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False Confession as a Possible Cause of Wrongful Convictions

Csongor Herke*
Barbara Szabó**

Abstract

Overestimation of the confession of the accused is prohibited by Hungarian law and judicial practice. At the same time, however, confessions can play a key role, since the basic condition for some special procedures (arraignment, penalty order, plea bargaining) is the confession of the accused. In addition, the very important forensic role of the testimony and re-interrogation of the defendant cannot be questioned in general. Experience has shown that many factual issues are no longer in dispute if the defendant makes a confession in this respect, i.e. if the defendant provides evidence that is truly decisive ("conclusive") evidence in deciding the factual dispute, especially by making a detailed and revealing confession, not to mention if his confession contains "testimony of fact" (i.e. the defendant states a fact that only the defendant can know). To this extent, the confession is also today the "queen of evidence" (regina probationum). The layman's idea is that it is impossible for someone to admit to committing a crime he/she did not commit it, but practical examples show that there are many cases of false confessions in whole, in large part or at least in part that's why all statements made by the defendant, including confessions and denials, first and subsequent statements, and statements of co-defendants, must be examined in detail and their acceptance or rejection as evidence must be very carefully reasoned.

The paper reviews the forms of false confessions and their dangers through some practical examples.

Keywords: *confession, wrongful conviction, justizmord, significance of confession, simplified criminal procedure*

I. Introduction

In addition to the multiple disadvantages of the defendant, the regulation of the status of the defendant must take into account the fundamental duality that is evident in every statement of the defendant, whether it is a statement of will or knowledge, whether it is a statement of fact or of law, whether it is a confession or a denial. This fundamental dichotomy is that the defendant is not only the subject of the defence, but also the subject of (and contributor to) the evidence. Consequently, all statements

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made by the defendant are both a means of defence (*moyen de défense*) and a means of proof (*moyen d'instruction*)[1].

Overestimation of the confession of the accused is also prohibited by Hungarian judicial practice. Therefore, the judgment of the court of first instance will be set aside on the grounds of unfoundedness if the court grounds its verdict of guilt on the only confession of the accused made during the investigation (and later withdrawn), the contents of which are not sufficiently supported by the objective evidence found in the case, and the professional investigations which could have supported or refuted the confession of the accused have also failed[2].

At the same time, however, confessions can play a key role, since the basic condition for some special procedures (arraignment, penalty order, plea bargaining) is the confession of the accused. According to judicial practice, the disclosure of the accused's confession during the investigation (which the court made part of the trial material by reading it out) is a significant mitigating circumstance even if the accused refused to confess at the trial[3].

In addition, the very important forensic role of the testimony and re-interrogation of the defendant cannot be questioned in general: in fact, in the absence of a defendant testimony, the investigation is only at the stage of "cleaning up", while in the presence of a defendant testimony, it is already at the stage of "examining". Experience has shown that many factual issues are no longer in dispute if the defendant makes a confession in this respect, i.e. if the defendant provides evidence that is truly decisive ("conclusive") evidence in deciding the factual dispute, especially by making a detailed and revealing confession, not to mention if his confession contains "testimony of fact" (i.e. the defendant states a fact that only the defendant can know). To this extent, the confession is also today the "queen of evidence" (*regina probationum*)[4].

In conclusion, as a matter of principle, we wish to emphasise that all statements made by the defendant, including confessions and denials, first and subsequent statements, and statements of co-defendants, must be examined in detail and their acceptance or rejection as evidence must be very carefully reasoned.

II. The Importance of Confession in some European Countries

II.1. France

The source of French criminal procedural law is the *Code de procédure pénale* of 1958. The procedure is divided into three stages, the investigation is followed by the so-called instruction and the trial stage. In France, it is during the taking of evidence that the defendant is questioned as a procedural act[5].

In France, the confession is of particular importance in relation to plea bargain-like legal institutions. Two specific legal instruments can be highlighted:

a) the penal composition *("composition pénale")* *and*

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[1] Herke Csongor, Fenyvesi Csaba, F. Tremmel, *A büntető eljárásjog elmélete [Theory of Criminal Procedure law]*, Dialóg Campus, Budapest-Pécs, 2012, p. 82.

[2] BH2001. 316. (Court Order)

[3] BH1993. 480. (Court Order)

[4] Cs. Herke Csongor, Cs. Fenyvesi Csaba, F. Tremmel, *cited*, p. 171.

[5] Cs. Herke, *A francia és az olasz büntetőeljárás alapintézményei [Basic institutions of French and Italian criminal procedure]*, PTE-ÁJK, Pécs, 2013. pp. 1-4. and 29.

b) the appearance based on prior admission *("comparison on reconnaissance préalable de culpabilité"*).

a) In the first case, during the penal composition, under certain conditions, the prosecutor offers a plea bargain to the defendant who has pleaded guilty to crime (threatened with a fine or to an imprisonment of not more than five years) or to any misdemeanour[6]. The penal composition is excluded in cases of press offences, political offences and intentional homicide (and only with certain restrictions in the case of juveniles over the age of 13). However, the law does not exclude repeat offenders from the proceedings.

Pradel highlights 3 conditions for a penal composition:[7]

- it can only take place before the indictment,
- only upon a confession, and
- never mandatory (always at the prosecutor's discretion).

The law offers the prosecutor 17 options in penal composition, according to Pápai-Tarr[8]. This may include the payment of a certain sum of money, the surrender of property, the surrender of a driving or hunting licence, participation in an alcohol dehydrator or rehabilitation programme, unpaid work for the public good, undertaking a course of study or training in a health or social institution, a ban on using a cheque or bank card, a ban on visiting certain places or having contact with certain persons, a ban on leaving the place of residence or even the country etc.

A penal composition is concluded by a court decision, i.e. it is on the same level as a court judgment.

b) In the case of the appearance based on prior admission, the prosecutor can effectively apply penalties, even recommending imprisonment for a term not exceeding one year[9]. That is why the participation of a defence lawyer is mandatory in this procedure, and it is actually a way to speed up the court procedure (not to avoid it). This procedure is not applicable to juveniles, and a confession is also a condition. This procedure is only available for offences punishable by a maximum of five years' imprisonment (not for felonies and misdemeanours), and is also excluded for press offences, political offences and intentional homicide.

In the case of a confession, the prosecutor can propose a sentence (the defence and the accused cannot). The term of imprisonment imposed in the proceedings may not exceed one year or half of the maximum penalty laid down by law[10]. During the procedure, the defendant and the defence lawyer appear before the prosecutor, who, after the confession, announces the specific sentence offer. If the defendant accepts the offer, it is approved by the President of the Court of First Instance (Président du Tribunal de Grande Instance) or by the judge designated by this President.

II.2. Italy

In Italy, a confession is an indispensable requirement for the immediate trial (*il giudizio immediatio*), where the preliminary hearing (*udienza preiminare*) is omitted after the

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[6] Á. Pápai-Tarr, *„Vádalku vagy amit Franciaországban annak neveznek" [Or a plea deal, as they call it in France]*, Miskolci Jogi Szemle 2011/2. pp. 17-18, 26.

[7] J. Pradel, *Procédure pénale*, 11e, Cujas, 2002. p. 211.

[8] Á. Pápai-Tarr, *A büntetőeljárás gyorsításának lehetőségei a francia és a magyar jogban [Possibilities of speeding up criminal proceedings in French and Hungarian law]*, Miskolc, 2021. pp. 241-243.

[9] F. Molins, *Comparution sur reconnaissance préalable de culpabilité*, Dalloz, 2004/5. p. 2.

[10] Á. Pápai-Tarr, *cited,* pp. 241-255.

investigative phase and the trial begins immediately. This procedure therefore requires the confession of the defendant during the interrogation[11]. During the Italian plea bargaining in the case of an offense punishable by up to three years' imprisonment, the prosecutor and the defendant enter into an agreement and jointly request the court to impose a specific sentence. However, the court has no discretion here as to the level of the sentence: the court either imposes the proposed sentence and thus closes the proceedings or continues the proceedings without accepting the plea bargaining.

III.3. Germany

In Germany, three types of agreement have emerged[12]. The waiver of charge and the penalty order show less plea-bargain (although in the latter case, the prosecutor may offer the penalty order during the bargain in exchange for the defence counsel's promise that the defence counsel will not request a trial). According to the third form, related to the confession of the defendant, there is a possibility to negotiate between the prosecutor and the defence counsel before the indictment (so-called German guilty plea). In return for the confession, the defendant can expect a shorter trial and be promised that for some crimes, the prosecution will refrain from indictment or propose a lesser sentence in court. In Germany, the plea-bargain appeared without legal regulation in the 1970s. At first it was used only in insignificant cases, in the 90s, according to Kertész, 20-30% of the procedures were conducted on a negotiated basis[13]. This so-called "*Verständigung"* is an institution similar to a plea bargain, which is nothing other than the possibility of a settlement. In the German legal system, this agreement can be made by the court, and the judge is not only a passive participant but also the coordinator of the agreement, since the judge can agree with the parties to the proceedings on the further course and outcome of the proceedings[14]. The subject matter of the settlement is well-defined and can only be a legal consequence, a procedural act or the procedural conduct of the participants. In all cases, the basis of the settlement is the confession of the accused[15].

II.4. Spain

In Spain, the procedure based on the recognition of guilt (*conformidad*) has been known since the end of the 19th century. In doing so, the prosecutor sends to the accused with the indictment the proposed sentence and its amount (up to 12 years' imprisonment since 1989). If the accused accepts this punishment or enters into a bargain and, as a result of the bargain, reaches an agreement with the prosecution, the court will order the punishment without conducting further evidentiary proceedings[16].

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[11] Cs. Herke, *cited,* pp. 3-6, 37, 68, 101-103.

[12] E. Fakó, *Vádalku a kontinentális jogrendszerben [Plea bargaining in the continental legal system],* Publ. Univ. Miskolc. Sect. jur. et pol. Tomus 20/1. 2002. pp. 255-257.

[13] I. Kertész, *Megállapodás az elkövetővel [Agreement with the offender]*, Rendészeti Szemle, 1993/10. p. 21.

[14] B. Elek, *Költség és időtartalékok a büntetőeljárásban [Cost and time reserves in criminal proceedings]*, Büntetőjogi Szemle, 2015/1-2, pp. 11-12.

[15] B. Miskolcziné Juhász, *A büntetőeljárás fejlődése [The development of the criminal procedure],* https://jak.ppke.hu/uploads/articles/12332/file/Juh%C3%A1sz%20Bogi%20PhD%20dolgozata%20teljes.pdf pp. 255-256.

[16] Á. Farkas, *Konszenzuális elemek a büntetőeljárásban* [Consensual elements in criminal proceedings], Magyar Jog, 1992/8. p. 512.

III. The Significance of Confession in Hungarian Law

The Hungarian law regulates four legal institutions belonging to the broader range of plea bargaining[17]:

a) cooperation with the suspect,

b) conclusion of an arrangement,

c) confession at the preparatory session,

d) agreements concluded under the Protection Program[18].

In addition, there are even more places to find a legal institution in the Hungarian criminal procedure, that bears the character of an agreement. Thus e.g. the "become effective" of a prosecution warning requires the tacit consent of the accused (since if he complains about it, the investigation must continue). The same is true of conditional prosecutorial suspension, where, in addition to tacit consent, there may be further consensus in the background (e. g. compensation, reparation etc. by the accused is difficult to imagine without prior consultation of the prosecution and defence, even with the victim involved). And in the same way, there is a tacit agreement in penalty order proceedings, and in many cases, it can only be arraignment only because, on the basis of a preliminary discussion and consensus, the accused sees that the criminal proceeding will be quicker (and the practices shows it's coming with a lenient sanction) in the case of confession. Thus, at the beginning of the proceedings, three more accelerating institutions are available (arraignment, penalty order, arrangement) and their number decreases over time, and no such separate simplification procedure is possible during a normal trial[19].

a) If a person with a reasonable suspicion of committing a criminal offense cooperates in the investigation and proof of the case (or other criminal case) to such an extent that the national security or law enforcement interest in the cooperation outweighs the criminally suspected as an interest in bringing a person reasonably suspected of having committed a criminal offense, depending on the stage of the proceedings, the prosecution rejects the application (§ 382 of CCP) or terminate the proceedings (§ 399 of CCP).

Cooperation shall be excluded if the subject of the suspicion is a criminal offense which involving the deliberate extinction of another's life, permanent disability or intentionally causing serious deterioration in health.

In the case of cooperation, the state reimburses the damage (damages) for which the defendant is obliged to compensate under civil law (if it has not been reimbursed in any other way).

If compensation (payment of damages) is to be decided in a civil lawsuit, the legal basis for the claim must be presumed and the state is represented by the Minister of Justice in the civil lawsuit. The statement of litigation may not cover any fact on the basis of which the person charged and the reasons for cooperation can be inferred.

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[17] Zs. T. Szabó, *A büntetőeljárásról szóló, 2017. évi XC. törvényről - az előkészítő ülés és az egyezség" [XC of 2017 on criminal proceedings. on the law - the preparatory session and the agreement]*, XIV. Jogász Doktoranduszok Országos Szakmai Találkozója. Budapest: Károli Gáspár Református Egyetem *Állam- és Jogtudományi Kar, 2018.* pp. 393-401.

[18] Cs. Herke, *The agreement as a form of the plea bargaining in Hungary*, Miškininkystė ir kraštotvarka, Kaunas, 2021/1. pp. 95-102.

[19] Zs. Fantoly, *Konszenzuális elemek az új büntetőeljárási törvényben [Consensual elements in the new criminal procedure law]*, Szakmaiság, szerénység, szorgalom. Budapest, Dialóg Campus, 2018. pp. 187-196.

b) Before the indictment, the public prosecutor's office and the defendant may reach an arrangement on the confession of the guilt of the crime committed by the defendant and the consequences thereof (§ 407 of CCP). The private prosecutor may not enter into an arrangement with the accused (§ 786 of CCP). The arrangement can be initiated by the defendant, the defence counsel and the prosecutor's office (even when the prosecutor's office interrogates the defendant). The participation of a defence council is obligatory in the procedure for concluding an arrangement.

In order to reach an arrangement, the prosecutor's office, the defendant and the defence counsel (with the consent of the accused only the prosecutor's office and the defence counsel) may negotiate the admission of guilt and the content of the arrangement (except for the findings of fact of the crime and its classification according to the Criminal Code). If the prosecution and the defendant have agreed on the content of the arrangement, the prosecution will warn the defendant of the consequences of the planned arrangement during the interrogation of the suspect and record the arrangement in the minutes of the interrogation of the suspect. The minutes shall be signed jointly by the prosecutor, the defendant and the defence counsel.

If the public prosecutor's office and the defendant have reached an arrangement, the public prosecutor's office will raise charge with the same facts and classification as the arrangement included in the minutes (§ 424 of CCP). In such a case, the prosecutor's office proposes in the indictment (to which the prosecutor's office attaches the minutes) that the court approve the arrangement, what penalty should be imposed (apply a measure) in line with the content of the arrangement, make any other provision corresponding to the content of the arrangement.

Before deciding on the approval of the settlement, the prosecutor and the defence counsel may speak. The court then decides the approval of the arrangement or its refusal:

Conditions for approval of the arrangement	**Cases of refusal to approve an arrangement**
1. the conclusion of the arrangement complied with the regulations **2.** the arrangement contains the legal supplies **3.** the accused understood the nature of the arrangement and the consequences of approving it **4.** there is no reasonable doubt as to the defendant's ability to set off and his admission on a voluntary basis **5.** the accused's confession is clear and is supported by the case file	**1.** the indictment or motions of the accuser deviate from the settlement **2.** the accused did not plead guilty in accordance with the arrangement at the preparatory session or did not waived the rights to a trial **3.** the conditions for approving the arrangement are not met **4.** the defendant has failed to fulfil the assumed obligations **5.** establishment of a classification departing from the charge seems to be established

c) If there are no obstacles to holding the preparatory session, the prosecutor may, at the request of the court

- describes the essence of the charge (this may be omitted for the accused's motion or consent),
- indicate the means of evidence in support of the charge and

- also make a motion on the amount (duration) of the penalty or measure in the event that the accused admits to committing the offense at the preparatory session.

If the accused pleads guilty and waives the right to a trial within the scope of the confession, the court decides in order on the basis of this fact, the case file and the interrogation of the accused whether to accept the accused's pleading guilty (§ 504 of CCP).

The conditions for accepting a declaration of guilt are as follows:

- the accused has understood the nature of this statement and the consequences of approving it,
- there is no reasonable doubt as to the defendant's ability to set off and to admit it voluntarily,
- the accused's statement of guilt is clear and is supported by the case file.

Once the declaration of acceptance has been accepted, there are two options:

- the court sees no obstacle to settling the case in a preparatory session: the accused is also questioned about the circumstances of the sentence, after which the prosecutor and then the defence counsel can speak and then the court can pass judgment;
- if the case cannot be dealt with at the preparatory session: the accused and the defence counsel may submit a motion for evidence and other procedural acts not to affect the merits of the indictment and the question of guilt, as well as the exclusion of evidence, stating the reason and to which the prosecutor may remark (and make the same motion).

d) According to § 2 of the PP Act (the Act LXXXV of 2001 about the Protection program for participants in criminal proceedings and assistants to Justice), the Protection Program (similar to personal protection) can be applied during the criminal proceedings or after the end of the criminal proceedings, if

- the person to be protected has testified or intends to testify to the essential circumstances of a serious crime,
- the testimony of the person to be protected has helped or may have helped to establish the facts and there is a reasonable presumption that obtaining evidence would otherwise be unforeseeable or disproportionately difficult,
- has been or is likely to be subjected to a criminal offense against the person to be protected as a result of the participation in criminal proceedings, rights or obligations, and such an offense is likely to be committed against the person to be protected, and
- the protection of the person in a threatened situation or the data subject cannot be ensured within the framework of personal protection.

The conclusion of the agreement may be initiated during the criminal proceedings with the consent of the prosecutor by the investigative body, the prosecutor or the chairman of the acting council which the criminal proceedings take place. After the conclusion of the criminal proceedings, the conclusion of the agreement may be initiated by the investigating body which the criminal proceedings took place (in the case of a prisoner in a prison, the conclusion of the agreement may be initiated by the penitentiary, the prosecutor or the enforcement judge).

The conclusion of the agreement must be initiated with the Witness Protection Service, which will be within 15 days.

- rejects the initiative if, on the basis of a preliminary psychological and security risk assessment, the person at risk is unfit for protection;
- if it agrees, it submits a reasoned proposal for the conclusion of the agreement to the national police chief for a resolution (§ 5 of the VP Act).

IV. The false confession

As the above summary shows, the importance of the confession of the defendant is paramount. The layman's idea is that it is impossible for someone to admit to committing a crime he did not commit, but practical examples show that there are many cases of false confessions in whole, in large part or at least in part.

The reasons for false confessions are quite trivial. For example, the defendant may make a quick confession at the start of the proceedings because the defendant wants to avoid criminal proceeding for a more serious offence by admitting to a minor offence (e.g. the police arrive at the defendant's home following a complaint of theft, and the defendant quickly admits to the offence, even though did not commit it, so that they do not search the house and find a large quantity of drugs). It is also typical when the accused makes a false confession in order to save another person (either because he wants to save a relative, or because it is the defendant's "duty" as a member of the criminal organisation to confess to the crime, or because the defendant confesses for financial gain). According to the literature, it is also possible that the defendant, because of a morbid desire to appear or a mental disorder, may wish to gain publicity and press coverage by taking the case in hand[20].

The literature distinguishes three main types of false confessions:

a) Voluntary false confession: in this case, there is no pressure from the authorities on the defendant, but the defendant makes a false confession of his own free will and admits to having committed the crime, even though did not commit it. Most often these false confessions are made in defence of a friend or family member. In many cases, an elderly parent, perhaps of a lower status, will make a confession in the interests of his or her child. But the other two cases mentioned above also belong to the same group, i.e. when someone falsely confesses to a crime for the sake of fame or to cover up a more serious crime. There is also the case of false confession for self-harm, when someone wants to punish himself or herself, either because of a previous undisclosed crime or because of guilt related to other acts of daily life. According to Elek, some innocent confessions are made spontaneously, without any official coercion, often to attract attention, but sometimes they are motivated by mental or psychological illness[21].

b) Coerced and compliant false confession: this is where the defendant makes a false confession because of extreme interrogation methods (physical or psychological

[20] G. Katona, *Valós vagy valótlan? Értékelés a büntetőperbeli bizonyításban*, Közgazdasági és Jogi Könyvkiadó, Budapest, 1990. pp. 204-205., 224-225., 237-241., 251-252.

[21] B. Elek, *A vallomás befolyásolása a büntetőeljárásban [Influence of testimony in criminal proceedings]*, Tóth Könyvkereskedés és Kiadó Kft., Debrecen, 2007. p. 104.

coercion), even though the defendant knows that is innocent. Such coercion may include physical violence, duress, threats, torture or promises. The latter in particular raises borderline issues as to which promises can still be considered lawful and what separates tactical bluffing from unlawful interrogation methods.

Tóth distinguishes between four types of outcomes of bluffing:

- the guilty suspect exposes himself,
- the defendant is innocent and does not react to the bluff,
- the innocent suspect gives the impression of being guilty,
- the suspect calls the bluff and provides false evidence or acts passively.

The first two are desirable forms of bluffing, but the latter two can result in serious mistakes[22].

A coerced confession already violates the Universal Declaration of Human Rights, as "no one shall be subjected to torture or to inhuman or degrading treatment or punishment"[23]. A judgment of the European Court of Human Rights in 1978 lists further abuses by the authorities which also fall within the definition of torture (e.g. prolonged, protracted interrogation, obstruction of sleep, or the continuous sound of a whistle during interrogation)[24]. But depriving the addict of cigarettes or drugs alone may be enough, as withdrawal symptoms can lead to physical suffering that can result in violence[25].

The prohibited methods of interrogation listed in § 136a Subsession 1 of German CCP include abuse, ill-treatment, exhaustion, physical interference, administration of medical substances, torture, deception and hypnosis. Threats or promises of unlawful advantage are also prohibited, as are measures that impair the suspect's memory or insight. Austria also prohibits the making of promises or the use of trickery, threats, coercion, ambiguity and vagueness[26].

c) Coerced and obtained false confession: in this case, the defendant under physical and/or psychological pressure already believes that his or her otherwise false confession is true. Researches have shown that even innocent people can be induced to confess guilt by certain methods. What is most striking in the cases described in the literature is that the innocent person's memory can be completely altered by certain interrogation methods. This is particularly true for juveniles, the tired, the naive and the low-intelligent, but stress can also easily lead to false confessions. This phenomenon was compared to hypnosis in the 1970s[27].

V. Specific cases of false confession

My previous scepticism about the existence of false confessions was completely removed by the following incident. In the early 2000s, a father appeared at my lawyer's

[22] M. Tóth, *A taktikai blöff alkalmazása [Using the tactical bluff]*, Belügyi Szemle, 1980/5, p. 18.

[23] The Convention was promulgated by Act XXXI of 1993. Act, and the § 3 of which contains this prohibition.

[24] B. Elek, *cited*.

[25] E. Bócz, *Kihallgatás, kényszervallatás [Interrogation, forced interrogation],* Belügyi Szemle, 2013/5, p. 18.

[26] § 164 Subsession 4 of the Austrian CCP.

[27] B. Elek, *A vallomás befolyásolása a büntetőeljárásban [Influence of testimony in criminal proceedings]*, Tóth Könyvkereskedés és Kiadó Kft., Debrecen, 2007.

office with his 15-year-old child. They said that the previous day, outside a local nightclub, the child had witnessed a robbery: two people he knew by sight and by nickname had forcibly taken a mobile phone from a young man standing outside the nightclub. The police told him this morning that he had to go in for questioning. They think he will be interviewed as a witness, but they want him to go because they do not trust the police.

At the time of the incident, there was no rule in the Hungarian Criminal Procedure Code that a minor could only be questioned in the presence of his/her legal representative (at least this was not a living provision at the police station of Pécs), so only the legal representative could be present with the minor during the questioning. Therefore, I accepted the order and went to the interrogation.

At the beginning of the interrogation, the police officers were visibly shocked that the minor did not come alone, they were not very happy about the presence of a legal representative, but they finally allowed my presence. We sat down in a larger room where there were objects covered with a black bag on the table next to us. The interrogating officer said that they knew everything, it was a pity to deny it. The client looked a little puzzled as to what was there to deny. The officer then outlined in a friendly manner that the person being questioned had two options. One was to say that he had robbed the victim and taken his mobile phone (the officer even helped by saying that the child had thrown it away somewhere in his fright, which was why they couldn't find it), in which case he would be allowed to go home on a factual confession, including guilty plea. The other option is that he denies it, in which case he will be arrested, a decision will have been made (at which point he will have been waving a typed paper, the contents of which we were not even allowed to know), the court will decision about the detention for months, the child will be expelled from school, and in prison the child will be mixed up with a society that will only lead him into further crimes. The story goes that the minor was an excellent student despite his minority (gypsy) background. The detective also said that it was pointless to deny it anyway, because many people saw the incident and the physical evidence (?) was covered up on the next table.

To my utter dismay, the minor then said, half crying, that OK, he would admit that he had done it, but he did not want to talk about the details. I have to say that his father was absolutely right to foresee what was going to happen, and it is a good thing that he had his legal representative with him. I asked the child, to his utter amazement, how he could admit it, when on the way here he even told me who the perpetrators were. He replied that they would never be caught anyway, and there was all that evidence on the covered table. Of course, I did not let him make the false confession, and (although he was afraid of the real perpetrators) he told for the record who had committed the crime.

The case ended with a happy ending, as the police knew the two suspects, arrested them within a short time and even found the stolen mobile phone on them. So my client became a witness in the case instead of a defendant, but it's hard to imagine what would have happened if he had gone to the hearing without a lawyer: the police would have suspected him with the crime, the prosecutor would have charged him and the court would have convicted him on the basis of a full, revealing confession, with witnesses who saw him (also) at the scene of the crime. The real perpetrators would have received a prison sentence of several years to be served, which is probably what would have awaited him. And since the case would have been successfully closed by the investigators, they would not have investigated the missing mobile phone, which could have been evidence of the defendant's innocence.

Usually, we only find out who the real perpetrator is, either on the basis of evidence from another case or for other reasons, because it is difficult to prove the innocence of a person who has made a false confession. An example of the latter was the famous case of Ulvi K. in Lichtenberg, who made a false confession in the murder of a nine-year-old girl, Peggy K[28]. As it turned out, Ulvi K. was at the mental level of an 8-10 year old boy and had previously committed sexual violence against a boy, for which he had been treated in a psychiatric institution, and that's why was suspected. Ulvi K. gave a confessional testimony, but his defence lawyer was convinced that the confession was the result of exhaustion and hours of interrogation and suggestive questions. In addition, the defendant claimed that the investigator had persuaded him to confess with chocolates and promised him that he would not go to prison if he only told the "truth". In addition, there was a witness, who had previously been Ulvi K.'s companion during her psychiatric treatment, who testified that Ulvi K. had told him about the circumstances of the victim's murder. The witness later retracted this statement because, according to him, he only made the incriminating statement because the police had promised him that if he testified against the suspect, his sentence would be reduced[29]. This case also ended well, as Ulvi K. was eventually acquitted in a retrial, but before that he had a final conviction.

VI. Conclusion

Julia Shaw and Stephen Porter conducted a very interesting study in the mid-2010s[30]. Their study involved 126 university students. They contacted the parents of the participants after obtaining their consent. The parents were asked about emotionally charged events in the students' childhood. The stories were used to filter out students who had witnessed abuse, assault with a weapon, theft, accidents, animal attacks or the loss of a large sum of money.

Of the students who were then filtered out, 60 were told that they had actually taken part in one of the six events mentioned above. They also provided details of real past events as confirmation, and these details were mixed into the description of the fictitious event. The researchers then used two methods to elicit false confessions from the students in three different interviews:

- they claimed that the parents had narrated the event,
- the students were told that all people can recall details from their memories that they thought they had lost.

The results were shocking: 24 students (40 per cent of students) thought the fictional events had actually happened. This proportion was roughly the same for those who made a false confession about a crime (21 out of 30) and for those who did so about other types of events (23 out of 30). However, the test was very strict: only those who claimed that the incident had taken place and who could recall at least ten different, specific details about the circumstances of the incident were considered to have confessed.

