UNIVERSITY OF TIMISOARA
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JOURNAL OF EASTERN-EUROPEAN CRIMINAL LAW

No. 2/2024

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

UNIVERSUL JURIDIC

2024

Universul Juridic Publishing House
Edited by Universul Juridic Publishing House
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The journal is indexed in databases SSRN, EBSCO, HeinOnline.

ISSN 2360–4964

Redactor: Ciprian Radu
Tehnoredactor: Tania Militaru
Copertă: Aurelian Leahu

23 de ani 2001-2024 UNIVERSUL JURIDIC

Redacție:
tel.: 0732.320.666
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editurauniversuljuridic.ro
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The articles contained in this issue were presented within
the Criminal Sciences Section of the Biennial International Conference
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XVth edition, which took place on 8 November 2024,
in Timisoara, Romania.

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The Many Faces of Confiscation in Italian Criminal Law

Maristella Amisano*

Abstract

The Italian criminal code knew to recover the proceeds of crime just the confiscation, but that wasn't the main goal. Over time, the Italian system has found tools to extend the recovery of sums involved in a crime. But we must be careful to remain linked to the crime, without preventing in a way contrary to the guarantee principles of the Italian criminal system.

Keywords: *confiscation, security measures, preventing measures, criminal principles*

I. Confiscation in the 1930 criminal Code

The recovery of sums involved in various capacities in a crime is an element of fundamental importance for modern legal systems. Today the idea of punishment is reduced for leaving more space to prevention and punishment is enriched with nuances that remove the centrality of prison sentence. But it has not always been this way, at least in the Italian criminal system. The current penal code dates back to 1930 and the philosophy that inspired it was – to say it as Hart would – that of punishment and responsibility. Faced with the commission of a crime, the imposition of a penalty was inexorably triggered. The recovery of sums related to a crime was only possible and accessory.

Although the recovery of sums involved in a crime was not the main objective of the legislator of the 1930 code, the Italian penal code since its inception had provided a remedy – still present today. although much changed in its extension – to ensure that the proceeds of a crime were insured to the State. That instrument is confiscation, whose declared nature is that of a security measure. Due to the fact that the nature of an institution characterizes its functioning, it is necessary to open a brief parenthesis to explain what security measures are. It is necessary to take a step back and return to the cultural climate in Italy in the early 1900s, or shortly before the code, that lives even today, was issued. In that period, two different criminological schools clashed in the Italian cultural climate: the Classical School and the Positive School, which had two visions, not opposed and irreconcilable, but undoubtedly different of criminal law and especially of the punitive system. The Classical School is based on rationalistic and natural law principles of Enlightenment origin. For the Classical School, the crime is a legal entity to be analyzed as an empirical-social phenomenon that arises from the free will of a subject. Man has free will, therefore he chooses to commit crime following a rational evaluation of disadvantages and benefits and the sanction must therefore be

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proportionate to the evil he has committed, in an essentially retributive perspective. An exponent of the classical school is Carrara, author of the Program of Criminal Law, a fundamental work for Italian criminal lawyers.

On the other hand, the Positive school has its roots in methodological Positivism and believed that the act of committing a crime was the result of various reasons: anthropological, family and especially social. A sort of determinism that focused more on the offender than on the crime. Exponents of this school were Enrico Ferri and the famous Cesare Lombroso. It is clear that this diversity of approach has major implications on the legitimacy of punishment because for the classical school, punishment was the consequence of the evil committed; for the positive school, punishment had to remove the causes that had led to the crime and had to be based on social dangerousness. Social dangerousness, a flexible concept and not easily identifiable, was defined in the penal code as the previous commission of a crime combined with the probability that the subject would commit other crimes.

Well, faced with this dichotomy, the penal code has attempted a conciliation, which has materialized in the double sanctioning track, composed of penalties that respond to the need for retribution, and security measures, which respond to therapeutic or social security needs. Confiscation is a security measure and this makes us understand that it responds to a partially sanctioning need but above all to social defense: it wants to eliminate those elements that present an intrinsic dangerousness, such as the things that were used to commit the crime or that what are the product of it. In fact, confiscation is the only patrimonial security measure (the others are personal or real) and is governed by article 240 of the penal code. It is worth clarifying where this rule is placed within the code. This article is the rule that closes the first book of the Italian penal code, which is the one that deals with crimes in general: describes all the elements that make up the crime and its forms of manifestation. And this means that the scope of Article 240 is a general scope, it means that it applies to all types of crimes that are identified in the second book of the Italian penal code, which is the one that deals with crimes in particular. Article 240 therefore ends the general part of the code and is placed at the end of the security measures which, being an element of the so-called double track, are located immediately after the penalties.

II. The elements of confiscation

Confiscation consists in the expropriation in favor of the State of the things that were used or intended to commit the crime or that represent the product, profit or price of the crime or even of the things whose manufacture, use, possession or alienation constitutes a crime. The things that were used or intended to commit the crime are, for example, the tools that were used for breaking in during a burglary. The product or price of the crime are the profits that the criminal has derived from the crime itself. And the things whose manufacture, use or possession or alienation constitutes a crime are, for instance, weapons or counterfeit coins[1]. It is clear that this rule was not directly aimed at recovering the sums related to a crime but to ensure that what was, in a broad sense, connected to the crime could no longer harm society. However, the idea of recovering the proceeds of the crime itself was present in the part relating to the

[1] For a complete analysis of the elements of the confiscation, see A. Alessandri, *Confisca nel diritto penale*, in Digesto delle discipline penalistiche, III, Torino, 1989.

product of the crime. In fact, confiscation consists in a forced transfer to the State of an asset, or a set of assets, in some way related to the commission of a crime and the transfer effect occurs regardless of the will of the interested parts. Confiscation is an irrevocable and instantaneous measure and it's permanent: it cannot be revoked, it cannot be modified, even in the case of repeal or declaration of unconstitutionality of a criminal law.

So the idea of recovering the profits of crime in the 1930 code was only outlined and was just a background to the aspect related to social dangerousness, as logical for a security measure. Of course, confiscation is a particular security measure because it is independent of the requirement of the perpetrator's social dangerousness. Dangerousness for confiscation is objective and not subjective: it is not so much a matter of limiting the possibility that a subject who has already committed crimes would commit other crimes again, but of limiting the intrinsic dangerousness of certain objects connected to the commission of the crime. Furthermore, while other security measures are revocable when the conditions of social dangerousness of the perpetrator cease to exist, as I said earlier, confiscation is an irrevocable provision and, in fact, is based on objective dangerousness. For this reason, confiscation is a *sui generis* sanction and not a security measure.

Confiscation can be optional or mandatory[2]: this can be deduced from the wording of the law which alternates "confiscation can be ordered" and "confiscation is always ordered". The confiscation of things that were intended or served to commit the crime, for instance: the means of execution of the crime and the confiscation of the things that are the product or profit thereof, is optional. The confiscation of things that constitute the price of the crime or the things whose manufacture, use, carrying, possession or alienation constitutes a crime is mandatory.

At this point, in order to establish the scope of operation of one or the other type of confiscation, it is important to identify the exact scope of the concepts of 'product', 'price' and 'profit' of the crime. "Product" are all the material things that originate from the crime itself; "price" are the sums of money or other benefits given or promised as compensation for carrying out the crime. More controversial is the notion of "profit", which we can summarise as the indirect economic profit, that is what can be obtained from the crime after transforming the product. Narrowing the field to the actual recovery, this involves the product or the profit of the crime and the price of the crime, but only for the price of the crime is confiscation mandatory, while in other cases it is only optional and therefore depends on the free conviction of the judge. It will be the judge, on the basis of the regulatory wording "may order confiscation", to decide how to act: whether to confiscate the product or the profit of the crime or leave them at the disposal of the offender. It is immediately clear that in this way the recovery by the State is only residual: after all, this was not the main objective of the legislator of 1930.

III. New forms of confiscation

However, over time, social and legal sensitivity has changed. Not only has the punitive prison sanction gone from being considered the solution to all evils to constituting a problem itself and therefore requiring other alternative sanctions. But what is more

[2] About mandatory confiscation, see O. Forlenza, *Confisca obbligatoria in caso di condanna definitiva*, in Guida al diritto, no. 42, 2000, p. 53 and the following.

significant is that the European Community[3], initially only in the field of environmental criminal law, but then with a general extension, has begun to introduce other sanctioning systems. Among these, depriving the offender of the gain he obtained from the crime has primary importance[4], for this reason the European Community has proposed, among other instruments, that "whoever commits a crime pays". The idea was born with "whoever pollutes pays" but has now taken on a general value. The logical basis is that the perpetrator is deprived of everything he has obtained through the crime, otherwise no restorative sanction would make sense. If the offender can keep what he has obtained from the crime, any restorative sanction would be nullified.

The idea of the need to recover the proceeds of crime has thus become established and therefore the legislator has posed the intent of extending confiscation not only to the things linked to the crime by a direct etiological link but also to the same amount in the absence of any proof of a relationship of pertinence between the assets seized and the illegal act to which the conviction refers. This is how confiscation by equivalent was born[5], whose logical and legal basis is constituted by the failure to identify and seize the assets that physically constitute the price or profit of the crime. This is a confiscation that has an undisputed capacity to deter the repetition of the crime and that has not been introduced in general but only for individual types of crimes, including, first of all, usury. If confiscation is already a hybrid institution aimed at pursuing various objectives, confiscation by equivalent has particularities that make it difficult to place it in a dogmatic category free from contamination. The various types of confiscation by equivalent all have a common purpose, that is to neutralize the economic benefits deriving from the criminal activity even when, for various reasons, there is no concrete possibility of materially finding, in the assets of the offender, the specific economic entity that he has directly obtained from the commission of the crime. The fact that the legislator has not modified art. 240 of the Criminal Code but has inserted the possibility of confiscation by equivalent only with reference to certain crimes makes the regulatory technique completely peculiar and casts doubt on the nature of the security measure.

The nature seems to become predominantly punitive[6], because confiscation by equivalent is resolved in a form of public removal to compensate for unlawful acts. But this repression has particular aspects: it is not a punishment tout court but a punishment that eliminates the advantages of the crime, with notable social, preventive and even educational implications for the offender and, through him, for the entire community. Which, all in all, includes confiscation by equivalent among the security measures, albeit with different accents. Moreover, the proliferation of figures has gone, in our system, hand in hand with a more or less explicit diversification of the sanctioning models. So, confiscation by equivalent is an institution with a hybrid and multifunctional nature.

Even the latest reform that has affected the criminal process in Italy, namely the reform of law 134 of 2021[7], has greatly extended the execution of confiscation by

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[3] See G. Di Chiara, *Modelli e standard probatori in tema di confisca dei proventi del reato nello "spazio giudiziario europeo": problemi e prospettive*, in Foro it., 2002, p. 263 and the following.

[4] G. Melillo, *Il congelamento dei beni a fine di confisca o di prova nel sistema della cooperazione giudiziaria europea*, in Questione Giustizia, 2002, p. 99 and the following.

