, but it is not sufficient. Cooperation among *supervisory, administrative, and law enforcement authorities* is crucial for successfully combating money laundering. The role of supervisory bodies will increase with the establishment of AMLA, a supranational body that will contribute to the *coordinated implementation of AML/CFT* rules. It should be emphasized that the AMLA, as a new supranational authority, will also have the power to impose administrative sanctions and investigative powers. In prevention, *compliance measures* in the legal entity could be an important means.

9. Freezing and confiscation of funds acquired through a criminal offence is an important means of combating (organized) crime. It is essential to emphasize that *freezing or confiscation* orders should be enforced without verification of double criminality in case of money laundering in accordance with the EU Regulation[18].

E) Compliance to Avoid Sanctions against Legal Persons and Enterprises and their Employees

I. Obligation to establish compliance and its scope

1. *Compliance,* which originated in the mother country, the USA, has now also arrived in the European Union and its Member States. There is a *legal obligation to establish and consistently apply compliance*.

2. Compliance primarily comprises the obligation *to observe the applicable law* as well as *the rules created by the company itself*.

3. If the task of regulated self-regulation of companies is not carried out, this establishes the *responsibility of companies under criminal or fine law in the sense of organizational responsibility*.

4. In addition, there is *state–private co-regulation*, through which companies are obliged by law to take over state functions of standardization, policing and sanctioning. Thus, employees must be trained and educated in areas such as anti-money laundering or occupational health and safety.

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[17] Preamble Nr. 9. Directive (EU) 2018/1673.

[18] Article 3, Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders. OJ L 303, 28.11.2018, pp. 1-38.

II. Avoiding criminal, administrative and civil sanctions through compliance

5. A central area of compliance concerns the *avoidance of penal, administrative and civil sanctions* threatening the company and its employees, especially at the management level. In this context, the company management must comply with the statutory provisions and internal company guidelines *(duty of legality)* and work towards their observance by means of organizational precautions at subordinate levels and within the corporate group *(duty of legality control).*

III. Responsibility of the corporate management

6. The management team has to organize compliance. Therefore, the establishment of a compliance department and the delegation of compliance tasks is mandatory.

7. The management team is also responsible for the implementation of self-regulation.

8. The management team is responsible for compliance with and monitoring of the *legal requirements* and the rules that have been established within the framework of *corporate self-regulation*. The same applies to the requirements of state–private co-regulation, especially in the topics (areas) of anti-money laundering and occupational safety.

IV. Responsibility of the legal person and/or the enterprise in addition to the individual person

9. The wrongful and culpable acts and omissions of the company's employees, especially if they belong to the management level, establish the responsibility of the legal person and the enterprise (economic entity) simultaneously.

10. Failures of an employee attributable to the legal person or the enterprise shall result in the sanctioning of the natural person and the legal entity or the enterprise.

11. Corporate crime this way becomes an offence of the organization. Criminal liability or fines thus serve to enforce the legal rules as well as the company rules which have been set within the framework of self-regulation. Violations of state-private co-regulation requirements in anti-money laundering and occupational safety also give rise to corresponding criminal or fine liability.

V. Compliance elements limiting the responsibility of the legal entity and the company

12. If an employee commits a legal violation despite comprehensive compliance measures, it is no longer the company but only the offending natural person who is responsible for the violations.

13. Failure to comply with compliance requirements must also be taken into account as a reason for mitigation in criminal law and the law on fines (Geldbußen). As a result, the unwritten compliance regulations also acquire legal relevance through consideration as a reason for mitigation. It is therefore no longer a matter of soft law, but part of the binding law.

VI. Development of a guideline for the design of an effective and efficient compliance management system

14. Consideration should be given to developing a guide for designing an effective and efficient compliance management system. The aim of such a guide should be to create more transparency and legal certainty for companies.

15. The "Evaluation of Corporate Compliance Programs", published by the Fraud Section of the U.S. Department of Justice on 1 June 2020, can serve as a guide[19]. Due to its high level of detail, this guide provides companies with clear orientation for the design of compliance programs.

F) On the Need for Further Harmonization of Substantive Sanction Law and Sanction Procedures in Accordance with Rule of Law Standards

I. Need for further harmonization of substantive criminal and administrative sanctions law

1. The fight against irregularities detrimental to the financial interests of the European Union concerns a *central area of economic criminal law*. It is therefore a justified and reasonable concern of the European Union to improve and further develop criminal law protection in this area in particular.

2. The European Union has not only related the fight against protecting the European Union's financial interests to *fraud* and *(serious) VAT evasion* but justifiably also to *corruption and money laundering.*

3. The *fight against customs offences,* where the relationship between customs debt and sanctions has been restructured since the revision of the Union Customs Code in 2016, must also be included.

4. In addition to anti-money laundering and occupational safety measures, government–private co-regulation for *data protection* must also be put in place as a new, important focal point.

a) The area of occupational safety is largely covered by the protection of human rights under the law on fines within the framework of chain responsibility. Here, an independent concept is pursued, which is to be fitted into corporate responsibility under fine law.

b) Concerning data protection, it should be ensured that the penalties under the law on fines are applied uniformly in all Member States.

5. Furthermore, *climate and environmental protection under criminal law,* which affects *people's livelihoods,* should occupy a position in the European Union's legal policy comparable to the protection of the financial interests of the European Union.

6. The *individual criminal law of the Member States, criminal sanctions against legal persons and enterprise fines* must be coordinated.

7. *The sanctions under fine law against legal persons and enterprises in the sense of the "economic unit"* should be coordinated.

8. If there is no fixed upper limit for the fines imposed on legal persons and enterprises, the principle of the rule of law requires the enactment of binding sentencing guidelines. These should be issued by the legislature so that they are also binding for the courts.

II. The necessity of further development of the law on criminal and administrative penalty proceedings

9. The law on criminal and administrative fines must be made subject to the *criminal constitutional requirements of the member states, the Charter of Fundamental Rights and the European Convention on Human Rights.*

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[19] https://www.justice.gov/criminal-fraud/page/file/937501/download (last visited 20 December 2022).

10. The *position of legal persons and enterprises (economic units) as subjects of proceedings* against which criminal and administrative penalties are imposed requires that the *guarantees of criminal procedure,* in particular the rights of the accused, the principles of *nemo tenetur*, *ne bis in idem* and the right to file inspection, be guaranteed.

11. Furthermore, *comprehensive and effective legal protection* against state intervention has to be guaranteed.

12. The *imposition of administrative, criminal and civil sanctions* must be *proportionate* overall. Procedural rules must ensure this. This requires an *integrated procedure regulated by statutory law*.

13. The *ne bis in idem* principle does not apply to non-EU countries. Criminal sanctions and fines imposed in third countries must be taken into account in the case of renewed sanctioning in the European Union.

III. Need for Further Development of the Right to Confiscate and the Reimbursement of Damages from Confiscated Funds

14. *Criminal confiscation* is a legal institution that is harmonized concerning the preconditions for confiscation but requires *further legal regulations* with regard to its handling.

15. This legal institution, which is directly related to criminal sanctions and is applied within the framework of the investigation and criminal proceedings, should primarily *benefit the victims* who have a claim for damages. The *process of awarding damages* has so far been inadequately designed.

16. In particular, *special regulations* are needed *for the reimbursement of damages to victims from the confiscated funds,* especially as far as *foreign victims* are concerned. For this purpose, there is a need for specially regulated official procedures for compensation of damages, which lead to the relief of the public prosecutor's office and the criminal courts.

References

1. Dannecker, G., Farkas, A., Judit, J., *Conclusion and recommendation of the project*. In: A. Farkas, G. Dannecker, J. Jacsó, (eds.), *External, internal and criminal investigations of criminal offences affecting the financial interests of the European Union*, Wolters Kluwer Hungary, Budapest, 2022, https://euinv.uni-miskolc.hu/study.

2. Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law. OJ L 284, 12.11.2018, pp. 22-30.

European Union Agency for Criminal Justice Cooperation: Eurojust Report on Money Laundering Criminal Justice Across Borders October 2022. https://www.eurojust.europa.eu/publication/eurojust-report-money-laundering (last visited 05 November 2022)

Farkas, A., Dannecker, G., Jacsó, J., (eds.), *External, internal and criminal investigation of the criminal offences affecting the financial interests of the European* Union, Wolters Kluwer, Budapest, 2022. The volume can be downloaded from the website of the project: https://euinv.uni-miskolc.hu/files/20573/Hercule_tanulmanykotet_fedel_beliv_1_502old.pdf.

3. HERCULE III PROJECT (Nr. 101015428 — EUINVESTIGUNIMISKOLC) – "Certain questions of the external, internal and criminal investigation of the criminal

offences affecting the financial interests of the European Union (fraud, corruption, money laundering and other illegal activities against the financial interests of the EU) with special focus on the role of OLAF, EPPO, Eurojust, and Europol"; web site of the project: https://euinv.uni-miskolc.hu/en.

4. HERCULE III PROJECT (Nr. 786253 – HUUNIMISKOLCPFI) - "Criminal law protection of the financial interests of the EU – Focusing on money laundering, tax fraud, corruption and on criminal compliance in the national legal systems with reference to cybercrime"; web site of the project: https://hercule.uni-miskolc.hu/EN.

5. https://eucrim.eu/news/aml-package-ii-commission-proposes-aml-regulation/ (last visited 9 October 2022)

6. https://www.eurojust.europa.eu/sites/default/files/assets/eurojust-report-money-laundering-2022.pdf (last visited 05 November 2022)

7. International standards on combating money launderinng and the financing of terrorism & proliferatio. The FATF Recommandations adopted by the FATF Plenary n Februar 2012. Udapted March 2022. https://www.fatf-gafi.org/publications/ fatfrecommendations/ documents/fatf-recommendations.html (30.11.2022).

8. Proposal for a Regulation of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010, COM/2021/421 final.

9. Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders. OJ L 303, 28.11.2018, pp. 1-38.

10. Regulation (EU) 2022/991 of the European Parliament and of the Council of 8 June 2022 amending Regulation (EU) 2016/794, as regards Europol's cooperation with private parties, the processing of personal data by Europol in support of criminal investigations, and Europol's role in research and innovation, OJ L 169, 27.6.2022.

Permissible Risk in Medical Malpractice – the Criminal Law Perspective

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Abstract

The present paper deals with permissible risk in the context of potentially criminal conduct by healthcare professionals. In practice, we have come across several cases involving wrongful death or bodily harm committed by doctors, and in most of these cases the doctors have claimed strict compliance with professional standards. Although some of them ended up in the prosecution phase, a significant number of defendants were convicted. Also, checking the case law in the field, only 8% of cases of culpable homicide, respectively culpable bodily injury, ended with acquittals, acquittals that were wrongly based, as we will show in the article, on the provisions of Article 16 para. 1 letter b) sentence II of the Criminal Procedure Code. Romanian jurisprudence also reveals that defendants who have this status do not follow the procedure of admission of guilt, invoking precisely the respect of the professional standard, and the practice of the courts is in the sense of lack of guilt in this context, a solution that is incompatible with the simplified procedure of admission of guilt.

The aim of this paper is to clarify the concept of permissible risk and to frame it correctly within the architecture of the offence. At the same time, we will analyse a number of cases in the case law where either a breach of the professional standard has been found or where it has been held that this standard has been respected by the doctor.

Keywords: *criminal law; permissible risk; professional standard; healthcare professionals; lack of guilt*

I. Initial issues

The permissible risk is not regulated by law but it`s classified in the doctrine as a ground for excluding wrongdoing because conduct involving a danger of harm to legal values is nevertheless permitted or authorized by law, provided that a certain level of risk is not exceeded because precautionary or control measures are taken to keep it within socially and legally acceptable limits in a balancing of interests[1].

This concept is closely related to the theory of objective imputation of the result, considering that imputation will be excluded when the action that caused the result does not exceed the limits of the risk allowed by law. We note that the Argentinian author E. Bagicalupo links permissible risk to typicality, more precisely to causality[2]. Thus, foreign doctrine speaks of those risks that society tolerates because they are

[1] G. Jakobs, *Derecho penal. Parte general. 2ª edición ampliada y corregida*, trad. de Joaquín Cuello Contreras y José L. Serramo González de Murillo, Editorial Marcial Pons, Madrid, 1997, p. 44.

[2] E. Bagigalupo, *Derecho penal. Parte general*, Ed. Hammurabi, Buenos Aires, 1999, p. 273.

considered necessary for social development. For example, the installation of an atomic reactor entails certain risks, but these risks are accepted by society[3].

The treatment of patients by doctors in compliance with *lex artis* falls within the scope of permissible risk, and in those cases where the death or bodily injury of the patient occurs but the medical act is in accordance with professional standards, the act lacks typicality, and procedurally it must be closed, respectively acquittal under Article 16 para. (1) letter b) sentence I from Romanian Criminal Procedure Code[4].

In our view, medical risk is inherent to medical practice and proportional to the degree of scientific development on which a particular case is grafted. Thus, the doctor must be placed in an area of professional autonomy and compliance with professional standards must be verified by a specialist commission.

The medical standards are often laid down in medical guidelines without having the force of criminal law in the strict sense of the word because the recommendations are generic and are based on an abstract disease and patient, while in practice the doctor is called upon to make these standards specific to each patient.

According to Article 53 of the Medical Ethics Code, the doctor's obligation is a duty of care (of diligence). Hence, even in the event of an incomplete assessment of the patient's situation at a given time, the doctor cannot be held liable for malpractice, let alone criminal liability, if the way in which he acted was within the usual standards of professional practice[5].

The standard of practice is assessed according to the specialty and complexity of the medical procedure chosen and applied, on the one hand, and the state of medical science at the time, on the other. Thus, medical activity can be considered culpable if it contravenes a practice accepted by at least part of medical science at a given time, the harmful results being precisely the consequence of the violation of a standard of practice specific to a medical field.

Hence, a doctor will not be criminally liable if he is acting in accordance with a medical practice accepted at the time by at least part of the medical profession, even though there may be other doctors who adopt a different practice.

In the medical literature, reference has been made to various causes likely to appear on the line of causal relationship, causes that have received the name of "medical risk", the doctor being placed in an area of professional autonomy[6].

II. Permissible risk and the offence of culpable bodily harm under art. 196 para. 3 Romanian Criminal Code

According to Art.196 para. (3) of the Romanian Criminal Code, the offence of culpable bodily injury is considered aggravated if it is committed *"as a result of failure to comply with legal provisions or measures for the exercise of a profession or trade or the performance of an activity".*

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[3] M. Cancio, *Los orígenes de la adecuatíon social*, Ed. Universidad Externado, Bogota, 2017, p. 415.

[4] C. Roxin, *Derecho penal. Parte general. Tomo I. Fundamentas. La estructura de la teoria del delito*, Ed. Cìvitas, Madrid, 2014, p. 363.

[5] Code of Medical Ethics of the Romanian College of Physicians from 04.11.2016 published in the Official Journal, Part I, No 981 of 7 December 2016.

[6] R. Dumitrescu, *Fenomenul malpraxisului medical în România – perspective etice* in Medichub Media, available at www.medihub.ro.

Therefore, the discussion is carried out on the level of specialized conduct required by the activity, and then the conduct of the active subject is compared with the abstract conduct required by the professional standard in the matter.

In one case, a surgeon was found guilty of culpable conduct when, while performing an orchidectomy operation on the injured party, he mistakenly removed his healthy right testicle instead of his left testicle, which was affected by a tumor, thereby causing him disability. It is clear from the evidence in the case that, at the end of the operation, while recording the activities carried out in the medical documents, the defendant stated to the entire medical team that 'I excised the healthy testicle'. In this case, it is possible to identify a failure to comply with professional standards, given that the doctor was obliged to check the documents and to locate the organ to be excised topographically correctly[7].

In another case brought before the Brasov Court of Appeal, it was found that the injured person went to the UPU where he was examined by the defendant who wrote him a prescription and sent him home because he did not consider it necessary to admit him. On the same day, his health condition deteriorated, and he was brought back to hospital and diagnosed with hemorrhagic stroke. The injured person was finally classified as severely impaired. What is interesting in this case are the contradictory findings of the forensic experts. In the first forensic report drawn up in the case, it is stated that the approach was in accordance with the approach of a doctor serving a health unit intended to deal strictly with emergency cases given that the general condition of the patient at that time did not suggest a medical emergency requiring the initiation of special treatment and hospitalization measures. The second forensic report drawn up by the National Institute of Forensic Medicine shows that at the time of the patient's presentation to the UPU, a minimum of laboratory investigations, hospitalization and emergency initiation of specific treatment were required. In this context, the court of judicial review ordered the conviction of the defendant, finding that there had been a breach of professional standards[8].

In a similar case, the defendant was charged with the fact that he did not request a post-operative neurological consultation which would have been useful both to verify the existence of a neurological lesion, which resulted in paresis and therefore permanent physical disability. The court, on the grounds of the forensic expert opinion, held that the defendant had complied with the recommended medical standards, making a correct and complete diagnosis in a context in which a neurological consultation, although useful, was not mandatory. At the same time, it was also stated that, due to the type of surgery, the patient was subject to a significant risk that cannot be ignored, while the witnesses heard in the case did not confirm the existence of any incident during the surgery or the use of an aggressive surgical technique by the defendant[9].

III. Permissible risk and the offenxe of culpable homicide under article 192 para. 2 of the Romanian Criminal Code

Similarly to the offence of culpable bodily harm, according to Art. 192 para. (2) of the Criminal Code, the offence of culpable homicide will be considered aggravated if it

[7] Decision no. 143/2023 of 24.02.2023 ruled by the Court of Miercurea Ciuc, available on rejust.ro.
[8] Decision no. 508/2019 of 25.06.2019 ruled by the Court of Appeal Brasov, available on rejust.ro.
[9] Decision no. 735/2020 of 30.07.2020 ruled by the Bucharest Court of Appeal, available on rejust.ro.

is committed "as a result of failure to comply with legal provisions or measures for the exercise of a profession or trade or the performance of an activity".

In another interesting case, a nurse on the ICU ward was convicted for wrongly determining the patient's blood group by performing a single method pretransfusion test, which determined that the victim had blood group AII, although in fact she had blood group B, after which she was given two units of blood group AII, resulting in death[10].

The present case is relevant because the causal link was argued by the court by direct reference to the concept of non-permissible risk. Thus, the perpetrator's conduct which led to the typical result was from the beginning a dangerous one, i.e. one which created a certain likelihood of producing an injury or endangering the protected social value. At the same time, the wrong determination of the blood group endangered the victim's life, given the victim's pre-existing pathologies, and the death was not directly caused by any other cause unrelated to the defendants' activity.

Also, in a case involving the offence of culpable homicide, a surgeon was charged with failing to recognize the complication of necrotizing fasciitis following surgery on a patient, labelling the symptoms as caused by alcohol withdrawal and belatedly making the diagnosis due to misinterpretation of clinical signs. In the present case, the court analyzed the legal obligations imposed on the doctor to carry out his activity and found that no obligation had been breached by him[11].

Although the court's decision is basically correct, the arguments are more in the direction of the lack of guilt from the perspective of the intellective component than in the direction of the lack of objective typicality in relation to the causal link. Thus, it is stated that "like any form of guilt, fault – including professional fault – must be proved". This sentence continues, in our view, in a critical manner, along the lines of causality, stating that "no causal link can be established between the activity of culpable homicide and the result produced, the death of the victim".

Despite this slightly confusing situation, the court correctly analyzed the standard of practice in relation to which the doctor's conduct could be assessed as improper. Thus, an overall analysis of the factual situation was carried out, concluding that no violation of medical rules could be identified and that the defendants did not fail to comply with medical protocols, leading to an acquittal.

IV. Compliance with professional standards – evidential value of forensic expertise

In practice, forensic expertise is ordered from the outset of criminal proceedings and is one of the most important and complex evidentiary procedures in cases of medical malpractice. There are a number of standard aims specific to cases of culpable bodily injury, i.e. wrongful death, committed by a doctor, which are directly related to the risk involved.

Therefore, among the common aims encountered in practice, we can list the existence of errors in medical technique and conduct during hospitalization, their identification, who committed them and what consequences they produced, respectively

[10] Decision no. 397/2022 of 10.06.2022 ruled by the Court of Sector 1 Bucharest, available on rejust.ro.
[11] Decision no. 32/2023 of 13.02.2023 ruled by the Court of Curtea de Argeș, available on rejust.ro.

whether there is a causal link between the errors in medical technique and the injury or death. At the same time, it must also be pointed out that the practice often resorts to a forensic finding, with the same objectives as the expertise. What is dangerous in such situations is the possibility that this forensic finding can be excluded in pre-trial proceedings.

Reading Article 172 para. (9) of the Criminal Procedure Code, it is clear that three alternative conditions must be met in order for the prosecution to use this evidentiary procedure: (i) when there is a danger of disappearance of evidence; (ii) when there is a danger of a change in factual situations or (iii) when it is necessary to clarify urgently certain facts or circumstances of the case.

It is true that the use of a forensic finding rather than an expertise is a matter of opportunity rather than legality, and in the criminal prosecution phase, the prosecution body is the only authority entitled to use a particular evidentiary procedure or a particular means of evidence or another.

However, whether the prosecutor or, as the case may be, the criminal investigation body complies with the conditions prescribed by law when opting for an evidentiary procedure or means of proof is a matter of the legality of the acts of criminal prosecution and is a matter for the preliminary chamber or pre-trial proceedings.

In other words, the preliminary chamber judge does not have the legal authority to examine the opportunity to dispose of an evidentiary procedure or the use of evidence during the criminal proceedings, but he has the legal authority to examine whether the prosecuting authority has complied with the law when deciding to use that evidentiary procedure or evidence.

The rulings of the Constitutional Court are also relevant in these matters, the Constitutional Court stating that "the order to make a finding will always be the exception, and it can only be made if the conditions laid down in Article 172 para. (9) of the Code of Criminal Procedure[12].

Although in cases of medical malpractice, urgency can be presumed, given that time can lead to a healing of the injuries (if we are talking about days of medical care in the case of the offence of culpable bodily injury), the performance of the forensic finding should be treated as the exception, as it is a non-contradictory procedure and thus offers less guarantees than the expertise[13].

V. The relationship between the surgeon and the anestethist – grounds for establishing theit liability

As has been pointed out recently in the literature, the anesthetist was initially held liable not only for harm resulting from the way in which anesthesia itself was carried out or from other therapeutic interventions of his specialty (e.g. interventions in intensive care or resuscitation work), but also for harm resulting from the way in which he fulfilled his duty to supervise the patient[14].

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[12] Decision of the Constitutional Court No 460 of 5 July 2018, published in Official Monitor of Romania, Part I, No 979 of 20 November 2018, para. 51.

[13] According to Article 172 para. (8) of the Criminal Procedure Code, authorized experts may participate in the expert's report at the request of the parties.

[14] I. Kuglay, *Răspunderea penală pentru malpraxisul medical*, Ed. C.H. Beck, București, 2021, p. 55.

In this respect, the anesthetist is responsible for his acts during the pre-operative, operative and post-operative period, and from the moment the surgeon has left the operating room, the patient is under the responsibility of the anesthetist[15].

In another common law approach, the surgeon is considered to control and supervise the actions of the anesthetist. In Chalmers-Francis v. Nelson, the Supreme Court held that "the surgeon has the power and therefore the duty to direct the participants and their actions during the operation"[16].

In this context, the doctrine advocated the idea of the anesthesiologist as a "legal servant" of the surgeon, the arguments revolving around this being rather anachronistic and based on the idea of the patient's trust in the surgeon and the supposedly secondary role that the anesthesiologist plays[17].