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[28] I. Jung, C. Lemmer, *Der Fall Peggy. Die Geschichte eines Skandals [The Peggy case. The story of a scandal],* Aktualisierte und überarbeitete Taschenbuchausgabe. Knaur, München, 2016. p. 16.

[29] https://www.bild.de/news/inland/prozess/mordfall-prozess-vater-zeigt-foto-so-koennte-peggy-heute-aussehen-35452420.bild.html (accessed on 15.08.2020).

[30] https://psmag.com/news/convince-someone-committed-crime-98442.

The conclusion is that false confessions are based on confabulations fuelled by details provided by investigators. The high proportion of people who give false confessions in trials warns against the use of procedures in investigation and interrogation that facilitate the formation of false memories.

We have seen that confessions are of particular importance not only in Hungary but also in all the European countries examined. For this reason, every confession must be examined to see whether it is consistent with all the circumstances of the case and the other evidence. A criminal tactical method of verifying confessions is the on-the-spot interrogation, since the defendant who makes a false confession will not be able to answer questions about the details of the crime accurately on the spot, or to show the specific facts of the crime[31]. The presence of a lawyer is also a guarantee factor, since in the presence of a lawyer, the investigator is less able to influence the suspect and is forced to refrain from using unlawful means. The presence of a defence lawyer can also reassure the defendant, making him less likely to make a false confession under pressure from the interrogator.

If these measures are not taken, false confessions can easily lead to wrongful convictions. This is very unlikely to come to light later, as confessions are less likely to give rise to suspicions that they are in fact a case of wrongful convictions.

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11. https://psmag.com/news/convince-someone-committed-crime-98442

[31] Cs. Fenyvesi, *A kriminalisztika tendenciái. A bűnügyi nyomozás múltja, jelene, jövője [Trends in criminology. The past, present and future of criminal investigation]*, Dialóg Campus Kiadó, Budapest, 2017. p. 185.

12. https://www.bild.de/news/inland/prozess/mordfall-prozess-vater-zeigt-foto-so-koennte-peggy-heute-aussehen-35452420.bild.html (2020.08.15.)

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Personal Identification Attempt in the Decisions of the European Court of Human Rights

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Abstract

The study shows the most representative cases in the European Court of Human Rights in the field of identity parade/line-up section. Its aim is to examine how we can prevent false personal identification in criminal cases which can lead the worst outcome: justizmord (miscarriage of justice). The reader can understand how the mistakes of identity parade (line-up, recognition) method is a main factor and it can have not wished outcome.

Lastly the writer suggests the modification of some legal rules ("de lege ferenda") for the lawmakers and a few preventive methods, tactics for the law enforcers (police service men, custom examiners, detectives), and criminalists as well.

Keywords: *identity parade, line-up, false identification, miscarriage of justice, justizmord*

I. The European Court and the European Convention on Human Rights

In the course of our research we have examined the rulings of the European Court of Human Rights (later referred to as ECtHR) in order to answer the following questions:

a) does the ECtHR pay attention to the recognitions at all („presentation for identification", eyewitness identification procedure", „identification parade", „line-up")?
b) does the recognition proceeding affect any of the fundamental human rights?
c) if it does, has did a violation ever occured?
d) which are the most common reasons of violation?
e) have there been any Hungarian recognition anomalies in front of the court?
f) what sort of conclusions and edifications can be taken in the domestic regulations and practices?

As a starting point we establish that on the 5th of November in 1992 Hungary has ratified, then declared one of the most important documents of the European Community – the Convention to Protect Human Rights and Fundamental Freedoms – phrased on the 7th of April in 1993 in the XXXI Act of 1993. This convention originally took effect on September 3rd in 1953 (later referred to as Convention).

In case of the grievance of the Convention – among others the failure of detection – anyone can appeal to the European Court of Human Rights in Strasbourg with a complaint. Today the Convention has a great number of ancillary protocols.

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We have reviewed the content and the cases of the ECtHR and we think that our topic is relates to the prohibition of torture fixed in Article 3 and to the right to a fair trial, which can be found in Article 6. (The first point of Article 6 makes a keystone of the document, which is authoritative for all kinds of proceedings, while points 2 and 3 contain elements of criminal procedure.) Here we quote both Articles as part of the preface of our study:

Article 3 - Prohibition of torture: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 6 – Right to a fair trial:

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

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

3. Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

II. The decisions of the European Court of Human Rights on (personal) identification

The ECtHR– for most members of the Council of Europe own direct effect –is the highest level interpretation forum of the Convention; its decisions usually lead to changes in law and in customary practice. Accordingly, its decisions on detection can be prevailing – according to our view-point – and also for our domestic law and for its application. For this reason the the chronological review of the jurisdictional decisions of the aspects of the past decades can be useful in answering the original questions, in observing the Hungarian regulations in force and in creating the „de lege ferenda" suggestions.

The first one to be noted is the *Perry vs. United Kingdom case* in 2003, in which the applicant was suspected with robbery series and denied takeing part in the personal recognition process. This is why a high ranked police officer gave permission to take records of him secretly. It happened in the way of calling the applicant in again to the recognition process to the institution of the authority which he denied again to take

part in. However, while he was waiting in the common area, a crystal-clear recording was taken of him. Later they generated the videotape along with the records of 11 volunteers. Afterwards they showed these records to the witnesses, from whom 2 identified the applicant as the perpetrator of the robberies.

On the trial of the applicant the judge disapproved of the application to exclude the video evidence although he admitted that the police had not used properly the Code of Procedure. The applicant was convicted and the appeal was rejected.

According to the ECtHR the regular usage of the security cameras on the public streets or even in shopping malls or in police stations where they serve a rightful and predictable purposes do not raise any problems in connection with human rights. In this case the police positioned the cameras in the way to make clear records of the applicant and they made a montage of these records to show them to the witnesses for the purpose of identification. The video was also shown on the public trial. Irrespectively of the fact that the applicant was or was not aware of the camera, there were not any signs which referred to the identification purposes of the records. This act of the police overran the regular and predictable usage of the security cameras that is why the permanent recording and the montage made by them for further usage could be considered as collecting and processing the personal data of the applicant, which meant breach of the fundamental rights.

Furthermore, the records were not voluntarily gained nor in conditions where the use of the records could have been predicted for identification purposes. Accordingly, the police interfered into the right to respect privacy and with this they violated Article 8 of the Convention.

As we mentioned the Article 8 is the third important Article and we quote it here from the Convention:

> *„Right to respect for private and family life. 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".*

The *Zashevi vs. Bulgaria case* started on the application of two Bulgarian citizens' application, Genka Ivanova Zasheva and Metodi Dimitrov Zashev, who presented the application on the 26th of April in 2005. The applicants stated that the authorities failed to perform the efficient investigation in connection with the death of their son and they did not even get an efficient remedy.

The applicants are parents of Ivaylo Zashev, who was killed in the house of his aunt in Stavertsi village, Pleven region in February, 1997. The crime happened as follows: around midnight the victim and his sibling Valeri Zashev woke up and saw three men standing in the room wearing masks and gloves. The attackers commanded the siblings to give them the money they had. This time T. L., the aunt of the children stepped in. The attackers became startled and the man with the gun shot twice. One of the bullets hit the boy, Ivaylo Zashew, who thereupon died minutes later. The detectives interrogated madam T. L. and many other witnesses. Including V. K., who worked as the driver of the local businessman, P. T. He became a suspect on the 8th of February and was kept in custody for a few days. During this time he was interrogated multiple times. He confessed

that P. T. had ordered him to go to Stavertsi's with I. K. and two other persons. When the three men had got out of the car they took up masks and gloves. While V. K. was waiting for them, he heard two shots. After this V. K. returned to the house of P. T., who told him to forget the events of the night.

On the 15th of February, 1997 P. T., I. K. and V. P. were arrested and on the next day P. T. was set free and later the detective performed a presentation for recognition where V. K. identified I. K. and V. P. In March 1997 someone called G. G. was also arrested with the suspicion of taking part in the robbery.

V. K. was interrogated again in June, 1997. He withdrew his previous statements and said that he was forced by the police to supply false evidence. During an interrogation in August a person, who was taken into custody and stayed in the same cell as G. G., stated that this person asked him to kill V. K.

In November the detective interrogated V. K. again, who changed his statement again. He confirmed his statements taken in February to be true and withdrew his statement he had made in June. He said he had been under pressure by P. T., who had kidnapped and restrained him and this is why he had lied.

During the organised presentation for recognition in the December of 1997 V. K. did not recognize G. G., then stated that the police treated him badly and he was under pressure for identifying a person who had been defined earlier.

The court of justice did not find the presentation for recognition with the participation of V. K. trustworthy. It was against the procedural rules that they never asked him about the perpetrators' differentials from which they would identify them before the recognition procedure and in the line there were not any individuals who looked like him. Moreover, V. K. got an order about who he should identify by which physical characteristics. The prosecutor's office did not present any other evidence for setting up the connection between the suspects and the crime. In the lack of evidence an acquittal was born.

According to the ECtHR the detectives made the first mistake when they had not collected enough information before the recognition process from which they could have decided that in this instance a special recognition process should have been conducted with a one-way mirror, in favour of the safety and influence immunity of the eyewitness. In the next place the action itself was performed in an irregular way[1]. After all these they affected the efficiency and decency of the investigation with not providing efficient protection for the key eyewitness, who probably withdrew his criminative statements because of the intimidations given to him[2]. Regarding to these, ECtHR reached the conclusion that the investigation in connection with the death of Ivaylo Zashev violated the 2nd Article of the Convention and Bulgaria was condemned.

If it arisen, we quote the 2nd Article of the Convention:"*Right to life"*

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

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

(a) in defence of any person from unlawful violence;

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[1] B. W. Behrman, S. L. Davey, *Eyewitness identification in actual criminal cases: an archival analysis*, Law and Human Behavior, 2001/2, pp. 475-491.

[2] P.M. Wall, *Eye-Witness Identification in Criminal Cases*, Springfield, Illinois, USA, Charles C. Thomas Publisher, 1965.

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

(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

The *K.Ö. vs Turkey case* was started by a Turkish citizen February 23rd in 2001. According to the main case the daughter of the applicant joined an illegal organization. What the applicant said is that since that the police had descended on her in her house, harassed and threatened her multiple times. The applicant states that in the evening on the 19th of November in 1999 three men identified themselves as police officers stuffed her mouth, beat her, threatened her and the officers also committed sexual assaults against her. Furthermore, the applicant stated that the officers overran her house again on the 28th of November. They told her that they were going to kill her and her children if she would hand in a formal complaint in connection with the previous incident. One of them was holding a gun to her head and took her money.

In the December of 1999 the applicant filed a report in which she asked for taking three police officers in civilian clothes in front of the court. She described the events of the two days which had been committed by the same three police officers according to her statement. She also noted that the officer who had held a gun to her head was tall and thin and thin haired. On the 27th of December she made a statement again with the interpretation of her son and stated that two police officers went to her house around 6 pm and told her that they knew that she had handed in a complaint. She had never seen them before. They went into her house and tore up her medical reports, broke the pictures of her daughter and ruined her green card. After these they beaten and threatened her.

She pointed that the perpetrator was not on the photos which were shown to her in the police station. She also made a description about the two persons and added they had a beard. According to her the officer who was strangling her with a cord had black hair and he was tall and thin and a white man.

On the 31st of March, 2000 the applicant was called for a presentation for identification in the police station. 108 police officers (from the anti-terrorism section) stepped in to the identifying room in 10 persons-groups.

Under the recognition protocol the applicant and her son identified R.G. as one of the men who had stepped inside their house. The prosecutor of this time decided o ask the son to leave the identifying room because he showed excited behaviour.

After her son was taken out of the room the applicant stated the R.G. was one of the men who had been in her house in 1999, November 28th. She stated also that R.G. and the two other officers had said they had been journalists and that was why she had opened the door to them. She could see R.G. but she could not see the other two men's faces. When she was asked why contradictions appeared in her testimonies the applicant stated that she was confused. She repeated that R.G. had taken her money on the 28th of November 1999 but he had not hurt her. In 2000, 7th April the prosecutor interrogated R.G. – the identified person – who denied the commitment of the crime. He stated that he was not familiar with the applicant or with her house. He said that he spoke a bit of Kurdish and he had heard when the son of the applicant had said to his mother that she should identify him. According to him the son of the claimant applicant tried to take revenge with this act because a half year ago he had arrested the son of the applicant. Furthermore, he added that he had been working in the area in the last 3 and a half years and not everybody sympathized with him. Lastly, he suggested the

applicant's statements taken during the identifying procedure were contradictionary with her previous statements.

On the 17th of April, 2000 the director of the Psychiatry Department, S.Y. communicated that the applicant was taken under examination on the 26th of February and on the 24th of March. She was diagnosed with post-traumatic stress syndrome and she was under treatment by that time already.

On the 23rd of May the prosecutor handed in the decision in which he did not file an indictment against R.G. The applicant found fault with the mentioned prosecutor's decision but the Jury rejected her objection. The applicant stated that the police had molested her in her house repeatedly and she had been beaten and threatened by them in the May of 2000 and in April and June of 2001.

On the 3rd of January in 2005 the applicant was arrested. On an undefined date one of the Turkish courts sentenced the applicant because of the aiding for an illegal weapon organism, they imposed 3 years and 9 months of imprisonment upon her.

The ECtHR found in its decision made in 2007, December 11 the violation of the 3rd Article of the Convention because of the lack of an effective investigation into the applicant's allegations because of ill-treatment.

In the investigation of the homicidal *Popov vs. Russia case* the applicant took part in a presentation for identification where two schoolboys out of four identified him. However, these two boys were not eyewitnesses of the murder he was suspected with in May 2000. when the applicant was kept in the SIZO 77/1 prison in Moscow. In June 2002 his lawyer handed in a complaint to the prosecutor because of the conduct of the investigation. Among other things he stated that the presentation for identification violated the requirements of the proceeding and that there were no steps taken for the proving of the applicant's alibi[3].

The prosecutor permitted the implementation of the proposal, to interrogate R., the applicant's neighbour and K.H., the carpenter working in the house. Their testimony was never recorded by the investigation authorities. In 2003 the applicant was sentenced for 10 years to high-security prison. Besides the conflicting reports of the schoolboys the court leant on other evidence for example to the necropsy of the victim, on the crime scene and on other diverse reports without explaining how these items proved the guiltiness of the applicant.

According to the ECtHR by neglecting the interrogation of two witnesses of the protection the national court did not scale that their statements could have been important in case of the investigation of this case. The previous motions of the protection, to examine them were permitted even in the preliminary examination and in the judicial proceeding. Consequently, the domestic authorities thought that their statements could be relevant. Considering the following:

a) the sentencing of the applicant was based on conflicting evidence;
b) the domestic authorities neglected the interrogation of the witnesses;
c) the relevancy of their statements was ignored;
d) by this they denied the right to have protection with an irreconcilable way of the fair guarantees.

Hence, as a final conclusion. the ECtHR offered as one voice the violation of point d) in the (3) Paragraph of Article 6 in connection with the (1) Paragraph of Article 6.

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[3] G.L.Wells, R. Lindsay, *Improving Eyewitness identifications from lineups: Simultaneous versus sequential lineup presentation,* Journal of Applied Pshychology, vol. 70/1985, no. 3, pp. 556-563.; G.L. Wells, E. A. Olson, *Eyewitness testimony*, The Annual Review of Psychology, no. 54/2003, pp. 277-295.

In the *Bocos-Cuesta vs. Netherlands case* the applicant complained that after a presentation for identification the court – falsely – sent the case back to the detective authorities for the victims to choose their abuser by identification with photograps. The applicant wrote in the application that it was unnecessary to take identification with his photograph because the recognizers had already identified him on the personal presentation for identification (however, not regularly).

In the same case it appeared that the persons acting in the proceeding organised a presentation for identification with the help of a one-way mirror where no one was presented except the suspect on the presentations for identification. Furthermore, it was not allowed for the applicant to ask questions from the underage victims, who were the recognizers.

The applicant also found it offensive that the proceeding causelessly took an illogically long time. The ECtHR stated that the investigation took almost two years and during this time significant delays occurred. The applicant handed in a complaint to the prosecutor's office in the August of 2006, however, he was only interrogated in the January of 2007 and the substantive official investigations were also started only in this month. The recognition process was held on the 28th of February in 2008. Nothing explained the implementations after one and a half years of the handling in of the complaint.

The ECtHR considered that the investigation was not objective and comprehensive, in view of these it stated the violation of Paragraphs (1) and (3) of Article 6.

In the *Laska and Lika vs. Albania case* on the 21st of March, 2001 a person wearing a blue, two wearing white face covering masks (baklava) robbed the passengers of the minibus travelling between Kukes and Tirana, armed with knives and AK-47s. They had taken the money of the victims, their jewellery and after that they left without causing personal injury.

A few hours later the police practiced house searching in the houses located near the scene, including Lica's house (the second applicant), where he was staying with his father, his brother (B.L.) and his friend – Laska (the first applicant).According to the police's report the police found two white and a blue T-shirts in the pocket of the first applicant and the baklavas were considered to be made of these clothes. (The stolen items and the weapons were not found, only a couple of grenades near the house.)

The applicants and B.L. – the brother of Lika – and his father were taken to the police station for interrogation. B.L. asked for the presence of a lawyer but they the denied the request, even though he was underage. Lika denied the possession of any kind of masks or baklava and charged the police with the manipulation of the evidence.

On the same day the presentation for identification was held according to Articles 171-175 of the Albanian criminal procedure law with the participation of the victims. Five persons were queued up for the identification. The two applicants and B.L. were wearing homemade white and blue baklavas and the two other presented persons were wearing black ones. Even though the police had changed the positions of the persons standing in the line and the victims identified again the ones wearing white and blue baklavas.

The recognition of the persons was followed by recognition of items. In this procedure the victims were asked to choose from among two black, two white and one blue baklava. They chose the white and the blue masks as the baklavas of the perpetrators.

With all these evidences the applicants and B.L. were arrested because of the suspicion of armed robbery. The first applicant accepted that he possessed a white T-shirt which was converted into a baklava by F.N. – the officer responsible for the investigation. The second applicant stated that the other white T-shirt which was found by the first applicant was not his.

On 2nd of April, 2001 the prosecutor's office brought an accusation against the applicants and B.L. At the trial they asked for the ignorance of the results of the presentation for identification in knowledge of the fact that they were held in violation of the domestic law and considering that suspicion was casted on the police in connection with faking the evidence. Also because of this they asked the officers to summon to the court who labelled the textiles to be baklavas, because they thought that they were only T-shirts and asked to present them in front of the court. The court refused to allow both of these applications without specifying a reason and building to the results of the presentation for identification and it sentenced the applicants for 13 years imprisonment and B.L. to five years imprisonment. (Beyond that they were found guilty with illegal possession of weapons even though the weapons used by them during the crime were not found by the police.)

On the 29th of May 2002 the defendants held in an appeal to the Shkodrai Appellate Court with the reason that the general court's sentence was created in an unfair proceeding. They stated that the presentation for identification was implemented with harsh violation of the Albanian criminal procedure because they were wearing the same ski masks at the processes. The court in first instance rejected the application of their attorney in connection with the nullity of the identifying act. They also found it offensive that despite of their request the pieces of evidence – the masks – were not shown at the trial. They argued with the fact that the authorities could not find the money and the weapons used for the robbery.

In front of the ECtHR the applicants pleaded that the presentation for identification was unfair. They stated furthermore that the domestic courts never fulfilled their applications which asked to examine the pieces of evidence (ski masks) at the public trials.

The ECtHR felt that the guiltiness of the perpetrators was set by the statements of the eyewitnesses who had taken part at the presentation for identification. That is why it examined the rules of the identification process and the implementation method specially. According to the sentence Paragraphs 171-175 the Albanian criminal procedure rules the organisation of the presentation for identification obviously. The corporation examined that in case of the applicants the presentation for identification was or was not in correspondence with the requirements of decency due to Article 6.

Firstly, the applicants and B.L. had to stand in the line wearing white and blue ski masks, similar to the ones worn by the perpetrators. The other two people in the line wore black ski masks unlike the white and blue masks which were suspected for the commitment of the crime worn by the applicants and B.L. The changing of the positions of persons taking part in the setup did not result indifferent results because they had to wear the same coloured ski masks (white and blue). The ECtHR stated that the presentation for identification was equivalent with a direct call for the witnesses to point out the applicants and B.L. as the perpetrators of the crime.

The Court of the Human Rights also noticed that the presentation for identification was held without the presence of the attorneys of the applicants. From the documents of the case it did not emerge if the applicants renounced from their free will – decidedly or implicitly - from the entitlement for defence during the presentation for identification. The ECtHR noted in connection with this, that even though the regional court admitted that during the examination period infringements occurred, when sentencing the the applicants, it relied on the positive identification of them which was set by the eyewitnesses on the recognition process. However, nor the defence offered later by the attorney, nor the contradictory natured proceedings following the previous ones could repair the errors having occurred during the criminal investigation.

There was no independent supervisory proceeding about the unfair proceeding or about the protestation about the flagrant irregularities. The Strasbourg-panel stated that the obvious ignorance of right to have defence in this period had influenced irreversibly prejudicial the posterior justice of criminal jurisdiction.

Lastly, the judges noted that there was no explanation for rejecting the application of the accused about showing the used ski masks on the presentation for identification in front of the court. Although it is true that the right to release the relevant evidence is not absolute, the court has to examine the decision-making proceeding in favour of granting the proceeding to fit to the conflicting proceeding to the equality of the weapons and to the integrated requirements.

The ECtHR judged that the in the cases of the applicant the equity would have demanded that they should have been able to argue beside the fact that the ski masks worn during the identifying process, which were the main evidence of the charge, were entirely different from the ones worn by the robbers. At the trial they did not get the opportunity to repair the irregularities having occurred during the presentation for identification. In connection with these the Albanian government did not refer to explanations of public utility in holding back these kinds of evidence and from the domestic procedure did not show any reason for this either.

Facing the findings above the ECtHR came to the conclusion with its decision made on the 20th of April 2010 that the mentioned proceeding did not fit the requirements of a bona-fide proceeding. Accordingly, it announced the violation of point (1) of Article 6.

In *Velev vs. Bulgaria case* the applicant handed in a complaint in connection with the failed efficient investigation. In the general case on March 21st in 2005 the applicant and another person, E.Y. were apprehended by the police with the suspicion of robbery. A year later the applicant handed in an accusation that said the police officers had beaten him to make him admit the commitment of the crime during the 3-day long custody. He stated that he did not know the names of the officers but he would be able to identify them.

The applicant was interrogated several times between January and March in 2007. On one of these occasions he described the officers abusing him and the ones who were eyewitnesses of the abuse. One of the officers was about 160 cm tall and black haired and the other officer who abused him on 21st March 2005 was about 25-30 years old, 175-180 cm tall and had short black hair and a beard with a distinctive shape.

On 19th February 2008 the applicant took part in the identifying process with photographs. With more photos different people were shown to him and the applicant identified two of them as the ones who beat him on 21st of March but could not identify the officer who beat him on 22nd March. Later the applicant was confronted with S.S. and D.D. but he stated that he was not familiar with them. It appeared to him that they were not the officers identified by him on the presentation for identification made with the photographs.

On 11th March 2008 the prosecutor finished the criminal procedure. One of the reasons for this was that the applicant confessed that he had seen the assumed perpetrators after the incident, which influenced the results of the identification process with the photographs according to the prosecutor's opinion.

The ECtHR found that there was a violation of Article 3 of the Convention by reason of the authorities' failure to investigate the applicant's ill-treatment effectively.

In the main *Beuze vs. Belgium case* on 17th December, 2007 the French gendarmerie arrested Philippe Beuze, a Belgian citizen and after that took him in custody in virtue of a warrant of arrest and on 31st December handed him to the Belgian authorities. He

had murdered his ex-girlfriend, M.B. with malice aforethought. The warrant of arrest contained that Beuze was identified officially by the neighbour of the victim. The warrant also contained the danger of recidivism on the grounds of the violent past of the perpetrator. From the records of the French gendarmerie it turns out that the suspect had renounced from the defendant choosing and from the appointed public defender also due to Paragraph (4) of Article the 63 of the French criminal procedure.

The suspect was interrogated by the Belgian police and by a verifier judge without the presence of a defendant. The dealing Belgian court rejected the application of the suspect, which he asked them to exclude the evidence which was included without a defendant in front of the police and the verifier judge. After the trial the jury sentenced him to life-long imprisonment because of murder with alike aforethought. His appeal was rejected by the Supreme Court because in the verifier period before the trial the lack of defence was not considered as a bruising fact of his right to have a fair procedure.

The ECtHR stated that the accused was handed over to the Belgian police on 31st December, 2007 at 10:40 am but till 17:42 pm – until the meeting with the verifier judge - he was not able to discuss anything with his defendant when the verifier judge asked for the appointance of an attorney. After this he was able to make discussions with his defendant but he was interrogated or other investigation acts were taken without the presence of the defendant 10 times (including the presentation for identification). The defendant did not take part in the reconstruction of the location on 6th July, 2008. It otherwise did not win statement that neither the French, nor the Belgian authorities made pressure on the suspect.

Besides the Treaty the 2013/48/EU guideline of the European Parliament and Council disposes about the right to have the help of an attorney during the criminal procedure in connection with the warrant of arrest and about the right to notify some of the third parties at the time of the imprisonment and about the right to communicate with the third parties and the consular authorities during the imprisonment.

The sentence of the ECtHR stated the violation of Article 6 because the lack of the presence of a defendant in some of the investigation events for example during the presentation for identification, which can disparage the fair trials.

In the main *Mindadze and Nemsitsveridze vs. Georgia case*, David Mindadze (later referred to as first applicant) and Valerian Nemsitsveridze (later referred to as second applicant) turned to the ECtHR in the May of 2005. They stated that:

a) the first applicant was abused by the police while the arrest;
b) the conditions and the period of the arrest were deficient and illicit in the case of both of the applicants;
c) some of the seizure orders did not include adequate decrees;
d) with both applicants the criminal procedure was basically unfair.

According to the story in January 2004, the criminal procedure was started against unknown persons, who attacked K.G. with weapons, a representative of the Georgian parliament; they attempted homicide. In February 2004 the victim was interrogated by a detective first. According to his description a sketch was made of the perpetrator, but the representative said that he did not know who the attacker was and did not know if he was able to identify him.

On 13th May, 2004 the first applicant was captured on the street because of the suspicion for attempting homicide. According to the police the first applicant confessed that he had made an agreement with the second applicant, who offered ten thousand USD to murder the representative.

On the same day the first applicant had taken part at a presentation for identification with three other persons. After some hesitation the member of parliament identified the applicant as his attacker.

After the presentation for identification the member of parliament asked for a private conversation with the first applicant, which was allowed. No one was present at this conversation and later that day the second applicant was also arrested with the suspicion of the attempt of homicide.

In the May of 2004 the first applicant was confronted with the second applicant. On this he confessed duly to his previous confession, he accused the second applicant.

Subsequently, the wife of the first applicant complained that she had seen signs of massive abuse on his husband and that is why they had entrusted an own attorney.

After the first applicant had handed in a complaint to the detective authorities referring to his confession, which he had made under torture on 13th May, he had been beaten and shocked by electricity. His proclamations made at that time were not true due to this reason. He asked for repeated interrogation. He cleaved to the fact that the criminal procedure conducted in connection with his abuse would be of capital importance with the survey of the validity of the criminal procedure conducted against him and the second applicant.

The second applicant also confessed himself to be innocent. His attorney asked for the pronouncement of the records ineligible because it was worsened by malpractice. In connection with this he highlighted that the victim had said: he was not able to identify his attacker, the sketch which was made from his description was not similar to the first applicant. Later he stated that he was able to identify him and he had done it building upon the "general look" of the applicant. On top of that the first applicant was lined up with three other persons in front of the victim and those persons looked entirely different from him. His application was rejected by the Georgian authorities because of groundlessness.

One of the men who had taken part in the presentation for identification where the first applicant was identified told the court that the police had contacted him on the street randomly to take part in the process. He stated that all of the participants of the identification process were shaved except the first applicant. One of another obvious discriminative parameter was that from among the men in the line only the first applicant was bald. The applicant looked weary and a deep bruise was to be seen around one of his eyes. A significant difference was to be discovered between the appearance of the applicant and that of the other three men.

The other participant of the presentation for identification – who was also called in from the street – told the same characteristics about the applicant including the bruise as well. He added that only the first applicant did not wear a belt and shoelaces. When the victim identified him as the man who shot at him the applicant shouted that it was not him.