[5] See D. Fondaroli, *Le ipotesi speciali di confisca nel sistema penale. Ablazione patrimoniale, criminalità economica, responsabilità delle persone fisiche e giuridiche*, Bologna, 2007, p. 120.

[6] See L. Baron, *La confisca con "condanna sostanziale": verso un nuovo "principio generale" in materia ablatoria?*, in Cass. Penale, 2020, p. 4799.

[7] For some example, see V. Mongillo, *Confisca proteiforme e nuove frontiere della ragionevolezza costituzionale. Il banco di prova degli abusi di mercato*, in Giurisprudenza costituzionale, 2019, p. 3343.

equivalent. Equivalent confiscation is fully part of the development of a modern criminal law capable of overcoming the primacy of the prison sentence and, at the same time, effectively countering the collective and economic dimension of criminal phenomena[8]. With confiscation by equivalent there is always a link with the crime, because the seized assets must be the equivalent of those that constituted the profit or the product or the price of crime. This means that the crime is ascertained and so is the guilt of its perpetrator. Traditional confiscation and confiscation by equivalent respect the ascertainment of the crime and its perpetrator. What becomes essential is the meaning of "equivalence": civil law doctrine refers to the restoration of a pre-existing balance disturbed by the illicit conduct of a subject. That way, the equivalent is nothing more than a mechanism to re-establish the balance that the crime has broken: just as compensation tends to balance the disvalue caused to the damaged assets, as well as the consequences that such disvalue has produced, confiscation tends to coincide with the value of the illicitly acquired assets. There remains the problem of determining the value, which is not a natural fact but rather the stipulated result of the application of certain criteria conceived for the achievement of social purposes.

IV. A doubtful confiscation

But the maximum dissuasive effectiveness is that of the confiscation of assets suspected of illicit origin[9]. Which is even independent of the crime, so far from the crime that it is a measure of so-called prevention. Preventive measures, as well as all preventive criminal justice, are very welcome to politicians because criminal prevention has, by definition, the ability to generate consensus, even when statistical data testify to their poor success[10]. The problem is that preventive limitations of any freedom, even that of property, are very far from liberal principles and create para-incriminating norms that replace criminal ones, producing the same punitive effect, without ascertain either the fact of the crime or the responsibility of its perpetrator[11]. It is therefore necessary to be very careful to implement a prevention that must respect the principles that govern criminal law, where the foundation is the ascertainment of the fact of crime and, therefore, the compression of the individual's freedoms cannot be allowed only for indicators of social dangerousness not ascertained. The European Community, which in a proposed directive of 2022 sets the objective of identifying, freezing and managing assets by expanding the possibilities of confiscation and requires the introduction of a traditional non-conviction based confiscation[12], has an ambiguous position because the Cavallotti appeal is still pending at the ECHR, where the ECHR would seem to consider the

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[8] In the same sense, M. Donini, *Le due anime della riparazione come alternativa alla pena-castigo: riparazione prestazionale vs. riparazione interpersonale*, in Cass. Penale, 2022, p. 2027.

[9] On the extent of preventive confiscation, see V. Manes, *L'ultimo imperativo della politica criminale: nullum crimen sine confiscatione*, in Rivista italiana di diritto e procedura penale, 2015, p. 1259.

[10] See A.M. Maugeri, *L'irrefrenabile tendenza espansiva della confisca quale strumento di lotta contro la criminalità organizzata*, in *Criminalità organizzata e sfruttamento delle risorse territoriali, in osservatorio permanente sulla criminalità organizzata* a cura di Barillaro, Milano, 2004, p. 97.

[11] See K. Gavrysh, *Il principio di proporzionalità e la confisca di prevenzione nella prassi della Corte europea dei Diritti dell'uomo*, in Cass. Pen., 2022, p. 3720.

[12] E. Zuffada, *La Corte europea giudica compatibile con la convenzione la confisca del profitto del reato anche in assenza di condanna*, in Riv.it. Dir e proc pen, 2020, p. 380.

application of confiscation in the absence of a formal finding of guilt a violation of the presumption of innocence. And so we are faced with contradictory pressures: on the one hand, the Union Europe is pushing for a greater diffusion of preventive confiscation tools such as preventive measures, in which Italy has played a pioneering role. On the other hand, the Europe of the ECHR could narrow its scrutiny and put a stop to the use of non-conviction confiscation. This road is still under construction. But the doubt concerns confiscation as a preventive measure[13], which is independent of the crime. The path is already marked for the confiscation that follows a crime, that it is very important for the purposes of preventing further crimes but also for sanctioning purposes, that the illicit act is not lucrative and that the illicitly received goes into the coffers of the State. As an effect of justice but also as a new way of understanding punishment, far and different from that which inspired the Italian penal code of 1930.

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Hearing of The Witnesses – Psychological and Evidence Value of The Statement Given in The Pretrial Procedure

Vesna Trajanovska[*]
Natasha Peovska[**]

Abstract

Witnesses are still important and very common evidence in criminal procedure. In the case of subjective evidence, it is very important to assess the credibility of the testimony correctly. The authorized official (criminalist, judge or public prosecutor) in the pretrial procedure has an extremely difficult task in evaluating the objectivity of what the witness presents during his hearing. Therefore, in addition to legal, the authorized official must also have extra-legal knowledge. To be able to conduct the hearing successfully, the authors indicate the importance of knowing the psychological processes and tactics of the authorized persons when taking the testimony from the witnesses.

At the end of this paper, the authors analyze the problems related to the probative value of the statements given in the pretrial procedure, the use and the evidence value of the statements of the witnesses given to the public prosecutor in the pretrial procedure that are used in cases of inconsistency between this statement and the statement of the witness given during the main hearing. Although the purpose of the existing Law on Criminal Procedure is primarily to present all the evidence immediately at the adversarial and public hearing, it must also provide exceptions from the direct presentation of the evidence.

Keywords: *criminal procedure, examination, psychology, witness, reliability of testimony, the probative value of the statement.*

I. Introduction

The subject of the testimony is a criminal event that happened in the past, and it refers to the crime and the perpetrator. The criminal event is fully or partially understood by the witness, which is why the criminalist has the task of separating the information obtained from the testimony into important and unimportant for the criminal procedure.

Any person can be a witness regardless of his characteristics (psychological, physical, and age). A witness is any person who was able to observe the occurrence of the crime in a certain way, to reproduce the observations by way of memory during

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the procedure itself. When it comes to the age of the witness, it is irrelevant because both minors and adults can appear as witnesses. Also, children can be questioned, taking into account their psychological development as well as the nature of the subject for which they have to testify[1].

One of the criteria for dividing the witnesses is the way they perceived (learned about) the specific criminal event. In connection with the above, we divide the witnesses into those who testify about the criminal event based on their own observations *causu criminalis* or so-called, real witnesses and witnesses who came to the knowledge of a certain criminal event through an indirect way by hearing from other people which is why we call such witnesses indirect witnesses or hearsay witnesses.

Personal evidence arises as a result of observation (perception) and psychological survival of the persons who were in contact with the commission of the crime (witnesses, the injured as a special category of witnesses, and the suspect in the pretrial or the accused in the criminal procedure). The evidentiary information from these persons is taken by way of hearing. This type of evidentiary information is primarily conditioned by the possibility of noticing (perceiving), remembering and forgetting, and reproducing what was observed, which on the other hand is directly conditioned by the tactics of questioning to obtain a true statement. Apart from criminalistic tactics, forensic psychology also deals with this issue.

Signals, as carriers of criminal information, arise when a crime is committed, exist in the outside world, and contain information about both the crime and the perpetrator. Crime, as a real phenomenon that surrounds us, is not in a static state, but in rapid and constant disintegration and disorientation. From the moment when the signals of the committed crime have arisen, they begin to change, transform, and disappear, regardless of whether they are personal or material carriers of information. Psychic carriers of information, that is, memories fade and change over time. Because of this, it is necessary to take criminal measures following the principle of speed and surprise, to successfully and promptly discover and fix criminal information, because only with such action can their loss and destruction be prevented[2].

The information obtained by questioning the victim of the crime, the witness, the perpetrator, or the defendant in a situation given by law, represents a solid basis for discovering and proving the crime. Even though we are talking about the hearing of witnesses, the victim or the perpetrator, the general criminal rules that are implemented in the investigative procedure must be respected. We must mention that no precisely defined template should be used by operatives in the investigative procedure. This finding is supported by the arguments that criminal acts are grouped into several subgroups, the perpetrators of them have different character traits intellectual power, and different interests.

During the hearing of the mentioned group of persons, we meet two parties, an examiner (an authorized official) and a respondent who can appear as a suspect, witness, and victim in the pretrial procedure.

In this process of examination, an interaction is established between the participants (the respondent and the subject), which is verbal, i.e. primary, on which the secondary part is added, which is the psychosomatic behavior of the respondent (nervous behavior,

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[1] N. Rot, *Opšta psihologija [General psychology]*, Beograd, 1974, p. 115.

[2] V. Pivovarov, *Istrazhna Kriminalistika [Criminal Investigation],* Skopje, 2017, p. 4.

dry throat while giving answers, trembling of the body and voice, wandering gaze, redness of the face etc.), which allows the examiner to build the most fruitful examination tactics[3].

II. Legal basis for examination of witnesses in pretrial procedure

Although the purpose of the existing Law on Criminal Procedure is primarily to present all the evidence immediately at the adversarial and public hearing, it must also provide exceptions to the direct presentation of the evidence. Depending on the legal situation in which the person suspected of committing the crime is, or if an accusation has been brought against him, the examination of the suspect is carried out by the criminal investigator in the pretrial procedure.

According to the LCP, a witness (testis) is any natural person, a person who is obliged in the criminal procedure to present his sensory observations about all the facts that are the subject of the proof and are of importance for the criminal event. The obligation to testify arises with the decision of the court and not with the proposal of one of the parties in the procedure.

The statement given by the witness is called testimony, by which the witness conveys his immediate observations about the facts of the past that he knew (perceived), with the help of the senses of touch (for blind people), smell, hearing, and sight, which relate to on a certain criminal event. A witness statement is a statement made by a person other than the accused, given to the authority that conducts the criminal proceedings, the same to note a fact from the past, a fact that is important for the specific case and to prove that fact[4].

All those persons who are supposed to know (personal or transmitted by another person) and who relate to the crime (perpetrator, circumstances for preparation, execution, and concealment of the same) can be called witnesses. The injured party, the injured party as plaintiff, and the private plaintiff, also according to Art. 217 paragraph 2, may be heard as a witness. Even in certain situations, the other persons participating in the procedure, such as the prosecutor, the judge, and the lay judge, may be questioned as witnesses, provided that after giving their testimony as witnesses, they are exempted from further proceedings. Age, gender, social status, and business ability of persons cannot be an obstacle for them to be called to testify about a certain criminal event[5].

The duty to testify is a legally constituted obligation of all citizens, both domestic and foreign, residing in the territory of the Republic of Macedonia unless they are exempted from the obligation to testify by special legal provisions. The obligation to testify covers the following elements: the duty of the witness to appear on the summons of the court and to give his testimony.