A few ideas worth discussing were set out by the Supreme Court in the famous *Hillyer* case, where during surgery, while the patient was under anesthesia, his hands hung over the sides of the operating table, and one limb ended up being burnt by the hot water canister, while another suffered permanent nerve damage as a result of being pressed against the table. Although legal action was taken against the anesthetist and the hospital, it failed. The court ruled that the surgeon rather than the hospital or the anesthetist was the "legal master" of the hospital employees in the operating theatre[18].

It is true that the surgeon has the obligation to supervise the smooth running of the operation as a whole, but all the obligations of the professionals involved in a team must be taken into account. Thus, in a case brought before the French Court of Cassation, both the surgeon and the anesthetist were held liable, thereby establishing a permanent duty of care and diligence incumbent on the surgeon. In fact, after a tonsillectomy operation, both the surgeon and the anesthetist immediately left the clinic, leaving the patient unattended, the latter dying as a result of cardio-respiratory problems caused by the lack of post-operative anesthetic supervision[19].

Therefore, the surgeon has a duty of supervision, and it is his duty to ensure the smooth running of the operation, both pre-operatively, during the operation and post-operatively, by checking how each member of the team fulfils his or her obligations[20].

VI. Professional standars and forseeability of the criminal provisions

Any regulatory act must meet certain qualitative conditions, including predictability, which means that it must be sufficiently precise and clear to be enforceable[21].

The European Court of Human Rights has ruled that the law must indeed be accessible and foreseeable as to its effects. For the law to satisfy the requirement of foreseeability, it must specify with sufficient clarity the scope and manner of exercise

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[15] *Ibidem.*

[16] Available at https://casetext.com/case/chalmers-francis-v-nelson, accessed on 27.05.2023.

[17] J. Harland, A.. Mewett, *The legal relationship between the surgeon and the anesthetist*, in Springer,Vol. 6, No. 4, 1959, p. 305.

[18] *Ibidem.*

[19] Court of Cassation, Decision No 432 of 30 May 1986, available at https://www.legifrance.gouv.

[20] *Ibidem*.

[21] Decision of the Constitutional Court No 189 of 2 March 2006, published in the Official Monitor of Romania, Part I, No 307 of 5 April 2006.

of the discretion of the authorities in the area concerned, having regard to the legitimate aim pursued, in order to afford the individual adequate protection against arbitrary action[22].

The medical standard is regulated by law in a general manner in Art. 663 para. (1) of the Law No 95/2006 on health care reform, which mentions the obligation of the doctor to provide care to the patient.

At the same time, medical obligations are stipulated in normative acts that are inferior to the law, such as the Code of Medical Ethics or the Protocols of medical units. In this context, even an obligation stipulated in the job description may constitute the source of a professional obligation and, consequently, an instrument for setting the professional standard.

In view of the majority infralegal character of these sources, the constitutionality of the provisions of Article 192 para. (2) and Art. 196 para. (3) of the Criminal Code.

In decision 405/2016 of the Constitutional Court, the Court ruled that the violation of the official's duties can be criminalized only if it constitutes a violation of the law in the narrow sense and not a violation of a normative act of inferior force[23].

The question therefore arises as to whether all the rules governing the conduct of medical activity must be regulated by law or by government emergency ordinances in order for culpable acts committed in the course of such activity to constitute a criminal offence. Along with other authors, we consider that the answer is in the negative, as Decision 405/2016 is not applicable to offences against the person, given the importance of these offences in the axiology of the legal system[24].

VII. The procedural solution

As we have already stated, if the doctor's conduct is within the limit of the permissible risk, i.e. no fault can be identified in the medical act, the discussion will focus on the objective side. Therefore, the correct procedural basis is acquittal under Article 16 par. (1) letter b), first thesis of the Criminal Procedure Code – the act is not provided for by criminal law.

In the past, there was a tendency for the courts to use the basis provided for in Article 16 par. (1) letter b) 2nd thesis of the Criminal Procedure Code – the act is not committed with the form of guilt provided for by law. A change of perspective can now be noted with the adoption of the theory of objective imputation of the result.

However, it has been pointed out in the literature that, although the procedural basis of Thesis I is correct, the substantive correspondence is debatable. Thus, it has been stated that the existence of identity between the actual conduct of the doctor and the ideal conduct leads to the evasion of the essential condition attached to the objective side, the act not being typical in relation to the pattern of the rule in the aggravated form[25].

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[22] Judgment of 4 May 2000, Rotaru v. Romania, para. 52; Judgment of 25 January 2007, Sissanis v. Romania, para. 66.

[23] F. Streteanu, *Considerații privind regimul normelor penale incomplete în lumina jurisprudenței recente a Curții Constituționale*, in CDP No 4/2016, p. 23.

[24] I. Kuglay, *op. cit.*, p. 28.

[25] *Ibidem*, p. 63.

VIII. Conclusions

Although it remains a concept not yet established in judicial practice, the permissible risk is nonetheless omnipresent, given that acquittals in the area focus on the non-existence of the dangerous conduct.

Medical activity is essentially a risky activity and any conduct of medical staff must remain within the limits of this risk.

The adoption of a standard that does not conform to the ideal standard entails the assumption that the offence of culpable bodily harm, or culpable homicide in the aggravated form, is typical.

Medical risk is inherent in medical practice and proportional to the degree of scientific development, so that it is impossible for the legislature to anticipate developments that may occur in this area.

References

1. Bacigalupo, E., Derecho penal. Parte general, Ed. Hammurabi, Buenos Aires, 1999;
2. Cancio, M., Los orígenes de la adecuatíon social, Ed, Universidad Externado, Bogota, 2017;
3. Dumitrescu, R., Fenomenul malpraxisului medical în România – perspective etice in Medichub Media, available at www.medihub.ro;
4. Jakobs, G., Derecho penal. Parte general. 2ª edición ampliada y corregida, trad. de Joaquín Cuello Contreras y José L. Serramo González de Murillo. Editorial Marcial Pons, Madrid, 1997;
5. Roxin, C., Derecho penal. Parte general. Tomo I. Fundamentas. La estructura de la teoria del delito, Ed. Cìvitas, Madrid, 2014;
6. Streteanu, F., Consideraţii privind regimul normelor penale incomplete în lumina jurisprudenţei recente a Curţii Constituţionale, in CDP, Number 4/2016;
7. Kuglay, I., Răspunderea penală pentru malpraxisul medical, Ed. C.H. Beck, Bucureşti, 2021;
8. Harland, J., Mewett, A., The legal relationship between the surgeon and the anesthetist, in Springer, Vol. 6, No. 4/1959.

Evidential Anomalies in Criminal Proceedings – the Use of Circumstantial Evidence

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Abstract

In criminal proceedings there are a number of difficulties in establishing proof. Evidence is always aimed at clarifying a past event, which clarification is made possible by evidence from the means of evidence. One could say that circumstantial evidence refers to the secondary circumstances related to the criminally relevant facts and, after proving these secondary circumstances, a conclusion can be drawn on the further fact, such as the fact of the crime and the identity of the perpetrator.

Circumstantial evidence is related to the main issue to be proved, or one of its elements, and can prove the main issue through the related fact in such a way that the court (prosecution, investigative authority) can draw conclusions from the circumstantial evidence, first to another fact and then to the fact to be proved relevant for prosecution. Circumstantial evidence is a particularly important component of correct, legal factual inference and, through the emergence of the structures of consciousness discussed later, of judicial conviction, the subjective elements of judicial reasoning. Circumstantial evidence is in fact an inference from fact to fact. In the case of circumstantial evidence, the emphasis is not on what the evidence is, but on its connection with other evidence. It is essential that the factual inference is made by a court and that it records both what it has inferred and what it has concluded. In the context of the jurisprudential practice regarding circumstantial evidence, in other words, when there is no direct evidence of the event relevant to criminal law, in contrast to the jurisprudential practice of the Curia, we agree with the views in the legal literature criticizing the chain theory. In the authors' view, there can be no doubt that the introduction of this interpretation of circumstantial evidence in the practice of the courts would resolve the rigidity of the interpretation of the Curia and could contribute to the ascertainability of the substantive truth.

Keywords: *circumstantial evidence, criminal proceedings, evidential anomalies, theories, direct evidence*

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I. Introduction

In criminal proceedings (but in fact in all proceedings where determining legal liability is based on the clarification of a past event) there are several difficulties in establishing proof. In this paper, I want to review the problem of proof using circumstantial evidence from the perspective of its impact on the establishment of substantive truth.

Evidence is therefore always aimed at clarifying a past event, which clarification is made possible by evidence from the means of evidence. "Proof is essentially a complex and indirect process of cognition and, as a process of cognition, it can never be without direct sensory experience. However, in the case of circumstantial evidence, the basic problem is that the fact relevant for criminal law – namely, the fact to be proved – does not become known, perceivable or decodable on the basis of the acquisition and examination of the evidence, because here cognition follows a more complicated path, and circumstantial evidence as such first raises the question of informative direction, and then the question of factual direction. Thus, with regard to all circumstantial evidence, phenomena, side facts, related facts and, circumstances – in short, *indicia* (indicators) – the establishment and clarification of which are followed by conclusions on the existence or non-existence of a fact relevant to criminal law, must first be treated as facts to be proved on the basis of the source criticism, based on assessing the credibility of the available means of proof"[1].

II. Theories

Three theoretical backgrounds to circumstantial evidence have emerged. In the middle of the last century, the so-called chain theory became dominant. The theory was founded by Mittermayer and Hans Gross, and their ideas were brought to life by Vyshinsky[2]. The chain theory is that if there is no direct evidence to prove a fact, the fact can be proved using circumstantial evidence. However, this requires that the circumstantial evidence must form a chain of closely related, closed texts, and if even only one link is missing, this absence alone precludes the success of the circumstantial evidence. According to Vyshinsky, the significance of circumstantial evidence is not determined by the nature and quality of the evidence, but by its position in relation to other evidence. In conclusion:

- the relevance of the circumstantial evidence derives from its connection with other evidence;
- the interrelationship of circumstantial evidence must be such that all circumstantial evidence forms a single chain;
- if a single link falls out, the whole chain falls apart, because circumstantial evidence is left to itself,
- circumstantial evidence left to itself is individually insignificant;
- circumstantial evidence must be consistent with the fact to be proved;

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[1] F.Tremmel, *Bizonyítékok a büntetőeljárásban (Evidence in criminal proceedings),* Budapest–Pécs, Dialóg Campus Publishing, 2006, p. 109.

[2] A. Januaryevich Vyshinsky, *A perbeli bizonyítás elmélete a szovjet jogban (The Theory of Judicial Proof in Soviet Law)*, Budapest, Akadémiai Kiadó, 1952.

- none of the circumstantial evidence can be proven to the contrary; *and*
- all these must exclude all other possible alternatives beyond reasonable doubt.

It is also clear from Tremmel's reasoning that direct evidence, by its very existence, makes it relevant to prove a fact that is relevant according to criminal law, which otherwise even a single piece of evidence is fully capable of doing. In the case of circumstantial evidence, on the other hand, only after the facts proved by the circumstantial evidence have been clarified can the conclusion be drawn as to the existence or non-existence of a fact relevant for criminal liability. In the latter case, it is impossible for a single piece of circumstantial evidence to establish the criminal liability of the accused beyond reasonable doubt.

One could say that circumstantial evidence refers to the secondary circumstances related to the criminally relevant facts and, after proving these secondary circumstances, a conclusion can be drawn on the further fact, such as the fact of the crime and the identity of the perpetrator. Thus, for example, if the accused denies that he could have killed the victim by stabbing him several times, if it is established that, at the time of the crime, the accused was undoubtedly the only person in the victim's home, it can be clearly inferred from this proven and essentially incidental circumstance that the crime was committed by the accused. However, on the plane of logic, this has several conditions, such as

a) The time of the crime must be proven; in other words, the medical examiner must establish the time of death of the victim as accurately as possible.

b) It must be clearly proven (e.g. by witness statements) that the accused was present in the victim's home at the time of the victim's death. This can be achieved, for example, by the fact that the witness living in the opposite apartment saw the accused walking around in the victim's apartment several times during the time-period in question.

c) It must be proven that the victim could not have taken their own life, in which case again the medical expert's opinion is only relevant if it excludes self-inflicted injuries.

d) It must be proven that no other person was present in the victim's home at the time of the offence, for example by a camera installed and operating towards the front door of the home, so that the camera footage clearly shows that only the offender entered the victim's home.

These are the facts to be proved, which on their own are capable of forming a closed chain of evidence that clearly excludes the possibility that the crime was committed by another person.

There may, however, be other secondary circumstances that make this closed chain even stronger; for example, if it can be proved that the offender owns the instrument of the crime or if the bloodstain on the offender's clothing is from the victim.

In other words, circumstantial evidence is related to the main issue to be proved, or one of its elements, and can prove the main issue through the related fact in such a way that the court (prosecution, investigative authority) can draw conclusions from the circumstantial evidence, first to another fact and then to the fact to be proved relevant for prosecution. After the so-called intervening fact has been proved, it is possible to move on to the fact to be proved that affects the main issue.

"On the basis of the examples given, we can also say that, in the case of direct evidence, it is enough to deal with the informative direction, and then we accept the

direct evidence, and we can establish the relevant facts in criminal law, namely whether the act took place and the identity of the perpetrator. With regard to direct evidence, such cases and their focal points are practically one-sided. On the contrary, in the case of circumstantial evidence, we are always talking about ambiguous situations, problems, the further inference from the related fact, the indicium, the fact relevant to the decision on the case in criminal law terms is ambiguous, several versions can be established, several versions have probability"[3].

According to Háger, *"Evidence is considered direct if the data drawn from a lawful source relates to the criminally relevant fact itself and, therefore, if direct evidence is admitted, the criminally relevant fact can be established immediately*". However, in the case of circumstantial evidence, the direct data from a lawful source does not directly relate to the criminal fact itself, but only to another "intermediate" fact in some connection or context.

Circumstantial evidence is a particularly important component of correct, legal factual inference and, through the emergence of the structures of consciousness discussed later, of judicial conviction, the subjective elements of judicial reasoning.

A distinction can be made between circumstantial evidence in the procedural sense and circumstantial evidence in the logical sense. From a perverse point of view, evidence is circumstantial if it is not taken by the court conducting the proceedings, but by a judge on secondment or by a court seized. The basis of circumstantial evidence in the logical sense is that every positive statement has a negative effect; in other words, it necessarily excludes facts that contradict the established facts, which can be called logical truth. The two basic forms of circumstantial evidence are apagogical and disjunctive evidence. The former establishes categorical conclusions when it states two facts that are completely mutually exclusive. In criminal cases, however, circumstantial evidence is typically disjunctive in nature, because it is usually necessary to refute each possibility in turn. The cognitive process that characterizes circumstantial evidence is arguably more complex and sophisticated than that regarding direct evidence. In an undoubtedly complex logical process, the judge has to move from the available clues as provisional facts, often in a multi-step process, to the "final facts," which can be proven beyond reasonable doubt. Tremmel rejects the "chain of custody" theory often invoked in court decisions, derived from Vyshinsky, and instead argues for the synergy of circumstantial evidence, pointing out that circumstantial evidence is also relevant in cases involving direct evidence. As I have already mentioned, chain theory says that the interconnectedness of circumstantial evidence must be such that it all forms a chain, and that if one link is lost, the whole chain breaks down. Tremmel disputes this and I share his view. The chain of evidence can indeed be established in many cases, but the exclusion of some evidence, whether for procedural or substantive reasons, does not necessarily break the logical order of the process of evaluating evidence"[4].

I note that Kertész's view was that the chain theory was wrong, even at its inception, while Tibor Király pointed out that pieces of circumstantial evidence do not appear in relation to each other, but independently, in isolation. Tóth argues that

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[3] Tremmel, *op. cit.*, p. 110.

[4] T. Háger, *Gondolatok a büntetőeljárás fogalmáról és a bizonyítás elméleti hátteréről* (Reflections on the Concept of Criminal Procedure and the Theoretical Background of Evidence), Budapest, *Iustum Aequum Salutare,* 2014/3, pp. 60-61.

"Some of the requirements summarized by Vyshinsky have indeed become out of date, and it can perhaps be argued that their general validity was doubtful even when they were formulated. It cannot be agreed, for example, that all the elements of a coherent chain must connect the evidential fact to the primary fact to be proved through unbroken transmissions in a perfectly closed system, and even the complete exclusion of possible conclusions to the contrary is not necessarily a realistic requirement. It is not in the case of the existence of a chain of evidence that any conflicting evidence concerning the individual components should be excluded, but it is precisely the exclusion of conflicting evidence that can join up the individual links"[5].

III. Curia's case-law

The Curia deals with the issue in great detail in the case BH. 2021.35.

According to the reasoning of the Curia, *"The fact-finding activity of the court is inherently an indirect cognitive activity – based on factual inference – since it is not a direct observer of the fact to be proved. Circumstantial evidence is further mediation (referral)".*

Pursuant to Section 163 (1) of the Code of Criminal Procedure, a fact to be proved is that which is relevant to the application of the substantive or procedural criminal law in a given case. The evidence is the proof of the fact to be proved, and the source (the means of obtaining knowledge of it) is the means of proof. Evidence is therefore the content of the statement, document etc., based on which and from which the court establishes the facts. A personal or material means of evidence (witness, document etc.) to whom or through which the court acquires knowledge of the evidence.

The relationship between the evidence and the fact to be proved – in other words, the proof and the evidence – can be direct or circumstantial (indirect). Evidence is circumstantial if it does not refer to the fact to be proved a priori, directly, explicitly (explicitly) and conclusively, but merely points to another fact – one or more intervening, subsidiary facts – which is nevertheless relevant because it can be used to draw a conclusion on the fact to be proved (conclusively).

Circumstantial evidence is a type of evidence in case of which there is no direct evidence, no confession or testimony based on a direct perception or observation of

[5] E. Belovics, M. Tóth, *Büntető eljárásjog. Negyedik, aktualizált kiadás. Az új büntetőeljárási törvény (2017. évi XC. törvény) tankönyve* (*Criminal procedure law. Fourth, updated edition. Textbook of the new Criminal Procedure Act (Act XC of 2017*). Budapest, HVG-ORAC Lap- és Könyvkiadó Kft., 2019, p. 156. Mihály Tóth also points out that Vyshinsky's theory is generally rejected, but in fact it is because he was involved in the sentencing to death of hundreds of innocent people as the chief prosecutor in Soviet conspiracy trials, and it is because of his actions, that the series of conflicts in lawbreaking between principle and practice became apparent. Mihály Tóth also refers to two other indirect theories of proof in addition to the theory of the link in judicial practice. One is the so-called rope theory, the essence of which is that the facts to be proved must be combined with the facts that can be proved by summing up the strength of several strands appearing in parallel, so that each strand becomes a cord, the cord becomes a twine, the twine becomes a rope, and although the strands, cords and twines, cannot individually support the weight hung on them, but the union as a rope can do so as a multiplied force, and the loss or breakage of one or two strands of thread etc. does not prevent the rope from doing its job. Finally, Mihály Tóth introduces the network model, the essence of which is that the relationship of each piece of evidence to the other is less emphasized, the focus being on the relationship with the facts to be proved. In this system, circumstantial evidence is linked by the fact to be proved.

what happened, or no credibility. Circumstantial evidence is always evidence of conscious facts (intentionality, negligence) and it is provided by the scientific method and physical evidence.

Circumstantial evidence (as other evidence) may lead to the finding of a fact, but this is insufficient, as it does not give an inference as to the fact to be proved. A fact established on circumstantial evidence must be capable of giving rise to an inference, either alone or in conjunction with other circumstantial evidence, of an additional fact from which the fact to be proved can be established.

Circumstantial evidence is in fact inference from fact to fact. In the case of circumstantial evidence, the emphasis is not on what the evidence is, but on its connection with other evidence. In comparison, while in the case of direct evidence only the lack of credibility is a condition for establishing the facts, in the case of circumstantial evidence the correctness of the factual conclusion must also be examined.

In this case, the conclusion or its result replaces the content of the direct evidence based on perception (which is considered credible). The essence of finding a fact to be proven is a factual conclusion. This is why the wrong conclusion is one without foundation[6].

In line with this, it is essential that the factual inference is made by a court and that it records both what it has inferred and what it has concluded. It is consistent jurisprudence to distinguish testimony based on perception from testimony based on inference[7].

In comparison, both in the context of the admissibility of circumstantial evidence and with regard to circumstantial evidence, the following elements must be examined:

- factuality or objectivity;
- the logical closure; *and*
- relevance as a counterweight to the logic of form.

The factual nature of the inference means that the circumstantial evidence, although not the evidence to be proved, is based on the perception of a fact which, as the basic data, is credible, reasonably arguable, justified and capable of a justifiable inference. If the source of the circumstantial evidence is an object of evidence, its credibility, including its creation, condition, location and circumstances of its discovery, as well as its capacity to be inferred, must also be examined, *mutatis mutandis*.

Here the Curia notes that in the absence of factual and objective evidence, circumstantial evidence is merely inferential, which is insufficient to produce a result of the same certainty as direct evidence.

The logical closure of the inference means that the circumstantial evidence, together with the consequent fact or the fact obtained from other circumstantial evidence, – alone (exclusively) provides an inference to the fact to be proved; and there are no other facts or circumstances that would refute or cast doubt on it; – it excludes or refutes the possibility of an inference (other version) that is not related to the fact to be proved or to a different or contrary inference.

"In the case of circumstantial evidence, in addition to proving the fact to be proved, it must also be made clear that it is the only one, which means the exclusion or refutation of the contrary circumstance or possibility. Circumstantial evidence is only suitable for proving a fact if it excludes the possibility of any fact other than the one to be proved"[8].

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[6] Code of Criminal Procedure (Be.) section 592 (2) (d).

[7] Court's decision no. BH1958.7.

[8] Court's decision nos. BH1975.164, BH2003.145.

Moreover, relevance means that, although circumstantial evidence alone does not allow an exclusive inference to be drawn on the fact to be proved, its content does not exclude the fact to be proved from its temporal, spatial or other physical context. Consequently, its connection with the object of the evidence has a rational basis. It is not solely opinion, it is conjectural and it is also linked to the material aspect of the fact to be proved.

In comparison, the perpetrator's intent, motivation and motive are necessarily indirect. Motive, on the other hand, is not evidence, but a psychological process that can be established from the proven facts, which is both a concept of substantive law and not a matter of statutory law.

The validity of the truth of a judgment is reality-conditioned, reality-based, and is ensured by the knowledge of reality. Hungarian procedural law allows for this through both circumstantial (indirect) and direct evidence.

The need for a closed chain of circumstantial evidence is undoubted, but it is not a chain of formal logic. The closed-loop nature of circumstantial evidence does not presuppose the smallest and equal size of links. In other words, it is not necessarily the case that the smallest details are proven as well. In fact, that would mean that the knowledge of reality is no longer indirect, but direct. And the closed chain of circumstantial evidence does not require that it shall be composed of evidence of equal value.

The emphasis is set on the closure that connects the two endpoints. Each link must be factual or objective, not speculative; it must be relevant and connected with reality [...], the evidentiary value – the judicial cognizance – is inherently limited.

At the same time, if there is no direct, justified and legitimate explanation for something, it does not mean that it is doubtful. In a lawsuit, from the point of view of evidence in a lawsuit, the statement "I believe it when I see it" does not necessarily have a decisive effect.

In the present case, the decisive fact to be proved is that the accused killed the victim and how this appeared in his mind.

The question is, therefore, whether the path to finding of a fact is the correct one from a procedural point of view, which has two essential points. The first is that the victim's death was caused by a stranger, while the second is that the stranger's hand was the defendant's.

In its judgment, the court of second instance examined the fact-finding activity of the court of first instance throughout and recorded its position on the matter, which the Curia agreed.