Even so the national court stated that the charge of attempting homicide was in the case of both applicants and by direct evidence which did not have essential anomalies. For example the proclamations taken from him due to the private conversation with the parliament representative and the proclamations of the first applicant. Both applicants handed in an appeal, which was rejected by the court and the first applicant was sentenced for 21 years of imprisonment and the second applicant for 16 years of imprisonment.

The ECtHR founded the violation of Point 1 and 3 of Articles 3, 5 and Point 1 of Article 6.

III. Short Answers for the Previously Asked Questions

a) The ECtHR is familiar with and deals with the identification processes. Most commonly referred to as „identity parade"
b) It is obvious that it can violate the requirement of fair proceeding (Article 6) if the identification which makes the base of the impeachment is implemented wrongly (influentially or forcefully). The humiliating and illicit management (torture) can also occur and it comes up against Article 3, the prohibition of torture. The wrong result of the identification can come off as the result of the wrong identity parade and also the violation of Article 5, "right to liberty and security". And the violation of Article 8 is also unexcluded if the mode enters into the right to keep the private and family life decent[4].
c) In some states the violation of the forensic and criminal procedural requirements can occur. The cases described above show that among the national authorities, technical deficiencies can show up. Not correct, not fair, not lawful implementation formulas[5].
d) Within the most common violation reasons the followings can be seen: the (potential) accused is not shown with persons with similar look, authorities make influence (in harsh cases coercion), conduction without the presence of a defendant, insecure choices are protocolled as secure choices.
e) Concrete Hungarian application cannot be found in connection with identification proceeding.

IV. Conclusions and Suggestions

Our conclusions drawn from the decisions of the ECtHR and our (general) suggestions for the Hungarian legislation and law enforcement are sketchily presented as the following. (We answer our previous 6th question with this line.)

We start immediately with our criticism of the appellation. According to our perception the appellation „presentation for identification" in the Hungarian criminal procedure urges the recognizer who usually wants to fit to the authorities' expectations and who is most commonly the insulted witness of the crime to choose from the presented people (objects, sounds, photos, videos etc.). To choose someone either way, to recognize someone for sure.

The forced compliance can come with the incorrect outcome that the recognizer chooses even though he or she is not sure about it or just feels a bit of similarity or simply makes an inference due to the outlook that he/she only guesses to see the real perpetrator. This flaw of the recognizer can lead to *justizmord* because the choice cannot be denied theoretically or practically if the chosen person does not have a substantive alibi[6]. This is why it would be more legitimate to speak about „experiment for identification" – modelled on the evidentiary experiment – that is to say the attempt of

[4] Department of Justice Technical Working Group for Eyewitness Evidence 1999: https://www.ncjrs.gov/txtfiles1/nij/178240.txt Chapter V, par. 4 (accessed on 22.02.2023).

[5] M.J. Saks, J. J. Koehler, *The Coming Paradigm Shift in Forensic Identification*, Science, 2005, no. 309.

[6] C.R. Huff, A. Rattner, E. Sagarin, *Convicted but Innocent. Wrongful Conviction and Public Policy*, Sage Publications, Thousand Oaks, 1966; A. Badó, J. Bóka, *Ártatlanul halálra ítéltek [Innocently death penalty]* Budapest, Nyitott könyv, 2003; http://www.innocenceproject.org (accessed on 25.02.2023).

identification not presentation. This is why we feature this expression in the title of our study[7].

Our following thought is part of our criticism on legislation. Even though we read the most detailed law regulation about the identification in the history of criminal procedural law the criminal proceeding does not say that the identification should be carried out preferably between the circumstances of the original perception.

A) We also suggest it as a „*de lege ferenda*" proposal that it would be practical to fix in the law framing that the person who performs the identification process should call the recognizer (and should inform the recognizer about the following):

a) it is not certain that the perpetrator is among the people to be recognized;[8]
b) it is not obligatory for him/her to choose (to make a choice anyway);
c) the investigation continues if he/she does not choose anybody;
d) he/she will not get any feedback about the „right" answer, if he/she had chosen at all;
e) in case of the identification of objects, photos the mentioned warnings in points a-d) should be applicable just as the fact that as time passes by the perpetrator's outlook (hair colour, hair length, hair shape, facial hair, skin) can change and may look different on photos.

B) We raise a suggestion for the applicators of the law which can prevent influence and this method can be carried out also in practice. Doing it, instead of the detectives familiar with the case other executors, so-called „blind" ones who have not dealt with the case so far are precluded. Here we speak about the law enforcement employees (police, customs investigator, prosecution) who are not familiar with the person of the (potential) suspect, namely they do not know even in their subconscious who the target is. The line-up itself is set up by the criminalist who is familiar with the case and the suspect. Their task stops here for a while, they step out from the process. The employee who is unhinged from the influence of the case and this employee communicates this fact to the recognizer too. Therefore, he only practices the identification process and he does not know the case or the participants. He conducts the identification experiment organised and fixed - reservedly, distantly, uninfluenced because he does not know whom he should focus on - duly to the tactical-technical dedications. After that he hands the protocol containing the „results" to the original detectives. Because he does not have data about the history of the case it is not difficult for him not to give feedback, reinforcement nor extenuation nor in words or with movements and metacommunication. And he cannot do this after the identification process as the detectives dealing with the case also cannot do it[9].

C) Before the conduction it is expedient to give the description made by the witness or by the victim about the (potential) suspect to the legal representative (defendant, defence counsel) of the suspect. Hereby, the defendant has the opportunity to observe the flagrantly differently, the suggestive setting and complain if needed[10].

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[7] Cs. Fenyvesi, *Felismerési kísérlet a bűnügyekben [Identification Attempt in Criminal Cases],* Ludovika EgyetemiKiadó, Budapest, 2023.

[8] Benefits of Best Practice Recommendations (Canada), https://www.justice.gc.ca/fra/pr-rp/jp-cj/rc-ccr/pej-pmj/p5.html (accessed on 10.02.2021).

[9] A. Levi, *Some Facts Lawyers Need to Know about the Police Lineup*, Criminal Law Quaterly, 2002, no. 46, pp. 76-180.

[10] D.B. Wright, A.T. McDaid, *Comparing system and estimator variables using data from real lineups*, Applied Cognitive Psychology, 1996/10, pp. 75-84.

D) It is an important and to be controlled criteria that among the people in the line there must not stand an acquaintance of the recognizer (most commonly the victim)[11].

E) The leader of the identification process should aim not to communicate much during the process. The instructions should be short, clear and punctual.

F) It could have tactical importance to refer punctually and to fix it correctly how the recognizer witness impresses that from the people in the line in whom he/she recognizes the one who is in connection with the crime. Does he/she point at the perpetrator? Does he/she it out loud, decidedly, surely, repeatedly or inversely insecurely, indefinitely?

G) In connection with the previous point we emphasize our reasoning that no presented similarity, match can be accepted. The active subject either recognizes the person (object, sound) or not. In between, percented comparing is not to be accepted; in this case we cannot speak about identification.

H) For the collation of the bustling witness who wants to fit to the expectations of the authorities the so-called „empty" formation is needed. In the case if the (potential) suspect is not set into the line only the ones who are indifferent and above the/any suspicion.

I) In connection with the witnesses we offer to summon the active subject to appointments separately so they cannot talk about the previous events, people, description or in front of the building or inside while waiting. Everything has to be done to prevent them from communicating with each other before or during the identification. (They should not send messages and photos to eachother and they should not create Facebook, WhatsApp groups).

J) During the identification carried out with photos several photos should be shown to the recognizer and the same should be done during the preliminary investigation and the collection of data.

K) More (different) photos about the same person cannot be shown.

L) The sizes of the photos about different people should be the same and they should carry same parameters. All of them should be shown to the recognizer for the same amount of time.

M) Especially when the process is made by functional personalities (e.g. running, talking, sound) it is practical to use more modern technical gadgets (e.g. video, digital camera, electronic recorder). No kinds of recording cut should be made in the parade.

N) By identifying a corpse it must be fixed if the active subject did not recognize the body or face but the clothes or jewellery. In this case we cannot speak surely about recognizing a (dead) person.

O) It should be considered that in the trial period is it necessary to repeat the question to the recognizer if he/she recognizes the person who he/she had already seen and picked out. We think that the „reproduction of the reproduction" does not have proving power.

P) It is not only a reason for the security of the victim that the passive subjects (the ones to be recognized) cannot see the active subject – the recognizer – but also a reason for the criminal tactics.

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[11] P. Hack, *Az igazságszolgáltatás kudarcai [Failure of Criminal Justice],* in Cs. Fenyvesi, (Ed.), *A Magyar Büntetőjogi Társaság Jubileumi Tanulmánykötete*, Budapest-Debrecen-Pécs, MBT, 2011.

V. Constitutional closing thought

Like all people who seek for the rule of law, security, qualitative criminal investigation, lasting and capable legal norms and like all the researchers busy with legal theory we also hope that our suggestion of improvement published in our scientific study have substantive influence and effect on the legislation and on the application of law. If not even in the following months but during the years we hope that we can earn that one of the milestone acts of the criminal proceeding – the identification experiment – can appear worthy to its contentious form even in law and even in implementation and it will not give evidence to false decision of the court and to *justizmord*[12] which ought to be prevented by everyone.

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The Role of Security in Social Well-Being

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Abstract

The paper focuses on security as a highly valued political good whose provision is being one of the basic functions of the state realized internally through a functional approach to rights. It explores various phenomena that affect society and the overall quality of social life in the context of the traditional understanding of human rights in a democratic society, and how the fight against organized crime jeopardizes human rights. The current trend in combating organized crime is manifested in a narrow spectrum of repressive responses to security threats, shifting the policy of combating organized crime beyond the framework of social well-being as a concept that guides social organization. The consequence of implementing such a policy against organized crime is intensified victimization. This paper aims to consider the proportionality of responses to threats from organized crime in the context of the infringement of human rights due to the use of repressive measures. Also, in the second part of the paper, the authors want to emphasize that a functional approach to ensuring security, as a value that enables the sustainability and development of the community, implies an integrative approach, i.e., the need to involve women as actors in the security system because a security strategy without an integrative approach deprives society of its overall attributes, negatively impacting its resilience and diminishing it.

The authors problematize the dysfunctionality of institutions, which results in the creation of market foundations for organized crime. Where the state effectively offers services that organized crime provides in weak states (debt collection, protection from violence and extortion, effective transactions in money and goods etc.), the space for the market placement of "products" of organized crime is significantly narrowed. Considering the proportion of repressive and non-repressive proactive action against organized crime, in the second part of the paper, the authors assess the realistic scope of favorable consequences that such a combined policy of combating organized crime would produce in the sphere of the composite corpus of human and civil rights affected through the categories and institutions of the democratic political system.

Keywords: *security, integrative approach, organized crime, social well-being*

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I. Security

Security is a socially constructed concept that gains specific meaning only within a given social context. The broadest definition of security implies freedom from fear, threats, and physical violence, which includes preventive or repressive actions to secure human rights. Since security is a concept with multiple meanings, it includes moral, ideological, and normative elements. This more ambitious understanding of security implies that, in addition to neutralizing traditional security threats, it also influences the quality of life of the population towards the optimal satisfaction of all essential rights.

The widely defined protection of rights and the various areas in which international law intervenes indicate the desire to establish standards for the protection of human rights and fundamental freedoms[4].

Explaining the needs that connect elements into wholes, as well as the reasons for such interconnectedness in the structure, is based on a functional perspective. Security is functionally explained as a social phenomenon based on relationships that form connections and links between various security elements (and cooperation)[5]. The existence (or anticipation) of a conflictual relationship between two (or more) elements in a particular society is the basis for the need for security, and the set of these relationships defines the security system or creates security system elements.1 Shaping social practices can be understood as a reflection of social complexity and the need for power. Displaying power in the security sphere inevitably reveals a symmetric or asymmetric power relationship between participants (security subject and danger subject), and increasing community resilience requires identifying friction factors in achieving the well-being of community members[6] .

The integrative approach to security produces synergistic effects in the dynamic shaping of security as a phenomenon, which is recognized in the systemic outcome as a high level of resilience. Being holistic, the integrative approach represents a humanistic approach with specific philosophical and ethical significance, and it is directly reflected in the domain of human well-being. This approach involves creating meaningful connections between different elements (goal, means to achieve the goal, system organization, activities and measures to achieve the goal, and organization function), leading to a greater possibility of resolving conflicts by changing perspective, applying knowledge from one area to another thanks to its functionality, and expanding the context in which the problem is considered. The traditional approach to conflict resolution is opposed to the reality created by contemporary conflicts that more than ever in human history affect civilians, leading to the globalization of the immigration phenomenon. The changed nature of modern conflicts, dominated by informal armed groups, militias, and military factions, has also led to massive human rights violations and numerous civilian casualties. As the endangerment of existing social relations triggers a social reaction to prevent and suppress that endangerment, it directs the innovation of approaches to thinking about security. The relationship between global, national, and human security requires a new way of thinking about security in the context of global

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[4] A. Bulatović, O. Pavićević, Crna ekonomija i crno društvo, Beograd: Institut za filozofiju i društvenu teoriju. 2021, p. 232.

[5] T., Smith, *Surprise, Security, and the American Experience*, in International Journal, 2005, 60(1), pp. 309-312.

[6] M. Mijalkovski, *Komplementarnost ljudske, nacionalne i kolektivne bezbednosti*, in Vojno delo, 2008, 60 (2), p. 120.

transformations that have conditioned the emergence of new global dangers. The basic role of the security system is to prevent dangers, protect human rights and freedoms, and contribute to the overall development of society. The effects of new global dangers are evident in the realization of the security functions of the system, which has been transformed from the functional field of the defense system to the functional field of the security system. In the context of global integration, the defense system has lost its significance because the causes of global dangers cannot be prevented by the defense system as a specific system of protecting security. The perspective of global integration implies a redefinition of the system and its security functions, focusing on the basic element of the system – the individual. Human security is a relatively new paradigm for addressing security issues, and, in comparison to traditional security concepts based on territorial integrity and state sovereignty, human security focuses on the safety of each individual[7]. The essential importance of the security of each individual for the creation of peaceful and stable societies is directed toward identifying and preventing risks that threaten individuals and can originate from various social spheres. The approach of human security aims to ensure freedom from fear, freedom from poverty, and the right to a dignified life. If we do not view this as an issue of human security and as a problem that has a significant impact on everyday life, powerlessness, distrust, alienation, and vulnerability will become inevitable[8].

In the context of law, the mutual relationship between the state and society in ensuring security encompasses the state's obligation to respect and protect rights, as well as, under certain conditions, to act in a way that limits them. Therefore, the relationship between the concepts of security and human rights is complementary.

As a fundamental human right, security is guaranteed by key international human rights documents. The right to security, along with the right to life and freedom, is guaranteed by Article 3 of the Universal Declaration of Human Rights of the United Nations, which is now considered a source of customary international law, i.e., general practice accepted as law. Based on this document, legally binding instruments were later developed, such as the International Covenant on Civil and Political Rights, which represents one of the sources of contemporary international law of the highest rank in the hierarchy, where the right to security is separately stated in Article 9[9].

The right to life means that the state must provide conditions for society to function safely, ensuring the individual's safety within it and eliminating all dangers in that regard. Security, or the lack thereof, affects the quality of life in numerous spheres, opening up different perspectives for its analysis. In traditional understanding, the reference object is the state, but in contemporary understanding, the reference object of security is society. Therefore, the current understanding of security expands its object beyond the traditional view, so that security is now considered not only in terms of threatening the state but also as endangering society, labeled as a non-conventional, so-called "soft" security threat[10] .

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[7] Ž. Bjelajac, *Bezbedonosna kultura umeće življenja*. Univerzitet Privredna akademija Pravni fakultet za privredu i pravosuđe Novi Sad, 2017, p. 140.

[8] M. Babović, O. Vuković et al., *Ljudska bezbednost – dve studije slučaja u Srbiji*. Beograd: SeConS – Grupa za razvojnu inicijativu, 2015, p. 67.

[9] European Communities, Treaty Establishing a Constitution for Europe, *Official Journal of the European Union,* C series, 310, 2004.

[10] S. Đorđević, *Understanding Transnational Organized Crime as a Security Threat and Security Theories* in Western Balkans Security Observer, 2009, 4 (13), pp. 39-52.

II. Organized Crime

One of the dominant non-conventional security threats, according to the established degree of harmfulness of the action, i.e., the degree of endangering social order and values, is organized crime as a specific form of crime. The significance that organized crime has on our everyday lives can be illustrated by global statistics based on the Corruption Perceptions Index and country rankings provided by the organization Transparency International. Mexico is ranked 100th, and Serbia is ranked 86th. The involvement of holders of political and state functions who appear as exponents of organized criminal groups with which neither the state nor society had the means to cope represents a challenge for everyone, from those employed in state institutions to citizens and scientific researchers who could provide quality solutions in this difficult situation[11].

Organized crime, in its essence, encompasses not only organization, planning, task division, discipline, and responsibility within a criminal organization aimed at achieving profit but also involves a certain connection with the state and its specific organs. This connection takes the form of collaboration between law enforcement agencies and those who seek to evade or undermine the law. This includes implicit agreements made between professional criminals and other officials responsible for law enforcement, with the purpose of protecting the former from arrest and punishment[12].

Radical changes in security needs provoke methods of combating organized crime that increasingly concentrate them in a very narrow spectrum of repressive responses and actions. This seriously jeopardizes the sphere of human rights in terms of traditionally accepted criteria, which are based on considering the consequences from the perspective of proportionality, i.e., weighing the degree of deprivation of traditional civil liberties that may be justified in the fight against transnational organized crime. As such, this issue becomes an unavoidable element of contemporary politics in societies grounded in values and rules defined by democratic tradition[13].

From the perspective of the concept of human security, the actions of organized crime manifest dramatically destructively, as human security is, in fact, an amalgamation of human rights, including rights such as environmental rights and the right to security from an economic crisis. Human security is a paradigm that denotes a new, modern concept of security, focused on the dynamic consideration of social problems in a broad spectrum that creates the exposure of individuals and communities to direct and indirect security threats emanating from state and non-state actors. The reference object of human security is the individual, not the state. Changes in the understanding of security have conditioned its narrower definition, now associated with "freedom from fear," with an emphasis on morally justified and necessary preventive or repressive actions to secure and protect human rights. Since repressive action, in principle, seriously jeopardizes the sphere of human rights in terms of traditionally accepted criteria of human rights, considering the consequences from the standpoint of proportionality, or balancing the amount of renunciation of traditional civil liberties that may be justified in the fight

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[11] M. Zirojević, D. Đukanović, D. Gajić, *Tradicionalna i savremena shvatanja o kriminalu, organizovanom kriminalu i transnacionalnom organizovanom kriminalu*, in: Bjelajac, Ž., Zirojević,M. (eds.) *Organizovani kriminalitet Izazov XXI veka*, Novi Sad: Pravni fakultet za privredu i pravosuđe, 2012, p. 32.

[12] M. Eliot, *Zločin u savremenom društvu*, Sarajevo, Veselin Masleša, 1962.

[13] A. Bulatović, O. Pavićević, cited, p. 12.

against organized crime, is an unavoidable element of contemporary policy in that domain, in societies based on values and rights defined by democratic tradition.

The fear of repressive actions by state authorities not only instills a sense of vulnerability and insecurity but also prompts a recognition of the delicate balance needed in empowering these authorities. Special rules, investigative techniques, and powers intended to combat organized crime should be treated as exceptions due to their potential to enhance efficiency at the cost of compromising human rights. Within the legal context, the goals of interpersonal transactions are shaped by inclinations that can be identified as needs. These perspectives collectively underscore the complexity of maintaining a just and rights-respecting framework in addressing both state actions and individual interactions[14].

III. Crime Control

The goals of interpersonal transactions are determined based on inclinations that, in the legal context, can be referred to as needs. Protection against crime is precisely the fundamental expectation of the criminal justice system. Security policy should increase both the subjective sense of freedom and the protection of citizens, and crime control within it represents a strategic approach aimed at creating institutional practices that enable the sustainability of social organizations as structures that facilitate the achievement of social goals and the satisfaction of social needs.

In contemporary societies, the police bear the formal responsibility and legitimacy for ensuring security through coercion. At the same time, the efficiency of police work is subject to scrutiny. In this sense, the role of the police is to be complementary to the judiciary and to provide support to the judicial process. An adequate response to citizens' needs for personal security and access to justice is at the top of the hierarchy of expectations from police work.

Today, investigative and intelligence work is considered the dominant form of countering organized crime in police operations. Therefore, when security considerations take precedence over the unhindered enjoyment of human and civil rights, problems arise from the perspective of civil rights. Alongside the fight against threats from organized crime, a message is sent to citizens that, in facing various challenges, the state is effectively willing to do whatever it takes to achieve its goal. Thus, security becomes an uncritically positioned value in society, disrupting the overall order of social values. The fact that security is important but not the most important value is suppressed in public consciousness, and the quality of life in its entirety, personal freedoms, and rights are more important than security itself.

Laws regulating the use of force by the state carry particular weight. They impact the entire society and must be guided by the public interest. There is currently a public debate regarding the draft of a new law on internal affairs, which, in fact, encompasses a whole package of laws: on data processing and records in the field of internal affairs, DNA registry, asylum, judges, the organization of courts, public prosecution, the High Council of the Judiciary, and the High Council of the Public Prosecution.

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[14] Z. Pavlović, *Significance and justification for the establishment of prosecutor's office Special Jurisdiction in combating organized crime*, in Bjelajac, Ž., Zirojević, M. (eds.) *Organizovani kriminalitet Izazov XXI veka*, Novi Sad: Pravni fakultet za privredu i pravosuđe, 2012, p. 605.

Among other things, the new regulations allow the use of new technology for mass surveillance to be employed for facial recognition, targeted against specific groups of people, and its selective use is not possible due to the principle on which it operates – using suitable software. Matching biometric camera footage with images from the police biometric photo database enables the rapid identification of a vast number of individuals in an exceptionally short period. This is unacceptable from the standpoint of human rights and freedoms. The application of biometric video surveillance, which is an intrusive technology, would have unforeseeable consequences for democratic society, citizens' rights, and freedoms. Namely, the use of biometric technology can instill justified fear among citizens of constant monitoring and surveillance by the state, resulting directly in deterring citizens from exercising freedom of expression, assembly, association, as well as freedom of movement. Such regulations increase the risk to privacy, and there is no balance between the two conflicting rights – the right to security and safety and the right to privacy.

The citizens' mistrust of the government's handling of modern technologies, marked by irregularities and abuses that infringe upon constitutional rights, particularly the right to privacy and personal data protection, is rooted in tangible evidence. This mistrust is not abstract; it is fueled by specific instances, such as the absence of accountability for numerous unauthorized accesses to citizens' data each year without proper legal authorization. This lack of determination of responsibility, despite being a mandated obligation, contributes to growing skepticism. In the context of social dynamics and specific relations, it becomes crucial for a society to assess, at any given socio-historical moment, the optimal balance between repressive measures and social control. This evaluation shapes the content of a comprehensive model for institutional crime prevention.

IV. Well-Being

Subjective well–being, which primarily pertains to an individual, is usually seen as a psychological construct that consists of a person's cognitive and affective evaluations of their life. These evaluations rest on emotional reactions to events as well as on cognitive judgments of satisfaction and fulfillment. Thus, subjective well–being is a broad concept that includes experiencing pleasant emotions, low levels of negative moods, and a generally high level of satisfaction with life. To achieve subjective well–being one needs an individual vitality to undertake activities that are meaningful, and engaging, and make one feel competent and autonomous[15]. The dynamics and specifics of social relations determine that, for a particular society, in every concrete socio-historical moment, it is necessary to evaluate the optimal relationship between repressive measures and measures of social control, thereby determining the content of a composite model of institutional crime prevention. In the context of the quality of life, it is a threat or impairment of values.

Repression and the criminal justice system are significant factors in people's well-being. The police have the function of increasing the sense of well-being because, at the community level, they enable the confrontation of security threats. Since "displaying power in the security sphere inevitably reveals a symmetrical or asymmetrical power

[15] A. Bulatović, *Well-Being as key matter of philosophical reflection and practice* in Roth, M., Hein, E. (eds.) *Philosophische Praxis 6: Philosohpiere!*. Hartung-Gorre Verlag, Konstanc, 2019, p. 71.

relationship between participants (security subject and danger subject)," then the police, in performing their function, can negatively impact the well-being of citizens, as they can be a friction factor in achieving that well-being.

However, well-being is defined differently depending on the values of the community, so it is possible to cumulatively increase well-being even if the endangerment of a certain value increases. In the legal context, security can be defined as the price of trust that a citizen gives to the state and the legislator. Although, in terms of general prevention, every repressive function is applied to exert a certain preventive influence, whether that expectation is justified or not, intensifying repressive police work, instead of increasing human security, can endanger it by violating the right to freedom from state terror. This is particularly pronounced in the application of special investigative techniques in the fight against organized crime, where security effects in terms of human security imply meeting the need for minimal use of special powers with maximum security effects, achieved primarily through procedural limitations on the application of certain investigative techniques so that operational work does not effectively jeopardize human security. In this way, even in the context of directing repressive measures towards certain dysfunctions in the community, under competence, action is taken in the right optimization of relationships in the community, contributing to the increase in social capital that plays the most significant role in our subjective well-being. As trust is one of the most important elements of all social relations, it affects all processes in society, including crime. Increasing trust increases social capital, which plays the most significant role in subjective well-being[16].

In a comprehensive sense, achieving a balance between rights and intrusive measures entails several key components. This includes upholding citizens' right to access their data, implementing internal hierarchical control within institutions, ensuring disciplinary accountability, and establishing external oversight by independent institutions over the collection, storage, and utilization of this data. This multifaceted approach aims to safeguard individual rights while maintaining a necessary degree of security. The relationship between well-being and changes in the scope of discretionary powers is intricate. Well-being is fundamentally tied to the assurance of individual rights, safety, and quality of life. Changes in the scope of discretionary powers, which refer to the authority given to decision-makers to exercise judgment within certain bounds, can significantly impact well-being.

When discretionary powers are expanded without adequate checks and balances, there is a potential for abuses that can threaten individual well-being. On the other hand, a careful and transparent adjustment of discretionary powers can contribute to societal well-being by allowing for effective responses to emerging challenges while respecting fundamental rights.

Balancing discretionary powers with the protection of individual rights becomes crucial for fostering a society where well-being is a priority[17]. Striking this balance ensures that the exercise of discretionary powers aligns with the principles of justice, fairness, and the overall welfare of the community. Therefore, changes in the scope of discretionary powers should be approached with careful consideration of their implications for the well-being of individuals and society as a whole.

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[16] A. Bulatović, O. Pavićević, cited, p. 102

[17] A. Bulatović, S. Korać, *Manjak etičke kompetencije u javnoj upravi i ljudska bezbednost.* In Zbornik radova Instituta za kriminološka i sociološka istraživanja, 2014, 33(2), pp. 145-163.

V. Change in the Scope of Discretionary Powers

A common misconception arises when people equate the terms "well-being" and "security." However, they do not always denote the same concept. Well-being is primarily concerned with the state of one's soul or inner self, whereas security pertains to one's physical condition or safety.

Within the framework of the contemporary understanding of the security concept, security is viewed in a broader context. It goes beyond merely neutralizing traditional security threats and extends to actively influencing the quality of life for the population. This broader perspective seeks to optimize the satisfaction of all essential rights, acknowledging the interconnectedness of security and the overall well-being of the community. In cases where the optimal rights of the population to a reasonably good life are jeopardized, there are problems in the security domain.