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[3] Ž. Aleksić, *Kriminalistika [Criminalistics]*. Beograd, 1982 p. 307.

[4] T. Markovikj, *Savremena tehnika istrazhivanja krivichnih dela [Modern techniques of criminal investigation*], Zagreb, 1977.

[5] Z. Milovanović, *Starosna doba svedoka kao elemenat za ocenu dokazne vrednosti prepoznavanja u krivičnom postupku. Anali Pravnog fakulteta u Beogradu [The age of the witness as an element for evaluating the probative value of recognition in criminal proceedings. Annals of the Faculty of Law in Belgrade],* 1986, pp. 34 (1-3).

During the pretrial procedure (pre-investigation and investigation), the judicial police and the public prosecutor are authorized to summon persons. According to Article 43 of the Law on Police and Article 12 of the rulebook on the way of performing police work, within the framework of police investigations, the judicial police, assuming that a certain person can give notice of facts that are important for a certain criminal event, summons the same with a summons.

The police are authorized in writing with an invitation to summon citizens to give the necessary statements necessary for the performance of police work. The written summons contains the name and surname of the person being summoned, title, place, and address of the headquarters of the organizational unit of the Police where the person is summoned, reasons for the summons, place and time of the summons, as well as instruction on the right to a defense attorney in the police procedure, as well as the consequences if he does not respond to the invitation. The subpoenaed person can be forcibly brought only by a court order and only when he refuses to respond to a duly delivered summons in which he was warned of the possibility of forced delivery and when he does not justify his non-appearance.

The person who responds to the summons or was forcibly brought, and refused to give a statement, cannot be summoned again for the same reasons. The person who is summoned or forcibly brought is instructed about the rights from Article 34 of this law, as well as about the fact that he is not deprived of his liberty and that he can leave after giving or refusing to give a statement. For the invitation and conversation, the police officer allows the invited person to make the statement by hand in a form previously prescribed by the Minister of the Interior or, if the official enters the statement in the form, reads it out loud and finally the respondent signs it. Minors are invited by submitting a written invitation to their parents or guardians.

The Law on criminal procedure obliges the justice police, as soon as it assesses that the citizen called to give a statement can come forward as a suspect, to immediately notify the public prosecutor[6].

The witness is obliged to give a statement and speak only the truth without concealing the facts known to him, and if he gives a false statement, he commits a crime – perjury. A witness is not required to testify to certain questions only if the answers given would cause embarrassment or material damage to him or a member of his family.

The accused as a witness has the legal opportunity to defend himself by remaining silent. Only in exceptional situations, the first accused may appear as a witness when his capacity as an accused ceases or when the accused has been convicted by a final court judgment in a case in which several co-perpetrators still have the capacity of an accused. The accused may, of course, voluntarily waive any of the rights, but his examination cannot begin unless the statement that he waives any of the rights is recorded and signed by him. The accused cannot waive the right to counsel if the defense is mandatory.

At the same time, the Criminal Procedure Code provides the possibility of recording the conversations of the suspect. Namely, paragraph 1 of Art. 207 stipulates that the examination of the accused by the public prosecutor or in his presence can be recorded

[6] Criminal Procedure Law of the Republic of North Macedonia, Official Gazette no. 150 from 18 November 2010, Article 279.

with a video-audio recording device. With this, they will be able to be used as evidence in the proceedings for the first time[7].

The European Court of Human Rights particularly takes into account whether the defense has been granted the right to question the witness during the investigation or at a later stage of the proceedings[8]. When the accused did not have the opportunity to ask questions of the witness, in the investigation or at the main trial, and the verdict is based exclusively or on the decisive degree of the testimony of the witness, then violated the rights of the defense to a fair trial, guaranteed by the provisions of Article 6 paragraph 1 and 3 (d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms[9].

The testimony of a witness given before the main trial cannot, as a rule, be used as evidence at the main trial, it is necessary for the party or the defense to prove to the court in advance that they have made efforts to ensure attendance. to the witness. and that despite that he remained unavailable

A certain group of persons, according to the Criminal Procedure Code, shall not be witnesses, namely:

- a person who would violate the duty of keeping a state or a military secret if he or she gives a statement, unless the competent entity relieves him or her of that duty;
- the defense counsel of the defendant on anything confided by the defendant in him or her as counsel, unless the defendant himself or herself demands it;
- a person who would violate the duty of keeping a business secret if he or she gives a statement, regarding anything learned during the practicing of his or her profession (religious confessor, attorney and physician), unless the person has been relieved of such a duty by a separate regulation or by a written statement, i.e. or by a verbal statement given on record by the person for whose benefit the keeping of the secret was instituted, i.e. by such a statement by his or her legal successor;
- a juvenile person who, bearing mind his or her age and mental development is not capable of understanding the significance of his or her right not to testify, unless the defendant himself or herself demands it; and
- any person who is not capable of testifying at all, due to his or her mental or physical illness or age[10].

Also, the Criminal Procedure Law provides for a group of persons who are excused from the duty to testify, that is, the testimony depends on their will. This group of persons consists of:

- the marital and illegitimate partner of the defendant;
- any blood relatives of the defendant in a direct line, any relatives in an indirect line up to the third degree, as well as in-law relatives up to the second degree; and
- an adopted child or a foster parent of the defendant[11].

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[7] G. Kalajdiev, *Kon predlog zakon za izmeni i dopolnuvanje na zakonot za policija, Makedonska revizja za kazneno pravo i kriminoloogija [On the draft law for amendments and additions to the Law on Police, Macedonian Review of Criminal Law and Criminology]* no.1-2, 2011/2012.

[8] *Ludi v. Switzerland*, 12433/86 of June 15, 1992.

[9] *A.G. v. Sweden,* 1315/09, 10 January 2012.

[10] Criminal Procedure Law of the Republic of North Macedonia, Article 213.

[11] Criminal Procedure Law of the Republic of North Macedonia, Article 214.

III. Psychology, strategies and tactics of the witness hearing

Witnesses have always been an important and often-used evidence tool in criminal proceedings. They have not lost their importance even today, despite the knowledge that they can represent a rather unreliable source of information. Namely, witnesses are in the group of so-called subjective means of evidence, which rest on the testimony of the person about the facts perceived by the senses. With such evidentiary means, it is difficult to avoid a certain amount of subjectivism, which permeates both the stage of the interviewee's statement and the stage of assessing his credibility. If witnesses continue to be one of the most frequently used means of evidence as sources of evidence in criminal proceedings, there is nothing left but to use the development of science to improve this evidence and neutralize its negative aspects. In this regard, we can rely on the previous achievements of forensic psychology, other psychological disciplines, logic, and criminology[12].

To be able to successfully conduct the examination, the authorized person in the pretrial procedure should first know the psychology of testimony, the methods of criminal psychology, and the general rules for conducting a conversation, and for all of the above, comprehensive preparation is required. Episodic memory is the basis for quality reproduction of what was perceived (observed) during the occurrence of a criminal event. Episodic memory is a psychological process that consists of declarative long-term memory that refers to the temporal determination of when the event occurred (episodes) and their temporal and spatial connection determining where and when some information is perceived. The problem of testimony is closely related to the properties of episodic memory[13].

a) Collecting data about the person to be interviewed is one of the most important elements in building a further strategy for conducting the interview. The data about the person with whom he is having a conversation is part of the preparatory stage for conducting a conversation, and the same is collected in an operational way (data about his personal life, his family, communication with other people, his habits and inclinations etc.) as well as by checking in the records of the internal affairs authority if the person with whom it is necessary to have an interview is already recorded in such records. A big drawback is the lack of records for persons with whom the internal affairs authority has already had a conversation on another basis, that is, data on their character traits. From such records of already registered persons, we can only obtain data about their former criminal activity, criminal communication with co-perpetrators, the way of committing crimes, the specificity for committing certain types of crimes etc. Such extensive preparation represents a solid foundation. for obtaining a successful representation for the future interlocutor and thus a basis for creating questions for which there is an interest in being fully or partially clarified.

б) In the preparatory stage, the second moment is the study of the specific criminal case, and with that, the interests of the operational worker are defined for clarifying a certain segment of the criminal event or the entire criminal event. The study of the

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[12] T. Markovikj, *Savremena tehnika istrazhivanja krivichnih dela [Modern techniques of criminal investigation],* Zagreb.

[13] M. Aćimović, *Uvod u psihologiju krivičnog postupka [Introduction to the psychology of criminal procedure],* Beograd, 1979, p. 32.

subject refers to all the verbal and material evidence collected up to that point, and after their study, the unclear points are specified which should be clarified or specified through the conversation.

The tactic of interviewing persons is divided into three successive stages, namely:

a) Stage of getting to know the person or introductory stage,

b) Stage of free presentation of the examined person, and

c) Stage of asking questions or stage of reply[14].

a) The purpose of the first stage of getting to know each other is for the examiner to establish a seemingly informal dialogue with the respondent authoritatively so that the respondent would relax in the upcoming stages. Thanks to the quality preparation for the hearing and previously provided knowledge about the person of the respondent, the examiner at this stage should act in a friendly tone, not raising his voice, starting the dialogue with general facts about the respondent himself, his family and the environment, indicating that he is experienced with the condition in which the respondent is, that is, that every person can be found in his condition. At this stage, it is necessary to gain trust on the part of the person being examined, because each person in contact with the examiner, represents a newly created situation in which the subject experiences stress that creates mistrust, nervousness, or restraint, which in the further examination procedure would certainly represent a problem for obtaining a quality and truthful statement, which is essentially the purpose of the hearing. The examinee must feel that he is being given sufficient and due attention by the examiner. The examiner shouldn't act arrogantly, address the respondent in a high-pitched tone, behave rigidly – bureaucratically, not to issue orders, and not to show excessive severity to the respondent. Such behavior in the respondent causes the opposite effects aimed at creating mistrust towards the examiner and on the other hand disinterest in cooperation during the examination.

Apart from gaining trust, the examiner with the initially established dialogue should also understand the intellectual capabilities of the respondent, his character traits, and his attitude towards the criminal event and the participants in it, but the most important thing is to direct the respondent in the direction of speaking only the truth. Even when establishing the first verbal contact, the examiner should monitor the psychological behavior of the examined person (trembling, rapid blinking of the eyes, wandering gaze, reddening of the face, cracking of fingers, trembling of the voice, sweating etc., as symptoms of internal psychological reaction expressed by the examined person), as an external manifestation of the respondent that may appear due to fear of false answers that he is preparing to give in the next stage of examination or fear of the newly created situation. For such symptoms that appear in the examinee, the examiner should analyze them and then come to an assessment of what they are due to.

Only after the respondent gains the trust of the examiner, the second stage of free exposure of the examined person can begin. We could not put this introductory stage into a template that would give the expected results, but the examiner himself should have a sense of finishing the first stage and starting with the stage of free presentation, which is a basic prerequisite for achieving the expected results of the hearing.