The essence of this, according to the Court of Appeal, is to refute the accused's account ("*it is difficult to dispute that he was not there and not when he claimed and not doing what he reported, for example smoking meat, being there between 8 pm and 8.30 pm, but this includes the allegations of being in the vicinity of the victim's workplace between 8 pm. and 9 p.m.; related to this, a conclusion can be drawn from a combined analysis of personal, documentary and communications expert evidence"*)[9].

In this context, it is necessary to refer to the aspects related to the individual assessment of the accused's testimony. In the present case, the accused was questioned as a witness in the administrative procedure; he maintained his testimony in his statement as a suspect, answered further questions, made statements before the investigating

[9] Court's decision nos. BH1975.164, BH2003.145.

judge, and then refused to testify from a stage of the procedure; in other words, he exercised his right to remain silent.

The trial court took into consideration certain details of the accused's testimony and, in comparison with the other data of the proceedings, correctly assessed them in such a way that all the essential parts of the testimony (the background, the alibi, the meeting and the victim's accompaniment, the scattering of the victim's remains) were disproved. However, the accused did not explain the circumstances in which circumstantial evidence was available.

The procedural right under Section 185 (1) of the Criminal Procedure Code – refusal to testify – is a fundamental right of incrimination, and if the accused exercises this possibility, then it is clearly not incriminating. The accused is not obliged to tell the truth.

However, it is also clear that the right to remain silent cannot be an obstacle to taking into account the silence of the accused, in circumstances which clearly require his explanation, in the course of the evidentiary procedure when examining the validity of the evidence provided by the prosecution or obtained by the court[10].

In other words, if the accused remains silent, it is not possible to infer from this that he is in a bad situation (incriminating circumstance), but neither is it possible to infer a good situation (i.e. a factual reality that is favorable to him but does not actually exist). In fact, this is the essence of the requirement under Section 7(4) of the Criminal Procedure Code. Silence in itself implies that there is no justification from the obligor or for a given element of reality.

However, the right of the accused to remain silent does not (cannot) mean that the relevant questions left unanswered (blank) cannot be known, answered or decided based on other information in the proceedings, including facts from circumstantial evidence.

According to the Court of Justice (which is in fact the result of an assessment of the evidence):

- The accused visited the victim at his place of work at the time indicated, parked his car in the yard, it was recorded when he left from there with his vehicle; the accused verified their stay together at the given time – from which the one-way movement between 21.00 and 21.20 in the direction of M.-D. can be deduced – two closely overlapping mobile phone sales of the accused – are not successfully disputable evidence. It is also part of the assessment that, apart from the evidence pointing to a direct link between this accused and the victim, nothing and no one-else can be verifiably linked to it.

- The identification of the remains found is not questionable according to the genetic expert opinion; according to the pathological-medical-chemical expert opinions, the external and internal examination of the remains found confirms the presence of a degree III–IV burn lesion; in other words, the presence of intense heat and the use of a burn accelerant, and the presence of fragments from body parts, i.e. the dismembering and burning of the body in order to destroy and hide it.

- From the evidentiary acts conducted at the three locations, further incriminating evidence was obtained or confirmed that the accused met the victim and, after a telephone call from the police, scattered the victim's remains in the place and manner described in the facts of the case on 29 May at around noon.

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[10] *Averill v United Kingdom*, 36408/97, 6 September 2000, judgment.

- The lack of credibility of the accused's testimony, the location and movements of the accused confirmed from several directions, the movement of the victim, which could be precisely matched to this, and the identical locations at the recorded times, were correctly established in the judgment.

There is no legal reason or justification for reassessing and weighing all this evidence, just as there is no legal reason or justification for doing so in the proceedings at second instance, or at third instance.

From all of this, the court of appeal correctly drew the factual conclusion that, despite the undisclosed details, the accused caused the victim's death"[11].

IV. Conclusion

In the context of the jurisprudential practice regarding circumstantial evidence; in other words, when there is no direct evidence of the event relevant to criminal law, I for my part – in contrast to the jurisprudential practice of the Curia – agree with the views in the legal literature criticizing the chain theory, according to which although the chain of evidence is a fact in a significant part of cases, the omission of certain evidence for whatever reason – as Háger points out – *"does not necessarily break the logical order of the process of evaluating evidence"*[12]. In my view, there can be no doubt that the introduction of this interpretation of circumstantial evidence in the practice of the courts would resolve the rigidity of the interpretation of the Curia and could contribute to the ascertainability of the substantive truth.

References

1. Belovics, E., Tóth, M., *Büntető eljárásjog. Negyedik, aktualizált kiadás. Az új büntetőeljárási törvény (2017. évi XC. törvény) tankönyve* (*Criminal procedure law. Fourth, updated edition. Textbook of the new Criminal Procedure Act (Act XC of 2017*). Budapest, HVG-ORAC Lap- és Könyvkiadó Kft., 2019.
2. Háger, T., *Gondolatok a büntetőeljárás fogalmáról és a bizonyítás elméleti hátteréről* (Reflections on the Concept of Criminal Procedure and the Theoretical Background of Evidence), Budapest, *Iustum Aequum Salutare,* 2014/3.
3. Tremmel, F., *Bizonyítékok a büntetőeljárásban (Evidence in criminal proceedings),* Budapest–Pécs, Dialóg Campus Publishing, 2006.
4. Januaryevich Vyshinsky, A., *A perbeli bizonyítás elmélete a szovjet jogban (The Theory of Judicial Proof in Soviet Law)*. Budapest, Akadémiai Kiadó, 1952.

[11] Court's decision no. 2021.35.
[12] Háger: *op. cit.*, pp. 60-61.

To be Punished or Treated? The Concept of Pedophilia and Criminal Action Against Sex Offenders

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Abstract

Nowadays, not only life problems, but also deviance are being medicalized, which are considered less and less a mere violation of the rules, but rather a disease. Among sexual offenders, pedophiles occupy a special place, because there is also a biological aspect to the phenomenon.

In addition, according to some studies, pedophile offenders have a high recidivism rate and problems that seem unmanageable to the law raise the need to find alternative solutions. Based on all this, the study seeks the answer to: should pedophilia be punished or treated?

Keywords: *criminal law, criminology, pedophilia, sex offenders, chemical castration, medicalization, treatment of pedophiles*

I. Introduction

One of the basic questions of criminal legislation is which behaviors entail criminal liability. The decision-making process is guided by a number of factors, such as international legal standards, or the state's obligation to protect individual fundamental rights, the constitutional standard of necessity and proportionality, but no itemized list of these factors is available. According to criminalization, a given social problem is essentially a crime, which makes it necessary for the criminal justice system to apply the appropriate sanction. This perception usually emphasizes the responsibility and even the guilty of the person[1]. On the other hand, medicalization refers to the modern tendency in which a fundamentally non-medical problem is viewed from a medical point of view, described using medical terms and the language of medicine, understood using the explanatory principles of medicine, and attempted to be solved ("treated") with medical interventions2. Nowadays, not only life problems,

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[1] G. Szöllösi, *A társadalmi problémák szociológiai elmélete – a konstrukcionista nézőpont* [The sociological theory of social problems – the constructionist point of view]. Metszetek, Vol. 5. No. 1, 2016, pp. 49-51.

[2] P. Conrad, *Medicalization and Social Control*, Annual Review of Sociology vol. 18, 1992, pp. 213-232; A. Garry, *Medicine and Medicalization: A Response to Purdy*, Bioethics, Vol. 15. No. 3. 2001, p. 264.

but also deviance are being medicalized, which are considered less and less a mere violation of the rules, but rather a disease. According to Conrad, a deviance is medicalized when previous efforts to control it have failed and there is some kind of medical intervention (mostly medication) that seems capable of controlling it, and medicine is willing to classify deviant behavior as a disease[3].

The primary goal of the study was to examine the concept of pedophilia from a purely legal perspective. However, as a result of the review of the specialized literature, it was recognized that tangential research of the related disciplines is also necessary, since the concept of pedophilia does not appear either in criminal legal facts or in criminal law dogmatics. In criminal law, pedophilia can be compared to crimes against the freedom of sexual life and sexual morals committed against children or minors, but it is not a concept that can be identified with it. Pedophilia has different meanings in different disciplines, so simply put; it means something different to the general practitioner, the specialist (psychiatrist) and the criminal lawyer, and indeed to society as well. Although my thesis was not written through the analysis of the relevant legal background, jurisprudence and legal dogmatics, it tries to take a stand on the question: should pedophilia be punished or treated? The study examines the meaning of pedophilia and affects the action taken against sex offenders in the practice of individual countries.

II. The definition of sex offenders: why is a pedophyle different?

Sex offender is a collective term that currently does not have a generally accepted definition recognized by all specialist literature[4]. Regardless of the commission of any kind of crime, the person who implements the legal facts is a "perpetrator" from the point of view of criminal substantive law. Studies of sexual crimes by foreign researchers use different definitions of perpetrators5. They were not able to create a general concept of a sex offender and differentiate between the offenders based on their motivation and motive. The diagnosis of pedophilia is irrelevant from the point of view of criminalization, the criminal justice system does not deal with the perpetrator's mental disorder as long as it does not limit or exclude his ability to be charged. According to the scientific point of view – be it medical or criminal law – the various sexual deviances (paraphilias) are not classified as a pathological state of mind as a reason for excluding criminal liability. However, the biological, psychological and sociological determination of pedophilia could justify the treatment and reintegration tools to be developed in the penitentiary in the future, or even chemical castration. The reasons and motivations behind the commission of sexually motivated crimes are usually different and a significant part of them (especially pedophiles) can be traced back to some kind of psychological illness, and their actions are manifestations of their

[3] P. Conrad, *On the Medicalization of Deviance and Social Control*. In: Richard Stivers (2004): Shades of Loneliness. Pathologies of a Technological Society. New York—Oxford: Rowman & Littlefield Publishers, Inc. 2004, p. 33.

[4] Aggrawal, A., *Paraphilias and Sexual Crimes-An Overview*. In: Wiley Encyclopedia of Forensic Science (Five Volume Set) Edition: 1 Chapter: Paraphilias and Sexual Crimes – An Overview. Publisher: Wiley, US Editors: Jamieson, Moenssens. 1.

[5] D. Finkelhor, *Child Sexual Abuse: New Theory and Research*, New York: Free Press, 1984, pp. 35-37.

sexual urges[6]. The terms used for individual offenders actually cover a much wider range and are often misleading without proper definition[7], however, from the point of view of criminological investigation, it is essential to define the circle of perpetrators.

Pedophilia is one of the diseases known in (psychiatry) medical literature, which are called paraphilias or psychosexual disorders. According to Turvey: "paraphilias can be characterized as qualitative disorders of sexual drive, when the sexual desire is not directed to the original biological goal, but to another person or object, which often conflicts with the rules of public morality or is even considered an act sanctioned by law"[8]. The literature defining the definition of pedophilia starts from the American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders – fifth edition (DSM-V)9. In the interpretation of the manual, the starting point is the constant existence of deviant sexual desire and fantasizing for an immature body for a long period of time – at least 6 months. Childhood and adolescence are considered the two main centers for the development of deviant sexual fantasy worlds. In both periods, fantasizing can be incorporated as the main coping mechanism, and then it can become automatic even at the expense of reality, which can ultimately result in the fixation of deviant fantasy content. However, deviant sexual fantasy can also appear and become fixed in adulthood, but then it typically appears as a response to traumatic sexual experiences, or a sexualized environmental impact coupled with heightened emotional charge[10].

The diagnostic techniques that appeared as a result of the development of medicine made it possible to observe how changes in the structure or function of the human brain affect the sexual orientation and behavior of the individual. Such neurobiological research examined the manifestation of an individual's sexual desire for children in connection with brain functions and the functioning of individual lobes. Studies have proven that as a result of certain brain deviations, the individual is unable to control his repetitive, deviant sexual behavior[11]. Other studies have seen disorders of sexual development as a result of the reduction of gray matter12, while neuroendocrinological theories trace the bad brain structure, which results in the development of deviant sexual behavior, to poor masculinization and defeminization during the fetal period[13].

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[6] G. Pregunné Puskás, *A szexuális bűnelkövetők terápiás kezelésének tapasztalatai* [Experiences in the therapeutic treatment of sex offenders], Börtönügyi Szemle no. 1/2011, pp. 37-52.

[7] B. Drexler, M. Somogyvári, *A szexuális bűnt elkövetők hazai vizsgálata büntetés-végrehajtási statisztikák alapján* [Domestic investigation of sex offenders based on penitentiary statistics], Belügyi Szemle, no. 3/2015, p. 67.

[8] A. Lehoczki, *A fantázia szerepe a szexuális emberölésekben* [The role of fantasy in sexual homicides]. In: Magyar Rendészet no. 2/2017, p. 69.

[9] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition., Arlington, VA, American Psychiatric Associa- tion, 2013, https://repository.poltekkes-kaltim.ac.id/657/1/Diagnostic%20and%20statistical%20manual%20of%20mental%20disorders%20_%20DSM-5%20(%20PDFDrive.com%20).pdf.

[10] D. Gee, A. Belofastov, *Profiling sexual fantasy: Fantasy in sexual offending and the implications for criminal profiling*. In: R.N. Kocsis, (ed.), *Criminal profiling: International theory and research*, Totowa, Humana Press, 2007, p. 60.

[11] M. Mendez, J.S. Shapira, *Pedophilic behavior from brain disease*, Journal of Sexual Medicine vol. 8 (6), 2011, pp. 1092-1100, https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1743-6109.2010. 02172.x

[12] T.B. Poeppl, J. Nitschke, B. Dombert, P. Santtila, M.W. Greenlee, et al., *Functional cortical and subcortical abnormalities in pedophilia: a combined study using a choice reaction time task and fMRI*, Journal of Sexual Medicine vol. 8(6), 2011, pp. 1660-1674, https://pubmed.ncbi.nlm.nih.gov/ 21477019/.

[13] *Idem.*

According to some studies, sexual desire for children may be related to neurochemical changes due to different serotonin function and metabolism in the brain[14]. According to another study, the level of the hormone cortisol is significantly higher in pedophiles than in the control group, and at the same time, serum cortisol and prolactin levels are significantly lower[15]. According to Marshall and Barbaree's integrated theory, injuries resulting from a dysfunctional childhood lead to the commission of sexual violence in connection with the social and biological processes of adolescence, and then in contact with situational factors (stress, mind-altering drugs etc.) and opportunities[16].

Research shows that sexual desire for children can be biologically determined and identifiable as a mental disorder (paraphilia), but abnormal sexual socialization can contribute to its development. The researchers were not able to create a concept of pedophilia that summarizes all areas, and there was no agreement on what is responsible for the development of pedophilia. In the medical and psychiatric literature, pedophilia is a concept that examines a deviant behavior, sexual desire, in such a way that it is not evaluated either from the point of view of society's value judgment or from the point of view of criminal law, it is regarded as a "disease" that is essential from the point of view of medicalization.

III. Treatment options for pedophilia: can it be medicalized?

Psychiatric and (legal) medical expert explanations of the concept of pedophilia mostly appear in foreign – English, American – literature. The research method of the concept of pedophilia appearing in other, non-legal disciplines – due to the lack of an adequate level of competence – was limited exclusively to description, without critical formulations or evaluations. However, this did not affect the inclusion of criminally relevant findings from the literature, forward-looking, relevant facts from the point of view of the dissertation. In connection with explaining the possibility of treatment applied to offenders, it is essential to mention the so-called treatment ideology. Efforts aimed at the improvement and education of criminals have never been alien to the penal system. After The World War II, the American Donald Clemmer, Gresham Sykes and Erving Goffman provided a conceptual framework for a better understanding of the prison world, which brought with it the realization that the prison is a personality-destroying institution that is dysfunctional in several aspects. During this period, the various social sciences developed by leaps and bounds – such as psychology, sociology – and psychiatry within medicine, which brought with it the assumption that human behavior changes with the help of all these tools. This led to the so-called for the birth of the treatment ideology, according to the basic premise of which the cause of criminal behavior lies in the personality, so it should be treated not by punishment, but by treatment[17]. The doctrines are related to modernism and positivism. A significant part

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[14] M. Maes, D. Van West,,N. De Vos, H. Westenberg, F. Van Hunsel, D. Hendriks, P. Cosyns, S. Scharpé, *Lower Baseline Plasma Cortisol and Prolactin together with Increased Body Temperature and Higher mCPP-Induced Cortisol Responses in Men with Pedophilia*, Neuropsychopharmacology, vol. 24, 2001, pp. 37-46.

[15] *Idem.*

[16] G. Virág, G. Kulcsár, A. Rosta, *Szexuális erőszak* [Sexual violence]. In: Borbíró, A., Gönczöl, K. Kerezsi, K., Lévay, M. (eds.), Kriminológia, Wolters Kluwer Hungary, Budapest, 2019, p. 575.

[17] L. Huszár, *Medical model. Historical overview of treatment/education,* Börtönügyi Szemle, no. 3/1997, p. 67.

of the sources created in this area consider the teachings of the representatives of the Italian anthropological school, Lobroso, Ferri and Garofalo, to be decisive. Positivism – be it biological, psychological or sociological – represented a paradigm shift compared to the teachings of the classical school in that the perpetrator – and not the act – became the center of attention. Thus, in place of the rationally decisive and fully responsible criminal of the classical trend, he painted a picture of a person determined by external and internal factors beyond his control. They believed that behind the commission of a crime there are biological, social and/or psychological factors over which the individual has no influence and which determine and "decide" his behavior[18]. However, as a result of the coercive nature of some of the therapeutic interventions carried out within this framework, as well as the related ethical reservations and concerns regarding the human rights of prisoners, the medical model seemed to be called into question starting in the 1960s. According to Gönczöl; "In the Western world, especially on the North American continent, a panic has developed due to the failure of penal policy"[19]. Despite the fall of the treatment ideology, it did not pass without a trace. Sexual deviance is such a complicated problem for communities that it may have psychological or pharmacological treatment options. Regarding the selection of the latter, individual countries do not differentiate between pedophiles and non-pedophiles. In view of the different motivations and the overlapping categories of offenders, it is difficult to choose the appropriate ("medical") treatment for those who commit crimes against the freedom of sexual life and sexual morality. It is clear from the practice of individual countries that therapies – chemical and surgical castration – are generally applied to sex offenders, and individualization – such as the treatment of pedophilia, if applicable – can only take place within that framework. Despite the wide range of treatments, it can be stated that the goal of all of them is to reduce the risk of offenders recidivism, and the statistical data justifies the review of treatment options for sex offenders. Because, according to a 1991 study, they committed the crime again within an average of 6 years after their release from prison[20]. In addition, some studies report 50%-70% declines in sex offenders[21].

IV. Pharmacological treatment: the application of chemical castration

Drug treatment of sex offenders is based on the assumption that behavior is sexually motivated, so suppressing sexual desire will reduce sexually deviant behavior. Although sexual fantasy and urges remain, it is reduced to the extent that the individual is able to suppress it – as a result of the drugs[22]. Chemical castration is, on the one hand, a drug treatment option for pedophilia, and on the other hand, in some countries (for example, some states of the United States of America, Poland) it functions as a

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[18] J. Szabó, *Speciális prevenció és dezisztencia* [Special prevention and desistance], Országos Kriminológiai Intézet, Budapest, 2019, pp. 52-53.

[19] K. Gönczöl, *Bűnös szegények* [Guilty poor people]. Közgazdasági és Jogi Könyvkiadó, Budapest, 1991, p. 6.

[20] M.E. Rice, V.L. Quinsey, G.T. Harris, S*exual recidivism among child molesters released from a maximum security institution*. Journal of Consulting and Clinical Psychology, 1991.

[21] E.M. Tullio, *Chemical Castration for Child Predators: Practical, Effective, and Constitutional*, Chapman Law Review no. 13, pp. 191-220.

[22] J.M.W. Bradford, N.S. Kaye, *The Pharmacological treatment of sexual offenders*, American Academy of Psychiatry and Law Newsletter no. 24, 1999, pp. 16-17, http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.741.4512&rep=rep1&type=pdf.

punishment, because it can be imposed by the court. In 1996, California became the first state in the United States of America to allow chemical or surgical castration for statutory sex offenders after serving their prison sentences. Eight additional states have since passed laws providing for some form of castration for sex offenders on parole or probation[23]. The treatment method is medical castration, the essence of which is that the testicles are not removed, but the sexual desire is eliminated with drugs. Its mechanism has been known since the 1940s, when evidence was found that the so-called anti-androgens reduce testosterone production and its blood level[24]. Two typical chemicals used in the treatment are cyproterone acetate (CPA) and medroxyprogesterone acetate (MPA). Both quickly reduce sexual drive and deviant sexual fantasy. In addition to both drug treatments, serious side effects such as liver dysfunction, the development of adrenal disorders, gynecomastia, weight gain, and digestive system diseases can be expected. In terms of its mechanism of action, testosterone, which is primarily responsible for sexual activity, is inhibited, by stopping the production of testosterone in the testicles and adrenal cortex, as well as neutralizing its effect, in addition to stopping the production of the biological product that controls the production of testosterone in the sexual center of the brain.

The questioning of the sentencing of the exclusive prison term used among sex offenders has already begun. May 16-17, 2013 In Freiburg, Germany, the Max Planck Institute (MPI) and the National Institute of Criminology (OKRI) held an expert workshop on the joint research entitled "Means for the prevention of sexual recidivism in the penitentiary" – "Development/development of legal regulation and treatment of sexual offenders in Europe" ("Developing sexual offender laws and treatment in Europe")[25]. The event was attended by 24 experts in the field – including lawyers, psychologists, sociotherapists, mediators and researchers – from several European countries, such as Germany, England, Scotland, Ireland, France, the Netherlands, Belgium, Denmark, the Czech Republic, Poland, Croatia, Bulgaria, Hungary also from Russia. The participants reported on the possibilities, legal, psychological and medical means of preventing sexual recidivism, as well as their country's practices regarding the latter. Due to the disproportionate violation of the human rights of sex offenders, Germany has often been criticized for a process that prioritizes the social protection function of punishment, which paralleled the question of whether criminal law is suitable for providing protection against sex offenders. In the spirit of this problem statement, the MPI researchers began to evaluate and evaluate the effectiveness of the therapeutic practice aimed at sex offenders[26].

Chemical castration clearly functions as a punishment and not as a treatment in the individual states, from which it follows that the countries do not accept the "disease nature" of pedophilia, in fact they do not order to treat it, but to punish it with this severe punishment. Chemical castration works on a voluntary basis in some countries, in other countries we can also find examples of its use as a punishment that can be imposed by the court. Louisiana, Wisconsin, and Iowa mandate chemical castration for child rape victims, but Florida, Oregon, and Montana subject the perpetrator to

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[23] F.S. Berlin, *"Chemical castration" for sex offenders*, The New England Journal of Medicine. 1997, vol. 336, p. 1030, https://pubmed.ncbi.nlm.nih.gov/9091797/.

[24] *Idem.*

[25] Szabó, J., Parti, K., Virág G., *cited,* p. 14, p. 95.