The traditional justification for state coercion and repression is based on the idea that rights are conditioned by the way they are used, and therefore their derogation is possible under certain conditions. According to the understanding of civil rights in a democratic and liberal society, they include the right to privacy, freedom of movement, independent decision-making on how to express opinions on certain topics, whether a person will answer certain questions, whether they will provide information about their private life, i.e., the right to personal secrets. The application of special investigative techniques implied by the modern approach to combating organized crime involves repressive measures that are unusual for everyday life, such as surveillance, wiretapping, waste inspection, and questioning acquaintances, thereby compromising the autonomy of the individual as a human being, i.e., their right to a secret they voluntarily refuse to disclose. The right to human dignity before the state, manifested in the specific sphere of the right to privacy and secrets, is opposed to the right of the state (and as a moral right) to violate the privacy of citizens when there is a strong enough suspicion that the content of the secret is criminal, i.e., such that it endangers the general interest to an extent that constitutes a criminal offense. The principle of reciprocity justifies the violation of privacy by the state as a departure from the usual ethical framework: if a citizen violates the right of another citizen or society as a collective by committing a criminal offense, he automatically deprives himself of his own right equivalent to the one he violated. Moral risk is inevitable when special investigative techniques are applied to someone for whom there are no clear indications that they have committed a criminal offense, based only on suspicion or external indications (for example, socializing with criminals or terrorists). This risk balances the need to establish the truth, i.e., to obtain evidence to detect, clarify, and adjudicate a specific criminal matter of organized crime, and its adequate control requires a clear framework of authority, structures of indications, and a reliable system for protecting accidentally discovered information.

Civil rights are characteristically political rights, different from human rights because human rights are determined concerning the preservation of life. When civil rights are treated enumerative, i.e., when it is decided declaratively who has which rights and whether they are human rights, then they are re-conceptualized as human rights. In this way, the composite concept of human rights gradually transforms into the broad concept of security, i.e., human security that can be reduced to the right to a quality life.

The question of well-being is a question of creating a complete picture of values in society, depending on how well-being is defined. If we consider well-being as the quality of social life, it should be kept in mind that it is primarily expressed in the immediate

environment, at the level of the local community, and police engagement within its framework is assessed based on what the police, actually, do in line with citizens' expectations ranging from expectations that the police function as an instrument of law, through expectations that the police ensure public order and peace, to expectations of the police as a public service that serves citizens. If these expectations are met, it increases the sense of well-being and confidence in the functionality of the social order, i.e., the quality of life as the ultimate outcome of human motivation. In other words, the potential to achieve an optimal relationship between different measures within the composite model of institutional crime prevention should be sought in establishing a balance between the need to reduce organized crime and the need to prevent a drastic violation of human rights.

VI. Women And Transformative Changes In Security Architecture[18]

The well-being of women is a crucial factor in their ability to address risks effectively. Their personal or internal capacities are directly impacted by their state of well-being, influencing their vulnerability to risks. Consequently, women need to prioritize self-care and initiate a proactive approach to safeguarding their well-being, recognizing it as an integral element in ensuring their overall security. Traditional gender roles have similar aspects: men are portrayed as aggressive, and protectors, and women are their nurturing support. Femininity is mostly associated with tenderness, while men are attributed to more competitive, assertive qualities such as dominance, leadership, and sometimes violence, especially in the context of warfare. In communities where these gender constructions are strong, there is implicit acceptance of one gender's domination over the other and the acceptance of violent assertiveness as an expression of masculinity[19]. These norms usually imply acceptance of other norms that promote both structural and direct violence. A radical alternative to such a social structure involves condemning violence as an acceptable expression of masculinity and condemning the dominance of one group over another. Deconstructing these socially constructed gender roles opens up space for peaceful coexistence[20].

Gender equality is an expression of a norm change that, on a general level, prevents violence by spreading from the individual to the national level[21]. The development of societal responses to security threats focusing on resilience is grounded in empirically confirmed linkages between women's security and community stability[22]. Women's security has structural value for community security. States with higher levels of gender equality in social, economic, and political terms are more stable and rely less on

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[18] This section of the text is based on a previously published article, namely: Bulatović, A., Žene i bezbednost – Integrativni pristup otpornosti. In: Ćopić, S., Antonijević, Z. (urs.) *Feminizam, aktivizam, politike: Proizvodnja znanja na poluperiferiji*, Beograd: Institut za kriminološka i sociološka istraživanja, 2021, 431-442.

[19] E. Bjarnegård, E. Melander, *Disentangling gender, peace and democratization: the negative effects of militarized masculinity*, in *Journal of gender studies*, 2011, 20(2), pp. 139-154.

[20] A. Alexander, R. Turkington, *Treatment of Terrorists: How Does Gender Affect Justice*?. In CTC Sentinel, 2018, 11(8), pp. 24-30.

[21] For example, if members of the community condemn violence, the likelihood of violent groups gaining support or recruiting fighters decreases.

[22] M. O'Reilly, *Why Women? Inclusive Security and Peaceful Societies*. Washington: Inclusive Security, 2015.

military force in dispute resolution[23]. As gender equality increases, women's emancipation increases, and the risk of conflicts decreases. Even in international crises and conflicts, states with higher gender equality levels that participate in them demonstrate less violence compared to other states involved in the conflict[24]. One of the key components of the argument seeking to theoretically explain this phenomenon focuses on changes that have occurred in the domain of traditional gender roles related to changes in social structures where norms and institutions limiting the use of violence have developed[25]. Achieving authentic security is not possible until unequal structures of gender, race, and class power are deconstructed, eliminated, or at least reduced, introducing economic, social, and political gender dimensions into the paradigm of human security[26].

In modern governance, public policies are considered one of the most significant instruments as they establish norms and patterns of thinking and behavior, create, and regulate political subjects, establish new relationships in society, define problems, propose solutions, create new social and semantic worlds, and establish power regimes. The issue of women's integration into the security sphere is related to political freedom and economic independence, and they are largely defined by standardization. Regulations not only determine the normative structure of offenses and punishment but also have symbolic value because they determine what is acceptable or desirable in society. Regulations ensure gender equality by stipulating that neither men nor women have the right to dominate the other in any sphere. Achieving gender equality generally implies increased women's rights. By removing barriers that hinder effective women's participation in the security sector, transformative changes in security architecture are enabled. Female leadership, in terms of the process by which leaders achieve goals (which happens when an individual shares idea to meet certain social needs that others accept as potential solutions), is overlooked in many societies. Recognizing and respecting this will be important for the inclusion of women because they still do not participate equally in the security sphere. They are still underrepresented in national and international security institutions and discussions, and gender perspectives are not sufficiently integrated into strategic documents guiding national and international security[27]. This emphasizes the importance of context. The security agenda should be tailored to address both existing and emerging needs, advocating for a human security approach that is gender-equal in its norms and practices. This approach aims to prevent the undervaluation of human capital, a key resource, and to promote a more balanced and sustainable orientation of overall social capacities towards the well-being of society.

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[23] L. Sheperd, *Power and Authority in the Production of United Nations Security Council Resolution 1325*, in *International Studies Quarterly* 2008, 52 (2), pp. 383-404.

[24] Tl. Gizelis, *Gender Empowerment and United Nations Peacebuilding* in Journal of Peace Research, 2009, 46(4), pp. 505-523.

[25] S. Pinker, *The Better Angel of Our Nature*. New York, NY: Viking, 2011.

[26] An important component of United Nations Security Council Resolution 1325 is the inclusion of women in peace processes. Although women participated in these processes between 1992 and 2018, it was to a very limited extent: 13 percent in negotiations, 3 percent in mediations, and 4 percent as signatories of major peace processes. The vast majority of peace agreements do not address gender, and by 2018, only 4 out of 52 concluded agreements contained provisions on gender issues (UN Women, 2021). *See* A. Tickner, *Peace and Security From a Feminist Perspective*, in S. E. Davies, J. True (eds.), *The Oxford Handbook of Women, Peace, and Security*. Oxford: Oxford University Press, 2019, p. 15.

[27] M. Bloom, *When Women Are the Problem*, in United States Institute of Peace. *Charting a New Course: Thought for Action Kit*. Washington, DC: United States Institute of Peace, 2015, p. 20.

VII. Conclusion

Security and well-being are inextricably connected as two sides of the same coin. Assessing the realistic scope of favorable consequences stemming from a unified policy to combat organized crime within the democratic political system requires careful examination. On one hand, such a policy has the potential to enhance public safety, protect individual rights, and fortify democratic institutions against criminal threats. However, it necessitates a delicate balance to prevent any encroachment on civil liberties, ensuring that measures taken are proportionate and respectful of fundamental rights. Furthermore, the effectiveness of the policy depends on robust implementation, international cooperation, and ongoing evaluation to address evolving challenges. This kind of experience pushes us to think more consciously about the issue of the successful execution of a combined policy against organized crime given that it could yield tangible benefits for human and civil rights within the democratic framework, emphasizing the importance of strategic and rights-conscious approaches. What we need is to create spaces and opportunities for incorporating security and well-being practices into our security policies to ensure not only basic needs are met but also social, political, and cultural factors. Such an approach suggests that any framework for human security should be rooted in human rights rather than market principles.

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Criminal Offences in Production and Trade in the System of Offences Against Economic Interests of the Republic of Serbia

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Abstract

Criminal law protection of economic relations is gaining more and more importance, especially after the end of the Second World War. With the development of the economy, there are changes in the field of incrimination of offences against economic interests, as well as criminal offences related to production and trade, which is one of the reasons for constant monitoring of legal legislation in this area. The commission of criminal offences in connection with production and trade endangers the economic system as a whole or certain of its institutes, and the occurrences of organized commission of these criminal offences, which take on the characteristics of professional criminality, attract special attention, hence the need for a more detailed analysis of the relevant issues arises, both from the normative and from the aspect of representation of these criminal offences in the economy of the Republic of Serbia.

The aim of this work is to indicate the characteristics of offences against economic interests of the Republic of Serbia, as well as the position of criminal offences related to production and trade in the system of offences against economic interests.

Keywords: *criminal protection, economic system, production, trade*

I. Introduction

Offences against economic interests are directed against the economy, that is, against the social relations that govern the process of production and distribution. The regulation of relations that rule in the economy is very diverse, because they are based on differences in the economic system, in the socio-economic organization, as well as different economic conditions and different interests that are protected by that regulation in certain countries. The group of offences against economic interests in the legislation of the Republic of Serbia is given due importance and they are provided as a separate group of criminal offences. Criminal offences from this group are directed against the economy as a whole or against certain of its branches, as well as against social relations in the economy, which are based on the principles of the existing economic system.

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II. Characteristics of Offences Against Economic Interests

In modern criminal law, economic criminal offences have a special significance and special attention is paid to their prescription. The specificities of criminal offences in the economy, as phenomena in society, condition the need for adequate legal solutions in the field of criminal protection against this type of criminality. The starting point for understanding offences against economic interests are the constitutional principles on which economic relations are based. According to Article 82 of the Constitution of the Republic of Serbia[1], "economic organization in the Republic of Serbia rests on the market economy, open and free market, freedom of entrepreneurship, independence of economic entities and equality of private and other forms of property." The Republic of Serbia is a unique economic area with a unique market for goods, labor, capital, and services. The impact of the market economy on the social and economic position of employees is harmonized through social dialogue between trade unions and employers." In the legislation of the Republic of Serbia, offences against the economic interests are provided as a separate group of criminal offences. Criminal offences are without any doubt socially dangerous acts and according to Provision 14 of the current Criminal Code, a criminal offence is an offence set forth by the law as such, which is illegal and which is concealed, while a criminal offence does not exist if illegality or guilt is excluded, even though there are all the features of a criminal offence determined by law. Srzentić[2] states that in contemporary criminal legislation, economic criminal offences are very diverse, and they were such in previous periods, which affects the fact that the regulations defining these criminal offences are subject to frequent changes. The consequence of the need to determine adequate forms of criminal law protection of certain social relations in the economy in the various changing conditions of economic life that exist in certain countries is stated, which is achieved through the protection of a certain economic system and its proper functioning in the economic life of a certain country.

The great dynamics in the development and movement of economic and property changes in relations must have an effect on the dynamics and structure of socially dangerous attacks on the economy. This also requires a change in the incriminations of offences against economic interests, through changes in the description of some of the already existing criminal offences or the incrimination of new types of attacks on the economy, or that some outdated forms of attacks which have lost their significance and social danger, are decriminalized. It is important to emphasize that the process of accession negotiations with the European Union, within the framework of Chapter 23, created a series of reform tasks that actualized certain issues, which the professional and scientific public had pointed out for years[3]. One of the reform requests refers to the revision of offences against economic interests in the Criminal Code, which was done by the Law on Amendments and Additions to the Criminal Code from 2016, which introduced significant novelties in Chapter XXII. In the case of certain offences against

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[1] Constitution of the Republic of Serbia, Official Gazette of the RS, no. 98/06. *(SR: Ustav Republike Srbije, Službeni glasnik RS, br. 98/06.).*

[2] F. Bačić, N. Srzentić, *Komentar Krivičnog zakona SFRJ [Commentary on the Criminal Code of the SFRY],* Belgrade, *Savremena administracija*, 1978, p. 502.

[3] M. Kolaković Bojović, *Privredna krivična dela i Poglavlje 23 [*Economic criminal offences and Chapter 23] in I. Stevanović and V. Čolović (eds.), *Privredna krivična dela* [Economic criminal offences], 2017, pp. 95-106, Belgrade, Institut za kriminološka i sociološka istraživanja i Institut za uporedno pravo [Institute of Criminological and Sociological Research and The Institute of Comparative Law], p. 95.

economic interests, there was a need for a conceptually different approach, as well as for a different legal prescription of certain criminal offences. Several new criminal offenses were introduced, while some were decriminalized. The group of offences against economic interests, which included 25 criminal offences, was increased to 29 offences against economic interests, and a new system of offences against economic interests was given, that is, their arrangement and grouping were carried out according to certain criteria, the most important of which is their kinship. A significant change in this chapter is the decriminalization of certain criminal offences, namely: abuse of authority in the economy, issuing checks and using cards without coverage, abuse of a monopolistic position and misleading customers, as well as the negligent form of the criminal offence of causing bankruptcy. Within this group of criminal offences, new incriminations were added: Fraud in Conducting Business Activity (now Art. 223 of the CC), Fraud in Insurance (new Art. 223a of the CC), Fraud in Conducting Business Activity (now Art. 224 of the CC), Abuse of Trust in Conducting Business Activity (now Art. 224a of the CC), Abuse in Privatization Procedure (new Art. 228a of the CC), Conclusion of a Restrictive Agreement (now Art. 229 of the CC), Accepting Bribes in Conducting of Business Activity (now Art. 230 of the CC), Giving Bribe in Conducting of Business Activity (now Art. 231 CC)4. Tanjević states that it is considered that the new criminal offences are not actually new, but rather incriminations that existed in the group of criminal offences against property and against official duty, and that in fact, it is about the introduction of special forms of existing crimes[5]. The legal description of several offences against economic interests has changed to a significant extent, and in some cases, it is only a consequence of the fact that it is no longer prescribed that the perpetrator can be a responsible person, but any person who carries out the act of execution and other features of the criminal offence. In this regard, with the criminal offence of abuse of the position of a responsible person - which was introduced by the Law on Amendments and Additions to the Criminal Code from 20126 instead of the criminal offence of negligent work in economic operations, it was necessary to delineate the responsibility of the official and the responsible person, for the reason that it is about two entities with different powers in different areas[7]. The legislator recognized that it is necessary to separate the criminal offences of corruption in the public and private sectors, and that is why, in addition to the criminal offence of Fraud in Conducting Business Activity (Art. 224), he also prescribed the criminal offence of Accepting Bribes in Conducting of Business Activity (Art. 230), as well as Giving Bribe in Conducting of Business Activity

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[4] More in: D. Kolarić, *Pregled na Zakon o izmenama i dopunama Krivičnog zakonika (krivična dela protiv privrede) [Review of the Law on Amendments to the Criminal Code (Offences Against Economic Interests)]* in I. Stevanović and V. Čolović (eds.), *Privredna krivična dela [Economic criminal offences],* pp. 35-46, Belgrade, Institut za kriminološka i sociološka istraživanja i Institut za uporedno pravo [Institute of Criminological and Sociological Research and The Institute of Comparative Law], 2017.

[5] N. Tanjević, *Privredni kriminal u Republici Srbiji – stanje i izazovi [Economic crime in the Republic of Serbia - situation and challenges]* in J. Kostić and A. Stevanović (eds.), *Finansijski kriminalitet [Financial crime]* pp. 237-253, Belgrade, Institut za uporedno pravo i Institut za kriminološka i sociološka istraživanja [The Institute of Comparative Law and Institute of Criminological and Sociological Research], 2018, p. 241.

[6] The Law on Amendments and Additions to the Criminal Code, Official Gazette of the RS, no. 122/12.

[7] More in: M. Kulić, *Zloupotreba položaja odgovornog lica u sudskoj praksi u RS [Abuse of the position of the responsible person in court practice in the RS]* in M. Bejatović (ed.), *Nezavisnost pravosuđa – zbornik radova [*Independence of the Judiciary – collection of papers], pp. 45–56, Novi Sad, the Faculty of Law for Commerce and Judiciary in Novi Sad, 2017; J. Dragojlović, G. Grujić, *Krivično delo zloupotrebe položaja odgovornog lica. Pravo – teorija i praksa [Criminal offence of abuse of the position of a responsible person. Law - theory and practice],* 2018, 35(4-6), pp. 30-44.

(Art. 231)[8]. Structural economic changes in the world in the 21st century have increased the possibilities of organized criminality in the field of insurance fraud as well, and for that reason the prescription of this criminal offence as a separate criminal offence is justified[9].

In addition to the fact that the Criminal Code underwent the mentioned major changes in the system, which refers to offences against economic interests, in the law of the Republic of Serbia, there is a tendency to further increase and spread the incrimination of offences against economic interests, in secondary or supplementary criminal legislation[10]. Secondary criminal legislation consists of criminal law provisions found in special laws, which taken as a whole are not criminal laws, but regulate different areas and, together with the Special Part of the Criminal Code, form the whole of the special part of the criminal law of the Republic of Serbia. The non-introduction of criminal offences from secondary criminal legislation into the Criminal Code is a consequence of the fact that the number of such offences is relatively small, as well as the fact that the matter regulated by those laws, such as laws in the field of economy, is subject to more frequent changes, and if these offences were included in the Criminal Code, frequent changes in economic legislation would imply frequent changes in the Criminal Code. This is generally avoided due to the fact that criminal codes contain material that is relatively stable and not subject to frequent changes[11]. Turanjanin states that although there are numerous offences against economic interests in secondary criminal legislation, in practice they hardly ever appear. However, their very existence indicates the need to clarify certain provisions, which are often not clear enough[12]. Offences against economic interests from secondary criminal legislation are provided for in the following laws: the Company Law[13], the Insurance Law[14], the Law on the Capital Market[15], the Bankruptcy

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[8] More on the analysis of these criminal acts in: J. Dragojlović, I. Milošević, *Krivična dela davanja i primanja mita u obavljanju privredne delatnosti [Criminal offence of giving and receiving bribes in the conducting of business activity]*, *Kultura polisa*, 15(35), 2018, pp. 383-392; M. Škulić, *Zloupotreba položaja odgovornog lica – ratio legis i neki nedostaci postojeće inkriminacije [Abuse of the position of the responsible person - ratio legis and some shortcomings of the existing incrimination]* in I. Stevanović and V. Čolović (eds.), *Privredna krivična dela* [Economic criminal offences], pp. 69-94, Belgrade, Institut za kriminološka i sociološka istraživanja i Institut za uporedno pravo [Institute of Criminological and Sociological Research, and The Institute of Comparative Law], 2017.

[9] More in: I. Tošić, *Prevara u osiguranju i njene vrste [Fraud in insurance and its types]* in I. Stevanović and V. Čolović (eds.), *Privredna krivična dela [Economic criminal offences],* pp. 269-282, Belgrade, Institut za kriminološka i sociološka istraživanja i Institut za uporedno *pravo* [Institute of Criminological and Sociological Research, and The Institute of Comparative Law, 2017.

[10] D. Jovašević, *Krivično pravo – posebni deo [Criminal law - special part]*, Belgrade, Dossier, 2017, p. 148.

[11] Đ. Đorđević, D. Kolarić, *Krivično pravo – posebni deo [Criminal law - special part],* Belgrade, University of Criminal Investigation and Police Studies, 2020, p. 2.

[12] More in: V. Turanjanin, *Privredna krivična dela iz sporednog krivičnog zakonodavstva [Commercial crimes from secondary criminal legislation],* in I. Stevanović and V. Čolović (eds.), *Privredna krivična dela [Economic criminal offences]*, pp. 203-214, Belgrade, Institut za kriminološka i sociološka istraživanja i Institut za uporedno pravo [Institute of Criminological and Sociological Research and The Institute of Comparative Law], 2017.

[13] See: Article 581 – giving a statement of untrue content, Article 582 – concluding a legal transaction or taking action in case of personal interest, Article 583 - violation of the duty to avoid conflicts of interest and Article 584 - violation of the duty of the representative to act in accordance with restrictions on the power of attorney, Official Gazette of the RS, no. 36/11, 99/11, 83/14 – dr. law, 5/15, 44/18, 95/18 and 91/19.

[14] See: Article 256 – unauthorized performance of insurance activities, Article 257 - giving false opinions and reports and Article 258 - giving a false assessment, Official Gazette of the RS, no. 139/14.

[15] See: article 281 – prohibition of market manipulation, article 282 – use, disclosure and recommendation of insider information, 283 - unauthorized provision of investment services, Official Gazette of the RS, no. 31/11, 112/15, 108/16, 9/20 and 153/20.

Law[16], the Law on Takeovers of Joint Stock Companies[17], the Law on the Procedure of Registration with the Serbian Business Registers Agency[18], the Law on Banks[19], the criminal legislation is almost reduced to the field of economy in a broader sense. Secondary criminal legislation mainly provides for criminal offences in various areas of the economy[20]. Offences against economic interests are numerous and different in content, which is why there is a dilemma as to whether it is even possible to talk about their common characteristics[21]. Given that the concept of a criminal offence against the economy should be determined through a group protective object, the question can be raised, what kind of economic model should be protected, because which incriminations will be prescribed in this area depends exactly on that. Stojanović states that the dominant position is that it should be a market economy, that is, an economy whose basic starting point and fundamental element for its formation is the free market, which means that the freedom and equality of entrepreneurs should also be prioritized during criminal law protection, and not the protection of economic relations itself[22]. Bearing in mind certain offences against economic interests, it can be seen that some special economic interests are also being protected, primarily the interests of the state in certain economic areas (in the areas of the banking, foreign exchange, customs, tax system etc.). Without denying the need to intervene in certain sensitive segments of the economy with criminal law, Stojanović believes that this should not be the dominant orientation when prescribing incriminations in this area. He is of the opinion that in this area of the economy, criminal law should provide additional protection, which would ensure equal business conditions for all economic subjects, that is, provide a sufficiently wide area, within which economic and market mechanisms will operate, and above all the law of supply and demand, free competition of business entities, which should have positive effects for all members of society[23].

The perpetrator of offences against economic interests can be any person, but some of them appear as the perpetrator of a responsible person in a company or other business entity. In the legal sense, a responsible person according to the provisions of Article 112, paragraph 5 of the Criminal Code is considered "a person who, on the basis of law, regulation or authorization, performs certain tasks of management, supervision or other tasks from the activities of a legal entity, as well as a person who is actually entrusted with

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[16] See: Article 205 – disposal of assets of the bankrupt debtor after the opening of bankruptcy proceedings, Article 206 - false presentation and concealment of facts in a pre-prepared reorganization plan, Official Gazette of the RS, no. 104/09, 99/11 - dr. law, 71/12 - US decision, 83/14, 113/17, 44/18 and 95/18.

[17] See: article 44 – offering or promising gifts, services or other benefits, article 45 - misuse of privileged information and article 46 – publication of false information, Official Gazette of the RS, no. 46/06, 107/09, 99/11 and 108/16.

[18] See Article 45, Official Gazette of the RS, no. 99/11, 83/14 and 31/19.

[19] See Articles 135, 136 and 136a (unnamed criminal acts), Official Gazette of the RS, no. 107/05, 91/10 and 14/15.

[20] Z., Stojanović, *Komentar Krivičnog zakonika od 1. decembra 2019. godine i prema stanju zakonodavstva od 21. maja 2019. godine [Commentary on the Criminal Code as of December 1, 2019 and according to the state of the legislation as of May 21, 2019],* Belgrade, Official Gazette, 2019, p. 737.

[21] Lj. Lazarevic, *cited*, pp. 259-260.

[22] Z. Stojanović, *Krivična dela protiv privrede u KZ Srbije [Offences against economic interests in the CC of Serbia*] in A. Radovanov, S. Nogo and V. Lakićević (eds.), *Promene u pravnom sistemu Republike Srbije: zbornik radova [Changes in the legal system of the Republic of Serbia: Collection of papers]*, pp. 109-122, Novi Sad, University Business Academy, 2008, p. 109.

[23] Ibid., p. 109-110.

the performance of those jobs. A responsible person is also considered an official when it comes to criminal acts in which a responsible person is designated as the perpetrator, and in this code they are not provided for in the chapter on criminal offences against official duties, i.e. as criminal offences of an official." According to the provisions of Article 112, paragraph 21 of the Criminal Code, "a business entity, another legal entity that carries out economic activity and an entrepreneur are considered to be the subject of business operations. A legal entity that, in addition to its basic activity, also performs an economic activity is considered a business entity only when it performs that activity".

The specificity of the criminal law of the Republic of Serbia is reflected in the existence of several types of criminal offences. Among those offences, there are also such offences that injure or endanger the economic or financial system, and which are not provided for in the criminal legislation. We are talking about commercial offences and economic misdemeanors, which together with economic offences constitute economic delinquency. [24]

A criminal offence is an unlawfully concealed act, which is determined by law as a criminal offence, while a misdemeanor is an illegal offence, which is prescribed as a misdemeanor by law or another regulation of the competent authority and for which a misdemeanor sanction is prescribed. The difference between these two types of public law delicts is based on formal elements, that is, the character of the regulation that determines and defines them. In summary, if the law defines illegal and hidden behavior as a criminal offence, then there is this type of delict, and vice versa[25]. Commercial offences are socially harmful activities of legal entities, their responsible persons and entrepreneurs, which violate the rules on economic and financial operations and which can cause serious consequences for the economy and economic relations[26].

The consequences of criminal acts against the economy are different and are realized on different objects of action. They consist in harming or endangering protected goods, and their manifestation is manifested through failure to perform certain economic tasks, causing disruptions in production and distribution, destruction, or damage to natural resources etc. Through the realization of individual consequences, a general consequence is also caused, which is characteristic of offences against economic interests, which is endangering the existing economic relations in the state[27]. It is characteristic of offences against economic interests that they are subject to frequent changes, and for these reasons, the dynamism of social relations that are protected by them, requires that the forms of criminal law protection be timely adapted to the frequent changes that occur in economic activities and their legal regulation[28].

Given the existence of a great diversity of offences against economic interests, it is necessary to determine their common characteristics and determine the criteria on the basis of which these offenses can be systematized, which will be the subject of analysis in the next subchapter.

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[24] D. Jovašević, *cited*, p. 149.

[25] D. Jovašević, D. Miladinović Stefanović, *Prekršajno pravo [Misdemeanor law],* Niš, Faculty of Law, 2018, p. 23.

[26] D. Jovašević, *cited*, p. 149.

[27] N. Mrvić Petrović, *cited*, p. 220.

[28] Lj. Lazarević, *cited*, p. 261.

III. The Position of Criminal Offenses Related to Production and Trade in The System of Offences Against Economic Interests

The economy, as a protective object of criminal offences, means the immediate process of performing economic activity, from which it follows that offences against economic interests imply an attack on the economy as a daily economic activity. Despite the fact that they can lead to more serious consequences, offences against economic interests do not aim to undermine the economic base of the country, because in that case it would be a criminal offence against constitutional order and security. Analogous to the above, the perpetrators of offences against economic interests do not intend to undermine the economic base of the country, so we can conclude that there is a subjective and objective difference between crimes against the economy and crimes against the constitutional order and security of the country[29].

The question of one relatively comprehensive chapter of the Criminal Code on offences against economic interests or the division of incriminations into several chapters is not only a question of legislative technique and expediency, but also a question of principle. It is about the fact that it is necessary to determine which methodological approach is the most logical and appropriate when forming individual chapters of a special part of the criminal code, in order to meet its purpose, both in terms of the systematics of the special part as a whole, and within the internal systematics of individual chapters. For the internal systematics of offences against economic interests, the objective elements alone are not sufficient for relatively precise demarcations, because they can be intertwined, and the behaviors of economic entities are not uniform. For this reason, Kobe believes that offences against economic interests can be classified into the following groups:

- acts directed against socio-economic relations and in accordance with adequate economic principles, as well as acts that cause or could cause serious disruptions in economic life;
- acts with the consequence of damage to social property by responsible persons, who are entrusted with the management of this property;
- acts in which the subject in business operations wants to satisfy other people's or his own individual wishes and desires for egoistic reasons, and that is illegal and unlawful to the detriment of his own work organization;
- acts of the same type and for the same motives to the detriment of another organization or if such acts were committed for the benefit of one's own organization;
- acts in which the subject in business operations wants to secure an illegal and unlawful benefit for his own organization, to the detriment of the wider social community[30].