It is recommended, if the conditions allow, to have two examiners present from the beginning during the examination of persons, for the reasons that the second

[14] V. Pivovarov, *Istrazhna Kriminalistika [Investigative Criminalistics],* Skopje 2017 god. p. 4.

examiner can fully monitor the manifestation of the behavior of the person being examined.

In this stage, the examiner first determines the identity of the summoned person and the capacity in which he is summoned (witness, victim, suspect in pretrial proceedings, or defendant in criminal proceedings)

b) The stage of free presentation begins at the moment when the examiner judges that the first stage of getting to know the person has been completed, and that he is ready for the further course of the examination.

In the introductory part of the stage of free presentation, the respondent is asked general and neutral questions after which he is instructed to continue with free presentation, that is, to interpret with his vision what he perceived about a specific criminal event. The examiner is obliged to carefully follow the presentation of the person being examined, and if the same is logical and does not contradict the previously collected material and verbal evidence relating to the specific criminal event, it is not advisable to interfere with the presentation of the person being examined. Otherwise, if the examined person interprets illogical data that is in contradiction with the previously collected material and verbal evidence relating to a specific criminal event, the examiner, by interrupting the presentation of the respondent, will try to indicate to the respondent in an indirect way that he does not speak the truth. If there are gaps in the presentation of the examined person regarding certain facts, then the examiner will refresh the respondent's memory with guiding questions. In situations where the examined person talks in general about the criminal event, which avoids the important moments that happened during the commission of the crime, and the examiner assumes that the subject knows those facts, then the examiner should react with questions that will reduce the space for an extensive (irrelevant) presentation, that is, they will return it to the desired direction of explaining specific facts. In the pretrial procedure, in a given tactical situation, the examined person is allowed to fully present his statement even though he is not telling the truth to gain the impression that the interrogator is confident in his statement.

In this stage of the examination, the examiner acts seemingly passively, expressing attention to the statement of the examined, and in essence, he makes an additional assessment of the personality of the examined, and on the other hand, he considers whether the previously repared questions for the third stage of the examination, the "replica stage", will insert new ones. questions that he did not plan and that arose from the examinee's free presentation. The examiner in a stage must write notes in his notebook, which will be of invaluable use in the next stage.

The hearing at this stage can pass in a non-conflict situation, when the examiner completely without remarks and guiding questions allows the examinee to present his presentation, and a conflict situation in which the examiner, due to the assessment made, interrupts the examinee's presentation with remarks and guiding questions. Which tactic the examiner will impose depends primarily on two factors. First, the assessment made by the examiner, and second, the course of the examinee's presentation, which can be true or false.

The examiner in this stage, the stage of free presentation of the subject, can apply the tactic of requesting a re-examination by the subject (if he doubts what was expressed by the subject), to point out the contradictions through re-exposing the subject. in his presentation.

The stage of asking questions or the so-called replica stage is the last in the examination of a person. After the examiner's assessment, the stage of free presentation ends, after which the examinee continues the course of the hearing by asking additional, reminders, control, or clarifying questions. The purpose of these questions is to supplement or check the statement given during the free presentation of the respondent, as well as a more detailed explanation of circumstances and facts that were unclear during the presentation of the examined person in the previous stage of free presentation or were not mentioned at all, to remind the subject of a fact that the examiner assumes that the subject knows that fact keeps silent, as well as to establish or remove possible misconceptions that exist among the examiner[15].

The questions that the examiner asks the respondent must meet the following criteria:

– to be clear,
– to be precise,
– not to be suggestive,
– to be understandable for the respondent,
– to have a chronological order, that is, to be in one whole.

When conducting the conversation, it is recommended that the examiner, as far as possible, conduct the conversation in the dialect used by the subject and after the previously made assessment for the subject and ask the questions depending on the intellectual development of the same.

The examiner shouldn't address the respondent in a loud and insulting tone, to ask one question that requires multiple answers. Also, the examiner should take into account the time factor, that is, by following the respondent (while conducting the conversation) to assess whether he is tired and if it is evident time to stop the hearing. After the break, the examiner continues the examination by presenting his summary of the dialogue conducted until then with the subject and even then continues with questions that follow and were previously prepared. If the examiner judges that there is no opportunity to take a break, then he continues the examination by regaining the concentration of the examinee by asking easy questions.

After a preliminary assessment, the hearing can be conducted by two examiners. Such a tactical solution has its advantages in that one examiner can be active (asks questions and leads the dialogue) and the second passive, in charge of observing the examinee, that is, his visible external manifestations, which are an expression of his inner psychological development. Also, both examiners can be active in such a way that one is the "strict" and the second is the "good" examiner, leading the subject to tell the truth to the good examiner, but always the passive examiner assumes the role of observing the external manifestations of the examinee[16].

The subject's internal mental restlessness manifests itself through increased body motility, striking gesticulation, playing of the facial muscles, vague gaze, increased sweating, drying of the lips, constant swallowing of saliva, uneven breathing, and changes in the intonation of the voice. If, during the conversation, the person under investigation manifests some of the visible signs that we listed earlier due to inner turmoil, the tactics of further conversation should be adjusted to the newly created situation.

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[15] R. Grasberger, *Psihologija krivičnog postupka (prevod) [Psychology of criminal procedure (translation)],* Sarajevo, 1958, p. 67.

[16] V. Vodinelić, *Kriminalistika [Criminalistics],* Beograd, Savremena administracija, 1982.

In certain situations when the examiner decides it is possible for the stage of free presentation and the stage of asking questions to take place simultaneously, i.e. combined. This method of combined examination is applied in situations where the examiner expects the respondent for various objective or subjective reasons to give a false statement to protect himself or another person[17].

After each hearing of a person, it is necessary to analyze the recorded material from the hearing, using the comparative method to compare it with the material and verbal evidence that was collected up to the time of the hearing to determine whether the hearing has clarified all the previously foreseen circumstances and facts under which the criminal event took place, i.e. whether the purpose of the hearing was achieved. The examined person is asked to wait for a certain period after the initial hearing, and if certain facts remain unclear during the initial hearing, the conversation is continued with the respondent to clarify all the ambiguities related to his role as well as the actions of the other participants. in the criminal event. The fixed content should be brought to the attention of the respondent and he should be asked to state his objections, and then, if there are any, to document them.

When interrogating persons, the respondent should always take into account the legal position of the person being examined, i.e. whether it is a witness, victim, suspect in the pretrial procedure, or the accused in the criminal procedure[18].

IV. Probative value of statements given in the pretrial procedure as the exception from direct taking of evidence

Otherwise, our theory (and practice), statements obtained by examining persons by the police, and in connection with the provision that the police may not question persons in the capacity of accused witnesses or experts, treated these statements as an informal information gathering from the citizens, which is applied before the start of the formal procedure, and thus did not consider them as evidence in the legal sense of the word, but only as evidence in the cognitive sense[19].

The LCP also leaves the possibility of using statements collected during the pretrial procedure, as an exception to the principle of immediacy, which remains one of the most important principles of the criminal procedure. The problem of the use and probative value of the statements given in the pretrial procedure, before the public prosecutor, arises in the interpretation and application of the provision of Art. 388 which governs the exception from the direct presentation of evidence. Namely, paragraph 2 of this article stipulates that the statements of the witnesses given in the investigative procedure and the statements collected within the framework of actions of the defense during the investigative procedure can be used during cross-examination or when refuting allegations presented or in response to a refutation, to assess the reliability of the statements made at the main hearing.

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[17] A. Hellwig, *Moderne Kriminalistik [Modern Criminalistics],* Leipzig, 1914.

[18] D. Putnik, *Sudska psihologija [Forensic psychology],* Beograd, 1962, p. 39.

[19] V. Bayer, *Jugoslavensko krivično procesno pravo, Knjiga druga: Pravo o činjenicama i njihovom utvrđivanju u krivičnom postupku, Četvrto izdanje [Yugoslav Criminal Procedure Law, Book Two: Law on facts and their determination in criminal proceedings, Fourth Edition],* Pravni fakultet u Zagrebu, 1986, pp. 109-123.

At the same time, the situations from paragraphs 3, 4, and 5 of this article are indisputable, which leaves the possibility, with the decision of the court, if after the start of the main hearing, indications appear based on which it can be concluded that the witness was exposed to violence, threats, a promise of money or another benefit so that he does not testify or falsely testify at the main hearing, the statements of the witness given before the public prosecutor in the pretrial procedure can be presented as evidence, as well as the minutes of statements given before the public prosecutor that can be presented as proof by reading or reproduction, if the person who gave the statement died, became mentally ill or, despite all the means provided by law for finding him, remained unavailable. At the same time, the situation from paragraph 3 is clear, which refers to the evidentiary hearing held when there is a danger that the evidence will not be able to be presented at the main hearing or that their presentation would be associated with difficulties and which, although it is part of the pretrial procedure, statements during this hearing are conducted according to the rules of the main hearing, so the question of their probative value does not arise further in the procedure.

The problem perceived in practice is, in fact, in the interpretation of paragraph 2 of Art. 388 and in paragraph 2 of Art. 400. So, in paragraph 2 of art. 388 provides that the statements from the investigation procedure, when they are used in cross-examination, it is to assess the reliability of the statements given at the main hearing, which is why in the application of the Criminal Procedure Code, practitioners interpret this as a ban on the statements reproduced in this way at the main hearing to base the judgment on.

Because of this, it is considered that the judges must not even allow their reading during the main hearing. But what, it seems, is not considered or is misunderstood, is paragraph 2 of Art. 400 of the Criminal Procedure Code. Namely, this article stipulates that the judgment cannot be based only on a statement made in this way. In other words, this means that the very fact that the Law says that a conviction cannot be based solely on a statement given in a pretrial proceeding before a public prosecutor, which was used during cross-examination at the main hearing, means that it allows the conviction to be is based on this statement, but with a limitation – only in case it is not the only evidence in the procedure. This is a completely justified exception, especially since it raises the question of what that procedure and that accusation would be, which would be based on only one piece of evidence, and even less if it was a statement.

From here, it is obvious that, if in addition to the statement from the pretrial procedure, which was reproduced at the main hearing, there are other pieces of evidence in the case, then there is no legal obstacle or prohibition for the court to allow the reproduction, and further take it taken into account when passing the verdict and its reasoning, according to the principle of free evaluation of the evidence and the right of the court to evaluate the existence or non-existence of the facts, which is not connected or limited by special formal evidentiary rules[20].

The 2018 Commentary of the Criminal Procedure Code, commenting on paragraph 2 of Article 388 of the Criminal Procedure Code, states: "The statements of witnesses given in a pretrial procedure before a public prosecutor and their statements made within the framework of the actions of the defense are used only to assess the reliability of their statements given during the main hearing, and that by themselves do not constitute evidence in the proceedings"[21].

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[20] Criminal Procedure Law of the Republic of North Macedonia, Article 16.

[21] G. Kalajdzhiev. G. Lazhetikj, L. Nedelkova, M. Denkovsa, M. Trombeva, T. Vitlarov, P. Jankulovska., D. Kadiev, Komentar na ZKP [Commentary on the Criminal Procedure Code], OBSE Skopje, 2018, p. 797.