[26] *Idem,* p. 96.

chemical castration regardless of the victim's age[27]. In the states of Iowa, Florida, and Louisiana, the mandatory use of chemical castration can be waived if the offender chooses physical castration instead. Texas gives the offender a choice of chemical or physical castration[28]. The practice of Poland is unusual in the application of chemical castration, because in the European Union states – if the possibility of chemical castration exists – the treatment can be used on a voluntary basis. On the other hand, as of 2009, according to Polish legislation, in the case of rape of a minor under the age of 15 or a close family member, after the imposed prison sentence, the court can oblige the perpetrator to participate in drug treatment that reduces sexual desire, as well as psychological therapy. Before the court decides on the appropriate therapy, it must take into account the expert opinion of psychiatrists and psychologists[29]. The provisions regarding psychotherapy prescribed in addition to chemical castration do not apply in practice either, since there are a total of 50 beds in the appropriate therapeutic institution for the approximately 3,000 sex offenders in Poland. Since chemical castration can only be carried out after serving a prison sentence according to Polish legislation and has only been ordered since 2009, there has not yet been an example of its imposition. Therefore, there is no information on its effectiveness or cost implications[30]. As a result of Poland's practice, on August 17, 2017, the European Parliament addressed a question to the Commission regarding whether European Union member states can apply chemical castration as a condition for release or mitigation of punishment, or whether they can impose it as a punishment (mandatory)[31]? The answer to the question was quite broad: Directive 2011/93/EU on the fight against sexual harassment and sexual exploitation of children and child pornography provides minimum rules for the definition of crimes and sanctions, especially in the field of such serious crimes. With regard to the sanctions imposed on natural persons, the directive only prescribes the maximum level of imprisonment, at the same time it obliges member states to propose "treatment" programs or measures for perpetrators of sexual abuse of children, which can be used on a voluntary basis. The Commission did not take a position on the applicability of chemical castration, but emphasized that, during the implementation of the directive, the member states are obliged to respect the rights contained in the Charter of Fundamental Rights of the European Union. Respect for the Charter implies that the sanctions imposed on persons must not be disproportionate to the crime for which they have been convicted[32].

Although chemical castration is potentially life-long for some offenders, it can allow sex offenders to resume normal sexual activity as part of psychotherapy. In addition, some sex offenders voluntarily undergo chemical castration. Unlike surgical castration, the effects of anti-libido medication are reversible after treatment is stopped. Despite this, chemical castration continues to be debated for a number of social and health reasons. Social problems include the fact that chemical castration may not guarantee

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[27] *Ibidem.*

[28] *Ibidem.*

[29] eLitMed.hu, *Kémiai kasztráció Lengyelországban* [Chemical castration in Poland], 15 August 2011, https://elitmed.hu/ilam/hirvilag/kemiai-kasztracio-lengyelorszagban.

[30] G. Virág, G. Kulcsár, A. Rosta, *cited*, p. 8.

[31] European Parliament, *Chemical castration in the EU*, Question for written answer E-005203-17 to the Commission, 17.08.2017, https://www.europarl.europa.eu/doceo/document/E-8-2017-005203_EN.html.

[32] https://www.europarl.europa.eu/doceo/document/E-8-2017-005203-ASW_EN.html.

human rights in forced, mandatory cases without the informed consent of the sex offender, so it can only be considered a punishment, not a treatment. In addition, medical aspects cannot be neglected. According to the guidelines of the World Federation of Biological Psychiatric Societies, combined psychotherapy and drug therapy is more effective than either monotherapy treatment[33]. However, whether it is about the application of any treatment option or the development of a therapy program, an important dilemma is the issue of involvement and voluntariness. This is closely related to the perpetrator's admission of the crime and individual responsibility for the act. This is because admitting or denying a crime can range widely, so it includes relativizing the act, shifting responsibility, or even complete denial[34]. Voluntary participation is essential for the effectiveness of the therapy, as its obligation may result in the convict's interest-driven attitude. In the case of compulsory participation in therapy, in order to obtain some discount (leave, absence, parole) or to avoid a sanction, the convict may show remorse and acknowledge responsibility, which may have a counter-productive effect in terms of effectiveness.

V. Alternative methods

The treatment and rehabilitation of sex offenders, including pedophiles, can be done not only with medication, but also with psychotherapeutic methods. A more popular model for the rehabilitation of criminals, the so-called Risk-Need-Responsiveness (RNR), the results of which show that so far cognitive behavioral therapies have proven to be the most effective in treating sex offenders and preventing recidivism. In Croatia, there is a special treatment program based on cognitive behavioral therapy for sex offenders. The 10-month program, in which 10 convicts can participate at a time, will take place during the period of execution of the prison sentence. Its primary goal is to develop the empathy skills of criminals, especially towards the victim(s) of their crime[35]. The Swedish Penitentiary and Probation Organization sent a brochure edited in 1995 entitled: "Treatment of sex offenders in prison – Action plan" to the Council of Europe's Department for Crime Problems, Prison Law and Criminology. Based on this, those convicted of sexual crimes are placed only in designated prisons. Participation in information and personality development programs was mandatory for them. Medical treatment is voluntary, the most recommended method of treatment is psychotherapy, but there is also the possibility of drug treatment, if it is justified[36].

However, the conditions for the implementation of therapy and special programs are not given everywhere – and in this area the countries of Eastern and Central Europe are particularly lagging behind. Not only because criminal law populism advocated the

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[33] F. Thibaut, F. De La Barra, H. Gordon, P. Cosyns, J.M. Bradford, *The World Federation of Societies of Biological Psychiatry (WFSBP) guidelines for the biological treatment of paraphilias*. World Journal of Biology and Psychiatry vol. 11, 2010, pp. 604–655, https://pubmed.ncbi.nlm. nih.gov/ 20459370/.

[34] B.M. Maletzky, *Denial of Treatment or Treatment of Denial?*, Sexual Abuse: A Journal of Research and Treatment vol. 8, issue 1, 1996, https://journals.sagepub.com/doi/10.1177/107906329 600800101.

[35] J. Szabó, K. Parti, G. Virág, *cited,* p. 14, p. 97.

[36] I. Köck, *Summary of survey of treatment of sex offenders in somé of the member states of the Council of Europe.*

tightening of measures and punishments against sex offenders, but also because social intolerance prevents the introduction of soft crime prevention tools in addition to punishing the offenders. This, along with the rise of the pessimistic "nothing works" doctrine of recent decades, does not favor the spread of the treatment ideology[37]. Recommendation CM/Rec (2014) 3 of the Council of Europe formulates the special treatment of serious sexual offenders and the importance of taking into account their needs assessed on the basis of risk. It draws attention to the fact that after the reception and risk analysis, as well as the evaluation of the inmate's characteristics and risk-based needs (in the light of its results), an adequate treatment program and appropriate institutional placement must be provided for the inmates as soon as possible[38].

VI. Conclusion

As a result of the review of the literature, it can be said as a whole that pedophilia is basically a category outside of criminal law, the concept of which is comprehensive, summarizing all disciplines and at least accepted by the majority of the scientific community. There was also no agreement on the ethology of pedophilia and the cause of its development, because according to some researchers, pedophilia cannot be "cured", it can only be controlled – for example by chemical castration – while other researchers believe that pedophilia is a consequence of bad sexual socialization – in the development of which early sexual experiences they are significant – or they can be of genetic or biological origin. Due to the blurring of the sex offender category, a clear causal relationship between testosterone levels and sex crimes remains uncertain[39]. However, despite surprisingly little evidence, various comprehensive theories of sex crime have incorporated hormonal factors into their explanations, concluding that both surgical and chemical castration undoubtedly reduce sexual interest, sexual performance, and, consequently, sexual recidivism[40]. In each study, the researchers tried to distinguish between sex offenders based on their motivations, but it is important to point out that this can be the basis of purely criminological investigations and, as a result, it can only support penal policy.

Chemical and physical castration is used in individual states – either voluntarily or compulsory – as a form of punishment, or as a measure that the offender can choose to avoid or mitigate the punishment. The conclusion can be drawn from this that the individual countries view sex offenders from the point of view of criminalization and that chemical castration appears as a criminalization tool. According to Peter Conrad's formulation already mentioned in the introduction, in order to medicalize a phenomenon, it is essential to declare it as a "disease", which is based on the medical science point of view and, ultimately, on the consensus of the given society. According to the current legislation and literature, chemical castration is vaguely situated between punishment

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[37] Szabó, J., Parti, K., Virág G., *cited,* p. 14, p. 95.

[38] B. Drexler, M. Somogyvári, *cited,* p. 66.

[39] D.A. Kingston, M.C. Seto, A.G. Ahmed, P. Fedoroff, P. Firestone, J.M. Bradford, *The role of central and peripheral hormones in sexual and violent recidivism in sex offenders*. The journal of the American Academy of Psychiatry and the Law, vol. 4, issue 40, 2012, pp. 476-485, https://pubmed.ncbi.nlm. nih. gov/23233468/.

[40] D. Grubin, A. Beech, *Chemical castration for sex offenders*. BMJ. 2010, doi:10.1136/bmj.c74, https://pubmed.ncbi.nlm.nih.gov/20068060/.

and treatment, as it can also operate on a voluntary basis, and in some countries, it can be imposed as a punishment, and overall it is a problematic issue for both medical ethics and reconciliation with human dignity.

Regarding the answer to the question in the title of the study, I would like to quote the words of Sárkány: "*Penal policy, like all spheres of politics, depends on a specific social system. There are also other connections that influence the penal policy of a given system. For example, what legal system a country traditionally belongs to. But even within individual legal systems, there are significant differences between geographical regions and countries. The general culture, the so-called state-legal culture is also of fundamental importance from this point of view. A serious determining factor is the cultural and legal awareness level of the population of a given area. It does not matter how people think about crime, law enforcement, and criminal justice. After all, depending on the socio-political system, this affects legal policy and the activities of law enforcement agencies with greater or lesser intensity"*[41]. However, it is important that although the perpetrators of crimes against the freedom of sexual life and sexual morality committed to the detriment of children are widely despised by society, they cannot be an exception to the requirements of the rule of law. In order to protect the basic rights of its citizens and those staying on its territory, as well as to fulfill its international obligations, the state is entitled to criminalize certain acts and to threaten their commission with specific punishments, so that it must at the same time respect the freedoms guaranteed by the constitution, and at the same time guarantee the rights of the perpetrators and the victims[42].

References

1. Aggrawal, A., *Paraphilias and Sexual Crimes-An Overview*. In: Wiley Encyclopedia of Forensic Science (Five Volume Set) Edition: 1 Chapter: Paraphilias and Sexual Crimes – An Overview.Publisher: Wiley, US Editors: Jamieson, Moenssens. 1.

2. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition., Arlington, VA, American Psychiatric Association, 2013, https://repository.poltekkes-kaltim.ac.id/657/1/Diagnostic%20and%20statistical%20manual%20of%20mental%20disorders%20_%20DSM-5%20(%20PDFDrive.com%20).pdf.

3. Berlin, F.S., *"Chemical castration" for sex offenders*, The New England Journal of Medicine. 1997, vol. 336, p. 1030, https://pubmed.ncbi.nlm.nih.gov/9091797/

4. Börtönügyi Szemle no. 4/2013.

5. Bradford, J.M.W., Kaye, N.S., *The Pharmacological treatment of sexual offenders*, American Academy of Psychiatry and Law Newsletter no. 24, 1999, pp. 16–17, http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.741.4512&rep=rep1&type=pdf

6. Campbell, K.M., *Rehabilitation theory*. In: Bosworth, M. (ed.), *Encyclopedia of prisons and correctional fascilities*, SAGE Publications Inc., Thousand Oaks, 2005.

[41] I. Sárkány, I. Tauber, *A kriminológiai gondolkodás fejlődése – a jogpolitika változásai – és a büntetőjogi reformok* [Development of criminological thinking – changes in legal policy – and criminal law reforms]. In Börtönügyi Szemle no. 2/1990, Budapest, p. 2.

[42] M. Lévay, *A büntető hatalom és lehetséges korlátai egy alkotmányban, különös tekintettel a bűncselekménnyé nyilvánításra és a büntetésekre* [The criminal power and its possible limits in a constitution, with particular regard to the declaration of a crime and the punishments]. Pázmány Péter Katolikus Egyetem – Pazmany Law Working Papers, no. 24/2011, Budapest, 2011, p. 3.

7. Conrad, P, *Medicalization and Social Control*, Annual Review of Sociology vol. 18, 1992, pp. 213-232;

8. Conrad, P., *On the Medicalization of Deviance and Social Control*. In: Richard Stivers (2004): Shades of Loneliness. Pathologies of a Technological Society. New York—Oxford: Rowman & Littlefield Publishers, Inc. 2004.

9. Drexler, B., Somogyvári, M., *A szexuális bűnt elkövetők hazai vizsgálata büntetés-végrehajtási statisztikák alapján* [Domestic investigation of sex offenders based on penitentiary statistics], Belügyi Szemle, no. 3/2015.

10. eLitMed.hu, *Kémiai kasztráció Lengyelországban* [Chemical castration in Poland], 15 August 2011, https://elitmed.hu/ilam/hirvilag/kemiai-kasztracio-lengyelorszagban

11. European Parliament, Chemical castration in the EU, Question for written answer E-005203-17 to the Commission, 17.08.2017, https://www.europarl.europa.eu/doceo/document/E-8-2017-005203_EN.html

12. Finkelhor, D., *Child Sexual Abuse: New Theory and Research*, New York: Free Press, 1984.

13. Forgács, J., *Miért beteg a magyar büntetés-végrehajtási nevelés?* [Why is Hungarian penal education sick?] Börtönügyi Szemle Vol. 32, No. 2, 2013.

14. Garry, A., *Medicine and Medicalization: A Response to Purdy*, Bioethics, Vol. 15. No. 3. 2001.

15. Gee, D., Belofastov, A., *Profiling sexual fantasy: Fantasy in sexual offending and the implications for criminal profiling*. In: R.N. Kocsis, (ed.), *Criminal profiling: International theory and research*, Totowa, Humana Press, 2007.

16. Giammanco M, Tabacchi G, Giammanco S, Di Majo D, La Guardia M., *Testosterone and aggressiveness*. Medical Science Monitor, vol. 11 no. 4, 2005, pp. 136-145, https://pubmed.ncbi.nlm.nih.gov/15795710/

17. Gönczöl, K., *Bűnös szegények* [Guilty poor people]. Közgazdasági és Jogi Könyvkiadó, Budapest, 1991.

18. Grubin D, Beech A., *Chemical castration for sex offenders*. BMJ. 2010, doi: 10.1136/bmj.c74, https://pubmed.ncbi.nlm.nih.gov/20068060/.

19. Huszár, L., *Medical model. Historical overview of treatment/education,* Börtönügyi Szemle, no. 3/1997.

20. Kingston, D.A., Seto, M.C., Ahmed, A.G., Fedoroff, P., Firestone, P., Bradford, J.M., *The role of central and peripheral hormones in sexual and violent recidivism in sex offenders*. The journal of the American Academy of Psychiatry and the Law, vol. 4, issue 40, 2012, pp.476-485, https://pubmed.ncbi.nlm.nih.gov/23233468/

21. Lehoczki, Á., A fantázia szerepe a szexuális emberölésekben [The role of fantasy in sexual homicides]. In: Magyar Rendészet no. 2/2017.

22. Lévay, M., *A büntető hatalom és lehetséges korlátai egy alkotmányban, különös tekintettel a bűncselekménnyé nyilvánításra és a büntetésekre* [The criminal power and its possible limits in a constitution, with particular regard to the declaration of a crime and the punishments]. Pázmány Péter Katolikus Egyetem – Pazmany Law Working Papers, no. 24/2011, Budapest, 2011.

23. Maes, M., Van West, D., De Vos, N., Westenberg, H., Van Hunsel, F., Hendriks, D., Cosyns, P., Scharpé, S., *Lower Baseline Plasma Cortisol and Prolactin together with Increased Body Temperature and Higher mCPP-Induced Cortisol Responses in Men with Pedophilia*, *Neuropsychopharmacology* no. 24/2001, pp. 37–46, https://doi.org/10.1016/S0893-133X(00)00177-9, https://www.nature.com/articles/1395585

24. Maletzky, B.M., *Denial of Treatment or Treatment of Denial?*, Sexual Abuse: A Journal of Research and Treatment vol. 8, issue 1, 1996, https://journals.sagepub.com/doi/10.1177/107906329600800101.

25. Mendez, M., Shapira, J.S., *Pedophilic behavior from brain disease*, Journal of Sexual Medicine vol. 8 (6), 2011, pp. 1092-1100, https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1743-6109.2010.02172.x

26. Németh, I., *Elmélkedés a büntetendővé nyilvánítás értéktartalmáró* [Reflection on the value of declaring a criminal]. In: Szoboszlai-Kiss, K., Deli, G. (eds.), Tanulmányok a 70 éves Bihari Mihály tiszteletére, Universitas Győr Nonprofit Kft., Győr, 2013.

27. Poeppl, T.B., Nitschke, J., Dombert, B., Santtila, P., Greenlee, M. W. et al., *Functional cortical and subcortical abnormalities in pedophilia: a combined study using a choice reaction time task and fMRI*, Journal of Sexual Medicine vol. 8(6), 2011, pp. 1660-1674, https://pubmed.ncbi.nlm.nih.gov/21477019/.

28. Pregunné Puskás, G., *A szexuális bűnelkövetők terápiás kezelésének tapasztalatai* [Experiences in the therapeutic treatment of sex offenders], Börtönügyi Szemle no. 1/2011.

29. Recommendation CM/Rec(2014) 3.

30. Rice, M.E., Quinsey, V.L., Harris G.T., S*exual recidivism among child molesters released from a maximum security institution*. Journal of Consulting and Clinical Psychology, 1991.

31. Sárkány I., Tauber, I., *A kriminológiai gondolkodás fejlődése – a jogpolitika változásai – és a büntetőjogi reformok* [Development of criminological thinking – changes in legal policy – and criminal law reforms]. In Börtönügyi Szemle no. 2/1990, Budapest, p. 2.

32. Szabó, J., Parti, K., Virág G., *A szexuális bűnelkövetőkkel kapcsolatos jogi szabályozás és kezelés fejlesztése Európában – egy tematikus workshop felvetései* [Development of legal regulation and treatment of sex offenders in Europe – suggestions from a thematic workshop], Börtönügyi Szemle, no. 4/2013, pp. 95-102.

33. Szabó, J., *Speciális prevenció és dezisztencia* [Special prevention and desistance]. Országos Kriminológiai Intézet, Budapest, 2019.

34. Szabo, J., Virag, G., *Szexuális bűnelkövetők a kriminálpolitika erőterében* [Sexual offenders in criminal policy context], Belügyi Szemle, no. 10/2023, DOI: 10.38146/BSZ.2023.10.14

35. Szöllösi G., *A társadalmi problémák szociológiai elmélete – a konstrukcionista nézőpont* [The sociological theory of social problems – the constructionist point of view]. Metszetek, Vol. 5. No. 1, 2016.

36. Szöllösi, G., *A társadalmi problémák (konstrukcionista) elméletének alapjai* [The foundations of the (constructionist) theory of social problems]. Z-Press Kiadó, Miskolc, 5-7., pp. 49-51.;

37. Thibaut, F., De La Barra, F., Gordon, H., Cosyns, P., Bradford, J.M., *The World Federation of Societies of Biological Psychiatry (WFSBP) guidelines for the biological treatment of paraphilias*. World Journal of Biology and Psychiatry vol. 11, 2010, pp. 604-655, https://pubmed.ncbi.nlm.nih.gov/20459370/

38. Tullio, E.M., *Chemical Castration for Child Predators: Practical, Effective, and Constitutional*, Chapman Law Review no. 13, pp. 191-220. https://www.chapman.edu/law/ _files/publications/CLR-13-elizabeth-tullio.pdf

39. Virág, G., Kulcsár, G., Rosta, A., *Szexuális erőszak* [Sexual violence]. In: Borbíró, A., Gönczöl, K. Kerezsi, K., Lévay, M. (eds.), Kriminológia, Wolters Kluwer Hungary, Budapest, 2019.

Women as Victims of Reproductive Coercion Committed by Male Partners and Possibilities for Their Criminal Protection in the Republic of Serbia

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Abstract

Reproductive coercion on women by male partners implies a range of behaviors by which male partners influence the reproductive autonomy of women, ie the onset of pregnancy or the continuation of a pregnancy that has occurred or its termination.

The variety of undesirable behaviors of male partners excludes the possibility that reproductive coercion will remain completely outside the reach of criminal law norms in the Republic of Serbia. If we take into account that reproductive coercion is realized through psychological, physical, sexual and material violence that a male partner exhibits towards his female partner, then reproductive coercion can be linked to criminal acts such as domestic violence, rape, as well as light or serious bodily injuries.

Nevertheless, the sophistication of certain methods by which men derogate women's reproductive autonomy affects the fact that they cannot be identified as relevant from a criminal law point of view, which gives this negative phenomenon the possibility to exist in the context of social conformity. We see the solution to this problem in the redefinition of the criminal offense of rape, that is, in the criminalization of rape without consent, since the aforementioned criminalization would remove the key shortcomings that we observed during the analysis of the criminal offenses in question.

Keywords: *reproductive coercion, women victims of violence, partner violence, family violence, criminal protection, rape*

I. Introduction

Birth control is not a new phenomenon since human society has always tended to influence its numbers in some way, regardless of whether for the sake of such control they resorted to some kind of contraception or through abortion and infanticide as more frequent forms of birth control, and it is considered that birth control was not unknown even to the Stone Age population[1]. Although birth control has been a

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[1] N.E. Himes, *Birth control in Historical and Clinical Perspective*, The ANNALS of the American Academy of Political and Social Science, vol. 160, no. 1, 1932, p. 49.

companion of human society since its earliest period, it does not mean that women freely decided on the use of birth control methods and made decisions about (not) giving birth, nor that they do so in the modern world. Regardless of the fact that human society has come a long way from its early periods to modern society, the patriarchal patterns that are still present are a reminder that gender equality in the world we live in is still questionable, and that control over a woman's body and her sexuality and still one of the strongest levers of patriarchy and one of the most powerful means of its maintenance[2]. The ideology of motherhood has been constituted for centuries with the help of the system of patriarchal culture, religion and dominant systems of values, morals and norms, which in this way create and maintain a desirable cultural pattern that does not give women the opportunity to make a free choice about (not) giving birth[3]. The authority of men over women was, and still is, strong and influential[4]. Even in the modern world, women are exposed to the behaviors of their partners that are manifested in such a way or are of such intensity that the onset of pregnancy, its continuation or termination, as well as the use of contraception, is determined by the reproductive decision of the partner, and not by themselves. Therefore, the lack of autonomy of will in women when making reproductive decisions is internationally recognized as reproductive coercion.

Reproductive coercion is directly aimed at the gross violation of women's reproductive rights and is achieved through the violation of women's psychological and physical integrity as well as their sexual freedom. Starting from the fact that violence against women is very widespread, as well as from the fact that reproductive coercion against women by male partners is unknown in the Republic of Serbia, but also a generally insufficiently researched phenomenon, the goal of this paper is to determine what the criminal law response to reproductive coercion, that is, what are the possibilities of women victims of reproductive coercion to protect their rights through criminal law. In order to achieve the goal of this paper, we will analyze the provisions related to the following criminal acts: domestic violence, rape, light bodily injuries and serious bodily harm.

II. Reproductive coercion on women by a male partner – concept and forms

Reproductive coercion[5] against women by a male partner is defined as any attempt

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[2] K. Kričković Pele, *Vantelesna oplodnja: rodne i društvene kontroverze* [In vitro fertilization: gender and social controversies], Novi Sad, Pokrajinski zavod za rodnu ravnopravnost polova i ACIMSI – Centar za rodne studije, 2014, p. 19.

[3] *Idem*, p. 9.

[4] *Idem*, p. 14.