Economic crimes can also differ with regard to the characteristics of the perpetrator, and according to that criterion they can be systematized into two groups - economic criminal offences, which can be committed by any person and economic criminal offences, which can be committed only by a certain person, that is, a person with a particular, special property, such as an official or responsible person, representative, proxy or similar.

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[29] B. Čejović, M. Kulić, *Krivično pravo [Criminal Law]*, Novi Sad, Faculty of Law for Commerce and Judiciary, 2014, p. 463.

[30] Kobe, R., *Krivična dela protiv privrede. Jugoslovenska revija za kriminologiju i krivično pravo [Offences against economic interests}*, in Journal of Criminology and Criminal Law, (4), 1975, pp. 600-601.

Also, economic offences can be systematized considering the form of guilt of the perpetrator with which he undertakes the act of execution. There is a difference between premediated economic criminal offences, which are more numerous and within which criminal offences that are undertaken with direct intent are distinguished, and negligent economic offences, which are undertaken with negligence as a milder form of guilt, such as divulging a trade secret. 31 For offences against economic interests, it is characteristic that they have an incomplete character, which means that for their application it is necessary to consider other legal norms, which can be contained in laws, as well as in by-laws[32].

For the systematics of a special part of criminal law, the most important division is according to the protective object, which enables the division and grouping of criminal offences into a larger number of groups, including in each group criminal offences that are related in some sense and which are directed against the same protective object. [33] Starting from the protective object, which is most often taken as a protective basis for the internal classification of offences against economic interests, they can be classified into several basic groups, depending on the areas of economic relations in which they are committed. Certain criminal offences can be committed in all areas, that is, in any branch of the economy, and they are called general offences against economic interests. The second group consists of special offences against economic interests, which are characterized by certain common specificities, considering the branch of the economy in which they are committed, that is, they can only be committed in certain branches of the economy. Čejović and Kulić[34] divide offences against economic interests into general and special. In doing so, they state that general offences against economic interests include the following criminal offences: Abuse of Monopolistic Position (Art. 232), Abuse of the Position of a Responsible Person (Art. 234), Abuse Concerning Public Procurement (Art. 234a), Causing Bankruptcy (Art. 235), Causing False Bankruptcy (Art. 236), Damage to the Creditor (Art. 237), Abuse of Authority in the Economy (Art. 238), Damage to Business Reputation and Credit Rating (Art. 239) and Disclosure of Business Secrets (Art. 240). The same authors divide special criminal offences into subgroups with regard to the branch of the economy in which they are committed:

- criminal offences related to production and trade: Illegal Production (Art. 242), Illegal Trade (Art. 243), Deceiving Customers (Art. 244), Unauthorized Use of Someone Else's Company (Art. 233), Smuggling (Art. 230) and
- criminal offences against state finances: Counterfeiting Money (Art. 223), Counterfeiting Securities (Art. 224), Forgery and Abuse of Payment Cards (Art. 225), Forging Value Tokens (Art. 226), Forging Symbols, i.e. State Hallmarks for Marking of Goods, Measuring Instruments and Objects Made of Precious Metals (Art. 245), Making, Procuring and Providing Means for Counterfeiting for Other Persons (Art. 227), Issuing Checks and Using Payment Cards without Cover

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[31] Miletić, V., *Privredna krivična dela u pravu Republike Srbije* [*Economic criminal offences in the law of the Republic of Serbia]* in Journal of the Institute of Criminological & Sociological Research, 36(2), 2017, p. 118.

[32] More in: Lukić, N., *Pojam i karakteristike privrednog krivičnog prava [Concept and characteristics of economic criminal law*] in Đ. Ignjatović (ed.), *Punitive reaction in Serbia: thematic monograph*. Part 4. 2014, pp. 268-284. Belgrade: University of Belgrade Faculty of Law, pp. 278-279.

[33] In the content of a special part of criminal law, this type of system of criminal offences is most often accepted in modern criminal codes and in the science of criminal law. Đorđević, Đ., Kolarić, D. *op. cit*., 2020, p. 5.

[34] Čejović, B., Kulić, M. *op. cit*., 2014, p. 464

(Art. 228), Tax Avoidance (Art. 229), Preventing Control (Art. 241), Avoidance of Withholding Tax (Art. 229a), Money Laundering (Art. 231)[35].

On the other hand, Mrvić Petrović[36] classifies offences against economic interests on the basis of special protective objects and differences in the act of execution as follows:

- criminal offences that violate the monetary system, threaten public finances and conceal the illegal origin of assets,
- criminal offences that violate the rules related to legal business operations in the economy and fair market competition and
- criminal offences related to the production and trade of goods or services[37].

According to the systematics of Đorđević and Kolarićeva[38], which is also carried out according to the group protective object, i.e. according to the economic system and its functioning, offences against economic interests are classified as:

- criminal offences against finance - Tax Avoidance (Art. 225), Avoidance of Withholding Tax (Art. 226), Smuggling (Art. 236), Counterfeiting Money (Art. 241), Counterfeiting Securities (Art. 242), Forgery and Use of Payment Cards (Art. 243), Forging Value Tokens (Art. 244), Making, Procuring and Providing Means for Counterfeiting for Other Persons (Art. 244b) and Money Laundering (Art. 245);
- criminal offences of negligent work and abuse in business operations - Fraud in Conducting Business Activity (Art. 223), Insurance Fraud (Art. 223a), Fraud in Conducting Business Activity (Art. 224), Abuse of Trust in Conducting Business Activity (Art. 224a), Abuse of the Position of a Responsible Person (Art. 227), Abuse Concerning Public Procurement (Art. 228), Abuse in Privatisation Procedure (Art. 228a), Conclusion of a Restrictive Agreement (Art. 229), Accepting Bribes in Conducting of Business Activity (Art. 230), Giving Bribe in Conducting of Business Activity (Art. 231), Causing Bankruptcy (Art. 232), Causing False Bankruptcy (Art. 232a), Damage to the Creditor (Art. 233) Preventing Control (Art. 237), Unauthorized Use of Another Person's Business Name and Other Special Designation of Goods or Services (Art. 238), Damage to Business Reputation and Credit Rating (Art. 239) and Disclosure of Business Secrets (Art. 240).
- criminal offences against production and trade – illegal production (Art. 234), illegal trade (Art. 235) and forging symbols, i.e. state hallmarks for marking of goods, measuring instruments and objects made of precious metals (Art. 244a).

IV. Conclusion

Economic criminal offences belong to the category of the most serious crimes, and for this reason, the obligation of every society, that is, the state, is to create adequate preconditions, both legal and practical, in order to prevent their commission as successfully as possible. The regulations governing offences against economic interests are subject to frequent changes, which is a consequence of the need to determine adequate

[35] The above division is according to the Criminal Code, Official Gazette of the RS, no. 85/05, 88/05 - correction, 107/05 - correction, 72/09, 111/09, 121/12 and 104/13. (SR: Krivični zakonik, Službeni glasnik RS, br. 85/05, 88/05 – ispr., 107/05 – ispr., 72/09, 111/09, 121/12 i 104/13.

[36] Mrvić Petrović, N., *op. cit.*, 2016, pp. 219-220.

[37] The aforementioned systematization is in accordance with the Criminal Code, Official Gazette of the RS, no. 85/05, 88/05 - correction, 107/05 - correction, 72/09, 111/09, 121/12, 104/13, 108/14. See more detailed classification in: Ibid.

[38] Đorđević, Đ., Kolarić, D., *op. cit.*, 2020, pp. 125-126..

forms of criminal law protection of certain social relations in the economy in the changing conditions of economic life. From what has been shown, we can conclude that the development of the economy leads to changes in the field of incrimination of offences against economic interests, so that over time some of them die out, change their forms, as well as the types of manifestation, while some new ones arise, which indicates a great dynamic in terms of incriminations in this area. The same applies to criminal offences related to production and trade in the criminal legislation of the Republic of Serbia.

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Criminalisation in the Criminal Law: Experience of Legal Doctrine

Vadim Khiluta*

Abstract

The article deals with the issue of the essence of criminalization in criminal law. The vectors of development of criminalization of social relations are defined. The aim of the research: to determine the criteria of criminalization of social relations in modern conditions and to characterize the system of criminal law measures in the structure of criminal law. Traditional methods of socio-legal and formal-dogmatic analysis were used in the research: documentary, historical-legal, analytical, systematic, logical. According to the results of the study, the author states that criminal law of the classical type is replaced by criminal law of the utilitarian type, where the concept of crime is associated with the infliction of harm, and public danger plays an auxiliary function. In the system of security measures, the public danger of a deed does not form a criminal-legal prohibition. Criminalization is based on the element of expediency, where the main importance is given to security law. Criminal security law aims to affect a person who has not yet committed a socially dangerous act, and this is not a crime in the classical sense. In such a model, it is not the nature and extent of the harm caused that fills the crime, but the social danger of the person, since it is the subject that is the source of a particular socially dangerous behavior. It is proposed to fix the idea of new social protection and security in the criminal law.

Keywords: *public danger, criminalization, criminal-legal impact, crime, criminal law, criminal responsibility, security*

I. The Essence of the Question Posed

The life of criminal law begins with criminalization, but in order to criminalize a certain type of behavior there must be good reasons. At the moment, in the post-Soviet system of law, the very raising of the question of criminalizing certain behavior and declaring it criminal is necessarily tied to an understanding of what public danger is and what significance it plays in establishing criminal liability for this or that behavior. However, in fact, the simple axiom that a certain behavior must be socially dangerous in order to become a crime does not remove or solve the problem of what kind of behavior (act) it should be.

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So, the main question that criminal law solves is in the plane of the grounds and limits of criminal responsibility. To this end, criminal law must study the human act (behavior) itself in order to establish the grounds and criteria for declaring such behavior criminal, to characterize its harmful consequences and the presumed measure of responsibility that could be just.

In the most general view, criminalization is "the process by which behavior and people are turned into crimes and criminals", i.e. it is the establishment of criminal responsibility for specific human behavior[1]. Here the general premise of the rationality of state action can be reduced to the fact that there is a socially dangerous form of behavior in society that can lead to undesirable changes in the life of society and cause harm to an unlimited number of people, so such behavior should be prohibited on pain of punishment.

Criminalization or the establishment of criminal law protection implies the transformation of relations into negative ones, i.e. certain social relations that are harmed as a result of criminal encroachment, and this requires appropriate protection. However, deciding on the need to establish a criminal law prohibition is always associated with the difficulties of determining the boundaries of criminal law and the grounds for criminalization. The general premise is that "if a phenomenon of social life does not have a legal form, it cannot be used within the legal field. Filling the phenomena of social life with legal content takes place within the framework of regulatory branches of law, where citizens use their opportunities to meet the necessary needs within the law. And only in the case of situations when it is necessary to influence the behavior of citizens by more repressive methods, it is worth talking about criminal law protection"[2]. Thus, it is argued that the element of the basis of criminal law protection is the regulation of social relations by positive branches of law. However, this is not always the case. A vivid example of this is the situation that took place with cryptocurrency, when the status of cryptocurrency was not defined in positive terms and there was no legislation that would provide for its civil turnover. Meanwhile, criminal attacks on cryptocurrency have occurred and often cryptocurrency has been used as a means or method of committing another offence. This, however, did not mean that due to the unregulated social relations with this object of civil law, criminal law could not activate its own response mechanism, and through law enforcement interpretation cryptocurrency was considered as an object, method and means of committing an offence long before the relevant norms of positive law regulating the process of turnover of this object of civil rights appeared.

Thus, when a State is debating whether to respond to the source of harm by criminalizing certain behavior that causes it, there are no pre-determined criteria that can be applied in formulating criminal law policy in this area. Crime has no ontological reality. The criminal justice system responds to a significant number of events that do not create weighty difficulties for individual citizens. The process of criminalization defines and classifies human behavior. It broadcasts laws so that no one has an excuse for ignorance and avoids those situations where an individual does not want to obey the rules of law. However, today's trends and patterns of criminal law show that criminal law itself is penetrating deeper into the social structures of modern societies

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[1] R. Amster, *Lost in Space: The Criminalization, Globalization, and Urban Ecology of Homelessness*, New York: LFB Scholarly, 2008, p. 8.

[2] V. Bondarenko, *Основание уголовно-правовой охраны и ее прекращение: автореф [The basis of criminal legal protection and its termination: author's abstract]*, Legal Sciences, Saratov, 2014, pp. 16-17.

and establishing new prohibitions. In fact, the fight against crime has become an industry, but it remains ineffective in ensuring the protection of all its citizens from possible harm.

Certainly, criteria are important here, and the theory of criminal law, together with criminology, in answering the question of what these criteria are when criminalizing dangerous acts, tries to outline them. These may be reasons (assessment of events of accidental nature; emergence of new social relations; the need to strengthen the protection of specific human rights and freedoms; unfavorable dynamics of certain types of human behavior), and grounds (prevalence of the act; level of impact on social relations; nature and type of damage (harm), its significance; level of public legal consciousness, traditions established in society) and principles (completeness of the corpus delicti; unity of terminology; non-redundancy of prohibition; economy of repression, and the necessity to protect human rights and freedoms). However, for the same considerations, we can cite the same criteria when discussing the question that it is an administrative offence and, in fact, it will still be necessary to answer the question of why a certain tort was declared an offence and not something else. In our opinion, all maxims regarding the fact that the process of criminalization should comply with some standard rules, principles, ideas etc., are vain, because it cannot be verified in any way. Criminalization of a certain area of social relations can always be easily confirmed or disproved, and purely arithmetical principles never work here, and the whole process is based on the expediency of decision-making and the conjuncture of the situation. In this case, there can be no universal rules and standards, because in specific historical periods the idea of what is proper and what is real always changes, as well as the general understanding of what is criminal and what is not.

With all the evaluative aspects of the existing aspects of understanding of what constitutes public danger of an act and how this category affects the criminalization of unlawful behavior, we can only state a simple thing in this situation: public danger is directly derived from expediency. It is expediency that guides the legislator and the authorities in the question of what act to call a crime and what not. And under this process, certain criteria developed by the doctrine of criminal law to address the issue of criminalization of a socially dangerous act will be built in an advantageous and necessary format. Conventionally speaking, this situation clearly indicates that, when necessary, we will take, for example, the indicator of the prevalence of the act, its scale etc. And when it is necessary, we will take completely different criteria as a basis, and these (abovementioned) will be relegated to the background. That is, it indicates that any reasons, grounds and principles of criminalization can be used if necessary.

In general, if we look at this problem realistically, we will see in this issue that public danger does not have a solid legal basis, it is more of a political nature, since the assessment of the act is given primarily on the basis of the criminal-legal policy pursued by the state. And from this perspective, the concept of public danger is always vulnerable, because the entire concept of public danger in criminalization is based on the assumption of possible harm to the state, society or the individual. However, in reality everything is much simpler. The presence of an atypical form of socially dangerous behavior forces the State to exercise its will and, in order to minimize the infliction of harm, to declare a certain form of human behavior a crime.

If we take public danger out of the framework of the crime and put it in isolation, it turns out that we judge the crime within the framework of the value aspect of social reality. However, the objectivity of the existence of public danger cannot be confirmed by anything. And if we single out the public danger of acts from a number of others,

then a natural question arises: how and on the basis of what signs it happens? And this process is essential for criminalization. As a result, the circle is closed. Public danger is based on harm, actually duplicating it. But the harm is not objective either, it depends on many circumstances, but to a greater extent on the legal consciousness of the legislator. Therefore, any values that the criminal law is designed to protect are symbolic, living with the belief in their validity. But if we assert that crime exists, it means that the values that are subject to it are also present. But this model is conditional. It does not prove the objective reality of social danger, because it is the person who gives the categories "crime", "harm", "values" etc. a social meaning.

II. New Contours of Criminalization

The foregoing allows us to assert that today the emphasis that we fix in the concept of "public danger" is necessarily shifted towards the security of the existing legal order, the state as a whole rather than the interests of society and a particular individual. In other words, public danger is now more connected with the institution of security of the authorities and the state.

Thus, criminalization as a phenomenon and process reflects the essence of the policy that functions in the state at a specific time, and in this regard, all talks about the rules, criteria, and grounds for criminalization today are futile, because the practice of recent years and the socio-political situation indicate that criminalization is directly based on the idea of expediency and socio-political conjuncture. At the same time, expediency, as we have noted, is based on a judgement about the security of the state and the rule of law, which is enshrined in law, rather than on simple truths about human rights and freedoms. These human rights and freedoms are now becoming an incidental, rather than a primary, component of the issue of criminalization.

Moreover, no international legal norms and rules no longer constitute the system on the basis of which a unified model of criminal law and a uniform policy of criminalization of socially dangerous phenomena would be built. International criminal law norms and standards do not have today the authority and the pervasive potential of criminal law impact as an instrument of total policy and a unified beginning. And this is primarily due to the deglobalization of law and its diversity. Hence it becomes obvious that the criminalization of this or that human behavior (act) is measured not by the social danger of the act, but by the nature of security of the normatively established legal order and the criterion of opportunistic expediency of the moment.

So, at present criminalization is seen as a kind of resource of power, which allows the state to realize its tasks and strengthen their social significance. This process is an ordinal means that strengthens the repressive component. Thus, acting as an exclusive right of the state, criminalization today is aimed at protecting the institutions and bodies of state power, and is a means of implementing the policy pursued by the state (not so much criminal law, but in general). This can be clearly evidenced by recent changes to the criminal law. In this context, it is the state that is perceived as the sole and unshakable subject of criminalization of certain types of acts, whatever trends we have previously observed (which could be the process of transferring certain functions to civil society or supranational international organizations), as well as the process of lobbying by certain actors or international organizations to make the decisions they need.

The thesis that criminalization is closely linked to expediency can be confirmed not only by the socio-political trends taking place in society, but also by the motives behind the decisions taken, which, by and large, no one can explain. Another indicator of this process is the expansion of law enforcement practice, which sometimes replaces lawmaking and substitutes the process of clarifying the procedure for the application of criminal law norms with their expansive interpretation, which also indicates the hidden criminalization of social relations.

III. Security and Human Rights

In this paradigm, criminalization is always aimed at ensuring the security of the authorities, the existing system, and the state policy. And in this matter, as we have already noted, human rights, their protection and observance do not serve as an indicator of what we call the criteria of public danger and, accordingly, a measure of criminalization of deviant behavior. According to N.V. Henrikh, recent trends in the criminal law policy indicate that "prohibitions are being introduced on any acts related to an attack on the very existence or negative impact on the functioning of power institutions, and additionally, increased guarantees are being established for the security of representatives of the authorities"[3]. Thus, criminalization today tends to protect social relations and prevent new forms of anti-social behavior but is not aimed at regulating social relations.

At the moment, the thesis that criminalization is based on human and civil rights is very ambiguous, and it is human rights and freedoms that predetermine the content of the criminalization process. The state should not interfere with the rights and freedoms of an individual (human being), and when taking such a step it should clearly justify this measure, because arbitrary criminalization of social relations for the sake of political or other expediency cannot take place, even if criminalization is carried out under the slogans of security of the state, society and the individual. This argument is connected with the premise that criminal law "has always been regarded as an objectification of the right, not the obligation of the state to apply public criminal punishment"[4].

Let us not forget that criminalization is aimed at ensuring collective security, but the State cannot view criminal law solely through the prism of a means of imposing punishment on those who infringe on the foundations of power. In any case, values that are significant not only for the State itself but also for society as a whole must be taken into account. If this is rejected, it would appear that in criminalization the state uses a *free method*, i.e. one that is linked to the subjective discretion of the law enforcer.

It seems that in this matter human rights are not the deterrent that puts a serious barrier to arbitrary criminalization of social relations. The freedom of the individual, observance of human rights etc. can always be pushed aside under the slogan of security, and it is the latter component that is now a kind of instrument in the hands of the state when discussing the establishment of prohibitions in the criminal-legal sphere. Of course, there should be no arbitrary criminalization of social relations, even on the basis of the principle of collective security. However, the problem is that today we do not know and

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[3] N.V. Heinrich, *Криминализация в системе институтов современного российского общества* [Criminalization in the system of institutions of modern Russian society], Moscow, Yurlitinform, 2022, p. 49.

[4] N.V. Heinrich, *Криминализация в системе институтов современного российского общества [Criminalization in the system of institutions of modern Russian society]*, Moscow, Yurlitinform, 2022, p. 41.

cannot name the universal boundaries of freedom of human behavior, the boundary that could indicate where criminalization is possible and where it is not. By definition, there will never be such a conditional boundary, as it depends on many factors and circumstances, the significance of which changes in the context of the development of historical events and is directly related to changes in the socio-political situation. And in this aspect, the state always tries to justify the interest it protects, no matter what the rights and freedoms of the individual would be restricted.

On the other hand, the state can always adopt a simple thesis: human rights and freedoms must be protected not only from possible arbitrariness on the part of the state, but also from arbitrariness on the part of a particular individual. Therefore, the idea of human rights and freedoms can be used as a legitimate means to justify the restrictive measures necessary to protect society itself from dangerous individuals. Moreover, today there is no answer to the question of what lies at the heart of human rights and freedoms and why these values have been selected from a number of others and elevated to the rank of "sacred cow". Consequently, human rights and freedoms are not a panacea; they can be used both as a means of criminalization and as a means of limiting this very criminalization.

In general, the world has great illusions about the protection of human rights and freedoms, the values of society and their reflection in criminal law. All this is, by and large, only one side of the coin - the external side, indicating how it should be ideally, what we should strive for. But often, in the end, it turns out that human rights serve only as a cover, and the true goals are quite different, and all this does not reflect the real picture of what is happening. The state always through the implementation of criminal law policy and declared goals, which are related to the protection of human rights, can carry out a completely different one, related to the security of the existing system and the protection of the interests of a certain group of people. In such a situation, criminalization as a means of criminal-legal policy can give rise to any corpus delicti, and it (new *corpus delicti*) will always be justified by public danger. And if to neglect such measures, the state is challenged and here always under the slogans of protection of human rights and freedoms the most diverse ideas can be carried out, up to the change of the constitutional order and replacement of some orders by others. However, even in this case criminal law will be at the forefront of socio-political events and some criminal law prohibitions will be replaced by other ones, i.e. criminal law will be reformatted to meet the needs of a different political system. Of course, in this case we are not talking about theft, murder, violent crimes etc., the nature of which is not questionable, at least from the principle of *malum in se*, we are talking about other crimes - *malum prohibitum*, the boundary of illegality of which is always conditional and only the criminal law policy in this regard determines the contours of criminal responsibility and the scope of criminal law itself, including the notorious mechanism of criminal law regulation. But such criminal law will always be permanent, because the idea of expediency here cannot be static.

IV. New Criminalisation

So, if we say that crime is organically connected with harm, because only it (crime) causes harm, then such an act is socially dangerous, and not vice versa, as it often happens - an act becomes socially dangerous only because it has become prohibited. In this respect, the eternal problem of *malum in se* and *malum prohibitum* acquires some contours, because *malum prohibitum* is always connected with the element of

discretion. However, separating these notions, we should clearly understand that criminalization can pursue different goals and perform non-identical functions, including those related to social control as a kind of instrument to keep and refuse subjects from claiming power relations. In this context, it is not morality that lies at the heart of the criminalization process, but rather other values and attitudes, which, as it later turns out, form the very morality, already bringing such moralism directly into society. Therefore, acts like *malum prohibitum* always carry an element of *"implicit"* public danger. Many acts may deserve public censure and punishment (condemnation), but this is not a reason to always elevate them to the rank of a crime[5].

In general, the role of moral and ethical prohibitions in the process of criminalization and the establishment of the boundaries of criminal law is a key issue. No one would deny that there is an important link between moral wrongdoing and the corresponding content of the criminal law. Many criminal offences, including the most well-known in the public perception (such as rape, robbery, murder, terrorism etc.) are also moral violations. And it is hard to believe that their wrongful features also sometimes do not warrant their criminalization. This idea commits us to only a very weak view of the relationship between moral wrongdoing and the content of criminal law. For example, it is consistent with the view that harm is central to deciding whether a certain type of behavior is criminalized. However, some behaviors may be wrong by virtue of the fact that they are harmful. And this characteristic of the behavior provides a basis for its criminalization because the wrongful act is always in the realm of morality, but more so in objective reality[6]. Nevertheless, this view leaves open the question as to whether it is permissible to criminalize behavior that is not wrongful if that behavior is harmful, and also presumes the possibility of situations where there is some wrongful behavior, namely non-harmful wrongful behavior, which there is no reason to criminalize.

When talking about morality and morality in the establishment of criminal law prohibitions, it must necessarily be pointed out that the justification for criminalization must begin by stating some value that can be identified as public, as part of the self-determination of the state. The criminalized conduct must therefore violate that value or threaten to harm the goods it protects and claim that the violation or threat is such as to warrant public condemnation. The main issue here, however, is that the values shared by society and the state may not be identical. The issue is that the values that the state should uphold depend to some extent on its particular characteristics, and this ultimately determines the contours of criminal law regulation. This leaves open the possibility that there are values that some people rightly uphold, and a person's behavior may be wrong in light of those values. However, since the state has no basis for endorsing these values, how much basis does it have for criminalizing this wrongful behavior? Does everything here depend on the subjective criteria of certain individuals who make criminal law policy? And here it should be emphasized that the decisions formalized in the criminal law are decisions made by people. Humans are rational beings who can reason about moral values, or take empirical evidence into account, or be influenced by public opinion, or rely on "common sense" to make legal decisions. But human rationality is always limited or constrained by various factors such as imperfect information and cognitive distortions. Thus, human law, unlike the laws of physics, reflects different

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[5] V. Khiluta, *Free will in criminal law through the lens of neuroscience.* Journal of Eastern-European Criminal Law, 2/2021, pp. 63-72; Z. Pavlovic, *About legality of on line trials in criminal procedure*, Journal of Eastern-European criminal law, 2/2020, pp. 33-41.

[6] V. Todros, *Wrongs and Crimes (Criminalization),* Oxford, Oxford University Press, 2016, p. 16.

characteristics of human decision-making that are also observed in other contexts, such as the influence of emotions and cognitive distortions. Therefore, any criminalization is conditional. Moral and moral precepts will never form the basis of criminalization because they are often used as a windfall when there is a need for a particular policy decision to justify a new criminal prohibition. In reality, the basis of such a decision is based on quite different criteria and theoretical postulates, which are more inclined towards the element of expediency of a managerial decision. Hence the inevitable conclusion: the state cannot, with the help of criminal law as a certain means (tool), maintain morality in society, although in practice it often happens.

This is where the main question arises: is criminalization inherently aimed at retribution or prevention? Much depends on the answer to this question, including the criminal law policy implemented by the state, its appearance and content. We agree that the answer to this question will always be different, but this is not a reason to equate any immoral behavior with a crime. This is understandable, because if an act is immoral, it also becomes illegitimate. However, today no one can explain to what extent immoral behavior should become a crime rather than an offence.

When discussing the criminalization of social relations and the connection of this process with the measurement of the public danger of committed acts, it should be said that the regulatory function of criminal law in this matter is secondary, since criminal law never directly regulates existing social relations. In any case, the state, establishing certain rules of conduct and formulating in a legislative way the grounds for their criminalization (of a certain area of legal relations), always considers this very criminalization as a means to consolidate the existing *status quo*. The regulatory component can take place only in the case of establishing the fact that an offence has been committed. The informational impact of criminal law cannot automatically impose positive rights and obligations on the participants of social relations[7].

Because of this, criminalization today is perceived as an *element of the state's* managerial activity, where the phenomenon of public danger is not of fundamental importance. In this capacity, criminalization is sometimes identified with the preventive activity of the state, a game of anticipation, when it is necessary to prevent a certain line of undesirable behavior of participants in social relations through the establishment of criminal law prohibitions. Thus, criminalization as a means of protecting certain values can develop into criminalization-defending new values or social standards promoted (or imposed) by someone else. It is not always possible to measure this process by the nature and degree of public danger, because the share of the conditional moment in such a situation will potentially always dominate the researcher. Public danger has an uncertain nature, it cannot be a constant value and can never be measured by formal criteria. This shows that at present criminalization cannot be based on old dogmas (mainly developed during the Soviet period in the second half of the twentieth century), as the new reality creates new processes of criminalization, where there are no "golden rules" and typical standards.