On the other hand, commenting on paragraph 2 of article 400, it says: "Paragraph 2 limits the judge to base the judgment only on the statements that were derived from the principle of immediacy in the production of evidence, that is, by reading or reproducing minutes or recordings of statements that they gave the faces to one of the parties. In this sense, the judgment cannot be based only on statements of witnesses that were read at the hearing, and given before the public prosecutor, and on statements or parts of statements given in a pretrial procedure, presented during cross-examination..."

Such a comment, in other words, means that the judgment can be based on these statements in cases where they are not the only evidence on which the judgment will be based. The commentary in paragraph 2 of article 388 and paragraph 2 of article 400 are inconsistent, because in the commentary in paragraph 2 of article 388, it is said that these statements are not evidence in the proceedings, and in the commentary in paragraph 2 of article 400 it is said that the verdict can be based on them (if they are not the only evidence).

V. Conclusion

The concept of testimony can be defined as a type of statement of persons given before the police authorities in the pretrial procedure or during the judicial procedure given before the court about the perceived facts of a certain crime that happened in the past. Examining a witness is a complex action that requires the expertise and precision of the criminalist or judge and their knowledge of the psychology of testimony.

A witness is any person who, in the criminal proceedings, states his observations about facts that happened in the past, during the occurrence of a certain criminal event. The witness focuses on reporting his sensory observations, while not giving his opinion on the observed facts. The witness in pretrial proceedings is an irreplaceable source of information.

Although the purpose of the existing Criminal Procedure Law is primarily to present all evidence immediately at the adversarial and public hearing, it must also provide exceptions from direct presentation of evidence. Witnesses can be called by all those persons who should know (personally or transmitted by another person) and who relate to the crime (perpetrator, circumstances of preparation, execution, and concealment of the same). The injured party, the injured party as plaintiff and the private plaintiff, also according to Art. 217 paragraph 2, can be heard as a witness. In certain situations, other persons participating in the procedure, such as the prosecutor, the judge, and the lay judge, can be heard as witnesses, provided that after giving their testimony as witnesses, they are exempted from further proceedings.

At the same time, the Law on Criminal Procedure provides for the possibility of recording the conversations of the suspect. Namely, paragraph 1 of Art. 207 provides that the examination of the accused by the public prosecutor or in his presence can be recorded by video-audio recording. With this, for the first time, they can be used as evidence in the procedure.

To be able to successfully conduct the hearing, the authorized person in the procedure should first of all know the psychology of testimony and the tactics of application during the hearing. Collecting data about the person to be interviewed is one of the main elements in building a further strategy for conducting a conversation and gaining the interviewee's trust. The tactic of interviewing people is divided into

three successive phases, namely: The phase of getting to know the person or introductory phase, the Phase of free presentation of the person being questioned, the Phase of asking questions, or the phase of the replica.

The European Court of Human Rights especially takes into account whether the defense was granted the right to examine the witness during the investigation or at a later stage of the proceedings. When the accused did not have the opportunity to ask questions to the witness, in the investigation or the main trial, and the judgment is based exclusively or in a decisive measure on the testimony of the witness, the rights of the defense to a fair trial hearing, guaranteed by the provisions of Article 6, paragraph 1 and 3 (d) of the European Convention for Human Rights are violated.

The testimony of a witness taken before the main trial cannot by default be used as evidence at the main trial. It is necessary for the party or the defense attorney to prove to the court beforehand that they made efforts to secure the presence of the witness, and that despite this he remained unavailable. The court cannot use the witness's statement in the pretrial procedure if the witness is present at the main trial.

The new concept stipulates that the court decision will be based only on the evidence presented at the main trial so that the statements of the examined witnesses and the accused provided during the pretrial procedure can only be used for presentation during the main trial if these persons do not give a statement or change their statements. An exception is provided only for the evidence provided at an evidentiary hearing, where those persons who cannot be heard during the main trial will be heard as witnesses. It is obvious from the above that the probative value of the statements obtained by the witnesses heard in the pretrial procedure is not the same as the probative value of the statements of the witnesses given at the main hearing or the evidentiary hearing.

Finally, the problems surrounding the probative value of the statements made in the procedure and the use and evidentiary value of the statements made before the public prosecutor in the procedure that is used in cases of inconsistency between this statement and the witness's statement are analyzed at the main hearing.

It is evident from practice the need for further harmonization of the provisions of the Law on Criminal Procedure that refer to the use and probative value of the statements made in the pretrial procedure and refer to the exceptions to the principle of immediacy when presenting the evidence during the main hearing. At the same time, it is necessary to clarify the evidentiary value of the statements of the witnesses given before the public prosecutor in the pretriale procedure, which is used in cases of inconsistency between this statement and the statement of the witness given at the main hearing as well as the possibility of an independent judicial assessment of the reliability of this evidence and finally basing the verdict on these statements. In practice, it creates confusion, and on the other hand, the fact is that testimony used in rebuttal to assess credibility is derivative evidence, which is further used by the court according to its free judicial conviction and ultimately is testimony used. towards the (non-)existence of legally relevant facts for making the verdict has been established.

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The Significance of Negative Clues

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Abstract

The study of "The significance of negative clues" emphasizes the significance of negative clues – what is missing from a crime scene – in criminal investigations. It argues that the absence of certain evidence can sometimes reveal more about the crime than what is present. For example, in a child murder case, the lack of bloodstains led investigators to delve deeper, while in an attempted homicide case, the absence of gasoline contradicted the prosecution's claims, resulting in an acquittal. The paper also explores psychological factors, such as the motives behind unsold stolen goods, which can influence how evidence is interpreted. Furthermore, the disappearance of Malaysian Flight MH370 is used to illustrate how missing electronic data can complicate investigations. In summary, the study suggests that investigators should consider both the presence and absence of evidence when analyzing a crime scene.

Keywords: *crime scene investigation, material remain, electronic data, absence clue*

I. Preface

In a 1980s Columbo investigation, a suspicious husband tried to confirm his alibi with tape recording. He wanted to prove that he was at home, in the living room at three pm when his wife was murdered, so he could not have been the perpetrator of the murder elsewhere. However, the inspector did not believe him, and he realized that the three gongs of the living room's standing clock were missing from the recording. This case inspired this presentation of speaking absence clues and material remains in real criminal cases.

II. The negative clue and the crime scene investigation

The absence of clues first emerges during crime scene investigation, as 60-70% of all crimes are committed at the crime scene. It is worthwhile to carry out a crime scene investigation where there is something to search for, examine, or "comb through," where the elements of the identification pyramid, the clues, and material remains can be found[1]. Forensic scientists worldwide value the primary crime scene as a repository

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[1] See in more detail Cs. Fenyvesi, J. Orbán, *Az elektronikus adat mint a 7-5-1-es kriminalisztikai piramismodell építőköve. [Electronic data as the building block of the 7-5-1 criminalistics pyramid*

of data and an open book to be read. To conduct an effective search for clues, a good criminalist, crime scene examiner, or crime scene investigator-CSI must "get under the skin" of the perpetrator and follow the suspected "path" of the perpetrator[2]. We can say the more thorough and attentive the perpetrator was at the scene, the more thorough and attentive the observer should be. It is worth doing a "thought reconstruction", on which several Hungarian authors have already expressed their views[3].

In our opinion, there isn't a crime scene completely devoid of clues or material remains; it is essential to find and investigate the often invisible alterations left at the crime scene, which must be associated with appropriate interpretations and meanings. Our study focuses on the "negative clues"[4], i.e. „what isn't there but should be, or what was there but is now missing". The non-existent missing clue often says more than the "speaking" present one.

III. The lack of speaking material remain in a murder case

A murder case in Baranya county revealed a lack of material remains, highlighting the importance of a speaking clue.

On September 15, a 4-year-old girl, called Aniko O. diappeared from a playground in Komló. Despite extensive searches and interviews, no trace of her was found until September 19, when local resident B. Z. reported her body in the basement of their house[5]. The crime scene investigation uncovered that Aniko's body, with severe injuries including lobular lesions, cuts, and puncture wounds, was found in a pantry. The storage room was not locked, and no signs of forced entry were observed.

During the investigation, the absence of spilled blood was notable. Despite using luminol to detect bloodstains, the investigators found only red stains from other sources. They precisely searched the building, focusing on where items like paper bags, clothing, and the Transdanubian Journal found near the body had come from. Ultimately, investigators discovered hair and blood of the victim in the perpetrator's apartment, leading to the conviction of Eva V. for the crime, resulting in an 18-year prison sentence.

IV. The evidentiary significance of material remain's absence in attempted homicide

The absence of human material remains in an attempted homicide case can reveal non-human origins.

In a village in Tolna County, a man poured flammable substance on his lover and set her clothes on fire. The victim was sitting on the terrace of her house. However, the

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model], Belügyi Szemle, 2019/2, pp. 45-55.

[2] On the "paths" that can be followed on site, see L. Kovács, *A mór megtette…[The Moor was done...],* Korona Kiadó, Budapest, 2009, p. 38.

[3] The most recent of these is G. Gárdonyi, *A bűnügyi szemle. [Criminal crime scene investigation]*, Ludovika Egyetemi Kiadó, Budapest, 2023.

[4] J. Dobos, *Negatív körülmények a helyszínen [Negative conditions on the crime scene],* Belügyi Szemle, 1964/1, pp. 54-59.

[5] For more details, see Cs. Fenyvesi, F. Kodba, *Kisgyermek sérelmére elkövetett brutális emberölés nyomozása [Investigation of brutal homicide of a young child],* Belügyi Szemle, 1990/4, pp. 106-113.

Szekszárd Court of First Instance (Tribunal) found that the pouring down could not have occurred on the terrace, as the crime scene investigation did not reveal any liquid remains. No liquid droplets, stains, or moisture were found, only a circular burn mark. Therefore, the spill alleged in the indictment did not occur there, and the woman identified as the victim did not come into contact with the gasoline in her clothing on the terrace[6].

V. The importance of voice non-recognition

During our research, we also noticed that it is not only the lack of physical evidence or material remain that can be found in criminal cases. It is also possible that a lack of a „memory clue" can be part of the evidence.

In a 2006 robbery case in Alkotmány Street, Pécs, a hooded man, with part of his face covered by his coat, walked into the sales area with an object that looked like a weapon in his hand. He aimed the weapon at the woman standing at the counter and declared, "I am a heroin addict, and I will make you a cripple forever"[7]. The victim, who had placed a sum of 70.957, – HUF into a bag, did not recognize the suspect's hoarse voice, which was confirmed by others. The victim did not mention this in her interview or detailed testimony. These anomalies were noted by the local court and the appeal chamber, and the negative trail, which was not observed by the witness, was assessed as not establishing that the accused person had spoken the threatening words.

VI. Conclusion to be drawn from the absence of electronic data

Electronic data is crucial in investigating crimes such as murder, kidnapping, robbery, and terrorism.