[5] Reproductive coercion against women by a male partner could be understood as the narrowest conception of reproductive coercion. Namely, in the literature we find definitions according to which reproductive coercion can be performed not only by male partners, but also by parents, peers, and doctors (M.A. Moore, L. Frohwirth, E. Miller, *Male reproductive control of women who have experienced intimate partner violence in the United States*, Social Science and Medicine, vol. 70, no. 11, 2010, p.1738). Also, it can be done by women towards men, but also by women towards women in homosexual partnerships (L. Chamberlain, R. Levenson, *Addressing intimate partner violence, reproductive and sexual coercion: a guide for obstetric, gynecologic, and reproductive health care settings*, San Francisco, The American College of Obstetricians and Gynecologists, 2010, p. 6; Park, J., et al., *Reproductive*

by a man to influence the onset of pregnancy or the continuation of pregnancy or its termination, i.e. to control the outcome of pregnancy through various behaviors that can manifest as psychological pressure, interference in decisions about contraception, as well as the application forces or threats with the same intent[6]. Based on the above definition, two forms of reproductive coercion are distinguished: coercion related to pregnancy (translated literally as pregnancy coercion) and birth control sabotage (also literally birth control sabotage). Pregnancy-related coercion refers to various tactics by which a man pressures a woman to remain pregnant, continue or terminate a pregnancy, or uses force and/or threats with the same intent[7]. Thus, a man can tell a woman that he will leave her if she does not become pregnant or that he will find someone else with whom he will have a child, he can accuse her of infidelity if she refuses sexual intercourse, since only through sexual intercourse can a man realize his intention to make a woman pregnant even though she does not want pregnancy, can manipulate her to agree to sexual intercourse without condoms and the like. Also, a man can threaten a woman that he will physically hurt her if she does not want to remain pregnant or that he will physically hurt her if she does not terminate a pregnancy that he does not want, a man's refusal to pay for an abortion in those cases when the woman has no personal income or does not have it at her disposal, canceling abortion appointments and the like[8]. Preventing birth control involves a range of behaviors that influence a man's contraceptive decisions without the use of force or threats. Within this form, we can talk about manipulation during the use of condoms, such as imperceptibly removing the condom during sexual intercourse or damaging it, taking away contraceptive pills, refusing to use condoms, refusing interrupted intercourse even though it was an agreed method of protection against pregnancy, throwing away contraceptive pills or forbidding a woman to use them and the like[9].

It follows from the above that reproductive coercion can be achieved through emotional manipulation, humiliation, psychological, physical, sexual and/or material violence and is a manifestation of the power of a man over a woman, which is recognized as one of the forms of violence against women[10].

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coercion: uncloaking and imbalance of social power, American Journal of Obstetrics and Gynecology, vol. 214, no. 1, 2016, pp. 74-78). In addition to the above, there is also a definition according to which reproductive coercion on women can be carried out by others, whereby the term "others" means family members of both the woman and her partner, persons involved in prostitution (e.g. pimps) as well as persons involved in human trafficking in the context of sexual exploitation. See S. Rowlands, S. Walker, *Reproductive control by others: Means, perpetrators and effects*, BMJ Sexual & Reproductive Health, vol. 45, no. 1, 2019, p. 65).

[6] E. Miller, G.J. Silverman, *Reproductive coercion and partner violence: implications for clinical assessment of unintended pregnancy*, Expert Review of Obstetrics & Gynecology, vol. 5, no. 5, 2010, p. 511

[7] L. Chamberlain, R. Levenson, R. *Addressing intimate partner violence, reproductive and sexual coercion: a guide for obstetric, gynecologic, and reproductive health care settings*, San Francisco, The American College of Obstetricians and Gynecologists, 2010, p. 6.

[8] M.A. Moore, L. Frohwirth, E. Miller, *Male reproductive control of women who have experienced intimate partner violence in the United States*, Social Science and Medicine, vol. 70, no. 11, 2010, pp. 1739.

[9] *Ibidem*.

[10] See M.A. Moore, L. Frohwirth, E. Miller, *cited.,* 1739; R.A. Camp, *Coercing Pregnancy*, William and Mary Journal of Women and the Law, vol. 21, no. 2, 2015, p. 317; J. Park, et al., *Reproductive coercion: uncloaking and imbalance of social power*, American Journal of Obstetrics and Gynecology, vol. 214, no. 1, 2016, pp. 74-78; L.A. Plunkett, *Contraceptive sabotage*, Columbia Journal of Gender and Law, no. 28, 2014, p. 108.

II.1. Reproductive coercion and the relationship with the criminal offense of family violence

Family members enjoy criminal protection against domestic violence. This criminal offense is prescribed by Article 194[11] and belongs to the group of criminal offenses against marriage and family.

For the existence of a criminal offense, in addition to the act of execution and its consequences, the special property of the active and passive subject, which is reflected in the naming of the criminal offense itself, is of key importance, i.e. that the action was taken by a family member and towards a family member. Considering that this crime will not exist if the perpetrator and the victim cannot be considered family members, we start the analysis of this crime from the concept of family as defined by the legislator. The criminal definition of family includes: spouses, their children, spouses' ancestors in the third line of blood relationship, extramarital partners and their children, adoptive parents and adoptees, foster parents and foster parents, as well as: brothers and sisters, their spouses and children, former spouses and their children and parents of ex-spouses on the condition that they live in the same household, but also persons who have a child together or a child about to be born, even though they never lived in the same family household [CC, article 112(28)].

We notice that the legislature also provides protection to persons who have never lived in the same household, if they have a child or is about to be born, but that protection is missing[12] former spouses who do not live in the same household, as well as former extramarital partners, regardless of whether they live in the same household or not. It is completely justified for the legislator to provide protection against domestic violence to former spouses living in the same household, because their cohabitation is most often the scene of new acts of violence (Jovanović, 2014, p. 248), since violence does not necessarily end with the termination of the community of life, but often and intensifies, that is, it is about its continuation in new circumstances. We believe that the legislator should have remained consistent and included former extramarital partners, who live in the same household, as family members, because making a distinction between these two forms of partnership implies the conclusion that the legislator favors a married union, which has an undertone of a patriarchal, traditional approach to family[13]. Some authors call into question the living in the same space by former extramarital partners, that is, the question arises whether former extramarital partners living in the same household can be considered exes[14]. The support for this opinion

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[11] Criminal Code published in Gazette of the Republic of Serbia, no. 85/2005, 88/2005 – corrected, 107/2005 – corrected, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019.

[12] Here, we mean exclusively the protection that is achieved through the criminal act of domestic violence. Persons who, according to the criminal definition of family, cannot be considered a family member will certainly be protected, given that almost all actions that can be used to commit this crime are covered by other incriminations. In that case, it could be about light bodily injuries, serious bodily harm, coercion etc.

[13] S. Jovanović, *Problemi krivičnopravne reakcije na nasilje u porodici* [Problems of criminal law response to domestic violence], in: D. Kolarić (ed.) *Nasilje u Srbiji – uzroci, oblici, posledice i društvena reakcija* [Violence in Serbia – causes, forms, consequences and social reaction], Naučno-stručni skup sa međunarodnim učešćem [Scientific and professional meeting with international participation], Beograd, Kriminalističko-policijska akademija, Fondacija „Hans Zajdel", 2014, p. 248.

[14] Đ. Đorđević, *Krivičnopravna zaštita od nasilja u porodici* [Criminal law protection against domestic violence]. In: D. Kolarić (ed.) *Nasilje u Srbiji – uzroci, oblici, posledice i društvena reakcija*

comes from one of the constitutive elements of extramarital union, that is, the existence of a community of life which, among other things, includes living at the same address[15]. However, we must take into account that the absence of a formal condition, i.e. the conclusion of marriage, also requires proof that an extramarital union exists, and it cannot automatically be concluded that cohabiting partners living at the same address are not former cohabiting partners[16]. Ex-spouses who do not live in the same household are not considered family members, which also applies to ex-common-law partners. By excluding the mentioned categories of persons from family members, the legislator becomes "blind" to the fact that victims of domestic violence sometimes break the community of life in order to protect themselves from violence, but they do not succeed[17]. Violence often culminates in the period of separation, because the perpetrator wants to return his "object" of domination, at any cost, and to that end uses psychological and/or physical violence[18]. Accordingly, the fact that the former marital or extramarital partners do not live in the same household should not be of crucial importance for determining family affiliation[19]. Disadvantages related to the criminal law concept of family are almost minimized when it comes to reproductive coercion, but they certainly exist. Although it is not inconceivable that, for example, an extramarital partner, with whom a woman lives in the same space, destroys, for example, contraceptive pills by throwing them away, thereby alluding to her promiscuity and endangering her tranquility, it is still more realistic in life, and appropriate to the purpose of reproductive coercion, a situation in which a man, through the use of violence, threats or insolent or reckless behavior, tries to influence the outcome of pregnancy, in which case the legislator considers the partners to be members of the family, regardless of whether they live in the same household or not, since one of the key factors is for belonging to the family of a child who is about to be born. On the other hand, if violence, threats, insolent or reckless behavior were aimed at the onset of pregnancy of a woman with whom a man is in a sexual-emotional relationship, the woman would not receive protection through this criminal act, but, taking into account the consequences that occurred, could have reported another crime.

As the basic form of the criminal act of domestic violence, the legislator prescribes: use of violence, threat to attack life or body, brazen or reckless behavior that endangers

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[Violence in Serbia – causes, forms, consequences and social reaction], Naučno-stručni skup sa međunarodnim učešćem, Beograd: Kriminalističko-policijska akademija, Fondacija „Hans Zajdel“, 2014, p. 68.

[15] Draškić, M., *Porodično pravo i prava deteta* [Family law and children's rights], Beograd, Pravni fakultet Univerziteta u Beogradu, 2011, p. 172.

[16] It is not difficult to imagine that the common-law partners bought an apartment or a house with joint financial means during the cohabitation and that after the termination of the cohabitation, by force of circumstances, they remain living in the same household, which does not differ in any way from the life of former spouses in the same household.

[17] S. Jovanović, *Problemi krivičnopravne reakcije na nasilje u porodici* [Problems of criminal law response to domestic violence], in: D. Kolarić (ed.) *Nasilje u Srbiji – uzroci, oblici, posledice i društvena reakcija* [Violence in Serbia – causes, forms, consequences and social reaction], Naučno-stručni skup sa međunarodnim učešćem [Scientific and professional meeting with international participation], Beograd, Kriminalističko-policijska akademija, Fondacija „Hans Zajdel“, 2014, p. 90.

[18] D. Dimovski, *Zaštita žena u krivičnom pravu* [Protection of women in criminal law], in: Konstantinović Vilić (Ed.) *Pravna klinika za zaštitu prava žena-norme i praksa* [Legal clinic for the protection of women's rights – norms and practice], Zbornik radova, Beograd: Autonomni ženski centar, Niš: Ženski istraživački centar za edukaciju i komunikaciju, 2013, p. 138.

[19] *Ibidem*.

peace, physical integrity or mental state of a family member [CC, Article 194(1)]. The legislator envisages three acts of execution: the use of violence, a threat to attack the life or body of a family member, and brazen or reckless behavior, which has the effect of endangering the tranquility, physical integrity or mental state of another family member. The first act of execution, i.e. the application of violence, involves the use of physical force that injures the bodily integrity of another person, the deprivation of freedom of movement or the freedom for a person to freely decide on his actions[20], i.e. it refers to any activity that directly, really and closely endangers the physical and mental integrity of a passive subject[21].

Violation of bodily integrity, i.e. bodily injury, as part of the basic form of the act, includes actions resulting in ordinary light bodily injury[22]. Seen from the point of view of reproductive coercion, we could talk about slapping a woman, strangling her, hitting her with a belt, inflicting burns etc., with the aim of getting her to "agree" to pregnancy, termination of pregnancy or its continuation. A male partner who intends to terminate a woman's pregnancy may kick her in the stomach or push her down the stairs to induce a miscarriage. He can also use physical force to prevent her from going to a health facility to terminate the pregnancy. However, if physical violence was directed at an emotional-sexual partner in order to make her pregnant with a man with whom she does not want a child, we would not be able to talk about domestic violence. The second enforcement action, which is prescribed by the legislator, is a threat. The threat consists in putting in the appearance of some evil that will befall a person or a member of his family, which is aimed at life or body. It must be serious, real and achievable, from the point of view of the one who is threatened[23]. If the threat was not aimed at life and limb, then one could talk about insolent and reckless behavior, and not about a threat in the sense of this act of execution[24]. The threat affects the voluntary component of human behavior, i.e., its goal is to create, direct, and strengthen the decision of the person to whom it is directed to undertake or not undertake a certain behavior[25]. The threat causes a threat to psychological integrity, which is reflected in the infliction of mental pain, suffering, causing fear, restlessness, vulnerability, and a sense of personal insecurity[26]. Thus, this act of execution could include various manifestations of reproductive coercion, such as: sending a threat to a woman that she will be beaten if she does not become pregnant, terminate or continue a pregnancy that has occurred; sending a threat to a woman that one of her family members will be

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[20] N. Delić, *Krivičnopravni aspekt nasilje u prodici* [Criminal law aspect of violence in gossip], in: S. Panov, M. Janjić Komar, M. Škilić (eds.), *Nasilje u porodici* [*Domestic violence*], Međunarodni naučni skup, Beograd, Pravni fakultet Univerzitet u Beogradu, 2012, p. 108.

[21] Đ. Đorđević, *cited*, p. 101.

[22] The injury should not put the injured person's life in question, that it is a bodily injury and not damage or destruction of its parts or organs, that the injury does not cause a danger to work or that it is short-lived, temporary, that it is an easy and short-term impairment of health. See M. Lukić, S. Jovanović, *Nasilje u porodici-nova inkriminacija* [Violence in the family – a new incrimination], Beograd, Autonomni ženski centar, 2003, p. 18.

[23] Z. Stojanović, *O pojmu pretnje u krivičnom pravu* [On the concept of threat in criminal law], NBP- Nauka, bezbednost, policija, vol. 18, no. 2, 2013, p. 6.

[24] V. Turanjanin, E. Ćorović, D. Čvorović, *Domestic violence in Serbia*, Zbornik radova Pravnog fakulteta u Nišu, no. 77, 2017, p. 86.

[25] Z. Stojanović, *cited,* p. 5.

[26] M. Lukić, S. Jovanović, *Nasilje u porodici-nova inkriminacija* [Violence in the family – a new incrimination], Beograd, Autonomni ženski centar, 2003, p. 18.

physically harmed if she does not become pregnant, terminate or continue a pregnancy that has occurred; the partner's threat to commit suicide if the woman, for example, does not continue the pregnancy or terminate it etc. The existence of not only this form of criminal offense, but also domestic violence in general, would be excluded in the event that the threats are addressed to a sexual-emotional partner with whom the man does not have a child or a child is not on the way to being born, i.e. in all cases where between a man and a woman there is a marital or extramarital union and the act of execution is aimed at the occurrence of pregnancy. Impudence and reckless behavior are prescribed as the third act of execution. Insolent behavior is that which violates the elementary rules of cultural and customary behavior, which shows insult, ignoring, readiness for physical confrontation with another[27].

Reckless behavior implies extreme disrespect for a person, physical and psychological abuse[28]. Insolent and reckless behavior in the context of reproductive coercion involves emotional blackmail, tactics and manipulation, for example manipulation of contraceptives or emotional blackmail addressed to a woman in order to get pregnant even though she does not want to. However, it is factual that they would be irrelevant from the point of view of the criminal offense in question. After all, judicial practice has taken the position according to which an attack on mental integrity cannot be considered "...the defendant's statement that she will move out and take the joint child with her relatives and that the father will no longer see him"[29]. In this regard, domestic violence could not be considered a criminal offense if the husband told the wife that he would leave her if she did not get pregnant, continue the pregnancy or terminate it. On the other hand, we believe that a case where a partner tells a pregnant woman that he will kick her out of the house if she does not have an abortion, while shouting, hysterical, and breaking things around the house would be relevant from a criminal point of view. Then this kind of behavior of a man could be characterized as impudent and reckless, which endangers the mental integrity of a woman. It is almost impossible to imagine criminal legal intervention in the event that a partner destroys a woman's birth control pills. But we believe that, for example, destroying contraceptive pills, followed by squeezing a woman's jaw while shouting that nothing can prevent him from giving birth to his child someday, could be qualified as domestic violence, especially if there is a continuation of similar behavior by a married or extramarital partner, because in this way the consequence of the act is realized, which is reflected in endangering the tranquility of the woman, while the behavior of the marital or extramarital partner could be subsumed under impudent and reckless behavior, as one of the alternative acts of execution. And when it comes to this form of crime, we must emphasize that it would only exist if a man and a woman are in a married or cohabiting union, while a sexual-emotional relationship would be considered criminally relevant if the woman is pregnant.

In addition to the basic one, the legislator foresees three more difficult forms. To achieve the first more difficult form, it is necessary that the person, i.e. a family member used a weapon, i.e. a dangerous tool or other means suitable for seriously injuring the

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[27] See Lj.Lazarević, *Komentar Krivičnog zakonika Republike Srbije* [Commentary on the Criminal Code of the Republic of Serbia], Beograd, Službeni glasnik, 2006, p. 550; D. Simić, *Krivičnopravna zaštita od nasilja u porodici* [Criminal law protection against domestic violence], *Kultura polisa*, vol. 12, no. 27, 2015, p. 526.

[28] See Lj. Lazarević, *cited,* p. 550; D. Simić, *cited,* p. 526.

[29] Decision of the District Court in Belgrade, no. 3370 /2005 of December 29, 2005.

body or severely impairing health during the use of violence, threats to attack the life or body of a family member or with brazen or reckless behavior with a weapon, i.e. a dangerous tool or other suitable means endangered the tranquility, physical integrity or mental state of a family member [CC, Article 194(2)]. In the context of reproductive coercion, the first severe form could exist if, for example, a male partner, with whom a woman is married, cohabiting or in a sexual-emotional relationship, threatens his partner with a kitchen knife that he will kill her and the unborn child if she does not continue the pregnancy she does not want. However, if a man threatened his partner with a knife that he would kill her if she did not become pregnant, undertaking this act of execution would only be relevant if the two were in a marital or cohabiting union, but not in a sexual-emotional relationship.

The second more severe form will be realized if there was a serious bodily injury or severe damage to health or the act was committed against a minor, where it is necessary that the alleged incident occurred through the use of violence, a threat to attack life or body, insolent or reckless behavior of a family member which may be accompanied by the use of weapons, dangerous tools or other means suitable for seriously injuring the body or seriously impairing health [CC, Article 194(3)]. As it is a criminal offense qualified by a more serious consequence, it is necessary that there is negligence on the part of the perpetrator in relation to serious bodily injury, that is, a more serious consequence. Given that this more serious form of crime will be committed even if it is committed against a minor, this means that the perpetrator should be aware of the victim's age. Seen from the point of view of reproductive coercion, this form of domestic violence could be realized when, for example, a husband/extramarital partner/emotional-sexual partner beats a woman and inflicts severe physical injuries on her because, contrary to his intentions, she wants to have an abortion. Or for example, if the husband/extramarital partner inflicts serious bodily harm on the woman by physically abusing her because she does not want to become pregnant with him.

The third most severe form will exist if, as a result of the application of violence, threats to attack life or body, brazen or reckless behavior, the death of a family member occurred, or the death was caused by the use of weapons, dangerous tools or other means [CC, Article 194(4)]. Even with this form of domestic violence, the death of a family member must be covered by the perpetrator's negligence, because otherwise it will be a criminal offense of aggravated murder, since the legislator has prescribed the deliberate deprivation of life of a family member who was previously abused by the perpetrator [CC, Article 114(10)]. In the context of reproductive coercion, it is possible that, for example, as a result of an argument caused by the woman not wanting to have an abortion, the partner pushes the woman down the stairs with the aim of causing an abortion, but as a result of the fall, the woman dies. We could also talk about this form when the husband/extramarital partner threatens the woman that he will physically hurt her if she does not agree to a pregnancy with him, or to an abortion (in this case sexual-emotional partners are also included), so the woman is afraid of such threats she ran out into the street where she was hit by a car and lost her life.

The criminal act of domestic violence can only be committed with intent. When it comes to the repetitiveness of violence, i.e. the dilemma that exists in relation to whether only one action is required for the existence of a crime or whether violence occurs continuously, the legislator prescribed the following: "when the action of a criminal offense is determined by a permanent verb, it is considered that deed committed, if the action was performed one or more times" [CC, Article 112(30)]. We observe that

the criminal law reaction will depend on each specific case, and that an act of violence would be relevant if, according to its characteristics, content and subjective relationship, it points to the risk of re-victimization[30]. Regardless of whether the execution action was undertaken once or more than once, it will be a single criminal offense[31].

II.2. Reproductive coercion and relationship with the criminal offense of rape

The crime of rape is the central crime in the group of crimes against sexual freedom. This criminal offense is prescribed in such a way that, in addition to the basic form, there is one special form, which can be considered lighter, and two qualified forms.

The basic form represents the essence of this criminal offense and consists in the coercion of sexual intercourse or an act equivalent to it, the use of force or the threat of immediate attack on the life or body of that person or a person close to him [CC, Article 178(1)]. Sexual intercourse implies a sexual relationship between a man and a woman, as a result of which there is penetration of the male genital organ into the female genital organ (emmissio in vaginam)[32]. When we talk about an act whic is an equal act with sexual intercourse, we can consider it in a narrower and broader sense. Thus, a narrower interpretation would include any penetration of the male sexual organ into the anal opening (immissio in anus) or oral opening (immissio in os) of the victim, regardless of gender, in order to satisfy the sexual urge[33]. With a broader interpretation, the insertion of objects or other parts of the body into the vaginal or anal opening of the victim can be equated with rape[34]. By using the term "who", the legislator defines both the active and the passive subject of rape in a gender-neutral manner. In this regard, we can conclude that rape is not perceived as a criminal offense for the existence of which it is necessary that a woman is the victim and a man is the perpetrator, and that criminal law protection is provided to all persons regardless of sexual orientation or marital status. Based on the legal definition of rape, it is clear that it is a two-act unlawful complex criminal offense[35]. Duplicity is reflected in the act of execution, which consists of coercion and coercion or an act equated with it. An improper complex criminal offense arises from the fact that coercion or an act equated to it are not illegal activities, unlike coercion, contrary to a real complex criminal offense that includes several illegal activities that make up a single criminal offense. These are two types of activities that are tightly connected and that give each other a new quality[36]. The act of execution is defined by the legislator as an alternative, that is, as a crime or an act equivalent to it, with the inevitable existence of coercion as a means of

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[30] M. Škulić, *Krivično delo nasilje u porodici* [Criminal act of domestic violence. In: S. Panov, M. Janjić-Komar, M. Škulić (eds.), *Nasilje u porodici* [Domestic violence], zbornik sa naučnog skupa Proceedings from a scientific meeting, Beograd, Pravni fakultet Univerziteta u Beogradu, 2009, p. 16.

[31] Đ. Đorđević, cited, p. 70; Judgment of the District Court in Subotica, no. 453/2008 of 22.7. 2008

[32] R.A. Ivanović, B.A. Ivanović, *Krivično djelo silovanja u krivičnom zakonodavstvu Crne Gore* [The criminal offense of rape in the criminal legislation of Montenegro], Pravne teme, vol. 2, no. 3, 2014, p. 94.

[33] See R.A. Ivanović, B.A. Ivanović, *cited,* p. 94; D. Marinković, O. Lajić, *Kriminalistička metodika* [Criminal methodology], Beograd, Kriminalističko-policijska akademija, 2012, p. 70.

[34] See R.A. Ivanović, B.A. Ivanović, *cited,* p. 94; D. Marinković, O. Lajić, *cited,* p. 70.

[35] M. Jović, *Krivično pravo – posebni deo (skripta I)* [Criminal law – special part (volume I)], Novi Pazar: Univerzitet u Novom Pazaru, 2011, p. 107.