In the context of the problem under discussion, another question arises: namely, about the standards and criteria of criminalization, since this process is always conditional and related to the search for optimal criteria (rational grounds) between the freedom of the individual and the security of the state. Therefore, it is always important to

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[7] V.N. Kudryavtsev, A.M. Yakovlev (eds.), *Основания уголовно-правового запрета. Криминализация и декриминализация [Grounds for criminal law prohibition. Criminalization and decriminalization],* Moscow, Legal literature, 1982, p. 220.

maintain a balance and not to overstep the line of excessive restriction of the rights and freedoms of citizens. In this context, the idea of security, which in fact currently underlies the development of criminal law of utilitarian type (character), incorporates not so much criminal law of "punitive" type, but criminal law of "preventive" type, where the place of public danger is minimized, because in such a paradigm public danger is replaced by expediency.

So, today we can observe a tendency of gradual shifting the contours of crime from the public danger of the act itself towards security, i.e. the establishment of preventive measures of protection. The state seeks to solve the problems of security, including by criminal law means, by establishing a mechanism of social management of society and criminalization of any deviations from the set standards and normative prescriptions. In this case, the criminal law is used as a means of minimizing possible risks at an earlier stage, which indicates that criminal law is more focused not on the protection of existing social relations, but on the establishment of the required public order. Therefore, we can say that the modern doctrine of criminalization "justifies the free, unlimited construction of criminal law prohibitions in order to ensure the security of the process of social transformation from any minimally possible and potential threats by forming and maintaining, through the threat of criminal punishment, the necessary moral status of individuals and the moral unity of society on the basis of those values that appear meaningful to the actors of social transformation"[8].

In the security paradigm, the emphasis is shifted from the act to the subject - the perpetrator and the person responsible for his actions. His responsibility is formed not as an individual model of crime-responsibility, but as a social model of control-security. Thus, while within the classical model a person becomes a criminal only at the moment of committing a crime, within the security paradigm he becomes socially dangerous when he does not obey the institutions that norm his behavior. Security shifts the emphasis towards the protection of collective values rather than individual values. The need for security requires the construction of a separate and independent system, both within and outside criminal law.

Crime is only one of the challenges to security (a form of deviation), but there are plenty of other marginalized deviations. Therefore, the basic idea of security is social defence, and more precisely the prevention of crime. And it is obvious that since here we are not talking about a committed illegal act, the main emphasis shifts to the plane of the individual, prevention of his further actions. Consequently, while today's criminal law deals with the establishment of a crime and its entire arsenal is aimed at retribution for the crime committed, the criminal law of security is aimed at countering crime at an earlier stage. Of particular importance in this case is the social meanings that fill the future unlawful act.

V. Instead of a Conclusion

In this paradigm, it is not harm that is at the center of the system, but the potential threat of harm[9]. It is under the aegis of the threat of harm that social protection and

[8] M. Babaev, Yu. Pudovochkin, *Уголовная политика и преступность: трансформация в эпоху социальных перемен* [Criminal policy and crime: transformation in the era of social change], Moscow, Yurlitinform, 2023, pp. 153-155.

[9] R.A. Duff, St. Green (eds.), *Philosophical Foundations of Criminal Law,* Oxford, 2011, pp. 21-25.

safety measures are implemented. Therefore, the state is forced to establish a system of restrictions and prohibitions at an early stage. And all this is done within the ideology of protecting society and the state from potential criminal threats. But still, the main danger here lies in the uncertainty and a wide degree of estimation of nominal risks and persons who may be involved. This is a fictitious aspect of the problem, containing a moment that is based on total control over society[10].

At the same time, the situation under consideration, characteristic of *pre-crime*, points directly to the fact that social control over a person's behavior is actually exercised, and this is not peculiar to criminal law and cannot give rise to relations of criminalization, since we are already talking about a different object of study here. Pre-crime is a special basis for assessing a person and selecting a special measure of influence (security) for such a person. The dangerousness of a person is determined by the nature of his or her social behavior. In such a construction we expand the discretion of the law enforcer, the subjectivism of the assessment of a particular person, who will decide on the election of social protection measures. Consequently, the concept of public danger can be linked not to the act of a person, but to the person himself.

The *criminal law of security* aims at affecting a person who has not yet committed a socially dangerous act, and this is not an offence in the classical sense. Consequently, in this model, it is not the nature and extent of the harm caused that fills the crime, but the social danger of the individual, since it is the subject who is the source of the specific socially dangerous behavior. But in this paradigm of criminal law of social protection there is no place for crime, since we are dealing with pre-crimes. For this reason, the criminal law should have the following norm: "Social protection (security) measures may be applied to a person with social danger in order to prevent the commission of crimes. The order of application of such measures shall be established by special normative legal acts".

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[10] D. Ormerod, K. Laird, *Criminal Law*, Oxford, 2021, pp. 11-12.

8. Ormerod, D., Laird, K., *Criminal Law*, Oxford, 2021.

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The Polarization of the Italian Criminal Law System Against Corruption*

Luigi Scollo**

Abstract

Three important reforms have changed the Italian criminal law provisions against corruption in the last decade in a more repressive sense, based on rampant penal populism. However, with this scenario in the background, a second countertrend emerges which has so far been little explored. This is a trend due to the progressive come into effect of reward mechanisms for procedural cooperation which can significantly reduce or completely exclude the punishment. This essay analyses the interaction between these two opposing trends, highlighting the effects of the polarization of the anti-corruption criminal law statutes between repressive and rewards tendencies, and highlighting the critical issues concerning the constitutional principles of offensiveness and proportionality of the punishment of a system in which the punishment it is applied mainly due to non-cooperation, and therefore due to the post facto conduct.

Keywords: *corruption, populism, polarization of criminal law, rewards mechanisms, constitutional principles, proportionality*

I. Introduction

In recent years, the Italian criminal law on corruption has undergone a very peculiar evolution, which seems to be oriented towards two antithetical and divergent directions[1]. In fact, on the one hand, there has been a tendency towards hyper-criminalization[2] of the corruption phenomenon, which has translated – as will be better seen later – into the creation of new types of offenses relating to the misuse of public power, the extension of the field of application or in the aggravation of the sanctions for the existing criminal offenses in this field, the creation of afflictive effects resulting from the conviction, in the tightening of procedural rules and the penitentiary system, in terms of preclusion of

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[1] In ten years, the crimes of public officials have been affected by three significant reforms in what has been defined as the «permanent anti-corruption construction site» by V. Mongillo, *La legge "spazzacorrotti": ultimo approdo del diritto penale emergenziale nel cantiere permanente dell'anticorruzione*, *Dir. pen. cont.*, 5, 2019, p. 231.

[2] D. Husack, *Overcriminalization. The Limits of the Criminal Law*, Oxford, 2007, p. 4 ff.; J.C. Coffee, *Paradigms Lost: The Blurring of the Criminal and Civil Law Models – And What Can Be Done About It*, 101, *Yale Law Journal*, 1991-1992, 1875 ff.; S.H. Kadish, *The Crisis of Overcriminalization*, in *Am. Crim. L. Q.* 17, 1968, p. 17 ff.

access to plea bargain, other procedures, and alternative measures to detention. However, on the other hand, there has been a growing need to introduce reward mechanisms, implemented into law in terms of mitigating circumstances or causes for exclusion of prosecution, to stimulate the emergence of the corrupt pact through new provisions characterized by hyper-rewards[3].

This seems to be an evolutionary peculiar trend characterized by the progressive 'polarization' of the anti-corruption microsystem towards two opposing directions: in the first instance, the discipline seems to be moving towards a model of severe repression of the corruption phenomenon, threatening the use of draconian sanctions to be atoned for rigorously in prison; upon closer analysis, however, it seems to be oriented towards a variable severity model, in which the response of the criminal law system ends up being predominantly graduated, in terms of greater or lesser firmness, based on the *post facto* author's contribution to ascertaining the offense, somehow making clear the ineffectiveness of the populist-repressive model[4].

This essay first aims to analyze polarization as an intersectional phenomenon and then as a feature of anti-corruption criminal law in Italy. So, the first section of the article will focus on the peculiar characteristics of polarization, trying to provide some defining clarifications (§ 2). Having made this clear, the second section of the article will try to outline an overall vision of the polarization in the Italian criminal law provisions against corruption, focusing on all the indicators that distinctly show the pervasiveness of the described phenomenon (§ 3). So, the third section will focus on the effects of polarization, on the reasonableness of the system and the legitimacy of punishment in a polarized legal framework, in conclusion highlighting the unreasonableness of a sanction imposed mainly for the *post facto*.

II. Defining aspects of polarization as a cross-curricular phenomenon

The Oxford English Dictionary describes polarization as «the action of polarizing light or other electromagnetic radiation», under a scientific use of the word, or in a figurative sense «the accentuation of a difference between two things or groups»[5]. However, the word is also used in other fields such as economics[6], sociology[7], political

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[3] In a critical sense, see T. Padovani, *La spazzacorrotti. Riforma delle illusioni e illusioni della riforma*, *Arch. pen.*, 3, 2018, p. 8; M.N. Masullo, *L'emersione del patto corruttivo: il nuovo fronte degli strumenti premiali e investigativi*, *Riv. it. dir. proc. pen.*, 3, 2019, p. 1265; D. Pulitanò, *Le cause di non punibilità dell'autore di corruzione e dell'infiltrato e la riforma dell'art. 5 bis*, *Dir. pen. proc.*, 5, 2019, p. 600.

[4] F. Sgubbi, *Il diritto penale totale*, *Punire senza legge, senza verità, senza colpa*, Mulino, 2019, p. 27; M. Donini, *Populismo e ragione pubblica. Il post-illuminismo penale tra* lex *e* ius, Modena, 2019; S. Anastasia, M. Anselmi, D. Falcinelli, *Populismo penale: una prospettiva italiana2*, Padova, 2020, p. 1 ff.; E. Amati, *L'enigma penale. L'affermazione politica dei populismi nelle democrazie liberali*, Torino, 2020, p. 138; J. Simon, *Governing Through Crime. How the War on Crime Transformed American Democracy and Created a Culture of Fear*, Oxford, 2007.

[5] Oxford English Dictionary, s.v. "polarization (n.)," September 2023, https://doi.org/10.1093/OED/3531843274.

[6] G. Aiello, *L'internazionalizzazione delle imprese del dettaglio*, Milano, 2005, p. 15 regarding consumer choices in the globalized economic context.

[7] S. Anastasia (ed.), *Polarizzazione sociale e sicurezza urbana*, Roma, 2021, which describes identity polarizations; A. Accornero, *Era il secolo del lavoro,* Bologna, 1997, which analyses the polarization between white collars and blue collars in the world of industrial relations; see also I. Piotto, *Il diritto allo sguardo. La cultura del controllo nelle relazioni industriali*, Milano, 2010, p. 50.

science[8], communication[9], and psychology[10] with somewhat related meanings. The communication philosopher Massimo Leone defined polarization as an «impetus» – perhaps «innate» or perhaps determined by «time» and «space» coordinates – but still a «destructive and self-destructive force of the extreme» that pushes society beyond all limits[11]. The economist Moisés Naìm defined polarization as one of the three components of the current face of «power» (along with «populism» and «post-truth») which erodes the cornerstones of democracy and society from within, taking it to the extreme towards unsustainable oppositions[12].

The objective of providing a unitary and transversal notion of polarization is beyond the scope of this essay, assuming or not granting that it is possible concerning such different sciences[13]. However, if we do not consider polarization as a strictly scientific phenomenon, two characteristics seem quite recognizable in all these definitions: they are the «duality» and the «diversity» of the poles. Upon closer inspection, these are two essential qualities in a polarized system. The first presupposes that an element (a fact, a concept, any entity physical or metaphysical) cannot be inscribed in a single whole but must be simultaneously traced back to two classes. The second implies that these classes are specular and opposite. This is particularly significant for the discussion in question since it contradicts the principles of identity and non-contradiction at the basis of the legal system[14].

Well, it is important to observe how polarization – as a phenomenon or as a driving force – is not foreign even to legal sciences. In this context, in Italy, the term is often understood as synonymous with «concentration». Such is, for example, the polarization of the legal system around the «creative energy» of case law as opposed to the statutory law in Italian jurisdiction[15], or that «new sensitivity»[16] which has led to the polarization

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[8] D. Palano, *Bubble democracy. La fine del pubblico e la nuova polarizzazione*, Brescia, 2020, p. 156; A.I. Abramowitz, K.L. Saunders, *Is Polarization a Myth?*, in *Journal of Politics*, 70, 2, 2008, p. 542; L. Iannelli, S. Splendore, A. Valeriani, G. Marino, *Studiare la polarizzazione politica nello "shockdown mediale"* in *Mediascapes Journal*, 15, 2020, p. 189.

[9] G. Bobba, *L'Europa contestata. Polarizzazione e politicizzazione delle opinioni in tempi di crisi*, Bologna, 2021, p. 152 in which the A. notes a growing polarization of opinions regarding the European project, ascribing it to the winners and losers' dynamic of globalization.

[10] G. Lago (ed.), *Compendio di psicoterapia*, Milano, 2016, p. 182 who understands polarization as the oscillation between concretism and abstraction.

[11] M. Leone, *I discorsi dell'oltre: fascino e pericoli della polarizzazione*, Trento, 2023, p. 8.

[12] M. Naìm, *The Revenge of Power. How Autocrats Are Reinventing Politics for the 21st Century*, St. Martin's, 2022, p. 5.

[13] In this essay we must limit ourselves to describing the concept approximately rather than asking ourselves, from the point of view of conceptual engineering, what the concept of polarization should mean. On the subject, see S. Koch, *Engineering what? On concepts in conceptual engineering*. *Synthese* 199, 1955-1975, 2021. https://doi.org/10.1007/s11229-020-02868-w.

[14] Aristotle, *Il principio di non contraddizione* (The principle of non-contradiction), Book IV on Metaphysics, trans. it. and commentary ed by E. Severino, Brescia, 2021. *See* also T.E. Tahko, *The Law of Non-Contradiction as a Metaphysical Principle*, Australasian Journal of Logic (7) 2009, pp. 32-47.

[15] *See* among Italian Scholars F. Giunta, *Dal governo della legge al Governo degli uomini? A proposito delle influenze reciproche fra diritto e processo*, in F. Danovi (ed.), *Diritto e processo: rapporti e interferenze*, Torino, 2015, p. 161; Id., Jus legibus solutum. *Ovvero la legge del giudice penale*, *disCrimen*, 12.11.2020, p. 1 ff; F. Palazzo, *Legalità fra* law in the books *e* law in action, in A. Cadoppi (ed.), *Cassazione e legalità penale*, Roma, 2017, p. 75; A. Cadoppi, *Il valore del precedente nel diritto penale: uno studio sulla dimensione* in action *della legalità*, 2nd ed., Torino, 2014; A. Manna, *Considerazioni introduttive su: "Il principio di legalità tra legislatore e giudice*", *Arch. pen.*, 1, 2020, p. 1 ff.; R. Bartoli, *Costituzionalismo e trasformazioni del diritto penale*, *Dir. pen. proc.*, 2021, p. 735; N. Mazzacuva, *Tra analogia e interpretazione estensiva. A proposito di alcuni casi problematici tratti dalla recente giurisprudenza*, *Criminalia*, 2010, p. 367;

of Italian constitutional justice towards more meaningful protection of fundamental rights[17], or again (in a similar sense) the polarization of the criminal justice debate of recent decades concerning the concept of «victims»[18]. This is a type of «univocal polarization», in which a single aspect increases its relevance within the system, taking on a hegemonic and decisive character that leads to significant transformations.

It deserves to be underlined that, not infrequently, polarization instead takes on the meaning of «conflict» between divergent and, as such, recognizable positions, opinions, or interpretations of law. They are, for example, the conceptions of dignity in an objective sense (limit to self-determination) and subjective sense (power of self-determination and self-representation) from which opposite consequences are drawn, for example, on the topic of surrogacy[19], but the examples could be many, all united on the structural level by the duality and the symmetrical character of the positions, and on the ontological level by the irreconcilability and alternativeness of the same, so one of the poles ends up prevailing and the other succumbs[20]. In this case, it is a «dual polarization», in which two aspects (in a contradictory relationship) take on decisive importance to the point of leading to the fracture of the system and the prevalence of one element over the other.

Instead, this essay focuses on a different, apparently new phenomenon, which can be defined as «reciprocal» polarization, in which two different and antithetical tendencies both lead to significant transformations (as in the case of univocal polarization) without producing a fracture (as, however, happens in dual polarization), but rather leading to a systemic tension whose effects deserve to be investigated.

III. The polarization in the Italian criminal law provisions against corruption

The Italian criminal law system against corruption has been affected by three important reforms over the last ten years (in 2012, 2015, and 2019). An analytical

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P. Grossi, *A proposito de "il diritto giurisprudenziale"*, *Riv. trim. dir. proc. civ.*, 1, 2020, p. 1 ff.; Id., *Sistema moderno delle fonti del diritto ed esperienza giuridica posmoderna in Italia*, *Riv. int. fil. dir.*, 2021, p. 155 ff.

[16] M. Cartabia, *Relazione sull'attività della Corte costituzionale nel 2019*, p. 8, December 2023, available on: https://www.cortecostituzionale.it/documenti/relazione_cartabia/1_relazione.pdf; in the same sense, spoke of «renewed sensitivity» also G. Lattanzi, *Relazione del Presidente Giorgio Lattanzi*, 21 marzo 2019, p. 14, December 2023, available on: https://www.cortecostituzionale.it/documenti/ relazioni_annuali/lattanzi2019/Relazione_del_Presidente_Giorgio_Lattanzi_sull_attivita_svolta_nell_anno_2018.pdf.

[17] V. Manes, *Dove va il controllo di costituzionalità in materia penale?*, *Riv. it. dir. proc. pen.*, 1, 2015, pp. 179-181 in which the A. traces the profile of a Court «vigilant on rights, perhaps more than on the geometries of the system»; F. Viganò, *La proporzionalità della pena. Profili di diritto penale e costituzionale*, Torino, 2021, p. 292; R. Bartoli, *La Corte costituzionale al bivio tra "rime obbligate" e discrezionalità? Prospettabile una terza via*, *Dir. pen. cont.*, 2, 2019, p. 139 ff.

[18] L. Cornacchia, *La vittima nel diritto penale contemporaneo tra paternalismo e legittimazione del potere coercitivo*, Roma, 2012, p. 11 ff.

[19] A. Schillaci, *"Le" gestazioni per altri: una sfida per il diritto*, in *Diritto e persone LGBTQI+* ed. by M. Pelissero and A. Vercellone, Torino, 2022, p. 131 G. Giaimo, *La gestazione per altri. Persistenti criticità e prospettive di regolamentazione in chiave comparatistica*, *Dir. fam. e pers.*, 2, 2023, p. 730; R. Bin, *Tecniche procreative, ordine pubblico, interesse del minore. Conclusioni*, *BioLaw Journal – Rivista di BioDiritto*, 3, 2021, p. 147.

[20] The dual concept of polarization as «identification» or «extremization» is well expressed by J.M. Reyes, *Social network, polarizzazione e democrazia: dall'entusiasmo al disincanto*, in *Web e società democratica. Un matrimonio difficile* a cura di E. Vitale e F. Cattaneo, Torino, 2018, p. 25.

description of the individual interventions of the legislator is beyond the scope of this essay[21]. Instead, a transversal element can be noticed by looking at the complex of reforms simultaneously and it is the polarization of anti-corruption criminal law.

A lot of Scholars have highlighted the consolidation of a tendency of the Italian legislator to intervene in a populist-repressive sense22 in the last ten to fifteen years which has affected various areas of criminal law and, among these, in criminal law regarding corruption this tendency is particularly significant[23]. This emerges clearly by adopting an overall vision that manifests the tendency in every corner of the discipline. Some indicators outline well the pervasiveness of this populistic trend in the entire criminal law discipline of corruption.

The changes in criminal offenses against corruption are an outstanding demonstration of the trend described. New criminal offenses have been introduced and some of the existing ones have been expanded. This happened for the Art. 346 bis (Traffic of Influence) and the Art. 319 quarter of the Criminal Code (Unlawful inducement to give or promise benefits) that entered into force in 2012, with the Law No. 190 of 2012. The same law replaced the Art. 318 of the Criminal Code and inserted the new criminal offense of corruption for the exercise of the function, and it also expanded the Art. 322 bis of the Criminal Code (corruption of foreign officials and other abuses) in terms of *actus reus* and *mens rea*[24].

Also, jail time changed several times in this decade, always in a more repressive sense both at the minimum and the maximum. Ten years ago, the Art. 319 – Corruption for

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[21] About the first reform, Law No. 190 of 2012 (called «Anti-Corruption Law») see B.G. Mattarella, M. Pelissero (ed.), *La legge anticorruzione. Prevenzione e repressione della corruzione*, Torino, 2013, p. 347 ff.; F. Viganò, *I delitti di corruzione nell'ordinamento italiano: qualche considerazione sulle riforme già fatte e su quel che resta da fare*, *Dir. pen. cont. trim.*, 3-4, 2014, p. 9 ff.; S. Seminara, *I delitti di concussione, corruzione per l'esercizio della funzione e induzione indebita*, *Dir. pen. proc.*, 8, 2013, p. 15 ff.; P. Severino, *La nuova Legge anticorruzione*, *Dir. pen. proc.*, 1, 2013, p. 7 ff.

After that, regarding the Law No. 69 of 2015 see F. Cingari, *Una prima lettura delle nuove norme penali a contrasto dei fenomeni corruttivi*, *Dir. pen. proc.,* 7, 2015, p. 803 ff.; V. Mongillo, *Le riforme in materia di contrasto alla corruzione introdotte dalla legge n. 69 del 2015*, in *Dir. pen. cont.*, 15.12.2015, p. 1; A. Spena, *Dalla punizione alla riparazione? Aspirazioni e limiti dell'ennesima riforma anticorruzione (l. 69/2015)*, *Stud. Iuris*, 2015, 10, p. 1115 ff.

Lastly, concerning the Law No. 3 of 2019 see N. Pisani, *Il disegno di legge 'spazzacorrotti'*, in *Cass. pen.*, 11, 2018, p. 3590 ff.; V. Mongillo, *Il contrasto alla corruzione tra suggestioni del "tipo d'autore" e derive emergenziali*, *Riv. it. dir. proc. pen.*, 2, 2020, p. 967 ff.; M. Caterini, M. Roca, *L'agente sotto copertura al limite della provocazione*, *Ordines*, 1, 2022, p. 180 ff.

Although with minor changes, the provisions of Chapter I of Title II of the Italian Criminal Code have been subject to modification by Law 20 December 2012, No. 237; by the Legislative Decree 14 July 2020, No. 75; by the Legislative Decree 27 January 2022, No. 4; by the Legislative Decree 4 October 2022, No. 156.

[22] In this subject, see the pioneering book of J. Simon, *Governing Through Crime. How the War on* Crime Transformed American Democracy and Created a Culture of Fear, supra nota 4, p. 1 ff. Among Italian Scholars see S. Anastasia, M. Anselmi, D. Falcinelli, *Populismo penale: una prospettiva italiana*[2], *supra nota* 4, p. 1 ff.

[23] V. Mongillo, *Il contrasto alla corruzione tra suggestioni del "tipo d'autore" e derive emergenziali*, *supra nota* 21, p. 967.

[24] On these arguments, see S. Seminara, *Sulla distinzione tra concussione e induzione indebita* nell'elaborazione giurisprudenziale, Dir. pen. proc., fasc. 7, 2023, p. 947; E. Dolcini, F. Viganò, Sulla riforma *in cantiere dei delitti di corruzione*, *Dir. pen. cont. trim.*, 1, p. 244; M. Romano, *I delitti contro la pubblica amministrazione. I delitti dei pubblici ufficiali*[4], Milano, 2019, p. 108; L. Scollo, *I modelli di contrasto alla corruzione internazionale. Prospettive di riforma del sistema penale e della responsabilità degli enti*, Torino, 2022, p. 124 ff.

an act contrary to official duties was punished with imprisonment from two to five years, instead today it's punished with imprisonment from six to ten years. So, the maximum limit is doubled, and the minimum limit is tripled. The progressive tightening of sentences, on the other hand, has reached (and, probably, exceeded) that balance between effectiveness and proportion of the punishment which should lead us to question ourselves on the sustainability of the anti-corruption system considering the constitutional principles and of the fundamental principles of criminal law[25].

The mentioned reforms introduced new perpetual penalties in addition to incarceration and extended the ones already provided by the Criminal Code from a subjective, objective, and temporal perspective broadening the content of the law in a more repressive sense. According to these reforms, disqualification from public offices has become perpetual in most cases of sentences for corruption such as the debarment and exclusion from government contracts. The purpose of the discipline is evidently to expel the perpetrator of corruption from interaction with the public sector, therefore not limiting itself to judging only the wrongdoing, but rather issuing an overall and immutable judgment on its perpetrator[26].

Other criminal law effects of the conviction were implemented by the reforms. For example, a strict ineligibility, forfeiture, or suspension regime for public offices passed with the Legislative Decree 235 of 2012[27]. Even though the Italian Constitutional Court and the Italian Supreme Court have repeatedly excluded the nature of criminal law for this type of measure[28], in compliance with the majority direction among scholars who propose a restrictive meaning on the subject of «criminal law effects of the conviction», questionably denying the nature of a punitive measure and therefore not applicable retroactively, this regime remains an effect of the conviction that must be considered in evaluating the repressive trend mentioned. Also suspended sentence can be considered in this argument, since according to the reforms of 2015 and 2019, they create a sort of anticipated effect of conviction for corruption, because it is expected that to benefit from it in corruption cases, a previous financial compensation is required differently than for other types of crimes.

The repressive trend is tangible looking also at the institution of security and prevention measures. For example, the confiscation for corruption has been progressively extended to some special hypothesis of confiscations, to non-conviction-based confiscations, and confiscation by equivalent[29]. Moreover, according to the Law No. 161 of 2017 which modified the Anti-Mafia Italian Statute (Legislative Decree 159 of 2011), a preventive

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[25] L. Stortoni, *Il diritto penale sotto il segno dell'efficienza del sistema*, *Riv. it. dir. proc. pen.*, 1, 2019, p. 386 has harshly criticized this specific aspect. On proportionality as a principle that guides the choices of incrimination and the measure of the criminal sanction, see, among Italian Scholars, see F. Viganò, *La proporzionalità della pena. Profili di diritto penale e costituzionale*, *supra nota 17*, p. 257 ff.; N. Recchia, *Il principio di proporzionalità nel diritto penale*, Torino, 2020, p. 235 ff.

[26] See M. Romano, *I delitti contro la pubblica amministrazione. I delitti dei pubblici ufficiali*[4], *supra nota 24*, p. 146.

[27] According to Legislative Decree 235 of 2012, former Italian Premier Berlusconi has decayed as a senator after his conviction for tax fraud.

[28] Corte Cost., 19.11.2015, n. 236, in *Guida dir.*, 2015, 49-50, p. 76, e in *Cass. pen.*, 5, 2016, p. 1884. See also Supreme Court of Cassation, 27.5.2008, n. 13831; S.C., 21.4.2004, n. 7593; S.C., 2.2.2002, n. 1362; S.C., 26.11.1998, n. 12014; Council of State, 29.10.2013, n. 5222; C.S., 6.2.2013, n. 695.

[29] A.M. Maugeri, *La confisca per equivalente – ex art. 322-ter – tra obblighi di interpretazione conforme ed esigenze di razionalizzazione*, *Riv. it. dir. proc. pen.*, 2011, p. 804.

measure is applicable in case of suspects in a criminal association aimed at committing corruption[30].

The institution of pecuniary compensation referred to in Art. 322 quarter of the Criminal Code passed with the reform of 2015 and extended by the reform of 2019 also to the corruptors is another indicator of the populistic and more repressive trend. This institution provides that the sentenced persons (corruptors and public officials) must pay a sum equal to the price or profit of corruption to the public administration damaged by the wrongdoing, without prejudice for compensation for damages. Scholars and Supreme Court's decisions stated that it's a civil penalty with a punitive nature, and with this, the constitutional statute of guarantees specific to criminal law applies to it. It is important to point out that this institute is a further symbol of the gigantism of the repressive measures implemented by the legislator in the field of corruption[31].