The disappearance of Malaysian Flight MH370 on March 8, 2014, remains one of the greatest mysteries in aviation history and it is in connection with the absence of electronic data[8]. The disappearance of Malaysian Flight MH370 on March 8, 2014, remains one of the greatest mysteries in aviation history.

On March 8, 2014, Malaysian Flight MH370, a Boeing 777-200, took off from Kuala Lumpur bound for Beijing with 239 people onboard. Shortly after departure, the plane's communication systems were deliberately disabled, and it began a series of unusual course changes. The last message from the co-pilot, "Good night MH370", was calm and occurred after one of the communication systems had been turned off.

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[6] Number of the acquittal decision in 2023: Szekszárd Tribunal Court 20. B. 120/2022/44-II. Number of the upholding decision in 2023: Pécs Regional Court III. Bf. 50/2023/6/II.

[7] The details of the case leading to the discharge (quitting) can be found here: Cs. Fenyvesi, M. Nagy, *Egy fegyveres rablás kriminalisztikai és büntetőeljárás-jogi tanulságai. [Criminalistical and criminal procedural lessons of armed robbery case],* Magyar Rendészet, 2007/ 11, pp. 106-121.

[8] For details, see security risks – forensic responses by the one of authors: Cs. Fenyvesi, *Biztonsági kockázatok – kriminalisztikai válaszok. Azt MH 370-es járat eltűnésének biztonsági és kriminalisztikai tanulságai. [Security and forensic lessons from the disappearance of MH370],* in Studies from the conference "Security Risks – Law Enforcement Responses", Border Guard Scientific Publications, XV, Pécs, 2014, pp. 167-176.

Several versions were considered:

a) Hijacking: Initially supported, but lack of distress signals or claims weakened this theory.
b) Terrorist action: No responsibility claims, attacks, or evidence of shoot-down ruled this out.
   Psychological issues: Two Iranians used stolen passports, but no link to the incident. The captain's simulator and affiliations raised questions but didn't prove involvement.
c) Fire or technical failure: Ruled out due to lack of distress signals and deliberate course changes.
d) Insurance fraud: No evidence of fraudulent intent.

In our opinion the most likely explanation for the disappearance of MH370 is that it resulted from deliberate human intervention. Flight attendants and passengers, might have posed a threat by noticing the change in the plane's route or compass heading. To prevent this, they were likely neutralized, which explains why no signals were received from anyone on board during the more than 7-hour flight. The most possible explanation is that only one person, likely the captain or first officer, remained alive in the cabin for the duration of the flight.The captain, with his extensive experience and simulator training, is considered the primary suspect. The co-pilot is less likely to be involved. The black box may provide further clues if it contains recordings from the last hours.

VIII. The psychological message of non-sale in a series of crimes against property

In 1988, a serial car burglar in Pécs, Hungary, was caught by police after he admitted to stealing. The suspect, Géza R., was arrested and held responsible for the crime. The police discovered a close bond between the man and his mother, Mrs. R. N., and conducted an urgent investigative search of Mrs. R. N.'s family home. The search resulted in the discovery of 454 items worth HUF 2.150.000,-, including cash, deposit books, gold objects, and public documents. The psychological message of non-sale in crimes against property highlights the importance of understanding the reasons behind non-sale actions in criminal cases. The case highlights the need for clearer explanations and correct sentences in criminal cases.

This unusual behavior prompted a psychological analysis by expert Györgyi Szarkássy. The analysis uncovered that Géza R. is a sensitive and intelligent person whose crimes emerged as a defense against insecurity and troubled relationships. His criminal behavior began suddenly and compulsively, giving him a sense of security but also increasing his anxiety. His behavior is marked by emotional immaturity and a lack of communication, with his crimes serving as an escape from inner tensions.

VIII. Final thoughts

As a final reflection, Columbo was right. Sometimes, what isn't immediately apparent can be more significant than what is. To borrow from a Hungarian movie analogy „a treasure that isn't." In criminal proceedings a good advice is: don't just look at what you see, but think about what you don't see. It may have a more valuable message.

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Chasing Justice: Asset Recovery in Legal Theory and Practice and Serbia's Path to EU Compliance

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Abstract

Countries lose billions of euros annually due to corruption, economic crime, and illicit financial activities. Europol estimates that between 0.7% and 1.28% of the EU's GDP is linked to suspicious financial transactions, with only 2% of criminal proceeds frozen and 1% confiscated. These figures highlighted the urgent need for robust asset recovery mechanisms to combat crime and uphold justice. Rooted in the principle that "crime should not pay", asset recovery ensures that no one retains gains acquired through unlawful acts, addressing economic, social, and moral harms caused by such activities.

This article examines the key phases of asset recovery: tracing illicit proceeds, implementing legal mechanisms for freezing and confiscation, and managing confiscated assets. The tracing phase highlights challenges in financial investigations, particularly for crime like corruption, where secrecy and collusion hinder evidence collection. Legal mechanisms are analyzed, emphasizing the need for extended, non-conviction based, and third-party confiscation to align Serbian law with EU acquis. Proper management of confiscated assets is essential to prevent depreciation and ensure their use for victim restitution or public benefit.

The article underscores the importance of balancing effective crime deterrence with human rights safeguards. It also examines international standards, with the special focus on EU Directives, and their application to Serbia's legal framework. By addressing the challenges of translational and evolving crime, the article advocates for adaptive legal frameworks and best practices to strengthen the global fight against financial crime and ensure justice.

Keywords*: asset recovery, EU acquis, international standards, financial crime*

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1. Introduction

Countries lose billions euros each year through corrupt practice, funds misappropriation, economic crime in general[1]. Europol estimates that between 0.7% and 1.28% of the EU's annual GDP is linked to suspicious financial activities, amounting to billions of euros each year, while only 2% of criminal proceedings are successfully frozen and even smaller portion, 1% is confiscated across the European Union[2]. This staggering figure reflects the scale of illicit finance circulating with the economy, highlighting the urgency for stronger regulatory frameworks and enforcement mechanisms[3]. As it was stated in the Explanatory Report to the Criminal Law Convention on Corruption[4], the corruption has existed ever since antiquity as one of the worst and, at the same time, most widespread forms of behavior, which is inimical to the administration of public affairs. Furthermore, illegal ways for acquiring property are also well-established and rooted when it comes to the private affairs and relations. Due to the fact that the acquiring property with no respect for proposed social regulations undermines the sole base of social and legal order, there is a traditional rule inherent to the criminal, civil and administrative law, that no one may retain material gain obtained by violating norms. When it comes to the civil law, such rule is embodied in the legal institute of acquiring without ground in legal transaction or law while the criminal law norms dictate that no one may retain material gain obtained by criminal offence[5] or in other words, it lays down a principle – *crime should not pay*[6].

To protect the system of providing social services, development projects, human rights, social justice, public moral, to prevent negative economic effects etc. asset recovery mechanisms need to be continuously developing and designed to fit the goal. However, in attempt to prove that the *crime does not pay* and that there is no *safe haven* for illegal property, the governments are facing huge challenges. At first place, the need to ensure that any proposed new legal measures imposing a cost to society should always be balanced against the benefits that will accrue[7]. Furthermore, it has to be said that the process of making criminal law norms and creating criminal justice system is in a certain way the art of balancing between an effective protection of the

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[1] See for more details in: J. P. Brun, A. Sotiropoulou, L. Gray, C. Scott, K., Stephenson, K., *Asset recovery handbook: A guide for practitioners*, Second edition, World Bank Publications, 2021.

[2] European Commission (2020) Report from the Commission to the European Parliament and the Council – Asset Recovery and Confiscation, Ensuring that Crime does not Pay, COM(2020)217 final.

[3] M. Matic Boskovic, *Oduzimanje imovinske koristi proistekle iz krivičnog dela – uporednopravna rešenja i iskustva iz Srbije [Confiscation of property benefits resulting from a criminal offense – comparative legal solutions and experiences from Serbia],* in J. Kostić, A. Stevanović (eds.), *Finansijski kriminalitet [Financial crime],* Institute of Criminological and Sociological Research, Institute of Comparative Law, 2018, pp. 175-189.

[4] Explanatory Report to the Criminal Law Convention on Corruption, Strasbourg 27 January 1999.

[5] This is to explain the well rooted legal principle in the three main branches of law. However, in the context of making distinction among criminal, civil and administrative forfeiture, the first one is based on a criminal conviction, the second one is based on unlawful conduct by which the asset was obtained while criminal conviction is not required.

[6] P.C. Van Duyne, W.S. De Zanger, F.G.H. Kristen, *Greedy of crime money. The reality and ethics of asset recovery*, in *Corruption, Greed and Crime Money: Sleaze and Shady Economy in Europe and beyond*, Oisterwijk, Wolf Legal Publishers, 2014, pp. 235-266.

[7] S. Sittlington, J. Harvey, *Prevention of money laundering and the role of asset recovery*, in *Crime, Law and Social Change*, no. 70(4)/ 2018, pp. 421-441.

fundamental values which are endangered by criminal acts and protection of the fundamental values (ownership rights, due process safeguards etc.) which can be endangered while that goal is being achieved. Finally, asset recovery norms and instruments have to be adequate and adapted to face the current criminality, particularly having in mind increasing transnational crime, online crime, emerging of so-called crypto crime and new-age crime environment in general.

When examining property crime and their perpetrators, it is essential to recognize that these offenses are typically driven by self-interest, with individuals seeking to maximize their personal utility[8]. In other words, the primary objective of rational perpetrators is to acquire as much property as possible, disregarding legal (criminal law) norms. Moreover, the criminal potential of criminal structures is frequently assessed based on their accumulated property and assets[9]. Therefore, taking into account that rational element in conducting property crime, it is a priority task of the law enforcement bodies to tackle the illicitly acquired asset to prevent the crime[10]. As it was stated in the literature there seems a broad consensus among politicians, prosecutors and police officers that using complex financial investigations followed by the seizure of illegal assets is the most powerful tool to control crime[11].

Given the importance and role of asset recovery in the enforcement of the criminal laws, most countries have adopted some form of asset recovery legislation. However, to be effective, every single approach in the combat against the illicit acquired proceeds need to address at least two questions: *How can confiscation of the proceeds of crime be accomplished; Whether the effective confiscation regimes are constitutional or not and do they infringe upon individual rights and liberties*[12]*.*

The focus of the article is to analyze the key elements that underpin asset recovery regulation through the lens of its three essential and interconnected phases:

(1) regulating tracing of illicitly acquired proceeds,
(2) legal mechanisms for freezing and confiscation, and
(3) managing assets post-confiscation. Assessment of the first phase includes assessment of the investigative techniques, international cooperation, and advanced tools for asset tracing, all aimed at uncovering and locating hidden or transferred assets. Furthermore, this phase relates on assessment of information-sharing systems, both domestically and internationally, as well as on institutional capacities to follow complex financial trials. In the assessment

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[8] *Ibidem*.