[36] Z. Stojanović, *Silovanje bez prinude: Usaglašavanje KZ Srbije sa članom 36 Istanbulske konvencije* [Rape without coercion: Alignment of the Criminal Code of Serbia with Article 36 of the Istanbul Convention], NBP-Žurnal za krinimalistiku i pravo, no. 1, 2016, p. 4.

realizing the crime or an act equated to it. Coercion involves the use of force[37] or threats[38] and it should be of such intensity that it breaks the victim's resistance. In the case of rape, coercion cannot be viewed in isolation. It has a constitutive character because its aim is to perform a crime or an act equivalent to it. It is a question of functional coercion aimed at breaking the victim's resistance or making resistance completely impossible. The attribute "functional" in relation to this coercion means that it is goal-directed – on the one hand, its basic goal is to commit a crime, and on the other hand, the goal of this coercion is to break resistance, that is, to demotivate the victim to offer resistance at all, which also enables forced marriage[39]. That force which in a specific case was sufficient to overcome the expressed resistance or eliminate the possibility of resistance, represents a force of sufficient intensity in the specific case[40]. However, the absence of defensive injuries on the injured person's body does not necessarily mean that there was no force and threat, that is, that not all the elements required for the act to be qualified as rape were fulfilled. The force or threat must immediately precede the rape. If this is not the case, i.e. if there is a threat of some future attack on life or body[41], it will not be an incriminated sexual relationship[42]. As for resistance, it is clear that it is not a special characteristic of the criminal offense in question, since the legislator does not insist on the fact that the victim resists the perpetrator, because the existence of resistance indicates that force was used, but not vice versa, that is, the absence of resistance does not mean that force was not used[43]. In the literature and judicial practice, it is accepted that the expected resistance is also sufficient, i.e., it is not necessary that the resistance was provided if it could be expected[44].

In terms of culpability, rape can only be committed with premeditation. The consciousness of the perpetrator must include the non-compliance of the passive subject, that is, opposition to the crime or an act that is equated with it. When a threat is taken as an action of execution, then resistance does not exist since it breaks the will

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[37] Force can be absolute or compulsive. In the case of absolute force, the victim is completely unable to undertake any voluntary act, and therefore the question of consent/non-consent cannot be raised. In cases of compulsive force or persecution, a person is not prevented from making a decision, but that decision is forced and therefore cannot be voluntary (M. Vešović, *Nasilje u partnerskim odnosima i porodici (krivičnopravni aspekt)* [Violence in partner relationships and family (criminal law aspect)], Revija za kriminologiju i krivično pravo, no. 2-3, 2015, p. 176). According to Article 112 CC, paragraph 12, the use of hypnosis or stunning means, with the aim of rendering someone against their will in an unconscious state or incapacitating them for resistance, is also considered force. When it comes to hypnosis, the victim is brought into an unconscious state, which makes him unable to resist. Hypnosis paralyzes or visibly reduces a person's conscious and volitional abilities. With stunning means (drugs, alcohol etc.) a person can be brought into a state of unconsciousness, as a result of which he is unable to resist (N. Memedović, *Krivično delo silovanja u jugoslosvenskom pravu* [The crime of rape in Yugoslav law], Beograd, Naučna knjiga, 1988, pp. 125-127).

[38] It is a qualified threat that implies an immediate attack on the life or body of the victim or a person close to him.

[39] M: Škulić, *Krvično delo silovanja u Krivičnom pravu Srbije* [The criminal act of rape in the Criminal Law of Serbia], Crimen, 3, Revija za kriminologiju i krivično pravo, no. 2-3, 2017, p. 403.

[40] M. Škulić, *cited.,* p. 403.

[41] J. Lazarević, *cited,* p. 2013.

[42] In this connection, judicial practice has also taken a stand. "The fact is that the accused did not undertake, even though he directly threatened and used force against the injured party, any action aimed at committing a crime, which occurred much later and in another place, without the use of force or threat." (Judgment of the Court of Appeal in Niš. No. I 1228/10 of March 15, 2010).

[43] Z. Stojanović, *cited,* p. 7.

[44] Z. Stojanović, *cited,* p. 7.

of the passive subject and he does not engage in active resistance[45]. The perpetrator of the criminal act of rape must be aware of his crime and want to commit it, which means that in the specific situation he must be aware that the passive subject does not voluntarily consent to rape or an act equated with rape, but that it occurs as a result of applied coercion, and what the doer will. In the subjective sense, the existence of a specific intention of the perpetrator of the criminal act of rape is not necessary, but it is sufficient that he has a direct intention[46].

A special form of rape consists of rape or an act equivalent to it with the application of a threat, where the threat, unlike the basic form, is aimed at revealing something that would harm the honor and reputation of the passive subject or a person close to him, or the passive subject is threatened with other serious evil [CC, Article 178(2)].

For the first more severe form, it is necessary that the basic or special form of the act is committed with the existence of one of the qualifying circumstances. Thus, the legislator prescribes: the occurrence of serious physical injury to the person against whom the act was committed; that the act was committed by several persons; that the act was committed in a particularly cruel or particularly humiliating manner; that it was committed against a minor or that the act resulted in pregnancy [CC, Article 178(3)].

The second more severe form, that is, the most severe form, will exist if the death of the person against whom the act was committed or if the act was committed against a child occurred [CC, Article 178(4)].

When it comes to qualifying circumstances, it is necessary for the perpetrator to demonstrate negligence as a form of guilt in relation to a more serious consequence, because as a result of acting with intent there would be a combination of rape and serious bodily injury, that is, rape and murder or serious murder[47]. When pregnancy occurred as a result of rape, it is not important whether the perpetrator was negligent or intentional, since pregnancy does not constitute a criminal offense, but if the perpetrator intentionally led to the pregnancy of the raped woman, it would have the significance of an aggravating circumstance[48].

By looking at the criminal offense of rape from the aspect of reproductive coercion against women by a male partner, we see that any application of coercion with the aim of obtaining sexual intercourse is rape, it only depends on the consequences or the form of the threat, whether it is a basic, privileged or one of the qualified forms. Therefore, the ultimate goal of the male partner, i.e. the occurrence of pregnancy, would be relevant only if the pregnancy did occur, and it is not important whether the man acted with intention in relation to the occurrence of pregnancy. Also, the crime will exist regardless of the interpersonal relationship between the victim and the perpetrator, which means that it is not important whether a man and a woman are in a sexual-emotional relationship, cohabiting or married. However, depending on the moment when force and threat were used, as well as the woman's resistance, there are situations that will exclude this criminal act. As an illustration, we can take into account sexual intercourse, that is, sexual intercourse that began voluntarily. Two partners voluntarily engage in sexual intercourse, where there is an agreement to use

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[45] M. Škulić, *cited,* p. 415.

[46] M. Škulić, *cited,* p. 415.

[47] M. Škulić, *cited,* pp. 421-423.

[48] J. Lazarević, M. Škulić, *Nove inkriminacije protiv polne slobode u Krivičnom zakoniku Srbije* [New incriminations against sexual freedom in the Criminal Code of Serbia], Bilten Vrhovnog kasacionog suda, no. 2/2017, p. 133.

a condom to protect against pregnancy. During sexual intercourse, the woman notices that the man does not respect the agreement and that he has removed the condom. She wants the sexual act to be stopped immediately, but the man uses physical force and continues the sexual intercourse. In our literature, there is an opinion that we cannot talk about rape, because such rape is not the result of the force used[49]. The use of force or the threat that occurred in the course of sexual intercourse is not causally related to sexual intercourse that occurred with the consent of the woman, coercion was used only to voluntarily initiate sexual intercourse and to complete it in a physiological sense[50]. This interpretation is not only degrading for women, but also questionable. Can we really talk about the absence of a causal connection between the marriage and the coercion that occurs after the woman has agreed to the marriage? Could the repatriation be understood as a completed slander, and the coercion that occurred in the meantime a new slander? If we start from the fact that intercourse is considered complete when it is physiologically completed, or more precisely when the man ejaculates, we are faced with the fact that the legal provision was created to suit the man since he has a legitimate right, because there is no sanction, to complete intercourse which the woman opposes due to circumstances that arose after penetration.

Reproductive coercion is not based exclusively on the use of force or threats, but actions, which do not imply coercion, are aimed at the occurrence of pregnancy and arise from sexual intercourse, that is, the delusion into which a man leads a woman, and concerns the conditions of sexual intercourse. One of the examples is similar to the one previously mentioned, i.e. removing the condom during sexual intercourse, but if the man did not apply physical force, how could the intercourse continue, since the woman only found out after the intercourse was over that she was under the delusion that she was protected all the time from possible unwanted pregnancies. For rape, or any other crime, this is an irrelevant event. The same would be true if a man, in some way, damaged the condom during sexual intercourse, for example damaged the part of it that allowed him to ejaculate into the woman's vagina. A woman who was seduced by a man in connection with interrupted intercourse as a protection against pregnancy, i.e. when semen was introduced (*immisio seminis*), would also be left without the possibility of seeking justice before the court. Even in the event that she became pregnant during that sexual intercourse, the woman would at best have two options: to give birth or to have an abortion. In fact, a woman would be punished by pregnancy or abortion for participating in a sexual relationship that resulted in a pregnancy that the woman did not want, that is, she did not want the introduction of semen, and therefore the pregnancy. We really cannot imagine that, within the ossified framework of patriarchal society and the legal definition of rape, condom manipulation or unwanted ejaculation can be seen as behaviors that can threaten a woman's physical and/or psychological integrity, as well as her sexual freedom and ultimately the right to, through the conscientious use of contraception, does not face an unwanted pregnancy.

It seems that by criminalizing rape without consent (promise without coercion), manipulation of an agreed method of contraception could be included as rape. Given that in our positive criminal legislation, consent is the next, not the key element of rape, we must look for the answer in foreign literature and judicial practice.

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[49] Z. Stojanović, *cited,* p. 10.
[50] *Ibidem.*

Almost two decades ago, the case of *M.C v Bulgaria* came before the European Court of Human Rights[51] in which it was decided whether the crime of rape must be determined by coercion. The court took the position that rape cannot be viewed only in the context of force and threat, but that it implies any involuntary act, including the absence of physical resistance on the part of the victim. It unequivocally follows from the court's position that the concept of rape with the necessary existence of force or threat is a rigid approach that prevents the effective protection of sexual freedom and physical integrity[52].

Consent means consciously and willingly entering into a sexual relationship[53]. Could the consent defined in this way include the following circumstances: 1) when the condom is intentionally damaged by the man without the woman knowing about the damage, 2) when the man ejaculated into the woman's vagina even though intercourse was interrupted and the agreed method of contraception was used, and 3) when the condom was removed during sexual intercourse without the woman's consent.

Puncturing or otherwise damaging the condom by a man without the woman's knowledge is just one manifestation of preventing birth control that should render contraception ineffective and lead to a pregnancy the woman does not want. Condom piercing has been debated in court in Canada. In the case of R. v. A Hutchinson woman reported her male partner without her knowledge used a punctured condom during intercourse, resulting in an unwanted pregnancy that she wanted to protect against by using a condom as a form of contraception. The court qualified the act as sexual assault and found the accused guilty. When deciding the case, the court had to answer two questions that are inextricably linked, namely what voluntary consent to sexual intercourse entails and whether deception regarding contraception can be considered as the absence of consent[54]. It was established that consent to sexual intercourse cannot be generalized, that is, that a person does not consent only to sexual intercourse, but also needs to give consent in connection with other circumstances concerning sexual intercourse. A person has the right to freely decide on the sexual activities he wants to engage in, and that the partner cannot make that decision for him, since it is about his body, not his. In this regard, the injured party should have consented to sexual intercourse with the damaged condom for the consent to be valid (R. v. Hutchinson, paragraph 88-90). In the presented case, the court does not value consent as a simple consent to sexual intercourse, but takes into account the dynamics of the act itself, which includes certain circumstances in connection with which there must be freedom of choice for both, not just one partner.

Ejaculation into a woman's vagina in case in which interrupted intercourse was an agreed method of protection against pregnancy. In the reality of life, there are not rare cases where a woman agrees to have unprotected sex, but agrees with her partner that interrupted intercourse is a method of protection against unwanted pregnancy.

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[51] Application no. 39272/98. Judgment of 4.12.2003. year, paragraph 164-166. Downloaded from https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22M.C.%20v%20Bulgaria%22],%22 documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22]}, available on 11.12.2021.

[52] J.S. Schulhofer, *Rape in the twilight zone: When sex is unwanted but not illegal,* Suffolk University Law Review, vol. 2, no. 38, 2005, p. 420.

[53] See B. Chesser, A. Zahra, *Stealthing: a criminal offence?*, Current Issues in Criminal Justice, vol. 31, no. 2, 2019, p. 219; M.C. Cusack, *Nonconsensual Insemination: Battery*, Reproductive System & Sexual Disorders, vol. 5, no. 2, 2012, p. 90.

[54] *R. v. Hutchinson [2014] 1 SCR* 346, paragraph 20. Downloaded from https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13511/index.do, available on 10.3.2022.

When a man does not comply with the agreement but, against her will, ejaculates in the vagina, such behavior is one of the forms of reproductive coercion, and therefore also violence against women, partner violence and domestic violence. In addition, it can be linked to the crime of rape[55] which was confirmed by two judgments in the United Kingdom. During his stay in Sweden, the accused Julian Assange met a woman with whom he had sexual relations. Although the sexual relations were voluntary, i.e. with the consent of both parties, the injured party insisted on the use of condoms, to which the accused Assange agreed. However, the injured party did not trust her and during the sexual act she repeatedly touched the root of his genital organ to make sure he was wearing a condom, especially after the moment when she noticed that the accused was taking some actions with the condom during repenetration. However, after the sexual act was over, the victim was confronted with the fact that the accused had ejaculated in her vagina. Due to the aforementioned circumstances, the injured party decided to report the rape, since she agreed to a protected sexual relationship and all the time believed that the accused was honoring the agreement, which turned out to be a deception since the accused at some point damaged the condom, which later enabled him to ejaculate in the vagina damaged. The court concluded that sexual intercourse with a condom is different from sexual intercourse without a condom, which carries with it the possibility of contracting a sexually transmitted disease, as well as the occurrence of an unwanted pregnancy. Furthermore, the court concludes that the victim's consent to sexual intercourse with a condom cannot mislead the accused regarding the nature of that relationship, so there is no justifiable reason for him to believe that the injured party consents to sexual intercourse without a condom[56]. Therefore, although the accused and the injured party entered into voluntary sexual relations, the non-compliance with the agreement, that is, the changed circumstances of the sexual act required consent in connection with those circumstances, which did not occur, and the court decided that it was rape. It follows from the explanation of the judgment that consent given before sexual intercourse does not mean consent to all other circumstances of the sexual act itself, that is, consent can be withdrawn even after the sexual act has ended due to circumstances in relation to which the injured party did not give her consent. In another case, the court was more specific when it came to ejaculation for which the woman did not give her consent. In this case, the accused and the victim are spouses who participated in a voluntary sexual relationship. However, the injured party asked the accused not to ejaculate, that is, to have interrupted intercourse as a method of protection against pregnancy, to which the husband agreed, but did not honor the agreement. When evaluating the evidence, the court was based on the Assange case, where it was apostrophized that the choice regarding the circumstances of sexual intercourse is of key importance in determining (non)consent. The Court points out that evidence relating to "choice" and "freedom of choice" must be interpreted extensively. In this regard, the court concludes that there can be no talk of consent, considering that the injured party, as a condition to which the accused agreed, set interrupted intercourse, that is, ejaculation outside her vagina. Taking into account that the accused decided of his own free will not to honor that agreement and knowing that there would have been no sexual intercourse if the victim had known

[55] M.C. Cusack, *cited,* p. 129.

[56] Assange v Swedish Prosecution Authority [2011] EWHC (Admin) 2849. Downloaded from http://www.gdr-elsj.eu/wp-content/uploads/2012/06/High-Court-2-Novembre-2011-assange-approved-judgment-1.pdf.

about his intention to ejaculate inside the vagina, the court concluded that it was a criminal act of rape[57].

Removing the condom during sexual intercourse without the woman's consent began to attract the attention of the scientific public only in 2017[58] called this behavior of men stealthing and indicated that it violates not only the trust a woman has in her partner, but also bodily integrity. The modern approach to rape that takes consent, not coercion, as the demarcation line between voluntary sexual intercourse and rape could be seen both as a segment of gender-based violence and as rape[59]. When relating the removal of a condom during sexual intercourse without the partner's knowledge and consent, it should be taken into account that sexual intercourse with a condom transforms into a different sexual intercourse the moment a man removes the condom, and consent to sexual intercourse with a condom does not imply consent to sexual intercourse. intercourse without a condom[60]. This is precisely the reason why certain authors advocate the criminalization of preventing birth control[61] and therefore removing condoms without the partner's consent, while others propose that this type of reproductive coercion be specifically criminalized[62]. Although removing a condom during sexual intercourse is not specifically criminalized, this does not mean that the courts have not decided on this issue. Thus, the court in Germany (Berlin) handed down a verdict by which the man was sentenced to 8 months of probation. In this case, the court qualified the act as sexual assault, not rape, and explained the qualification of the act by the fact that the sexual relationship was voluntary. Nevertheless, the court took into account that removing the condom was illegal since it was a condition of sexual intercourse, and that the injured party had the possibility of an unwanted pregnancy or infection with a sexually transmitted disease. A court in Canada is debating the same issue. Although a judgment has already been passed in Canada regarding a similar case, i.e. condom piercing (R. v. Hutchinson) which the court could take into account, the judgment has not yet been passed even though the act is qualified as sexual assault[63].

III. Reproductive coercion and its relationship with criminal offenses of minor and serious bodily harm

Proceeding from the fact that reproductive coercion affects women's reproductive decisions, which is achieved by endangering both psychological and physical integrity,

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[57] R(F) v DPP & A [2013] EWHC (Admin) 945, paragraph 26. Downloaded from https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/f-v-dpp-judgment.pdf.

[58] A. Brodsky, *'Rape-Adjacent': Imagining Legal Responses to Nonconsensual Condom Removal*, Columbia Journal of Gender and Law, vol. 32, no. 2, 2017, p. 186.

[59] A. Brodsky, *cited,* p. 187.

[60] A. Brodsky, *cited,* pp. 191-192.

[61] See N. Leung, *Education not handcuffs: A response to proposals for the criminalization of birth control sabotage*, University of Maryland Law Journal of Race, Religion, Gender & Class, vol. 15, no.1, 2015, pp. 146-169; J. Rubenfeld, T*he riddle of rape by deception and the myth of sexual autonomy,* The Yale Law Journal, vol. 122, no. 6, 2013, pp.1375–1443.

[62] See L.A. Plunkett, *Contraceptive sabotage*, Columbia Journal of Gender and Law, no. 28, 2014, pp. 97-143; M.S.Trawick, *Birth Control Sabotage as Domestic Violence: A Legal Response*, California Law Review, vol. 100, no. 3, 2012, pp. 721-760.

[63] Kirkpatrick v. Her Majesty the Queen, File No. 39287. Downloaded from http://www.westcoastleaf.org/wp-content/uploads/2021/07/Without-supporting-lit-392887-Kirkpatrick-v-Her-Majesty-the-Queen-Motion-Intervention-WC-LEAF-SUITABLE-FOR-POSTING.pdf.

then "help" should be requested among the characteristics of crimes against life and body. Taking into account that male partners, in order to induce pregnancy, often apply physical force, then depending on the consequences that occurred, it could be about light or serious physical injuries.

The aforementioned criminal acts would be relevant when a man and a woman are in an emotional-sexual relationship, where they do not have a child and the woman is not pregnant at the given moment, because in that case it would be a criminal act of domestic violence. Therefore, if a man slapped his partner or otherwise inflicted minor physical injuries on her, the severity of which is determined by a doctor, he could be fined or imprisoned for up to one year [CC, Article 122(1)]. For this basic form of the offense, prosecution is undertaken by private action. Also, we can talk about this criminal offense if the slight physical injury was caused as a result of the use of a weapon, dangerous tool or other means suitable for seriously injuring the body or seriously damaging health [CC, Article 122(2)]. Furthermore, if as a result of the physical injury of a woman by a male partner, and with the aim of getting pregnant, a serious physical injury occurred, i.e. if her body was seriously injured or her health was seriously impaired, we can talk about the criminal offense of serious bodily injury [CC, Article 121(1)]. When it comes to reproductive coercion against women by a male partner, the occurrence of serious physical injuries is not excluded, especially due to the fact that reproductive violence goes "hand in hand" with other forms of violence. Therefore, it is not excluded that a male partner can seriously injure a woman or damage her health so severely that her life is endangered as a result or an important part of her body or an important organ is destroyed or weakened or caused permanent incapacity for work or permanent and severely impaired health or disfigurement has occurred, the snitch could be punished with imprisonment from one to eight years [CC, Article 121(2)]. If the infliction of serious physical injuries or serious damage to health would lead to the death of a woman, it would be a more serious form of this criminal offense [CC, Article 121(3)]. In the event that serious bodily injury or serious health impairment occurred due to the negligence of the male partner, it would be a privileged form [CC, Article 121(4)]. Also, it is possible for a man to commit an ordinary serious bodily injury, a particularly serious bodily injury or one of the aforementioned serious bodily injuries that results in the death of a woman on the spur of the moment, i.e. when he is brought into a strong state of irritation through no fault of his own by an attack, abuse or severe beating by his partner, which implies a milder punishment [CC, Article 121(5)].

IV. Conclusion

Considering all the above, we can conclude that women victims of reproductive coercion in Republic of Serbia have the possibility of criminal protection of violated rights. However, we cannot talk about protection at the highest level, but only about partial protection, which can certainly be improved.

Although the legislator in the Republic of Serbia generally prescribes the acts of committing the criminal act of domestic violence, which gives the possibility that all, so far recognized, acts of reproductive coercion are included in the act of committing this criminal act, the problem lies in the definition of the concept of family. As with the act of enforcement, the legislator foresees a wide range of persons who are to be

considered family members, but the same range is not wide enough to include the varieties of partner relationships within which reproductive coercion can occur. In this regard, we believe that the legislator should not exclude from the concept of family sexual-emotional partners who do not have a child together or a child is not on the way to be born and who have never lived in the same household. This is because different types of manipulation of the sexual-emotional partner's emotions or contraceptives, with the aim of pregnancy, can be the first step towards more severe violence against women for which there is no criminal law reaction and therefore must not remain beyond the scope of recognition and the possibility of intervention. Potential unwanted pregnancy as well as unwanted pregnancy cannot be seen as normal, but as negative phenomena that affect only women, where in most cases it is not a woman's carelessness about her reproduction, but the inability to make decisions about it independently. Family members should also include former extramarital partners who live in the same household, since this is not an impossible situation in real life, and it is not excluded that the former extramarital male partner exhibits some of the behaviors that belong to reproductive coercion. In this way, complete criminal protection against domestic violence would be achieved.

Partial protection against reproductive coercion is also provided through the criminal offense of rape. Any form of reproductive coercion that implies coercion is rape, while the occurrence of pregnancy will be considered an aggravating circumstance. Nevertheless, there are forms of reproductive coercion that certainly represent a violation of sexual freedom, but cannot be qualified as rape, and therefore remain far below the radar of criminal law protection. For this reason, we believe that the criminal offense in question should be redefined so that rape or an act equivalent to it is linked to the absence of the victim's consent, and not to the application of coercion, or to prescribe rape or an act equivalent to it without the victim's consent as a separate criminal offense. Thus, men's manipulations with condoms, disobeying interrupted intercourse as an agreed method of protection against unwanted pregnancy would be covered by this criminal offense and therefore subject to criminal law reaction.

Looking at reproductive coercion through the criminal acts of domestic violence and rape, we notice that various forms of the researched phenomenon are "covered" by the mentioned criminal acts, but not completely. In this regard, some of the shortcomings can be reduced by other criminal acts, more precisely by light or serious physical injuries. The above-mentioned criminal acts can only be applied in the case of emotional-sexual partners who do not have children and with the condition that the partner is not pregnant, and when a man physically injures a woman, causing minor or serious physical injuries or harm to her health. However, here we are only talking about physical injury, while there are no actions that are not covered by other criminal acts and refer to the manipulation of means of contraception, emotional tactics and manipulation, as well as non-compliance with the agreement regarding interrupted intercourse as a method of protection against unwanted pregnancy.