Another important point emerged after the reform of 2019. Precisely, I refer to the exclusion of corruption offenses and other crimes of public officials from crimes for which is possible to benefit from alternative measure to detention. In fact, the Law No. 3 of 2019 changed the Art. 4 bis of the Law No. 354 of 1975, according to which with some exception is possible to change the prison sentence to an alternative measure, and in fact it inserted public officials' crimes among the exceptions, with the effect of forcing those convicted of corruption to serve their sentences in prison[32].

Many changes have also affected criminal procedure. In fact, wiretapping is today admitted for all corruption offenses provided by the Criminal Code. The same goes for pre-trial detention, and the plea bargaining is now subject to the full restitution of the price or profit of the corruption and the judge can apply some additional measure with the conviction, derogating from the general rules.

From all these elements we certainly draw a populist-repressive tendency that embraces the entire substantial and procedural discipline on corruption. The sentence framework is emblematic in this argument. As mentioned before, the reform of the last decade shows a rather evident and transversal tendency towards tightening in the minimum and in the maximum, which reverberates on many other consequences both of substantial (statute of limitations) and procedural (wiretapping, pre-trial detention, plea bargaining).

So far, it is a trend that has been well highlighted by many scholars and which constitutes unfortunately an orientation taken by the Italian legislator in almost every area of criminal law, with a penal populism that has little regard for the principles of subsidiarity, offensiveness, and proportionality. But what is important to observe, is that this trend is accompanied by another opposite one which generates in the anti-corruption criminal law system that effect of polarization of the discipline on which it is worth carrying out some reflection.

It refers specifically to two main institutions passed by the legislator during the two last-mentioned reforms of criminal law provisions against corruption. The first is the mitigating circumstance that allows the reduction of the sentence from one-third to two-thirds in the case of cooperation[33].

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[30] M. Pelissero, *I destinatari della prevenzione* praeter delictum: *la pericolosità da prevenire e la pericolosità da punire*, *Riv. it. dir. proc. pen.*, 2017, p. 464.

[31] See Supreme Court of Cassation, 25.1.2012, no. 8959.

[32] The law raised strong doubts and was declared partially unconstitutional to the extent that it also applied to the facts before its introduction by the Constitutional Court, with the decision no. 32 of 2020.

[33] The Law No. 69 of 2015 inserted the mitigating circumstance in the Art. 323 bis of the Criminal Code.

The second is the cause of non-punishment for self-reporting[34]. These provisions, in essence, reward collaboration before and during investigations, assigning significant reductions in sentences (in the first case) and impunity (in the second case) to those who work effectively to identify the other perpetrators and trace and make available the price or profit of corruption.

In this topic, it is necessary to point out that reward institutions in the Italian criminal law system are not new in the last decades. It is known that many areas of criminal law have known and still know reward mechanisms for collaboration: terrorism and mafia are the two areas of choice for reward discipline, and these are cases explored and dissected in detail by Scholars[35]. Therefore, even the reward system is not an absolute novelty in the criminal law panorama. What we observe is that (in the wake of emergency legislation[36]) the reward system has also progressively and distinctively affected criminal regulations regarding corruption.

So, focusing on reward institutions' effects, it's possible to notice a big change in the tendency towards hyper-criminalization that was first observed when looking at the sentence frameworks. Starting from Law No. 69 of 2015 the hyper-criminalization tendency goes down. How is this possible if the sentence frameworks have increasingly tightened? The aspect that arouses curiosity, in this case, is the relationship that exists between these two tendencies and the effect that the mutual interaction causes on the system. To fully understand the effects of polarization we should make a more complex analysis, but let's limit ourselves to grasping the most obvious aspects.

The minimum sentence and maximum sentence frameworks show an interesting fact. It can be found clearly a uniform tendency toward the tightening of the frameworks, as mentioned. But the tendency definitely changes considering the mitigating circumstance and the cause for non-punishment for cooperation provided by the Criminal Code. If we take these rules into account and disaggregate the tendencies a bifurcation is visible: the tendency of sentence frameworks continues to increase more and more from 2012 to 2019, while the quantity of imprisonment progressively decreases because of the possible application of the mentioned mitigating circumstances and cause of non-punishment. So, two different trends appear, the first is upward; the second is downwards. Here is the polarization of the anti-corruption penal system towards two different poles.

We note that after Law No. 190 of 2012, with the reforms of 2015 and 2019, the tendencies open like scissors, one continues upwards, and the other instead heads downwards. This range is nothing other than the amount of punishment one faces in case of cooperation or non-cooperation with the judicial authority. This alternative is quite significant. On the one hand, the increasingly repressive penal populism makes it possible to apply high sentences but, on the other hand, reductions up to two-thirds even to the total exclusion of punishment apply to those who cooperate with judicial authority.

The areas described by the two tendencies, and in particular the difference between them, show how significant and preponderant (after the 2015 and 2019 reforms) is the amount of punishment imposed by the legislator not for the wrongdoing itself, but rather for non-cooperation in the proceedings. A quick calculation shows that up to

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[34] The Law No. 3 of 2019 inserted the cause of non-punishment for self-reporting in the Art. 323 ter of the Criminal Code.

[35] See G. Flora, *Il ravvedimento del concorrente*, Padova, 1984, p. 172; C. Ruga Riva, *Il premio per la collaborazione processuale*, Milano, 2002, p. 451; G. Toscano, Post crimen patratum, Torino, 2022, p. 229 ff.

[36] See S. Moccia, *La perenne emergenza. Tendenze autoritarie nel sistema penale*[2], Napoli, 2000.

71% of the sentence is influenced by cooperation[37]. This means that the polarization of the anti-corruption criminal law statute has created a system in which over two-thirds of punishment is applied because of the post-facto.

III. The effects of polarization on the criminal law system

The polarization of criminal law statutes against corruption shows a polarized system in which the sentence is mainly applied because of the post-facto behaviour and not for the wrongdoing itself.

An effect of this type requires addressing some systemic questions.

First, it is necessary to take note that the rush to tighten discipline based on rampant penal populism proves to be ineffective when tested by facts. The threat of ever-increasing criminal penalties for corrupt conduct, on the other hand, does nothing more than weld the corruption pact even more, making it even more difficult to discover that corruption occurred. In fact, the possibility of being sanctioned so harshly makes it less convenient for either of the two parties to face the risk of a judgment. This is demonstrated by the fact that the reward for procedural collaboration which should be used to stimulate the emergence of the *pactum sceleris* has had, up to now, very little practical application in Italy, both for technical reasons which I cannot dwell on, and because it does not suit the criminological reality of corruption. But what is most important to observe considering the considerations that have been exposed in this essay is the systematic effect that polarization has produced. In my opinion, there is a twofold effect that translates into the violation of the principles of offensiveness and proportionality.

As for the first, a polarized system such as the one described imposes, in the abstract, imprisonment for the fact but applies, in concrete terms, a sentence for the post facto. The theme in the background which, however, remains central in the discussion under examination is whether the sanctioning apparatus shaped over the last decade, considering polarization, reflects the real negative value of the conduct of the misuse of public power or, rather, whether the punishment currently foreseen is, to a large extent, a political instrument.

As for the second aspect, in the past, Italian Scholars have noted that respect for the constitutional principle of proportionality, functioning upwards, as a guarantee for the author, would not be violated by the introduction of a reward for collaboration (which operates downwards)[38]. If these conclusions are acceptable, however, the polarization places the question under a new and different perspective, namely that of the interdependence between reward and punishment, since the reward is appreciated due to the severity of the legal framework, while the latter is aggravated not for an adjustment concerning the real negative value of the conduct and the damage to the legal good, but rather in conjunction with the introduction of the reward. Looking at the

[37] The number is obtained by calculating in Microsoft Excel the area between each of the two curves and the x-axis, setting the 2012 reform at the point of intersection between the Cartesian axes as the starting point of calculation, and indicating two additional points indicating the 2015 and 2019 reforms. Therefore, the area of the trapezoid obtained with each curve has a common base which is the distance between zero and the point indicating the 2019 reform. Also, the left side of the trapezoid is common and constitutes the distance between zero and the maximum punishment that can be imposed with the 2012 reform. The right side of the trapezoid, however, as well as the major base, differ based on the 2015 and 2019 reforms. The sentence frameworks carry the major base of the first trapezoid upwards. The reward rules instead bring the major base of the second trapezoid downwards.

[38] C. Ruga Riva, *Il premio per la collaborazione processuale*, *supra nota* 35, pp. 452-453.

polarized system, as an effect of penal populism, a violation of the principle of proportion emerges which escapes looking at the reward individually, now at the punishment, and emerges looking at the system as a whole.

The Italian Scholar Giorgio Marinucci come to mind who in one of his writings wrote that «in the name of urgency, our criminal policy is inevitably given the movement of a pendulum that swings frantically in radically opposite directions, now towards a boundless meekness, now towards a frenzied severity»[39].

Polarization adds a further element of complexity that goes even beyond the scenario in which Prof. Marinucci gave his shareable reflection. In fact, with the polarization occurs a simultaneous and concomitant oscillation of the pendulum and it generates a polarization in the system that changes the face of crime and punishment and irremediably conflicts with constitutional principles.

Precisely, polarization releases the punishment from the wrongdoing and introduces elements of unreasonableness and disproportion in its measure, leading to a penal system incompatible with the Constitution.

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Evaluation, Analysis and Reporting at the Beginning of the 21st Century

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Abstract

The basis task of every intelligence service, the evaluation, analysis and reporting has always been of utmost importance, yet this impotance is still growing in the first half of the 21st century.The war in the Ukraine higlihgts the value of correct and reliable analysis and reporting as well.However, this branch undergoes changes and challenges due to intelligence sharing policies and the rapid evolution of artificial intelligence. This study outlines how abovementioned phenomena can shape the intelligence & reporting work in a modern intelligence community.

Keywords: *evaluation, analysis, reporting, artificial intelligence (AI), intelligence sharing, information security, information cloud, fusion centre*

Introduction

It cannot be emphasized enough that of the two great predictions of the end of the short 20th century, the end of the Cold War – that is, the end of history[1] or the clash of civilizations[2] – the latter seems to be coming true. The obvious and true conclusion is that our world, if it is capable of providing a comfortable and livable home for billions of people, has become extremely complex. Prosperity and freedom may just be a short transition before the deep contradictions that Huntington described as the clash of civilizations surface.

There is no doubt that for the national security services dedicated to identifying hidden and man-made challenges, this means continuous testing and adaptation. It is also clear that summarizing the acquired knowledge, orienting the collecting of information and, above all, providing the decision-makers with adequate and credible, well-founded information are more important than ever (although they have always been important). In the present research article, I will show that this is the area where the biggest changes have occurred. By way of analogy, a meeting with a secret human source in 1917 was very similar to the one in 2017. If anyone could get into a time machine and witness such a conversation, the expert would immediately recognize what it was about. All of this cannot be said about evaluation, analysis and reporting system.

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[1] See Fukuyama.

[2] See Huntington.

Basic concepts

In order to present the changes, it is worth familiarizing ourselves with the basic concepts. The process of evaluation, analysis and reporting is often referred to collectively[3], which is correct, as it is a process that builds on each other. However, for a better understanding, let us now isolate and separate the individual elements. The evaluation is nothing more than a thought process during which we determine what the generated information is good for, i.e. which element of the organization's task system it promotes, if at all; and how good it is, i.e. how authentic and how verified. In practice, we can place the generated information along four axes. The first is the intelligence tasking, i.e. whether the generated information can be matched to any element of the intelligence tasking. The second is the aspect of the specific professional work process – this is usually the advancement of case processing in the operational work – i.e. the extent to which the generated information justifies or refutes the basic assumption. There are two other axes. One is the expansion of the conditions of secret reconnaissance. A simple example: if a person posts on social media that he will be on vacation abroad for two weeks, at first glance it does not help our professional work, but in fact it does a lot, since during this period we can take operational measures that can put our investigation in a better position. The fourth axis is also important, since we list here the part of the information that is not relevant for our organization, but may be significant for cooperating law enforcement organizations, for example, they indicate or prove the existence of a crime or criminal organization. In this case, the information must of course be transferred to the cooperating organizations.

The next work process, the analysis, will be discussed in more detail in the next part of the paper. I note here that analysis is the process of uncovering hidden connections, identifying and eliminating parallels, and creating an overall information picture. This is the level that orients covert reconnaissance; furthermore, this is the level where the information picture is being modified and adapted to reality, taking into account the new knowledge of secret reconnaissance.

Speaking about the reporting, as the name clearly shows, it means the work process when decision-makers receive relevant, authentic and up-to-date information, on the basis of which they can make the strategic decisions that are of outstanding importance from the point of view of the country, or at least the sphere of national security. The information can be made upon tasking, this would correspond to the professional model known as the intelligence cycle, but of course it is expected that an organization draws the attention of decision-makers to those processes and phenomena that could have remained hidden and did not appear on the surface. It is clear that the information must also cover the proposed measures and their beneficial and adverse effects.

The new face of analysis

As already mentioned, analysis is the most exciting part of data processing. This is where most of the values added to the information by the national security organizational system are formed. This is the work phase that shows the most changes at the beginning of the 21st century compared to previous years. As a point, it should be mentioned

[3] See related chapters in Lowenthal and Graves.

that information should be stored in a way that can be identified, sorted and rearranged. This requires data about the data, i.e. metadata. We can create metadata ourselves, but in such an obvious way for the location and source of the information, the persons, devices, vehicles etc. included in it.

The data has been stored in electronic form for a long time, which of course raises the question of the authenticity of the data. Basic data must be available to analysts in a non-modifiable form. An even more exciting question is that the structured data repositories typical of previous decades – which implemented the placement of data and then querying the stored data based on a predetermined (and constantly expanded) system of criteria – seem to be fading away, since artificial intelligence-based search engines are the preliminary criteria perhaps making its definition redundant. I will return to this later.

It is also a challenge that so far the information has been available to analysts mainly on a textual basis. It is quite clear that this situation is changing rapidly. The vast majority of information is now available in image and sound formats. Their quick storage and retrieval becomes particularly important, taking into account the increasing popularity of the new generation of analysts, who can be defined as 'digital natives'.

Another practical dilemma is the issue of internal information flow. Currently, the process is taking place, where the laborious, time-consuming and, not least, soul-killing process of preparing an extract from the report and another extract from the extract, i.e. the manual processing of the basic information, is increasingly being replaced by the automatic provision of assignments of various degrees and levels to the recorded information, obviously predetermined criteria and search terms. If this is necessary from the point of view of data security, sending instead of assigning, i.e. physically placing or moving to another storage location is also conceivable.

Perhaps the most important dilemma of analytical work is the dilemma of information security and information exchange. Information security basically corresponds to the classic practice of information collecting, according to which everyone can only know – but must know – only as much of the information as is necessary to carry out their work. This basic principle served well in the past centuries of the development of secret services, and it still serves well today in the phases of secret reconnaissance and information collecting. In contrast to this is the aspect of information exchange, which suggests that in order to uncover hidden connections and create the details of the operational situation, it is advisable for the individual analyst or the analysis group to get to know the widest possible range of information, preferably the entire range, since in our complex world, quick and effective situational awareness it is the only way.

It is clear that the two aspects are quite opposite. In the work of a national security service, the aspects of security and information security can never be neglected. How should this contradiction be resolved? Obviously, it is extremely important to be able to demonstrate who accessed each piece of data, when and why. Of course, it is also necessary to be able to show what basic information was used to prepare a summary, similar to the footnotes of a scientific work, even if these footnotes are not necessarily displayed. It is also clear that, with the complex application of operational forces and tools, a kind of protection must be implemented around the analyst's work area, electronic devices and person, which extends from simple regime rules through elements of cybersecurity to human security. All these rules can only fulfill their purpose if the staff is prepared for them, their organizing principles are clearly presented, and thus they create a kind of internal identification between the analysts and the regime rules that make their work more complicated on the surface – but actually make it possible at all.

The explosive increase in the amount of available data resulted in a qualitative change in the analytical processes. Today, the number of elementary data is not measured in hundreds of thousands, but in millions. This change induces further very important changes, which is both an opportunity and a challenge for national security analytical work. Platform fusion should be presented as an opportunity. Here, we mean that data from different systems are available to the specialist involved in the information acquisition at the same time, in the case of analytical or simpler data, on the same platform. Here follows a simple example: if, during the collecting process, social media information about the person subject to the measure is also displayed, it can orientate the measure and significantly advance the taking of adequate response steps.

The next considerable problem and challenge are how to find and retrieve large amounts of data and to identify, represent, and possibly interpret the relationships between them. It is obvious that this requires computers, it is obvious that this requires self-learning, i.e. computer programs capable of improving themselves, which we commonly call artificial intelligence[4]. This significantly reshapes the evaluation and analysis work, since in many cases, indeed, most often, you do not have to work with information itself, but you have to control the computer. Intuition, personal identification with the task, even under these circumstances, I believe, are values to be preserved.

The expansion of computers and computer programs requires new skills from the analyst. You need to be aware not only of a specific topic, and not only of secret intelligence and the work processes and task system of the organization, but you also need to understand computer data processing. It is a huge challenge to find such broadly qualified people, or to train them. It is clear that both paths must be taken, i.e. specialists with appropriate basic qualifications must be attracted to the services, and in parallel the existing staff must be trained in order to use the technical systems at the highest possible level. It is an interesting phenomenon that the ever-expanding internal world of information technology creates more and more people who are so specialized that they can solve almost everything in the world of computer technology, but they do not move so confidently outside the world of computer technology. It is expected that a new type of professional will appear: a professional who acts as a connection point between the world of computing and the world of national security challenges; is able to understand and formulate problems in such a way that it is understandable and manageable for the other side.

The next phenomenon is that a new kind of quality is created through the analysis of a large amount of data, which does not necessarily bear the characteristics of evaluation and analysis work in the classical sense, but can rather be described as a kind of information acquisition - i.e. the generation of basic information that becomes the subject of later analysis processes. From the organization's point of view, this means that the phases of analysis and covert reconnaissance and operational data collection are blurred. An example: by analyzing the data of public area video recording cameras, the movement pattern and relationship system of a target person can be created, i.e. with data analysis, we can obtain the kind of knowledge that, according to the classical working method, is created as a result of the work of surveillance[5]. (Another such field could be the analysis of open source information.)

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[4] For an easy-to-use definition from the legal perspective see Eszteri.

[5] The phenomenon become the general principle in the well-known intelligence handbook of Rolington.

The peculiarity of the operation of machine learning is that it can make use of its self-learning ability only by using it as widely as possible, and by applying the principle of trial and error as widely as possible, in the same way as its creator, humans learn. The obvious conclusion from this is that artificial intelligence-based programs should not only be used as widely as possible, but so-called learning data, i.e. data that is not connected to a specific task but professionally relevant, should also be processed by the system in order to use it as efficiently as possible in the future. It is not only necessary to create the technical conditions for this, but also the legal conditions, since the stockpiling type of data collection and the storage of data over a longer period of time are often subject to legal restrictions.

I have already pointed out that the development of artificial intelligence may render the maintenance and further development of structured data repositories unnecessary. In other words, the systematization and recording of data in a database – whether done by manual or machine work – can become unnecessary, the manpower, working time and financial resources spent on this can be better utilized elsewhere. This option is undoubtedly very tempting. However, in addition to the advantages, the elimination of structured data repositories also has disadvantages. The result of data extraction from an unordered data set with artificial intelligence always results in a larger hit field, just think of the dilemma of evaluating and using a query made by the Google search engine. In relation to work organization, this means that the work that we apparently saved during the organization of the data does not disappear, it is only transformed; we have to do it during data extraction and interpretation of the extracted information set. That is, the savings do not occur at the system level, but only in relation to certain subsystems.

The new face of reporting

After the problems of the analysis have been reviewed, it is worth spending a few thoughts on the possible dilemmas of the reporting. The terrorist attacks of 2001 led to very extensive systemic investigations within the US Intelligence Community. One of the big lessons was that the system contained a lot of information that, when summed up, could have led to the adoption of overt measures suitable for thwarting terrorist attacks. However, this information was not found, and this can be traced back to, among other things, the fact that law enforcement and national security services are hierarchically functioning, highly structured systems, where information is provided in a well-established way, in compliance with the rules of competence and authority[6]. This in itself is a kind of hindrance for data collectors and analysts, in the sense that it delays the formulation of primary conclusions and their official dissemination. This is humanly understandable, since who would want to attract the attention of the management with his insights, conjectures, which at first seem foolish, and his ideas that cannot or hardly fit into the previous way of thinking. As a result, however, the information did not reach the decision-makers and they could not meet to be the subject of a thorough analysis. It is, therefore, necessary to create the conditions for the information to be provided in a kind of "information cloud" (i. e. in a low-hierarchical manner, for a wider group of people that may not even be fully defined in advance).

[6] See the 9/11 comission report. https://govinfo.library.unt.edu/911/report/911Report.pdf.

The concept of information fusion centers is logically similar, but organizationally very different. This refers to organizations that are in possession of the information of not one, but many, preferably all, law enforcement and national security agencies, and thus, by following all information and filtering out possible contradictions, they are able to provide decision-makers with efficient, time- and energy-saving, so-called single-channel information. Obviously, such an organization must find its place and role among the long-standing members of the national security community. The history of development of the American OSS and the CIA clearly shows how it is not a simple process[7].

The medium that carries information is also changing. Nowadays, informational work is predominantly carried out in the form of paper-based, textual reports and information supplemented with images and maps. In addition, the value of direct oral information, in other words the genre of briefing, during which the manager or the expert verbally informs the customer about the available knowledge, usually supplemented with projected images, is of course increased. This genre strengthens and deepens the mutual trust between those who order the information, that is, the decision makers, and the national security organizations that extract the information. The parties get to know each other's way of thinking and world view. It is also a serious advantage that possible contradictions and unclear details can be clarified immediately. It is also possible to immediately formulate and issue tasks and measures related to the information. Obviously, all of this must be recorded in writing.

Changes are also being prepared at the other end of the spectrum. It should be taken into account that the generation that basically acquires its knowledge from social media, internet channels, and mobile devices is already in a decision-making position, and it is obvious that it also adheres to this medium as a decision-maker. I will not go into the technical and security aspects of the problem now, as they would fill a separate research article. From the point of view of informative work, this means that information should not be recorded in the form of text, but in the form of images and/or infographics. This again raises questions such as those I have already mentioned in connection with the general rise of computer technology. It is clear that the practitioners of the assessment and analysis profession need to be enriched with new skills.

Of course, customers raised on social media have a different attitude to the dilemma of information exchange, since sharing information is a value in the world of Facebook and its clones. I believe that a serious educational process is needed here, the center of which should be the responsibility of the user, i.e. the conscious commitment that the possession of the information provided to him or her/them – and otherwise extremely exciting, thus almost provoking sharing – obliges him or her/them to refrain from sharing for the sake of the greater good, the security of the country, the homeland, or perhaps the military and / or economical alliance, and to preserve your competitive advantage. The fact that the problem is real has been highlighted by recent scandals (for example, the forwarding of official correspondence to private mailboxes)[8].

As a final thought, a question must be formulated: if centers carrying wide-ranging – comprehensive at the level of needs – knowledge in a concentrated manner, freely connecting knowledge with each other and thus creating new value, appear and spread, what effect will this phenomenon have on the role of the so-called case officers? In

[7] Office of Strategic Services and Central Intelligence Agency, see https://www.cia.gov.

[8] To underline the importance of this, consider the fact that Donald Trump's – for that time the President of the United States of America – had 77,7 million followers on 20. April, 2020.

other words, where will the place be for those professionals who plan, organize and carry out the next steps of operational intelligence in the processing of a case with all partial knowledge. Isn't there a danger that those directly involved in the data collection will learn less and less about the real purpose of the data collection and will increasingly strive for the technical realization of the implementation in a broader sense. Should we be afraid of this at all, or should we rather welcome and speed up the process?

I cannot provide answers to these questions at this time. However, a hypothesis can be formulated that people who are able and ready to act autonomously have a place in the system of secret reconnaissance of the present and the future. I believe that, if not elsewhere, the role of business managers in today's sense will remain in the process of obtaining information from human resources. Obviously, their analytical support can represent another step forward in terms of working more efficiently in an increasingly complicated world, and this step forward is also needed.

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Hungarian and International Aspects of Illegal Fishing

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Abstract

By virtue of the geographical and ethnographical characteristics of Hungary, precise codification of the regulations regarding fish farming is highly desirable which encompasses rules at the fields of both administrative and criminal law. Hungary, based on its small relative geographical area in Europe, is uniquely abundant in freshwater lakes, as well as in rivers, tributaries, and smaller streams, in relation to which it is necessary to set apart the regulatory frameworks regarding sport angling, recreational (hobby) angling, and fishing. For the aforementioned activities, only administrative regulations are required primarily, any violation of the laws in the course of practicing them, however, is a subject of the laws of infractions and criminal law.

The Act CII of 2013 on Fish Farming and the Conservation of Fish (henceforth referred to as: Act) as well as the Decree 133 of 2013 of the Minister of Agriculture on the Specification of Regulations on Fish Farming and Conservation of Fish (henceforth referred to as: Decree) contain the statutory background of administrative regulations for this subject.

The Act draws a basic distinction between the concepts of fish farming and fish catching where the former one is defined as activities related to the conservation, regeneration, and exploitation of fish stocks in natural water bodies, as well as the generic concept of aquaculture and other fish farming activities whereas the latter one is defined as catching, and not releasing back into the water, fish or other useful aquatic animal in the course of fishing or angling. In my essay, exclusively those possible legal responses will be considered which may be given to violations of the laws related to catching.

Keywords: *illegal methods of catching fish, principles European law, territorial closure, fishery management, new Hungarian Criminal Code*

Introduction

Before all, it is reasonable to clarify that the two predominant methods of catching fish are angling and net fishing, or simply fishing. Fishing regularly aims at catching animals in larger quantities since its function is first of all the fulfillment of specific economical needs. Angling, in contrast, can be understood basically as a recreational, sport, or hobby activity. The angler, as a general rule, is allowed to angle with a maximum

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of two fishing rods (with 3 hooks per rod) at one time. The angling methods taking shape during the evolution of angling show a diverse picture: float fishing, bottom fishing, spin fishing, fly fishing, downrigging, trolling, or clonking for catfish catch[1].

The wording of the Act itself refers to such a distinction according to which angling is catching fish for recreational purpose by means and tool for angling[2], allowed by this act and by the decree implementing this act, in fish farming waters, or catching bait fish by lift net not exceeding 1 square meter /Act Section 2(16)/; fishing, on the other hand, is selective catching or collecting fish or other useful aquatic animal by allowed means and tool in fish farming waters for recreational or commercial, as well as ecological purpose, except angling /Act Section 2(9)/.

For the analysis of the subject, the examination of the following topics is necessary;

1) The criminology of illegal fishing;
2) Sketching the regulatory background;
3) Considering the aspects of the delimitation of offenses requiring interventions by either the administrative or criminal law;
4) The theoretic solutions, and possible shortcomings, in the recent regulations of criminal law.

In my essay, of course ethical issues are dealt with too. Even the question can be raised about animals in general whether to have moral standing, deserving protection by the regulations of criminal law too, and about different animal species whether to fall under the same category or not in this regard, (i.e. the differences in pain sensitivity and sensory thresholds can be substantial etc.). "These questions, and the answers given to them, deeply divide people who work in animal protection. Some activists assert that every animal is equal, according to the representatives of the other viewpoint, it is not possible to give an affirmative answer to this question"[3].

1. Historic overview. Illegal fishing in the criminological approach

Since the times of Stephen I, first king of Hungary, there had been historical records in relation to the regulations of fishing rights. In the beginning, these regulations were restricted to the definition of the entitled parties (dioceses, barons, and other aristocratic classes). The legal documents of the Middle Ages speak of a highly developed fish farming economy, and fishery had become a professional occupation in those times. It reserved, of course, its monopolistic status though because this activity was still considered to be a royal prerogative, so called *jus regale*. The relations in regards to the rights of property and use were regulated in acts on the one hand, and by means of consuetude on the other. In the landlord-serf relation, the so called *urbarium* or a particular contract settled down how much fish, and rent, the fisherman was expected to provide, and pay, in return for the fishing allowance.