[9] A. Bulatović, *Imovina kao element infrastrukture organizovanih kriminalnih grupa [Property as an element of the infrastructure of organized criminal groups]*, in J. Kostić, A. Stevanović (eds.) *Finansijski kriminalitet [Financial crime],* Institute of comparative law; Institute of criminological and sociological research, Belgrade, 2018, pp. 205-216.

[10] As Lord Steyn noted in one the of the UK House of Lords landmark judgement on confiscation orders under the Criminal Justice Act 1988, *Regina v Rezvi* (2002) UKHL 1 "*It is a notorious fact that professional and habitual criminals frequently take steps to conceal their profits from crime. Effective but fair powers of confiscating the proceeds of crime are therefore essential*." See more in A. Bacarese, G. Pereira, *Technical Paper on Criminal Assets Recovery System in Serbia and Comparative Analysis with other Systems in Central and Western Europe*, 2010, available at: https://rm.coe.int/16806ebc7a, accessed on 11.12.2024.

[11] R.T. Naylor, *Criminal profits, terror dollars, and nonsense*, in: *Transnational Financial Crime*, Routledge, 2017, pp. 559-566.

[12] See more in: T. Trinchera, *Confiscation and asset recovery: Better tools to fight bribery and corruption crime*, in *Criminal Law Forum*, Vol. 31, No. 1, 2020, pp. 49-79.

of the second phase, authors focus on the procedural and substantive legal frameworks that allow authorize to seize and confiscate identified assets. This includes examining various models of confiscation, specifically EU acquis, and compliance of Serbian legislation with EU requirements. Analysis of the third phase, addressed the often overlooked yet critical process of preserving and utilizing recovered assets. Proper management involves safeguarding the value of confiscated property, mitigating risks of depreciation, and determining their ultimate use, whether through restitution to victims, reinvestment into public funds, or other socially beneficial purposes.

By analysing these three dominant components in details, the article aims to provide a structured analysis of the asset recovery process and evaluate its effectiveness in combating financial crime. Through this framework, the study will highlight the challenges, best practice, and policy recommendations necessary to align asset recovery efforts with international standards and national regulatory framework in Serbia.

2. Regulating tracing of illicitly acquired proceeds

Criminal law enforcement bodies are facing problems at the first step when it comes to the fight against economic crime and corruption due to the inherently hidden nature of such activities. Economic crimes, particularly corruption, often operate under a veil of secrecy, shielding them from immediate detection and investigation. In particular, corruption manifests as a "business offer" made to the public authorities, creating mutual benefits for both parties involved in the corrupt relationship. This shared interest fosters a cycle of collusion and confidentiality, as both sides remain incentivized to protect their illicit dealings. Such relationships are built on trust and discretion, making them exceptionally resistant to external scrutiny. The hidden nature of corruption further complicates efforts to detect these crimes, as traditional investigative tools are often insufficient to penetrate these covert networks. Gathering evidence that meets the legal standards required for court proceedings becomes an even greater challenge[13]. Hence, even after dedicating considerable time and resources to investigations it is not uncommon for prosecuting authorities to drop cases due to lack of sufficient evidence[14].

Freezing and confiscation represent two key legal mechanisms in the fight against financial crime, organized crime, corruption, and money laundering. Together, these tools aim to deprive offenders of the financial benefits derived from their illicit activities while protecting the integrity of the legal economy and ensuring justice. Though closely related, freezing and confiscation serve different but complementary purposes within the broader asset recovery process.

Freezing is a preliminary measure applied during ongoing criminal investigation intended to temporarily restrict access, movement, or disposal of property suspected to have been obtained through or used in criminal activities. The purpose of freezing is to ensure that the identified property remains available for potential confiscation at a later stage, as there is a constant risk that offenders might transfer or conceal assets

[13] A. Stevanović, *Lobbying and Corruption: comparative legal analysis of two notions*, Journal of Eastern-European Criminal Law, No. 1, 2019, pp. 110-120.

[14] I. Carr, D. Lewis, *Combating Corruption through Employment Law and Whistleblower Protection*, Industrial Law Journal, no. 39 (1), 2010, pp. 1-30.

to evade law enforcement measures. Once freezing measures secure the assets, ***confiscation*** represents the final, permanent deprivation of property following a judicial or administrative decision. Confiscation can occur under several legal models. The most common is ***conviction-based confiscation***, which requires a criminal conviction to confirm the asset's illicit origin or use in criminal activities. In contrast, ***non-conviction-based confiscation*** allows the seizure of assets without a criminal conviction in specific cases, such as when the suspect absconds, is deceased, or unable to stand trial due to illness. In addition to these mechanisms, many jurisdictions implement ***extended confiscation***, which enables authorities to seize property that appears disproportionate to an individual's lawful income. This approach is particularly effective in tackling organized crime and corruption, where assets are often concealed or laundered through complex financial networks. Extended confiscation does not require direct proof that the specific property resulted from a particular crime; instead, the focus shifts to the inability of the accused to justify the legitimacy of the assets. Another important aspect of modern confiscation frameworks is the ability to target ***third-party assets***. Criminals often transfer illicit proceeds to family members, associates, or shell companies to evade confiscation. Legal mechanisms now allow authorities to seize property held by third parties if it can be proven that they knew, or should have known, that the transfer was intended to circumvent legal measures.

The traditional method employed by the law enforcement bodies is confiscation (conviction-based confiscation) which is limited to the property involved in the particular offence for which the defendant was convicted. Hence, all the relevant information are obtained within the criminal procedure. In addition, there is a possibility for the grounds of asset acquiring to be investigate within the tax law procedure by the tax department. If the investigated person or legal entity failed to prove the legal origin of its property, such property will be tax with special rates which are far more intrusive than the ordinary one.

Undoubtedly, there is a consensus among the scholars and practitioners that those traditional methods turned out to be inadequate to deprive criminals who engaged in corruption offences of their illicitly acquired proceeds based on many relevant empirical indicators. Even the sole experience showed that it is of a great importance to trace the „suspicious assets“ at the early stage of an investigation Therefore, difficulties in detecting evidences and initiating anti-corruption proceedings have led many governments, and consequently international organizations, to consider alternative measures that go beyond the classic provisions of criminal law when it comes to the fight against illicitly acquired proceeds. This was the reason for implantation of the concept based on extended confiscation or non-conviction-based confiscation. In line with this, such improved measures are known as a preventive asset recovery instrument employed outside of the criminal law and were developed as a part of anti-mafia legislation to decrease the organized crime profitability[15].

The previously mentioned conceptual shifting in asset recovery legal framework impacted also the legal terminology. For instance, a distinction between the term confiscation and the term forfeiture should be made since the confiscation refers to the permanent deprivation of the property of any kind derived or obtained directly or indirectly from an criminal offence, by order of the court or other competent authority,

[15] H. Matt, *Criminal law principles should be applied in all asset recovery cases throughout the EU,* in New Journal of European Criminal Law, no. 15 (4), 32024, pp. 73-374.

while the forfeiture means removal of items whose possession constitutes an offence or the items used in the crime commission[16,17]. Mirroring the previously explained trends in the crime control strategy when it comes to the illicitly gain property, there is a certain revival of the strategy focused around the confiscation even though the traditional conviction based forfeiture are still provided for in the laws worldwide[18].

However, in the case of corrupt crimes, the most visible and the most immediate consequence is the fact that persons involved in corruption may gather luxury cars, buy homes that look like palaces and enjoy exotic vacations. Such social, economic and political anomalies could be labelled as "illogicalities" are clear indicators of high degree of corruption in one society[19]. Having in mind the paradoxical situation that individuals show off wealth with disputable origin in terms of legal acquisition, the idea arose to target precisely the amount of wealth that could not possibly have come from official salary or other legal income[20].

International recognition at the regional level, for the concept of illicit enrichment based on targeting unexplained wealth was made when the Inter-American Convention Against Corruption[21] became the first convention to include illicit enrichment under Article 9, describing the concept as a "significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions...". It was in the 1996 and seven years later, in 2003, the African Union Convention on Preventing and Combating Corruption[22] became the second convention to include a provision on illicit enrichment, describing the concept in the same manner[23]. Finally, in the year 2003, the United Nations Convention against Corruption[24] included a provision on illicit enrichment in Article 20 stating that: "Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income". In this regard the international recognition of a concept got a universal dimension and importance.

The illicit enrichment, as proposed in the provisions of UNCAC, is the criminal offence itself when there is an unexplained wealth with no legal basis for it, under certain conditions. Due to the existence of numerous controversies that are reflected in conflicting views when it comes to the violation of important criminal law principles,

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[16] B. Vettori, *Tough on criminal wealth: Exploring the practice of proceeds from crime confiscation in the EU*, Springer Science & Business Media, 2007.

[17] In this context, the term seizure refers to the temporarily prohibiting the transfer, conversion and disposition of property or custody and other means of control over the property by the competent authority.

[18] *Ibidem*.

[19] A. Stevanović, L.M. Stănilă, *Illicit Enrichment as a Criminal Offense: Possibility of Implementation in the National Criminal Legislations*, Institucije i prevencija finansijskog kriminaliteta, Belgrade, December 2021, Institute of comparative law; Institute of criminological and sociological research, Belgrade, pp. 205-218.

[20] *Ibidem*.

[21] Organization of American States. Inter-American Convention against Corruption, 29 March 1996.

[22] African Union Convention on Preventing and Combating Corruption, 11 July 2003.

[23] A. Stevanović, L.M. Stănilă, 2021.

[24] United Nations Convention against Corruption, G.A. Res. 58/4, U.N.

the crime of illicit enrichment is provided as an option and states are only obliged to consider the possibility of introducing it into their legal systems if this is not contrary to its constitution and the fundamental principles of its legal system[25].

As the Human Rights Council[26] observed the promotion and protection of human rights is essential to the fulfilment of all aspects of an anti-corruption strategy. There are a large number of academics and practitioners who argue that criminalizing of illicit enrichment raises serious questions of civil liberties protection and criminal proceedings safeguards[27] and the same situation is when it comes to the extended confiscation or non-conviction-based confiscation or civil confiscation since that measures includes intrusive mechanisms that could be challenged from the perspective of constitutional law and human rights. For instance, there is a statement in the literature that the USA civil asset forfeiture laws at their core deny basic due process safeguards[28]. Considering the previous statements from the available literature, but also a certain view of the courts29, the following problems related to the criminalization of illicit enrichment and extended asset recovery practice stand out:

– violation of the presumption of innocence;
– violation of the right to silence;
– violation of the privilege against self-incrimination;
– violation of the burden of proof principle;
– violation of the *lege certa* principle *and*
– violation of the ownership rights[30].

The matter of fact is that the reverse burden of proof approach was employed when it comes to the extended and particularly civil confiscation, and this is the main reason for denying the positive effect in crime prevention mostly by stating that other values protected by the criminal law are endangered. On the other hand, the illicitly acquired asset is usually the most visible part of the (economic) crime and the process of tracing it must be focused around the „follow the money" principle[31]. In addition, it

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[25] A. Stevanović, L.M. Stănilă, 2021.