In the end, we would like to point out once again that it is not a very bad criminal law protection framework, on the contrary, it can be evaluated with a positive rating, but it is certainly not necessary to make efforts to raise it to a high level in a way that implies adaptation not only to the threats that they carry with them the remains of a patriarchal society, but also with the level of gender equality that modern law strives for.

References

1. "Stealthing": Berliner Polizist bekommt Bewährungsstrafe – weil er das Kondom abzog ["Stealthing": Berlin police officer gets suspended sentence – because he took off the condom]. Retrieved from https://www.stern.de/neon/wilde-welt/ gesellschaft/ -stealthing---berliner-polizist-bekommt-bewaehrungsstrafe---weil-er-das-kondom-abzog-8498608.html.

2. *Assange v Swedish Prosecution Authority [2011] EWHC (Admin) 2849*. Preuzeto sa http://www.gdr-elsj.eu/wp-content/uploads/2012/06/High-Court-2-Novembre-2011-assange-approved-judgment-1.pdf.

3. Brodsky, A, *'Rape-Adjacent': Imagining Legal Responses to Nonconsensual Condom Removal*, Columbia Journal of Gender and Law, vol. 32, no. 2, 2017, pp. 183-210.

4. Camp, R.A., *Coercing Pregnancy*, William and Mary Journal of Women and the Law, vol. 21, no. 2, 2015, pp. 275-318.

5. Chamberlain, L, Levenson, R. *Addressing intimate partner violence, reproductive and sexual coercion: a guide for obstetric, gynecologic, and reproductive health care settings*, San Francisco, The American College of Obstetricians and Gynecologists, 2010.

6. Chesser, B., Zahra, A., *Stealthing: a criminal offence?*, Current Issues in Criminal Justice, vol. 31, no. 2, 2019, pp. 217-235.

7. Criminal Code of Germany (*Strafgesetzbuch – StGB*). https://www.gesetze-im-internet.de/englisch_stgb/index.html.

8. Criminal Code, law no. 85/2005, 88/2005 – corrected, 107/2005 – corrected., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019.

9. Cusack, M. C., *Nonconsensual Insemination: Battery*, Reproductive System & Sexual Disorders, vol. 5, no. 2, 2012, pp. 78-141.

10. Decision of the District Court in Belgrade, case 3370/2005 of 29. 12.2005.

11. Delić, N., *Krivičnopravni aspekt nasilje u prodici* [Criminal law aspect of violence in gossip], in: Panov, S., Janjić Komar, M., Škilić, M. (eds.) *Nasilje u porodici* [*Domestic violence*], Međunarodni naučni skup, Beograd, Pravni fakultet Univerzitet u Beogradu, 2012, pp. 108-110.

12. Dimovski, D., *Zaštita žena u krivičnom pravu* [Protection of women in criminal law], in: Konstantinović Vilić (Ed.) *Pravna klinika za zaštitu prava žena-norme i praksa* [Legal clinic for the protection of women's rights – norms and practice], Zbornik radova, Beograd: Autonomni ženski centar, Niš: Ženski istraživački centar za edukaciju i komunikaciju, 2013, pp. 131-148.

13. Đorđević, Đ., *Krivičnopravna zaštita od nasilja u porodici* [Criminal law protection against domestic violence]. In: Kolarić D. (Ed.) *Nasilje u Srbiji – uzroci, oblici, posledice i društvena reakcija* [Violence in Serbia – causes, forms, consequences and social reaction], Naučno-stručni skup sa međunarodnim učešćem, Beograd: Kriminalističko-policijska akademija, Fondacija „Hans Zajdel", 2014, pp. 64-75.

14. Draškić, M., *Porodično pravo i prava deteta* [Family law and children's rights], Beograd, Pravni fakultet Univerziteta u Beogradu, 2011.

15. Himes, N.E., *Birth control in Historical and Clinical Perspective*, The ANNALS of the American Academy of Political and Social Science, vol. 160, no. 1, 1932, pp. 49-65.

16. Ivanović, R. A., Ivanović, B. A., *Krivično djelo silovanja u krivičnom zakonodavstvu Crne Gore* [The criminal offense of rape in the criminal legislation of Montenegro], *Pravne teme*, vol. 2, no. 3, 2014, pp. 92-110.

17. Jovanović, S., *Problemi krivičnopravne reakcije na nasilje u porodici* [Problems of criminal law response to domestic violence], in: Kolarić D. (ed.) *Nasilje u Srbiji – uzroci, oblici, posledice i društvena reakcija* [Violence in Serbia – causes, forms, consequences and social reaction], Naučno-stručni skup sa međunarodnim učešćem [Scientific and professional meeting with international participation], Beograd, Kriminalističko-policijska akademija, Fondacija „Hans Zajdel", 2014, pp. 246-255.

18. Jovašević, D., Đurđić, V., *Krivično pravo-posebni deo* [Criminal law – special part], Beograd: Nomos, 2006.

19. Jović, M: *Krivično pravo – posebni deo (skripta I)* [Criminal law – special part (volume I)], Novi Pazar: Univerzitet u Novom Pazaru, 2011.

20. Judgment of the Appell Court in Nis, case I 1228/10 of 15. 3. 2010.

21. Judgment of the District Court in Subotica, case 453/2008 of 22.7.2008.

22. *Kirkpatrick v. Her Majesty the Queen, File No. 39287*. http://www.westcoastleaf.org/wp-content/uploads/2021/07/Without-supporting-lit-392887-Kirkpatrick-v-Her-Majesty-the-Queen-Motion-Intervention-WC-LEAF-SUITABLE-FOR-POSTING.pdf.

23. Kričković Pele, K., *Vantelesna oplodnja: rodne i društvene kontroverze* [In vitro fertilization: gender and social controversies], Novi Sad, Pokrajinski zavod za rodnu ravnopravnost polova i ACIMSI – Centar za rodne studije, 2014.

24. Lazarević, J., Škulić, M., *Nove inkriminacije protiv polne slobode u Krivičnom zakoniku Srbije* [New incriminations against sexual freedom in the Criminal Code of Serbia], Bilten Vrhovnog kasacionog suda, no. 2/2017, pp. 122-153.

25. Lazarević, Lj., *Komentar Krivičnog zakonika Republike Srbije* [Commentary on the Criminal Code of the Republic of Serbia], Beograd, Službeni glasnik, 2006.

26. Lazarević, Lj., *Krivično pravo – posebni deo* [Criminal law – special part], Beograd, Savremena administracija, 2000.

27. Leung, N., *Education not handcuffs: A response to proposals for the criminalization of birth control sabotage*, University of Maryland Law Journal of Race, Religion, Gender & Class, vol. 15, no.1, 2015, pp. 146-169.

28. Lukić, M., Jovanović, S., *Nasilje u porodici-nova inkriminacija* [Violence in the family – a new incrimination], Beograd, Autonomni ženski centar, 2003.

29. *M.C v Bulgaria Application no. 39272/98.* Judgment of 4.12.2003. https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22M.C.%20v%20Bulgaria%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22]}.

30. Marinković, D., Lajić, O., *Kriminalistička metodika* [Criminal methodology], Beograd, Kriminalističko-policijska akademija, 2012.

31. Memedović, N., *Krivično delo silovanja u jugoslosvenskom pravu* [The crime of rape in Yugoslav law], Beograd, Naučna knjiga, 1988.

32. Miller, E., Silverman, G.J. *Reproductive coercion and partner violence: implications for clinical assessment of unintended pregnancy*, Expert Review of Obstetrics & Gynecology, vol. 5, no. 5, 2010, pp. 511-515.

33. Moore, M. A., Frohwirth, L., Miller, E., *Male reproductive control of women who have experienced intimate partner violence in the United States*, Social Science and Medicine, vol. 70, no. 11, 2010, pp. 1737-1744.

34. Park, J., et al., *Reproductive coercion: uncloaking and imbalance of social power*, American Journal of Obstetrics and Gynecology, vol. 214, no. 1, 2016, pp. 74-78.

35. Plunkett, L.A., *Contraceptive sabotage*, Columbia Journal of Gender and Law, no. 28, 2014, pp. 97-143.

36. *R. v. Hutchinson [2014] 1 SCR 346*. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13511/index.do.

37. *R(F) v DPP & A [2013] EWHC (Admin) 945*. https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Judgments/f-v-dpp-judgment.pdf.

38. Rowlands, S., Walker, S., *Reproductive control by others: Means, prepetrators and effects*, BMJ Sexual & Reproductive Health, vol. 45, no. 1, 2019, pp. 61-67.

39. Rubenfeld, J., T*he riddle of rape by deception and the myth of sexual autonomy,* The Yale Law Journal, vol. 122, no. 6, 2013, pp.1375–1443.

40. Schulhofer, J.S., *Rape in the twilight zone: When sex is unwanted but not illegal,* Suffolk University Law Review, vol. 2, no. 38, 2005, pp. 415-425.

41. Simić, D., *Krivičnopravna zaštita od nasilja u porodici* [Criminal law protection against domestic violence], *Kultura polisa*, vol. 12, no. 27, 2015, pp. 523-534.

42. Škulić, M., *Krivično delo nasilje u porodici* [Criminal act of domestic violence. In: Panov, S., Janjić-Komar, M, Škulić, M. (Eds.) *Nasilje u porodici* [Domestic violence], zbornik sa naučnog skupa Proceedings from a scientific meeting, Beograd, Pravni fakultet Univerziteta u Beogradu, 2009, pp. 10-22.

43. Škulić, M., *Krvično delo silovanja u Krivičnom pravu Srbije* [The criminal act of rape in the Criminal Law of Serbia], Crimen, 3, Revija za kriminologiju i krivično pravo, no. 2-3, 2017, pp. 392-441.

44. Škulić, M., *Maloletnici kao učinioci i kao žrtve krivičnih dela* [Minors as perpetrators and victims of criminal acts], Beograd, Dosije, 2003.

45. Škulić, M., *Nasilje u porodici: neki problemi zakonske inkriminacije i sudske prakse* [Domestic violence: some problems of legal incrimination and judicial practice]. In: Kolarić D. (Ed.) *Nasilje u Srbiji – uzroci, oblici, posledice i društvena reakcija* [Violence in Serbia – causes, forms, consequences and social reaction], Naučno-stručni skup sa međunarodnim učešćem, Beograd: Kriminalističko-policijska akademija, Fondacija „Hans Zajdel", 2014, pp. 34-51.

46. Stojanović, Z., *O pojmu pretnje u krivičnom pravu* [On the concept of threat in criminal law], NBP- Nauka, bezbednost, policija, vol. 18, no. 2, 2013, pp. 1-16.

47. Stojanović, Z., *Silovanje bez prinude: Usaglašavanje KZ Srbije sa članom 36 Istanbulske konvencije* [Rape without coercion: Alignment of the Criminal Code of Serbia with Article 36 of the Istanbul Convention], NBP-Žurnal za krinimalistiku i pravo, no. 1, 2016. pp. 1-23.

48. Trawick, M.S., *Birth Control Sabotage as Domestic Violence: A Legal Response*, California Law Review, vol. 100, no. 3, 2012, pp. 721-760.

49. Turanjanin, V., Ćorović, E., Čvorović, D., *Domestic violence in Serbia*, Zbornik radova Pravnog fakulteta u Nišu, no. 77, 2017, pp. 75-101.

50. Vešović, M., *Nasilje u partnerskim odnosima i porodici (krivičnopravni aspekt)* [Violence in partner relationships and family (criminal law aspect)], Revija za kriminologiju i krivično pravo, no. 2-3, 2015, pp. 159-184.

51. Vujičić, N., *Krivičnopravni i kriminološki aspekti seksualnog nasilja u Republici Srbiji* [Criminal law and criminological aspects of sexual violence in the Republic of Serbia], *Zbornik Instituta za kriminološka i sociološka istraživanja*, no. 1, 2016, pp. 119-136.

Treatment of Convicts in the Rehabilitation Process – International Standards

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Abstract[1]

Adequate organization, both of the educational and the work process, is a prerequisite for the success of the effects of treatment in the process of resocialization of convicts. The survey data shows that 58% of convicts are involved in some of the work processes, and that 42% of convicts are out of work at the institute. Also, of the 200 convicts, 55 of them have only eight-year school, or do not have a full primary school, 118 have completed high school, and 27 convicts have higher or higher school qualifications.

The decline of man's physical abilities is a consequence of the reduced need for movement, which can be compensated only by daily exercise and the adoption and maintenance of hygiene habits, a healthy diet, fostering a humane relationship between people, a better and more successful life. According to the data, although there is a will for recreation, there is no condition. Thus, in the Correctional Institution for Women in a semi-open and open department, on a sample of 100 respondents, 31 of them declared that sports and recreational activities do not take place, as well as in the closed department, out of 100 of them, 69 declared that there are no adequate conditions for recreation. Recreation may not attract the attention of every prisoner, the research concludes, but they give a strong emphasis on the individualization of the individual's various forms of interest. Together with other innovative approaches – as a role in promoting renunciation by motivating, engaging and inspiring individuals, as well as promoting meaningful and constructive therapeutic connections and support opportunities, recreational sport can be used as a platform to facilitate other innovative prison-based programs.

Keywords: *education, work process, sport, sanctions, re-socialization*

I. Introduction

Practice shows that the effects of punishment of detention are very modest, precisely because the level of recidivism has been increasing in recent decades. The overpopulation

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[1] The work was created as a result of research engagement according to the Plan and Work Program of the Institute for Criminological and Sociological Research for 2023, which was approved by the Ministry of Science, Technological Development and Innovation of the Republic of Serbia.

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of the convict population leads to disorganization and a general crisis of the prison system. The structure of committed criminal offenses is moving in the direction of committing a number of the most serious crimes with elements of violence, terrorist offenses, the structure of convicts is increasingly complex both in the criminological and psychological sphere, there is an increasing number of addicts from psychoactive substances, the material position of prisons and employees is very poor, inadequate personnel potential, unmotivated employees and the like[2]. International law stipulates that prisoners, although they lose their freedom while serving their sentences, must not lose other rights, including the right to play sports and physical activity, the opportunity to receive education, retraining and other activities, at the disposal of the prison itself. Research shows that sport not only contributes to better physical condition and health, but also to the social integration of people who play sports.

Improvements include: developing self-control, easier cooperation with others, getting used to playing according to the rules, developing self-awareness and cognitive competencies, education through sports activities, development, joy and enjoyment of winning in a positive way. The individual seeks to find out what makes him unique, special, different from others, what his strengths, what are his disadvantages and weaknesses[3]. Physical activity is the basis for preserving health, normal functioning of organs as well as preserving the biological status of man with nature. Any imbalance, limiting the motor functions of the most vital organs, leads to a violation of both functional and organic character, which threatens the biological status of man. In order to preserve health and create good habits, the State is obliged to take certain measures, in the form of the revival of sport and recreation both for the free and for people deprived of their liberty.

In the middle of 20. Century the tendency towards building a different model of execution of sentences of detention arises, which, compared to the classic model, does not rest on rigid rules governing the regime in prisons, but is the idea of dealing with convicts. Also, there is a need to define new correction programs, which are used in the process of resocialization[4].

When we say the process of re-socialization, we mean the methods of observation of the person condemned with the aim of determining socio-psychological, criminological, medical and other personality traits, on the basis of which adequate treatment is determined. The results obtained by observation of personality can be used in various stages of resocialization, for successful work of pre-educational services such as educators, psychologists, instructors, sports officers and other participants in the implementation of correction programs.

The concept of treatment can be viewed in a broader and narrower sense. Treatment understood in a broader sense refers to the treatment of perpetrators of criminal offenses both in criminal proceedings and in the process of execution of criminal sanctions and later in the postpenal period, but it is viewed at all stages from the point

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[2] J. Igrački, J. Ilić, *Application of alternative sanctions and crime prevention*, Court of Appeals in Kragujevac, No.1., Kragujevac, 2022, p. 71.

[3] Z. Stevanović, J. Igrački, *Psychosocial characteristics of perpetrators of criminal offenses with elements of violence*, Criminal Law Instruments of Countering Terrorism and Other Violent Acts, Ministry of Justice of the Republic of Srpska, Serbian Association for Criminal Law and Practice, International Association of Criminalists Banja Luka, Teslić, 2016, p. 470.

[4] J. Igrački, *Effects of Prison in The Resocialization of Convicts*, Institute for Criminological and Sociological Research, Belgrade, 2020, pp. 14-15.

of view of resocialization, as the most important goal of criminal sanctions[5]. The aim of the treatment is to eliminate the individual causes of crime in a process aimed at guiding the condemned through several stages, which include the acceptance of the current value system in society[6]. Prisoners are involved in certain forms of treatment, as Milutinović states, (a) moral-pedagogical upbringing and education of convicts; (b) work and professional training; (c) organizing leisure time (convicted leisure); (d) the participation of the convict in his re-education (e) the rewarding and punishment of the convict; (f) approaching the convict's treatment with the conditions of life at large and (g) the application of psychotherapy and group therapy[7]. In order to achieve such important and responsible tasks, professional educational staff is necessary. They represent the main carriers of the educational and correctional process and they are also the ones who directly approach convicts in changing the personality traits, as well as the behavior of convicted persons.

The role of the staff is[8]:

- To treat prisoners in a polite, humane and equitable manner;
- To make sure that all prisoners are safe;
- To make sure that dangerous prisoners do not escape;
- To ensure that there is good order and control in prison;
- To allow inmates to use their time in prison in a positive way, so that they can better fit into society after serving their prison sentence.

If convicts cannot be selected, staff are selected – Rule[9] 46.1, which applies to staff of penal institutes, stipulates that "The directorate of penal institutes must carefully select staff of all degrees, because good management of penal institutes depends on the integrity of this staff, his humanity, his personal characteristics and his professional ability".

II. Normative regulation and jurisdiction of the prison system

The largest number of persons deprived of their liberty in Serbia are in institutions under the jurisdiction of the Ministry of Justice, i.e. Administrationfor the Execution of Criminal Sanctions: Correctional Institutions, District Institutes and Special Prison Hospital. Thanks to the fact that these institutions have been more open to citizens in recent years, it is possible to continuously monitor their work, which includes direct insight into the treatment of persons deprived of their liberty. The prison system in the Republic of Serbia plays an extremely important role in the process of crime control and in cooperation with other social mechanisms has an impact on other sociopathological phenomena. The systematicof legal acts governing the system of execution of criminal sanctions, in our legal system, can be carried out on: (a)legal provisions and (b) bylaws[10]. When we talk about laws that directly or

[5] M. Milutinović, *Penology,* Contemporary Administration, Belgrade, 1977.

[6] S. Lavasseur, *Precis de criminologie et science penitentiare*, Paris, 1968.

[7] M. Milutinović, *cited,* p. 117 mark 118.

[8] Law on Execution of Criminal Sanctions (Official Gazette of RS, No. 55/2014 and 35/2019).

[9] *A set of minimum rules on the treatment of prisoners, adopted at the first UN Congress for crime prevention and proceedings with offenders in Geneva in 1955 and confirmed by the Economic and Social Council resolutions No. 663 (XXIV) in 1957 and No. 2076 (LXII) in 1977.* Translation taken from the Archives for Legal and Society's Doctrines, br. 4/1956, translated by prof. N. Srzentić.

[10] Đ. Ignjatović, *The Right to Enforce Criminal Sanctions,* Faculty of Law, Belgrade, 2006, p. 79.

indirectly regulate the field of enforcement of criminal sanctions, we will list the following laws:

- The Criminal Code[11];
- The Criminal Procedure Act[12];
- Law on the Execution of Criminal Sanctions[13];
- Law on the Execution of Extrajudicial Sanctions and Measures[14];
- Law on Juvenile Perpetrators of Criminal Offences and Criminal Law Protection of Minors[15];
- Ministry Law[16] and others.

Laws regulate the purpose of punishment, types of sentences as well as their execution, regulate the rules on parole, status of detainees, as well as the area of execution of criminal sanctions, types and types of institutes, services in institutes, internal organization of the prison system, management method, purpose of criminal sanctions, belonging to the portfolio etc.

Of course, in addition to the basic normative acts regulating the prison system, all other regulations apply to the functioning of the institute. Special importance for the enforcement of criminal sanctions is the observance of international rules, conventions, declarations and other recommendations governing standards in the field of enforcement of criminal sanctions. The more detailed standards set out in these principles, the minimum rules or guidelines, make it worth complementing the broader principles contained in legal contracts. These standards are: Standard Minimum Rules for the Treatment of Prisoners (1957); Principles for the protection of all persons under any form of detention or imprisonment (1988); Basic Principles for the Treatment of Prisoners (1990) and Standard Minimum Rules for the Treatment of Minors (1985).

There are also a number of instruments relating to staff working with people who are deprived of their liberty, and who in a specific way more closely regulate the areas that are relevant for the treatment of convicts and their stay in the institute. These documents are: Code of Conduct for Persons Responsible for Law Enforcement (1979), Principles of Medical Ethics relating to the Role of Healthcare Professionals, in particular Physicians, in protecting prisoners and persons in custody from torture and other cruel, inhuman or degrading sentences or acts (1982); and Basic Principles on the Use of Force and Firearms (1990). The importance of regulating all segments of the life of convicts in the institute, aims to prevent and prevent all circumstances that may occur during the stay in the institute. The aim of prescribing rules and procedures of conduct is in favor of the realization of the rights of each prisoner. In a broader sense, the responsibility of the state to ensure adequate and effective treatment, and care for the convict while serving his sentence.

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[11] Criminal Code (Official Gazette of RS, no. 85/2005, 88/2005 – ispr., 107/2005 – ispr., 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019).

[12] Law on Criminal Procedure (Official Gazette of RS, No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021 – Decision US and 62/2021 – Decision US).

[13] Law on Execution of Criminal Sanctions (Official Gazette of RS, No. 55/2014 and 35/2019).

[14] Law on Enforcement of Extrajudicial Sanctions and Measures (Official Gazette of RS, No. 55/2014 and 87/2018).

[15] Law on Juvenile Perpetrators of Criminal Offences and Criminal Law Protection of Minors (Official Gazette of RS, No. 85/2005).

[16] Law on Ministries (Official Gazette of RS, no. 128/2020).

While the provisions on the manner, methodology and objectives of dealing with prisoners are clear, there is diversity in practice. Meaningful prison work, education, sports and recreational activities and active leisure time, sometimes deviate from the basic principles of legal national as well as international acts, oriented to training, self-development and resocialization of prisoners.

III. Rights and benefits of the condemned

The fundamental rights of those convicted of his special rights[17] are clearly demarcated, although these two categories naturally and logically build on each other, and are regulated by the Law on the Enforcement of Criminal Sanctions[18]. The convicted person is granted special rights as a reward for his good behavior and advocacy at work, which is a realistic basis for confirmation and positive prognosis of the behavior of the convicted after his release. Special rights are granted to a convicted person by the head of the institute on the proposal of the re-education service and can only be exercised by the condemned person who deserves them, and thus the Law specifies special rights that may be granted to the convicted person.

According to the place of use, the benefits are divided into institute benefits, which are used in the institute itself and extra-judicial benefits, which are used outside the institute. Analyzing the type[19], frequency of use and abuse of special rights and benefits given to convicts (on average in the last five years), it is observed that the highest frequency of use of regular weekends (45.71%) and regular going out to the city (22.81%), which is a total of 67.10%. All other special rights are used significantly less (32.90%). If we look at the number of abused benefits, we can see that abuses of the benefits used are very small, almost negligible and range below 1%, within the scope of the benefits used. Such a small number of abused benefits indicates that the assessments of professional services are good and that these benefits mean a lot to convicts and do not want to abuse them, and therefore not lose them. This indicates that the convenience mechanism is quite good and that it works successfully. Respect for order and discipline imposed by the regime of life in the correctional institution is a necessary prerequisite for the realization of all legally guaranteed rights of convicts and a prerequisite for the successful and unimpeded implementation of the re-socialization program.