The ecological and societal changes from the 19 century necessitated the reorganization of the regulatory framework. By the abolishment of serfdom the acquisition of fishing rights became merely a matter of wealth, and by the same token,

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[1] T. Háger, A környezet alkotmányos és büntetőjogi védelme, különös tekintettel a vizek élővilágának oltalmára [Constitutional and criminal protection of the environment, with particular regard to the protection of aquatic life], 2006. *Büntetőjogi Szemle,* p. 32.

[2] An equipment, for the purpose of angling, appropriate for catching fish, which is made up of at least a fishing rod, fishing line, and is equipped with a maximum of 3 fishing hooks.

[3] A. Jámbor, *A kedvtelésből tartott állatok jogi védelme.* 2016, Miskolc, PhD értekezés, p. 18.

the number of the natural waters, and the fish stock, diminished substantially. The *Act VI of 1836*, however, retained the regulation of fishing as a royal prerogative invariably, and continued to ban the serfs from this activity. The *Urbarium Patent* of 1853 too upheld the view according to which the reorganization of urbarial relations did not apply to the so called *jura regalia*.

From the years of the 1870s onwards, a ministerial level, decree type legislation started. In the course of this legislation different seasonal closures were introduced, and specific fishing methods, (e.g., use of poison or dynamite), were prohibited.

The first legislations in this field were the *Act XXVIII of 1885* (Water Act), the *Act XIX of 1888* (Fisheries Act), and later the *Act LXIII of 1925* and the *Decree 9500 of 1926* on the implementation of the latter. These legislations declared that "the bed and banks of the bodies of water are the properties of the coastal possessor, and fishing is an indispensable part of the coastal possession"4. The declaration of this modern position of the proprietor was at the same time accompanied by obligations for the proprietor to provide the necessary and reasonable services in relation to fisheries management (i.e., establishing fisheries societies, supplying the markets etc.).

From the end of communism in Hungary, the methods of, and the frequency characterizing, illegal fishing have changed substantially. The two major changes can be identified in the characteristics of the tools used for, and in the ever growing recurrence of the organized character of, the commitment. All these were paired up with such, before all climate related, ecological impacts that necessitated new solutions in the treatment of illegal fishing and angling (henceforth referred to as: fish poaching), as well as the extension, and the increase of the efficiency, of the control exercised by the authorities.

The *Act XLI of 1997 on Fishing and Angling*, enacted in the year of 1997, already before its commencement, has received many critical acclaims: "the new legislation in its original formulation before its enactment has not served well a sustainable fish economy anymore that should otherwise take into account the aspects of environmental protection, and the societal and economic priorities of Hungary. Such kind of legislation, and a regulatory framework based on it, became necessary which, besides the particular modes of use, supports the natural regeneration of fish stock and prevents illegal catching and trading of fish"[5].

Also it became a fundamental question whether it would be necessary to rethink the techniques of sanctioning these violations of laws. That kind of common sense argument, however, went against the efforts for the criminalization which looks at the violations of laws related to fishing simply as 'mischief,' tolerable hobbies, and at fish as 'res nullius.' Even so, with effect from 1 July 2013, the poaching of fish became a separate criminal category in the new *Criminal Code* (Act C of 2012).

Behind the intention of the legislator the following aspects 'lurked;'

1) Besides the 'lone,' occasional offender, (who acted in a 'shoot and run' manner), groups also showed up working with professional equipment[6], operating in organized form, striving for regular profit;
2) Poaching, since the 90s, has become a status symbol in certain circles in the course of which catches were often carried out in seasonal closures, and of protected species;

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[4] A. Bezdán, A jogi személyiségű halászati szervezetek minősítésének jogi alapkérdései, [Basic legal issues of the qualification of fishing organizations with legal personality] Szeged, 2005, *Acta Juridica et Politica,* p. 5.

[5] T. Háger (2006), p. 32.

[6] E.g., with chemical, pyrotechnical devices.

3) The different water areas (e.g., the biggest lakes in Hungary, like *Lake Balaton* or *Lake Velence*, or the backwaters of the *Danube*) were principally out of control, and the by that time existing institutional mechanisms of the control exercised by the authorities could be characterized well as meager;
4) By joining the EU, the danger of the widening scope of criminal circles and methods emerged;
5) Also the food security hazards of large-scale illegal fishing surfaced since before handing forward the catch the offenders did not necessarily store the fish in a professional manner, and care about the requirements of hygiene etc.;
6) By the illegal activities the complete ecosystem was affected, including protected fish species too etc.

In our times either, of course, the offenders are not looked at by the public opinion as 'definitely antisocial, unscrupulous perpetrators' which is partly due to the fact that many motivations of these illegal conducts can be pinpointed, like the 'beauty of nature walks,' the ecstatic experience of the catch, the guise of a sport activity, financial difficulties etc. On the other hand, as it is my conviction, the offenders themselves either are not aware of committing a crime, or of the possible ecologic impact of their conduct.

In the essay of Balázs Elek, an interesting argument can be read according to which "beyond the violations of material, property related interests, before all the creation of dangerous situations has to be mentioned. Since poaching regularly produces dangerous situations in various areas of the country. It can often be heard that fish guards, rural guards, even policemen try to keep off such areas where poachers are active because they lose courage. The poacher can be dangerous also therefore because in fear of discovery, punishment the poacher can exert aggression against that person who catches or debunks the perpetrator […] there is a close link between poaching and accidents too since this conduct carried out secretly, by violation of professional rules, often leads to an accident. There was example for it that a man was caught in his own illegally thrown net in one of the backwaters of the *Tisza*. There was no escape from the dragnet, traditionally used in Hungary, now banned; it was in vain for the poaching fisherman to try to cut himself out of captivity[7].

According to my opinion, using penal measures in response to the violations of laws is important primarily from the point of view of nature and environmental protection. The regeneration of fish stock is a slow process, stretching many times over several years. This has, of course, economical impacts too as Kőhalmy notes; the goal of fishery management is "to get permanent yields without risking the future existence of the source. In case of renewable sources when we try to estimate their value not only their actual value, expressed in money-price, has to be taken into account but also the indirect damages, caused by their degradation, (the loss in diversity of the ecosystem), or the costs caused by the restoration of them when already degraded."[8] According to Elek, the value of the killed fish extends beyond that value which would be otherwise the guiding standard in court (based on expert opinion) in the case of a simple theft[9].

According to Háger "the protection of fish […] is an eminent task in environmental protection since the role of human activity in maintaining fish stock is unavoidable.

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[7] B. Elek, *Az orvhalászat és orvhorgászat büntetőjogi megítélése [Criminal assessment of poaching],* 2009. Pisces Hungaricy, p. 3.

[8] T. Kőhalmy, *Vadászati enciklopédia [Encyclopedia of Hunting]*, 1994, Budapest, Mezőgazdasági Kiadó, p. 71.

[9] B. Elek (2009), cited, p. 10.

Because of the earlier river engineering practices, as well as the impairment of the general condition of the environment, the fish stock in free waters, left alone, is not capable for renewal anymore"[10].

2. Statutory background, principles of international law

The statutory background applicable to illegal fishing is complex and it is, thus, related to many branches of law. Before all, however, it is important to place emphasis on those general legal principles according to nature and environmental protection set forth by international and European Union law which have to be unconditionally effective also in the sovereign national legislation.

As a general rule of international law, the non derogation principle should be emphasized which declares that the already existing level of protection achieved by earlier legislation can never be lessened because it can lead to irremediable environmental damages, as well as to the deterioration of the already existing condition. There is only possibility for 'withdrawal' if it turns out to be indispensable for the implementation of a specific constitutional value[11].

At the level of the European law, the *2003/80/JHA Council Framework Decision* has to be emphasized the Article 2 of which declares that each member state shall establish specific conducts causing harm to the environment as criminal offenses. Among others, unlawful possession, taking, damaging, killing etc., of wild fauna or flora species have to be considered as such. This attitude of legislation has to prevail especially in those habitats where the aforementioned species is threatened by extinction. Furthermore, it is important to refer to the *2008/99/EC Directive of the European Union on the Protection of the Environment through Criminal Law*.

In relation to the *Fundamental Law of Hungary*, the country's constitution, the *Article P* has to be stressed which declares the principle, and requirement, of 'sustainability,' as well as the circle of individuals to whom it is addressed; according to this not only the state but each person is obligated to maintain the integrity of the environment, as well as to prevent the deterioration of the good condition of the environment. The aforementioned Act can be characterized as the 'base law' of the topic which, among the general provisions, declares that the fish stock in the fishing management waters of Hungary is national treasure, natural asset, and economical resource which shall be protected by the society, and the renewal of which shall be aided, and the exploitation of which shall be planned and carried out, only according to the requirements of sustainability (Section 3).

Other relevant acts of protective value;

a) *Act LIII of 1995 on Environmental Protection* which, among others, declares the protection of water, as well as of life;
b) *Act LIII of 1996 on the Protection of Nature* which delivers detailed content to the general provisions of other branches of law, especially those of criminal law;
c) The *Act XXVIII of 1998 on the Protection of Fauna*, as well as the *Act LV of 1996 on Hunting*, partly deals with issues of the littoral ecology of waters too;
d) the *Decree 13 of 2011 of the Minister of Environmental Protection*.

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[10] T. Háger (2006), cited, p. 29.

[11] L. Fodor, *Környezetjog [Environmental law],* 2014, Debrecen, Debreceni Egyetemi Kiadó, pp. 109-110.

3. Approaches on administrative law and the laws about civil infractions

According to the *Act II of 2012 on Civil Infractions, Civil Infractions Proceedings, and the Registry System of Civil Infractions* (henceforth referred to as: Infractions Code), the primary person of authority for controlling infractions is the fish guard[12] who, according to this regulation, has an authority extending to charge on-the-spot fines (Infraction Code, Section 39.). It is a further requirement for this authority that he or she shall be an employee of any public administration body, or a governmental official of local government, or a public employee, or an official of the central government, or an official employed by the state.

The Infraction Code, a bit scantily, does not refer to such as 'fish poaching,' or to any conducts similar, or related, to these violations of law. Only in relation to breaching hunting, fishing, or grazing prohibition (Section 215), the Infraction Code makes a reference to it that breaching the general hunting, fishing, or gazing prohibition ordered in relation to the protection against natural disasters constitutes a civil infraction.

In addition, that subtype of the infraction against nature protection can be brought into relation with violations of the laws related to fishery management in the course of which the offender causes damage to, or takes, or kill, the living specimen of the protected spices, as well as when he or she disturbs the specimen of a protected or highly protected species in its habitat to a substantial extent.

The fine ranges between 10.000 and 500.000 forints /Infraction Code, Section 67(3)/. Its exact amount shall be specified based on all circumstances of the case, especially the scope, severity of the infringed interests of the affected individuals, the length of the period of the infringement of rights, and repeated commitment of the conduct, the advantage achieved by the infringement of rights /Infraction Code, Section 68(1)/. If the imposition even of the minimal amount of the fine is unnecessary for terminating the unlawful condition, or preventing from the further infringements of rights, the fishery management authority might give a caution to the person involved in the proceeding (Infraction Code, Section 70).

The coordinating body for the authority tasks analyzed so far has been the *National Fish Guard Service* since May 1, 2015 which is constituted of the fish guards employed, or delegated, by the *National Food Chain Safety Office* (henceforth referred to as: NFCSO)[13]. The national fish guards have jurisdiction for the entire country therefore, compared to the fish guards employed by authorized persons for fishing, they are entitled to act in any fishery management waters of Hungary and, in regards to the Infraction Code, are considered as fish guards. Personally I think, in respect to the prevention, and retribution, related to illegal catching of fish, this centralization of the control exercised by the authorities to be reasonable by all means.

Under the Act, the said authorized person is entitled, among others, to

a) restrict, or prohibit, manufacturing, storing, shipping, using, trading, exporting, importing, or, in the area of his or her jurisdiction, transporting fish product,

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[12] If the area of fishery management water, or the joint areas of waters, used and registered by the same authorized person for fishery exceeds 50 hectares, the authorized person shall employ fish guard according to the followings, a) for 50-100 hectare fishery management water at least 2 persons, b) for 100-2.000 hectare fishery management water at least 4 persons, c) for 2.000-4.000 hectare fishery management water at least 6 persons, d) for 4.000-6.000 hectare fishery management water at least 8 persons, e) for any fishery management water exceeding 6.000 hectares at least 10 people. (*Decree, Section 42(3)*).

[13] Source: http://portal.nebih.gov.hu/-/allami-halori-szolgalat (February 16, 2024).

b) order the fish stock or fish product to be seized, withdrawn from trade, recalled, made harmless, destroyed,
c) seize, forfeiture, order, at the expenses of the owner, the destruction of, the equipment appropriate for catching fish,
d) impose fishery management fine on the person authorized for fishery management if he or she issues territory ticket for a person without national angling ticket, national tourist angling ticket, national fishing ticket etc.

Besides these, this authorized person is entitled to impose fish protection fine on the person angling or fishing unlawfully; failing to keep catch notebook; angling or fishing in a way, with an equipment, not allowed by the Act or in seasonal closure; accomplishing the catch (collection) of prohibited fish or other useful aquatic animal; carrying out fishing or angling activity disturbing the reproduction and development of fish in a recreational closure area until the revocation of prohibition; trading fish or fish product of uncertified origin; emitting into the fishery management water any organism, food, pollutant appropriate for perturbing the natural equilibrium existing in the habitat of fish; accomplishing the unlawful catch of fish or other useful aquatic animal protected by size or bag limits, or seasonal closure etc. (Act, Section 67.)

4. Cases falling under the criminal law

The present Criminal Code, in contrast to the former one, the Act IV of 1978, defines fish poaching as a *per se* crime, separately from the definition of cruelty to animals. According to Belegi, the reason for this might be that the common sense understanding, and the commitment of the conduct, of fish poaching does not fit into the conception of cruelty to animals14. The motive of fish poaching, as the reasoning goes, basically is not to torture, cause any suffering to, the animal but to catch fish. Purely on theoretical grounds, I cannot agree with this argument since, according to this, not the trivial meaning or the conduct itself but the purpose differentiates between the conducts of the perpetrators. Notwithstanding I do not think the widespread judicial practice to be proper either based on which fish poaching and cruelty to animals cannot be charged in multiple count indictments.

The object of crime is 'fish' which is, according to the Act, any animal belonging to the groups of fishes and *Cyclostomes*, jawless fishes, in all phases of their ontogeny. /Act, Section 2(5)/

In most cases, the motive of the perpetrator is to catch native fish species in the given water area, (e.g., carp, zander, catfish, pike, eel, asp, barbel etc.), but, of course, also in the case of fishes of nonnative origin, (e.g., silver and bighead carp, grass carp), as well as of native but smaller fish species, (rudd, crucian carp, tench), the conduct falls under the definition of this crime. Furthermore, objects of crime are aquatic animals defined as 'useful' by the law too, thus, frogs, crustaceans, mussels, leech, sludge warm, lake fly, and other fish food organisms, in all phases of their ontogeny[15].

According to *Section 246(a)* of the Criminal Code, the perpetrator of the misdemeanor of fish poaching is the person who is engaged in activities for catching fish without

[14] I. Belegi, *A környezet és a természet elleni bűncselekmények [Crimes against the environment and nature]*, in Magyar Büntetőjog, Kommentár a gyakorlat számára, Harmadik Kiadás. 2013, Budapest, HVG-ORAC Kiadó, p. 1066.

[15] T. Háger (2006), cited, p. 34.

authorization. This phrase of the section can be applied only to that case if the perpetrator uses fish net or other fishing tool during his or her activity. Illegal angling alone, however, is not a crime in itself.

According to the categorization by Szilágyi, different methods of fishing have been developed in line with the behavior of the game animals. Using fish net can be considered to be the most frequent method which can be divided into the two subcategories of (active) trawl and (passive) static methods. The net, according to its type, can be lift[16], push, bottom trawling, as well as dragnet. Furthermore, catching fish by hands, the noodling, or using some *ad hoc* tool, (e.g., basket), fall also under the category of fishing[17].

The subject of paragraph *(a)* can be only that person who does not possess license required for any activity for catching fish. In this regard I would like to refer to the regulation according to which the fish stock living in the fishery management waters of Hungary, as a general rule, is state property. To catch fish that person is entitled who is personally authorized for fishery management in the waters of fishery management, or who possess license for catching fish issued by this person. /Act, Section 6 (1)-(2)/

The person with fishing right is, therefore, the owner on the one hand, and the usufructuary on the other. The Act also gives a closed enumeration of the persons entitled to usufruct according to which, in the waters for fishery management, activities for catching fish can be carried out either with

1) fishing license, or
2) national fishing ticket, in case of selective fishing for commercial and ecological, or recreational purpose, respectively, or with
3) national angling ticket, or national tourist angling ticket, in case of angling. It is important to note that the person with fishing management right is entitled to give further rights for fishing or angling to the authorized person by issuing territorial ticket. /Act, Section 44 (1)/

The person with fishing management right is obligated, among others, to display the name (company name), address (registered office) by whom the ticket has been issued, the name of the licensee, the fishing management water the ticket is valid for, as well as the period of validity of the territorial ticket too. (Decree, Section 27.)

The national fishing ticket is issued by the national fishing management authority and is valid from the date of its issue until January 31 of the next year. The national fishing ticket endows the ticket holder with the right of using simultaneously only 1, maximum 16 m^2 size, active fishing tool and 3, maximum 2 meters diameter, fyke net. The national fisher certificate, requirement for holding state fishing ticket, can be obtained by the successful completion of the subject-to-fee course organized by the fishing management authority. (Decree, Section 18.)

The act in paragraph *(a)* can be committed with either direct or oblique intent. There is no obstacle in the way of the determination of complicity if more persons carry out illegal fishing with knowledge about each other's activities, jointly, and in an active way. Evaluating the activity of a person for abetting, i.e., psychical help, who is merely present and passive, is, in my view, unreasonable, and besides this it can run into difficulties when it is about presenting evidence; by the same time, however, securing

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[16] In a relevant case in Hungary, the court sentenced a person fishing illegally with lift net in a fishing territory of a main canal to suspended minimum security prison (*Judgment 2.B.1016/2014/2 of the District Court of Nyíregyháza*).

[17] M. Szilágyi, *A Hernád halászata [The fishing of the Hernád]*, 1980, Miskolc, Herman Ottó Múzeum, p. 34.

the necessary material substrates, (e.g., fish net), in advance or simultaneously makes aiding, i.e., physical help, always demonstrable. In regards to the stages of accomplishing the act in paragraph *(a)*, purchasing the necessary tools for fishing is preparation, taking the fishing tools to the bank is attempt, and letting the tools in the water is accomplished crime.

The poaching of fish as defined in *Section 246(b)* can be committed by any person who is engaged in activities for catching fish using unauthorized fishing equipment and/or methods, provided for in specific other legislation, or in restricted fishing areas. In a case in Hungary, the defendant wanted to catch fish by raking on the bottom with a prohibited, destructive technique but after the second attempt was caught in the act by fish guards. The court, relying on Section 246(b) of the Criminal Code, sentenced the perpetrator as recidivist to 30 days in prison (Judgment 4.B.602/2013/5 of the District Court of Esztergom)[18].

The perpetrator of this crime, thus, in contrasts to paragraph *(a)*, can be a person also in possession of a license to carry out any activity in favor of catching fish. By the same token, I would like to note that, because of being an act more seriously harmful to society, as well as the wider scope of the potential perpetrators, I would feel necessary to define this phrase as a felony and at the same time to lift the maximum penalty to 3 years in prison.

In regards to the prohibited tools, as well as methods, the closed definition provided by the Decree gives orientation – the function of which relies on the physiological effect of electricity on fishes; the poisonous and/or stunning materials; explosives; stitching tools; the diving spear and other diving tools appropriate for catching fish; raking; using poacher's noose; practicing the method of dropper loop or single line-hook fishing for bottom fishing; gillnets;[19] as well as attempting any of these activities. /Act, Section 46 (4)/

In course of raking the perpetrator lets the hook enter into a body part of the fish other than its mouth. This requires special equipment: "regularly a very strong, (3-4 m) long […], hard rod, a bigger spinning reel, as well as a strong, thicker than average line is needed. The terminal tackle for raking is a bigger sinker, as well as more triple hooks. The triple hook can be tied to a leader attached to the mainline, or fixed tightly to the sinker, often by molting it to the sinker, this way linking the parts of the tackle together. A fisherman, and especially the fish guard, or a policeman with knowledge about angling, instantaneously recognizes the prohibited tool, as well as the special movements required for exercising this method. Raking is practiced in flowing waters, backwaters, and lakes as well, in both summer and winter. The fisherman casts the line into the water, then, with a characteristic, tugging movement […], draws the final tackle back. Raking is aimed at catching fish types with greater body size, in the spring/summer usually inhabiting the upper part of the water column, like the silver and bighead carp, the grass carp, specimens of carp schools. In winter, raking the more valuable, bigger catfish from the bottom of the water is more typical. Because huddling together, laying down in groups, especially in winter, during winter rest, is a behavioral trait of this species."[20]

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[18] T. Háger (2006), cited, p. 37.

[19] It is such kind of fishing tool the catching mechanism of which is based on wedging the fish in the net, leading to the death of the caught specimen shortly.

[20] A. Székely, *A harcsa és horgászata [The catfish and its fishing]*, 1980, Budapest, Mezőgazdasági Kiadó, p. 15.

The territorial closure serves as a water area for the calm, damage and disturbance free winter rest, and reproduction of the fish which is appointed by the fishery management authority. (Decree, Section 4.)

According to the Decree, the person authorized for fishery management is obligated to make the regulations in regards to the prohibitions and restrictions applicable to territorial closures public. The person authorized for fishery management provides for making the detailed description of the boundaries of the territorial closure, as well as the temporal scope of the fishing ban applying to the territorial closure in the territorial ticket, or in the printed information leaflet handed over with the territorial ticket public. (Decree, Section 5.)

The crime in paragraph *(b)*, too, can be committed with direct or oblique intent. In relation to complicity, as well as aiding and abetting, I find the aforementioned considerations in regards to paragraph *(a)* authoritative. In regards to the stages of accomplishing – relying also on the considerations regarding paragraph *(a)* – purchasing the necessary tools for fishing is preparation, taking the fishing tools to the bank is attempt, and dropping the tools in the water is accomplished crime.

I analyze the problem of multiple counts, and the questions regarding their separation, in relation to paragraphs (a) and (b) together. First of all, I would like to emphasize that according to the recent judicial practice which I do not think to be fully correct, however, poaching of fish and cruelty to animals cannot be charged in multiple count indictments even if carrying out the activity (e.g., raking, using of gillnet) causes permanent disability, death, or excessive sense of pain for the fishes. In regards to these results, no concrete references can be found at legislation level, only among the administrative regulations it is prescribed that to torture the caught fishes is prohibited, as well as that the taken and caught fishes should be treated in such a way that the physical impairment caused to them shall not exceed the limit which is minimally required by the fishing, as well as angling method. /Decree, Section 28(14)/

In my opinion, the analysis of the aforementioned questions requires legal philosophical inquiries: in this subject many legal philosophical views are known in relation to the differentiation based on pain and sensory thresholds, and to its relevancy in law. According to the theorists of one view, the line should be drawn by vertebrate animals[21]. Also that kind of legal solution is known when the legal protection is reserved for only a subset of vertebrates: according to the *U.S. Act of 1966 on Animal Welfare* the object of crime of cruelty to animals can be only cat, dog, hamster, rabbit, monkey, guinea pig, or other warm-blooded animal, as the secretary of agriculture may determine. / 7 U.S. Code § 2132 (g)/.

According to the view I think to be correct the discriminative criterion is the presence or absence of the capacity for the sensation of pain. To determine the answer for this question requires, of course, biological research, I surmise, however, that in case of animals belonging to the group of fishes the application of the crime of cruelty to animals would be undoubtedly reasonable if the unlawful act causes evidently substantial pain to the specimen. The aforementioned raking or the usage of gillnet could fall into this class. In these cases, thus, the conduct described in *Section 246(b)* should be considered according to the legal definition of cruelty to animals only, the crime of poaching of fish, however, would not apply. Obviously it would not be any possibility to charge multiple counts in such cases either because this would defy the principle of double jeopardy.

[21] D. Degrazia, *Az állatok jogai [Animal rights]*, 2004, Budapest, Magyar Világ Kiadó, p. 28.

The conduct of poaching of fish, according to my opinion, should therefore be restricted to the activities carried out illegally, as well as in a territorial closure unlawfully. The criminal sanctioning of these conducts is, of course, still necessary from the point of view of both nature protection and fishery management.

Based on the aforementioned considerations, according to the practice I would think to be correct, if the perpetrator carried out the usage of the prohibited tool or method without permission, the conduct would be considered as the multiple count indictment of the crime of cruelty to animals and the crime of poaching of fish as set forth in *Section 246(a)*, carrying out the same activities in territorial closure, however, would be considered as a multiple count indictment of cruelty to animals and poaching of fish as set forth by *Section 246(b)*.

By the same time, however, the judicial practice does not seem to be unequivocal in respect that theft and either paragraph *(a)* or *(b)* can be alleged in a multiple count indictment. (EBH 2015. B. 24.).

In a case in Hungary, the court sentenced the defendant fishing with prohibited fishing tool for misdemeanor of accomplice in theft and misdemeanor of poaching fish to prison without suspension. /Judgment 8.B.133/2012/17 of the District Court of Szarvas, Judgement Bf.340/2013/5 of the Regional Court of Gyula).

The imposition of this charge might presumably have adhered to the criminal record and other personal circumstances of the perpetrator too, the severity of the retribution, however, could well be considered as a 'precedent.' Above this, according to my view, the multiple count indictment of poaching of fish, theft, and the criminal offenses with explosives or blasting agents will be apply to the commitment if the perpetrator carries out catching fish as described in *Section 246(b)* with the aid of explosive or blasting agent and takes the surfaced carcasses of fishes illegally.

Poaching of fish regularly turns up as the underlying offense in crime groupings. Based on this, the activity of that person who, for financial gain or advantage, buys the fish caught and unlawfully taken by fish poachers is considered as fencing. In regards to the determination of criminal liability it is vital that the *mens rea* of the perpetrator shall encompass the unlawful killing, as well as illegal taking of the game. The court is expected to draw its conclusion by considering all circumstances of the case (e.g., the place and time of trading, the way and extent of compensation etc.).

Also conducts involving the violation of anti-money laundering provisions turn up at the level of crime groupings. The activity of that person who converts or transfers, or uses in business activity, any asset originating from a criminal offense, punishable by prison, and committed by another person, in order to conceal its origin, is considered as such. According to Elek, "the business activity can be running a restaurant too. In that case if the fish is used in course of this activity in order to conceal its origin, the definition of money laundering can apply to it"[22].

5. Closing remarks

The new Criminal Code – unreasonably – 'devalued' the importance of legal protection of fishes. An important sign of this tendency is the likely discriminative distinction drawn between poaching of game and poaching of fish: the former Criminal Code (Act IV of 1978) regulated the conducts of fish poaching and game poaching

[22] B. Elek (2009), cited, p. 13.

together as one misdemeanor punished with the same punishment. The recent code defines poaching of game as a felony, punishable with maximum three years in prison, when poaching of fish is still a misdemeanor with the maximum penalty of two years in prison.

The other fundamental problem is the concurrency of cruelty to animals and poaching of fish by prohibited tools or methods, as defined in *Section 246(b)*, and the unclear relationship between the legal interests defended by these regulations. For it is not clear whether the legislator created the latter phrase in respect to the exceptional sensation of pain in the animals or the damaging effects caused to nature in such circumstances. This regulation is not unequivocal in respect to the determination of multiple counts either, or in relation to the principle of double jeopardy.

In regards to illegal fishing control exercised by the authorities, in this field creating a coordinating platform between the NFCSO and the National Fish Guard Service in 2015 is doubtlessly a progressive step which, due to its skilled personnel, in the close future is likely to turn out to be an efficient mechanism in filtering out the violations of laws damaging fish stock. For the sake of prevention and redistribution, upholding the possibility for charging on-the-spot fines, raising the limit for fines, as well as exercising regular and *ad hoc* control by the authorities could serve as a solution in all cases.

Illegal angling has to be handled from illegal fishing separately. The former one could bear touristic relevancies too which first of all, according to my view, could be mended by application of, so to speak, 'marketing instruments.' Angling competitions organized by local governments, various fish festivals, as well as that kind of strategy, based on informing the broader public, which calls the attention of the potential perpetrators to the unlawfulness and other dangers of their activity could have eminent role in this campaign.

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