Inmates engage in work and education programs, but, they are often lacking in establishing true meaningfulness of time spent in prison. A lot of inmates, especially prisoners awaiting trial, spend most of their days indoors in a rather confined space, with limited access to daylight and fresh air. In such circumstances, it is fundamental for both physical and mental health, that prisoners have an appropriate period of time for daily outdoor sojourn, as well as have the opportunity to walk. Data[20] obtained

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[17] Special rights is the name for benefits. In all previous laws on the execution of criminal sanctions, the term convenience was used.

[18] Law on Execution of Criminal Sanctions (Official Gazette of RS, No. 55/2014 and 35/2019).

[19] Z. Stevanović, *Treatment of Prisoners in the Prison System of Serbia*, Institute for Criminological and Sociological Research, Belgrade, 2014.

[20] J. Igrački, *Research conducted in Mitrovica Penitentiary, Pozarevac-Zabela Prison and Women's Prison in Pozarevac*, Approval of the Ministry of Justice, Directorate for Execution of Criminal Sanctions, No. 704-00-2/2021-03-65, 2021.

from employees of 25 institutes on the territory of the Republic of Serbia clearly indicate that there is a lack of professional staff, who are in charge of sports and recreational activities, as well as that the conditions for their implementation are lacking. Out of 25 institutes, the Organizer of Cultural, Educational and Sports Activities, employs a professional in 5 institutes, sports and recreational activities are performed by educators in 15 institutes, in 2 institutes they are commanders, in 3 institutes they are in charge of sports and recreational activities from the security service. The data we analyzed confirmed earlier knowledge that a significant number of employees in Serbian prisons by basic education are not professionally competent to work with prisoners (professors of history, Marxism, defense and protection, geography, political scientists, mechanical engineers...). They need to further organize education and/or engage experts in specific fields to improve treatment and create new programs aimed at reducing recidivism of prisoners.

IV. Professional activities and leisure behind bars in serbia and international standards

The recommendations of the European Union and other international treaties[21] stipulate that prison sentences should aim to facilitate the reintegration of offenders into society. Education and work are an integral part of the modern prison system, but also insufficient, because time in prison must be meaningful and useful spent both in prison and after serving a prison sentence. In the section, *Contacts with the Outside World, Prison Regime, more*[22] closely regulates leisure time and in Article 25.1, the Prison Regime must provide for a balanced program of activities for all prisoners, and 25.2 This regime should allow all prisoners to spend outside the cells as much time as necessary for an adequate level of human and social interaction. According to international standards, prison work is no longer considered a source of profit, but is associated with the purpose of daily routines and important for integration as well as education and various forms of education. The space of free time remains open, so convicts, in most cases, organize themselves. Spending free time or sports and recreational activities are closely related to self-expression, increased self-esteem and internal motivation.

Reaffirming the standards contained in the recommendations of the Committee of Ministers of the Council of Europe, relating to specific aspects of criminal policy and practice and in particular Recommendation Rec (89)12 on education in prison, Recommendation Rec (93)6 on prison and criminological aspects of the control of infectious diseases, including AIDS and other health problems in prison, Recommendation Rec (97)12 concerning staff in charge of implementing sanctions and measures, Recommendation Rec (98)7 on ethical and organizational aspects of health care in prison, Recommendation Rec (99)22 related to overpopulation and increase of prison population, Recommendation Rec (2003)22 on parole, and Recommendation Rec (2003)23 on the conduct of the prison administration in terms of life sentences and other long prison sentences.

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[21] See Recomendation REC (2006), 2 Committee on the Treatment of Prisoners,, https://pjp-eu.coe.int/documents/3983922/6970334/CMRec+(2006)+2+on+the+European+Prison+Rules.pdf/e0c900b9-92cd-4dbc-b23e-d662a94f3a96.

[22] European Prison Rules, (2006), Council of Europe, Belgrade, p. 19.

Research data[23] indicate that most inmates are engaged in some kind of work, educational program, sports and recreational activities, but these programs do not achieve the goals they have set for themselves. Examining the scope of application of forms of educational-corrective work with convicts, the results show that individual work is applied in 78%, group work in 15% and all other forms of work in 7% of cases[24]. When it comes to the education and vocational training of prisoners, as an important factor in the process of resocialization, expectations have been betrayed. The process of inclusion in life at liberty precedes education and training within the prison, to which convicted persons are entitled.

The educational structure, i.e. the professional qualifications of most of the staff in the treatment and training services, is not in accordance with the specific needs of the prison population with whom they work[25]. Also, there are no confirmed opinions that educating an individual will significantly reduce the crime rate, i.e. that convicts, who have completed a certain educational process in the institute, will stop committing criminal offenses.

On a sample of 200 convicts, the results show that 55 of them are only with an eight-year school, or do not have a full primary school, 118 have completed high school, and 27 convicts have higher or higher school[26] qualifications. Of course, the educational process has a great impact on developing persons, on young people who are just forming, but for the education of adults, already structured criminals, this process has limited opportunities. When we talk about the work engagement of convicts, the situation is no better. Convicts are less and less engaged in production facilities, the interest of instructors is weakening, and convicts have more and more meaningless time when they are not occupied[27] by anything. The survey data indicates that 58% of convicts are involved in some of the work processes (including regime jobs-maintaining prisons), and that 42% of convicts are out of work in the institute[28]. The question is justified, are the legal obligations of the Institute to provide the convict with primary and secondary education[29], to provide conditions for work[30], whether in the institute or outside it? Prisoners have a limited selection of sports and recreational activities, and therefore do not see the ultimate purpose of the activity.

Fun forms of entertainment separate prisoners from negativity and facilitate the daily life of prison, routine, limited schedule, discipline and control and encourage positive thinking[31]. One of the common ways of coping that is available to all convicted

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[23] The research was conducted at the Correctional Institution in Pozarevac-Zabela, on a sample of 200 convicts of different status in relation to: the amount of sentence, the length of the sentence in prison, age, the type of crimes committed and other characteristics. Toy J., (2020).

[24] J. Toy, *Effects of Prison in The Resocialization of Convicts*, Institute for Criminological and Sociological Research, Belgrade, 2020, p. 87.

[25] B. Knežić, *Education of convicts: a way to be free*, Institute for Criminological Research, Belgrade, 2017.

[26] J. Igrački, *Effects of Prison in The Resocialization of Convicts*, Institute for Criminological and Sociological Research, Belgrade, 2020, p. 89.

[27] Z. Stevanović, *Treatment of Prisoners in the Prison System of Serbia*, Institute for Criminological and Sociological Research, Belgrade, 2014

[28] J. Igrački, *Effects of Prison in The Resocialization of Convicts*, Institute for Criminological and Sociological Research, Belgrade, 2020, p. 91.

[29] The Law on the Execution of Criminal Sanctions, Art. 122 and 123.

[30] The Law on the Execution of Criminal Sanctions, Art. 98-108.

[31] G. Carvalho, R. Capelo, D. Nunez, *Perspectives of the future when time is suspended: an analysis of prisoner* discourse, Time & Society, Vol. 27, 2015, p. 303.

persons is to think positively about future plans, as well as planning a better life after serving a prison sentence. The Regional Committee of Calabria in Italy has approved a law that will reward inmates for reading books by reducing their time in prison. Under the proposal, prisoners will be reduced by three days for each book they read, and the maximum is set at 48 days over a one-year period – equivalent to 16 books in twelve months. The offer would only apply to inmates serving their sentences for more than six months, and the advancement of prisoners would be supervised by prison educators to prevent cheating[32].

In 2010, IGNOU[33] announced its "Free Education for Prisoners" initiative and waived fees for all inmates who wanted to pursue the University's programs. The move marked a significant milestone in encouraging and rehabilitating inmates to improve their quality of life after their release from prison[34].

Prisoners in Saudi Arabia will receive handicraft training to give them a decent life after their release. The National Handicrafts Program, a leading program of the Saudi Tourism and Antiquities Commission, signed a memorandum of understanding (MoU) with the General Department of Prisons and the Corporation of Technical and Vocational Education to train prisoners for the production of handicrafts. The MoR aims to include training programs for handicrafts in the Kingdom's prisons, while developing the skills of prisoners that will allow them to train their colleagues. The MoR also stipulates that the three parties cooperating on the initiative will take responsibility for the marketing of inmates' products. The agreement aims to provide employment opportunities for inmates who complete training and reward them with cash rewards upon release[35].

According to the research[36], eleven inmates at the Minimum Security Tung Tau Correctional Facility in Stanley, Hong Kong, recently passed a written exam for a taxi driver's license. They were among 13 inmates who had taken a new taxi driver training course at the Department of Correctional Measures, during which they attended classes 48 days before taking the test. The course allows prisoners to obtain permits after their release. In addition, 15 of the 16 inmates who attended a 100-day assistant travel agent course passed the test. The course taught skills such as customer service and working with travel agency computer programs. The courses are part of the department's voluntary vocational training program, which offers more than 30 courses in 13 prisons in crafts for which there is a high demand. It aims to help prisoners find careers and reintegrate into society when they are released.

The research[37] also shows that a group of inmates at a prison in Berlin's Tegel, Germany, set up a union in an attempt to campaign for a minimum wage and a pension system for prisoners. Inmates are excluded from national pension schemes and the national minimum wage, which in Germany's case plans to take effect in 2015 at a

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[32] q=icps_news_digest_may_jun_2014_0.pdf&rlz=1C1PRFE_enRS690RS691&oq=icps_news_digest_may_jun_2014_0.pdf&gs_lcrp=EgZjaHJvbWUyBggAEEUYOdIBDTMzNDM2MzY3ajBqMTWoAgCwAgA&sourceid=chrome&ie=UTF-8#vhid=bYNb6I0JM0eJJM&vssid=l.

[33] http://www.ignou.ac.in/ retrieved 7/23/2023.

[34] *Ibidem*.

[35]q=icps_news_digest_may_jun_2014_0.pdf&rlz=1C1PRFE_enRS690RS691&oq=icps_news_digest_may_jun_2014_0.pdf&gs_lcrp=EgZjaHJvbWUyBggAEEUYOdIBDTMzNDM2MzY3ajBqMTWoAgCwAgA&sourceid=chrome&ie=UTF-8#vhid=bYNb6I0JM0eJJM&vssid=l.

[36] *Ibidem.*

[37] *Ibidem.*

price of 8.50 euros (£6.90) per hour. Prisoners in Berlin Tegel earn between 9 and 15 euros a day, depending on their qualifications. The Berlin union, which is registered as an association with no legal status and claims to have collected numerous signatures in prison, criticized the exemption of inmates from minimum wage plans. It said the lack of pension schemes meant many elderly prisoners were released right into poverty.

When we talk about leisure and sports and recreational activities, we believe that there is an intention to implement future visions of using leisure time in correctional institutions for the development of new skills, self-development and discovery of new hobbies. Prisoners emphasize that engaging in sports and recreational activities is useful and positive for them, and that the use of free time while serving their sentences significantly contributes to future plans, changes in lifestyle, improvement of the atmosphere in prison, reduction of tension[38]. The research shows that the degree of interest and level of involvement of convicts in sports and recreational activities is that out of 200 convicts, 30% are engaged actively, 52% are occasionally involved in sports and recreational activities, and 18% declare that they are not involved[39]. The results clearly tell us that there is no motivation among convicts to actively engage in organized leisure time. Since it is free time[40], the time where convicts have the right to spend outside closed spaces in the fresh air for 2 hours, and to have the right to organized physical activity, including the right to use sports fields and equipment together with other convicts, is nevertheless insufficiently and purposefully used.

In the execution of institutional sanctions against minors, leisure time and leisure activities, special attention is paid. Most often, as instruments for the resocialization of minors, the following programs are used: educational programs, occupational therapy, programs of leisure activities – cultural entertainment and sports programs, stimulating-motivational programs – benefits, rewardand punishment, programs of cooperation with the social community etc. The implementation of these programs is carried out through individual and group forms of work[41].

The content and organization of leisure activities of minors is adapted to the age, mental and physical development and needs of minors[42]. For the purpose of comprehensive educational activity on minors, preservation and development of psychophysical abilities and raising his cultural level, various activities are organized in the institute in their free time[43]. These activities, in our institutes, can be classified into three categories:

- sports and recreational activities (active or recreational activities or monitoring of sports activities);

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[38] See D. Gallant, E. Sherri, M. Nicholson, *Recreation or rehabilitation? Managing sport for development programs with prison populations,* Sport Management Review vol. 18 issue 1, 2014, DOI: 10.1016/j.smr.2014.07.005; R. Meek, G. Lewis, *The Impact of Sports Initiative on Young Men in Prison: Perspectives of Staff and Participants*, Journal of Sport and Social Issues, Vol. 38, 2014, pp. 95-123.

[39] J. Igrački, *Effects of Prison in The Resocialization of Convicts,* Institute for Criminological and Sociological Research, Belgrade, 2020, p. 93.

[40] The Law on the Execution of Criminal Sanctions, Art. 80.

[41] Z. Stevanović, J. Igrački, *Application of preventive programs in working with juvenile offenders,* Proceedings of the Institute for Criminological and Sociological Research, Belgrade, 2015, p. 169-180.

[42] Regulation on house rules of the Correctional Institution and the Rulebook on house rules of the juvenile correctional institution ("Official Gazette of the Republic of Serbia", No. 34/2006).

[43]Article 80 Regulation on House Rules in a Juvenile Correctional Institution ("Official Gazette of RS", No. 34/2006).

- cultural and entertainment activities (sections, cinemas, reading books, publishing a convict's paper etc.)
- convicted leisure, relaxation and rest (activities that do not require physical and mental exertion, but have a relaxing character).

Outside of work and education, prisoners largely define their free time on their own, because they do not have a professional person, in most institutes, which is in charge of this form of recreation. In conversation with the convicts and with the professional staff, we came to the data that this position, The Sports Officer, is not filled with an adequate profession, but these jobs are handled by educators or commanders. Convicts engaged in recreational sports, along with other forms of occupation, believe that the primary source of social adaptation to the prison environment allows them to reduce tensions and adapt to the existing situation. Based on data from various studies, sports and recreational activities are one of the most important means for maintaining emotional balance and mental health in prison, as well as for combating stress and tension.

V. Possibilities of the institute in the engagement of convicts in recreational sports

As Aristotle has noted, "Nothing so exhausts or destroys a man as long-term physical inactivity."

The prison system is increasingly recognizing the value of sport. Its effects are very beneficial for people in detention and for prison life in general. However, looking at the goals to the challenge, we can see that the link between sport and prison is complex and in order to better understand and see what lessons can be learned, an in-depth process of thinking is needed, based on current scientific knowledge in this field and on state policies and practices applied in prisons.

Sport and recreation in prison conditions should be considered a homogeneous entity, the primary recognized need, precisely because the diverse impact of sport and physical activity in different prison contexts, in different contexts of origin and need, different criminogenic requirements, direct research implication of recognizing the different uses and different effects of sport and physical activity on safe terrain, and the need to make greater efforts to determine which types of sports are It is the most effective way to achieve certain goals, whether they are physical, psychological or social.

Research[44] conducted in three correctional institutions in the Republic of Serbia indicates that the need for sports and recreational activities is recognized, that convicts and employees have a clear attitude but that there are no conditions. Thus, in the Prison for Women in the semi-open and open ward, on a sample of 100 respondents, 31 of them declared, as well as in the closed department, out of 100 of them 69 declared that sports and recreational activities do not take place. The convicts indicate that they do not even have basic conditions for walking. They are interested in yoga, volleyball, swimming, dancing, aerobics, but that they have no conditions. In Mitrovica, the convicts have conditions, and indicate that competitions are also taking place in the local SC Partizan, chess and table tennis. The competition takes place once a year

[44] J. Igrački, *Research conducted in Mitrovica Penitentiary, Pozarevac-Zabela Prison and Women's Prison in Pozarevac*, 2021, Approval of the Ministry of Justice, Directorate for Execution of Criminal Sanctions, No. 704-00-2/2021-03-65.

and in a sporting and fair atmosphere, without incident. In the closed department of the Prison in Mitrovica, when asked what is missing to engage in sports and recreational activities, 55 of them answered that they lacked fields for small sports, for the football field 15 of them, the athletic track 11 of them, the gym 13 of them and the sports hall 10 of them, on a sample of 100 respondents. In the semi-open and open department of the Prison in Mitrovica, a smaller number of convicts due to work obligations participated, so in the semi-open department, 35 of them replied that they were interested in sports and recreational activities on a sample of 40 respondents, and in the open department participated 10 respondents and are interested in competitions, sports and recreation. They lack free time because they work in economics, agriculture, and other jobs. When it comes to the Pozarevac-Zabela prisoners, due to the renovation of the field, the hall, can only engage in lifting weights, which are improvised street gadgets, and playing football on a field that is in a very bad condition. The sample is for the open ward of 50 convicts, for the semi-open 50 and for the imprisoned 100 convicts. In this institution, competitions in indoor football and table tennis are held annually.

As for objects, props, equipment, terrain, equipment, indicators are very poor. These are clear indications that although the attitude of most penologists, criminologists, psychologists, medical staff, and other important professions dealing with this issue, that the free time of convicts, and sports and recreational activities must be approached with more seriousness and with new ideas and content, aligned with the modern time and structure and interest of convicts, and that the current effects of leisure activities do not contribute to the successful process of resocialization of convicts and their reintegration.

Inclusion in recreational sports activities is one of the diversionary measures in juvenile criminal legislation. By applying educational orders, in juveniles, personality assessment is also applied, applying psychological assessment, where recreational sports precisely in a creative way occupy the attention of minors in a quality and creative way, which achieves the elimination of various negative contents to which minors are exposed, and thus leads the minor to successful social inclusion. Bearing in mind the above, it is necessary to use sports in prison as a recreational activity in order to influence the behavior, but also the health of convicted persons, both minors and adults.

The key message is that sport in prison can and offers many opportunities, but that there are also complexities associated with the development, implementation and evaluation of sports programs in prison conditions and that these activities can benefit the most if they are characterized as a means by which social, psychological and physical changes are implemented, and not as a solution itself[45].

VI. Conclusion

The convicts should be helped to find a way to get out of prison with as few harmful consequences as possible and to get involved in life as easily as possible after the sentence expires. The legal basis for such an attitude is found in the Law on the Execution of Criminal Sanctions (2019) and in the bylaws that prescribe treatment.

[45] Popadić, D., Bačanac, Lj., Golić, M., Petrović, M., Vidović, S., (2011), Violent behavior towards younger children and young people in sports- research results and recommendations, Belgrade.

The question is whether the personnel in penal institutions are up to the challenges of modern penological treatment. Do they possess: penological, andragogical, psychological, medical, criminological etc. knowledge and skills in order to reach the standards of the modern world in which the basic rights of convicts are respected. The education of convicts, as a form of acquiring new knowledge, should be seen as an integral part of any socialization. The goal of education is for the individual to understand the conditions of life and relationships in society, and to concern his personality, motives and reality that life provides him even after he has been sentenced to prison and help him better integrate into the social environment. Although research points to a low rate of education in the prison system, one should not give up on educational treatment, because only in this way can we contribute to better resocialization of convicts. Experience in the application of work shows that working in prison contributes mostly to the socialization of the personality of convicts and the preservation of mental health. Research suggests that the majority of the prison population is involved in some of the work processes, but in order to achieve a full effect in the formation of the personality of convicts who, in the future, will not violate social norms, greater engagement of instructors and all staff employed in the prison system is needed.

Sports and recreational activities have great potential to contribute to the formation of character and good habits both in terms of preserving health and reducing stress and for acquiring skills of nonviolent conflict resolution and improving communication and tolerance. According to the results of the research, convicts are interested in some form of recreational sports, but due to the lack of expertise of the staff, lack of adequate terrains, props, equipment, reduced number of competitions, they are not able to empty their frustrations and dissatisfaction through sports. This research further illuminates a number of factors (situational, psychological, social) that in mutual cooperation can contribute to the prevention of conflicts and the development of nonviolent communication and social skills of convicts through sports, both while serving a prison sentence and after the expiration of the sentence.

References

1. A set of minimum rules on the treatment of prisoners, adopted at the first UN Congress for crime prevention and proceedings in Geneva in 1955 and confirmed by the Economic and Social Council by resolutions No. 663 (XXIV) in 1957 and No. 2076 (LXII) in 1977. Translation taken from *the Archives for Legal and Social Sciences*, no. 4/1956, prev. prof. N. Srzentić.

2. Carvalho G., Capelo R., Nunez D., *Perspectives of the future when time is suspended: an analysis of prisoner* discourse, Time & Societi, Vol. 27, 2015, p. 303.

3. Gallant D, Sherri E., Nicholson M., *Recreation or rehabilitation? Managing sport for development programs with prison populations,* Sport Management Review vol. 18 issue 1, 2014, DOI: 10.1016/j.smr.2014.07.005;

4. Ignjatović Đ., *Right to execute criminal sanctions,* Faculty of Law, Belgrade, 2006.

5. Igrački J., *Effects of prison in the resocialization of convicts*, Institute for Criminological and Sociological Research, Belgrade, 2020.

6. Igrački, J., Ilić, J., *Application of alternative sanctions and crime prevention*, Court of Appeals in Kragujevac, No.1., Kragujevac, 2022.

7. Knežić, B., *Education of convicts: a way to be free*. Institute for Criminological Research, Belgrade, 2017.

8. Lavasseur S., *Precis de criminologie et science penitentiare*, Paris, 1968.

9. Meek R., Lewis G., *The Impact of Sports Initiative on Young Men in Prison: Perspectives of Staff and Participants*, Journal of Sport and Social Issues, Vol. 38, # 2, 2014.

10. Milutinović M., *Penology,* Contemporary Administration, Belgrade, 1977.

11. Popadić, D., Bačanac, Lj., Golić, M., Petrović, M., Vidović, S., *Violent behavior towards younger children and young people in sports – research results and recommendations,* Belgrade, 2011.

12. Recommendation REC (2006), 2 of the Committee on Treatment of Prisoners, https: //pjp-eu.coe.int/documents/3983922/6970334/CMRec+(2006)+2+on+the+European+Prison+Rules.pdf/e0c900b9-92cd-4dbc-b23e-d662a94f3a96

13. Regulation on house rules of the Correctional Institution and the Rulebook on House Rules of the Juvenile Correctional Institution ("Official Gazette of rs", No. 34/2006),

14. Rulebook on House Rules in the Correctional Institution for Juveniles (Official Gazette of RS, no. 34/2006),

15. Rulebook on treatment, program of conduct, classification and subsequent classification of convicted persons (Official Gazette of RS, No. 66 of 27 July 2015)

16. Stevanović Z., Igrački J., *Psychosocial characteristics of perpetrators of crimes with elements of violence*, Criminal law instruments of countering terrorism and other criminal offenses of violent character, Ministry of Justice of the Republic of Srpska, Serbian Association for Criminal Law and Practice, International Association of Criminalists Banja Luka, Teslić, 2016.

17. Stevanović Z., Igrački, J., *Application of preventive programs in working with juvenile offenders,* Proceedings of the Institute for Criminological and Sociological Research, Belgrade, 2015.

18. Stevanović Z., *Treatment of Prisoners in the Prison System of Serbia*, Institute for Criminological and Sociological Research, Belgrade, 2014.

19. Toy J., *Research conducted in The Mitrovica Prison, Pozarevac-Zabela Prison and Women's Prison in Pozarevac*, Approval of the Ministry of Justice, Directorate for The Execution of Criminal Sanctions, No. 704-00-2/2021-03-65.

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