[26] Human Rights Council Res. 7/11, Rep. of the Human Rights Council, 7th Sess., Mar. 3–Apr. 1, 2008 U.N. Doc. A/HRC/7/78, at 31 (July 14, 2008).

[27] A. Stevanović, L.M. Stănilă, 2021.

[28] D.B. Ross, *Civil forfeiture: A fiction that offends due process*, Regent UL Rev., no. 13, 2000, p. 259.

[29] In Romania, the body in charge of fighting corruption (ANI) was able to directly request from the court the confiscation of assets in cases where it was deemed that there was a significant disproportion (exceeding the amount of EUR 10,000) between the acquired assets and legal wage of a public official. However, in April 2010, the Constitutional Court of Romania found that such legal solution was unconstitutional in terms of several elements. It concluded, among other things, that that way the constitutional presumption that the assets have been legally acquired unless proven otherwise was violated." (Stojanović, 2019, p. 27). In 1994, Italy's Constitutional Court overturned the illicit enrichment provisions of Law no. 356 of 1992 on grounds that a presumption based on the status of the accused violated the presumption of innocence.47 In 2004 in the Arab Republic of Egypt, the Cassation Court addressed the question of whether the illicit wealth offense is compatible with legal principles and held that the second paragraph of Article 2 of the Illicit Enrichment Law, which defines as an offense whenever such increase is not consistent with the public official's resources and the public official fails to prove the legitimate source for it, violated the constitution regarding the genesis and presumption of innocence (Muzila *et al*, 2012, p. 29). More on Anti-corruption bodies in: M. Matic Boskovic, *Effectiveness of Anti-Corruption Bodies in Suppression of Corruption in Selected Countries,* Journal of Criminology and Criminal Law, no. 56 (3), 2018, pp. 73-91.

[30] See more in A. Stevanović, L.M. Stănilă, 2021.

[31] The U.S. was the first to implement a coherent follow-the-money strategy, embodied in the 1970

should be stated that the so called improved asset recovery mechanisms are not the criminal sanctions itself, but manifestations of the core criminal law principle that no one may retain material gain obtained by criminal offence, embodied in certain measures imposed on those who cannot prove the legal grounds of their property when certain legal and factual conditions are fulfilled. Additionally, even during the initial phase of implementing the extended and civil confiscation model in USA, relevant empirical research indicated that the effectiveness of confiscating illegal gains was significantly higher when courts employed civil rather than criminal procedures[32]. This evidence prompted several countries to reform their legal frameworks to incorporate similar approaches[33].

3. Legal mechanisms for freezing and confiscation

3.1. International standards

Legal mechanisms for freezing and confiscation are essential tools for combating financial crime, corruption, and organized crime. By implementing effective frameworks and aligning with international standards, countries can ensure that crime does not pay, while safeguarding the rights of individuals and promoting transparency in asset recovery process. International standards play a key role in guiding states to adopt efficient measures that strike a balance between combating crime and respecting fundamental legal principles.

Instruments such as the United Nations Convention Against Corruption (UNCAC), the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Warsaw Convention), FATF Recommendations and the EU Directives on asset recovery establish standards on strengthening mechanisms for tracing and identifying assets, legal frameworks for confiscation and forfeiture, including non-conviction-based measures, effective asset management to preserve and utilize confiscated property, international cooperation and mutual legal assistance, and ensuring victim restitution and equitable sharing of recovered assets.

UNCAC as the first legally binding global instrument dedicates a full chapter (Chapter V) to asset recovery, specifically on prevention and detection of asset transfers, international cooperation for tracing, freezing, seizing, and confiscating illicit assets, the return of stolen assets to their country of origin or victims, and mutual legal assistance and measures for non-conviction-based confiscation.

Financial Action Task Force (FATF) Recommendations sets global anti-money

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Bank Secrecy Act and the 1986 Money Laundering Control Act. See for more details in Naylor, 2017.

[32] R. Bowles, M. Faure, N. & Garoupa, *Economic analysis of the removal of illegal gains*, International Review of Law and Economics, no. 20(4), 2000, pp. 537-549.

[33] The non-conviction based confiscation model enables an object to be return to the victim after a very long period regardless of the trial or conviction what was the case when it comes to a historic silver pocket watch that travelled the world with Theodore Roosevelt during his presidency, which was returned to his family home at Sagamore Hill National Historic Site in 2024. The watch was missing for 37 years after it was stolen while on loan from the National Park Service (NPS) to a museum in Buffalo, New York, in 1987. See more at: https://www.fbi.gov/investigate/white-collar-crime/asset-forfeiture, accessed on 23.12.2024.

laundering and counter-financing of terrorism standards. Key recommendations include Recommendation 4 on freezing, seizing, and confiscating proceeds of crime; and Recommendation 38 on international cooperation on asset recovery, ensuring mutual assistance in tracing, freezing, and sharing assets. FATF regularly assesses member countries' compliance with these standards.

Warsaw Convention (CETS No. 198) adopted in 2005 remains the only comprehensive international treaty addressing money laundering, financing of terrorism, and asset recovery. It empowers states to halt suspicious transactions, seize and confiscate proceeds of crime, enhance international cooperation and establish effective asset management systems.

3.2. EU acquis and Serbia

The EU has progressively strengthened its legal framework for asset recovery to combat financial crime and organized crime more effectively. Directive (EU) 2014/42 laid the foundation by focusing on freezing and confiscating criminal proceeds, particularly through extended a non-conviction based confiscation measures[34]. Expended on this, the newly adopted Directive (EU) 2024/1260 introduces comprehensive, EU minimum rules for tracing, freezing, confiscation, and management of assets[35]. It includes provisions for third-party confiscation, facilitates cross-border cooperation and mandates robust asset management systems, reinforcing the EU's commitment to depriving criminals of illicit gains while ensuring transparency and efficiency in asset recovery processes.

As a candidate country for European Union (EU) membership, Serbia has an obligation to align its legal framework and practices with the ***EU acquis***, including those provisions related to asset recovery. This alignment is part of ***Chapter 23*** and *Chapter 24* of the accession negotiations, which includes anti-corruption measures, asset recovery, and the fight against organized crime.

The new Directive 2024/1260 mandates key obligations for Member States, including swift tracing and identification of assets linked to substantial economic crimes, freezing and confiscation of instrumentalities, proceeds, or equivalent property, third-party confiscation for assets transferred to avoid seizure, and confiscation in cases where proceedings halt due to circumstances like illness, death, or expired statutes of limitations. Additionally, the Directive includes provisions for confiscating unexplained wealth tied to criminal organizations and emphasises prioritising victims' restitution during asset recovery proceedings.

Member States are required to adopt a national asset recovery strategy by May 2027, with updates every five years. The Directive also allows for the sale of frozen assets before final confiscation under specific conditions, such as perishability or disproportionate maintenance costs.

Institutionally, the Directive strengthens Asset Recovery Offices for cross-border cooperation and access to national databases for asset tracing and mandates the

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[34] A. Sakellaraki, *EU Asset Recovery and Confiscation Regime – Quo Vadis*? *A First Assessment of the Commission's Proposal to Further Harmonise the EU Asset Recovery and Confiscation Laws. A Step in the Right Direction?,* New Journal of European Criminal Law, Vol. 13, No. 4, 2022, pp. 478-501.

[35] T. Wahl, *New Directive on Asset Recovery and Confiscation*, Eucrim, Issue 1, 2024, p. 37.

establishment of Asset Management Offices to oversee the handling of frozen or confiscated property. Member States must transpose the Directive into national legislation by November 2026.

Regulation (EU) 2018/1805 on the mutual recognition of freezing orders and confiscation orders[36] establishes a unified framework for the mutual recognition of freezing and confiscation orders across EU Member States, enhancing judicial cooperation and efficiency in cross-border asset recovery. Adopted in November 2018 and applicable from December 2020, the Regulation replaces earlier mechanisms with streamlined procedures to ensure the swift execution of orders issued in criminal proceedings. A key feature of Regulation is the duty of Member States to recognize and execute freezing and confiscation orders issued by another Member States within the framework of criminal proceedings. The Regulation introduces strict time limits to expedite the process. Confiscation orders must be recognized within 45 days from the receipt of the request and freezing orders within 48 hours, followed by an additional 48 hours for execution. These timeframes are designed to ensure the swift preservation and recovery assets, preventing delays that could result in the dissipation or concealment of criminal property.

Serbian Law on Seizure of Assets Derived from a Criminal Offence regulates the legal framework for the identification, freezing, confiscation and management of assets acquired through criminal activities[37]. Financial investigations, as a crucial phase in tracing proceeds of crime, represent a significant challenge for public prosecutors in Serbia[38]. These investigations require specialized skills, access to comprehensive financial data, and robust inter-agency cooperation, all of which are areas where systemic gaps persist.

To achieve full alignment with the EU Directive, Serbian law should address several key areas in its asset recovery framework. First, extended confiscation requires clearer regulation to effectively target assets disproportionate to a perpetrator's lawful income, ensuring they are presumed to have been derived from criminal activity. Second, Serbia should introduce provisions for non-conviction based confiscation, enabling authorities to confiscate assets in cases where a criminal conviction is unattainable due to circumstances such as the suspect's death, abscondence, or expiration of the statute of limitations. Third, the Law must incorporate third-party confiscation, allowing for the seizure of assets transferred to individuals or entities who knowingly participated in efforts to shield the property from confiscation. Some of these issues were overcame by the Supreme Court jurisprudence, but there is a need to be regulated by the Law[39].

In addition, Serbian Law must prioritize the return of assets to victims, particularly

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[36] M. Matic Boskovic, *Krivično procesno pravo EU [EU criminal procedural law],* Institute of Criminological and Sociological Research, Belgrade, 2022.

[37] The Law on Seizure of Assets Derived from a Criminal Offence, Official Gazette of the Republic of Serbia, no. 32/2013, no.94/2016, and no. 35/2019.

[38] M. Matic Boskovic, J. Kostic, *Track Record in Fight Against Corruption in Serbia – How to Increase Effectiveness of Prosecution?*, Journal of the University of Latvia. Law, Vol. 17, 2024, pp. 5-20.

[39] N. Važić, *Pravni stavovi krivičnog odeljenja Vrhovnog kasacionog suda o spornim pravnim pitanjima u praktičnoj primeni Zakona o oduzimanju imovine proistekle iz krivičnog dela – zauzeti na sednici Krivičnog odeljenja 03.02.2020 [Legal positions of the criminal department of the Supreme Court of Cassation on disputed legal issues in the practical application of the Law on confiscation of property resulting from a criminal offense – taken at the session of the Criminal Department on 02/03/2020],* Bilten, No. 2, Supreme Court of Cassation, 2021, pp. 11-18.

foreign nationals, in compliance with international standards. This includes strengthening mechanisms for mutual legal assistance to ensure cross-border cooperation to facilitate the restitution of confiscated assets to rightful owners or victims in other jurisdictions.

4. Managing the assets post-confiscation

There is no doubt that the crime prevention strategy cannot be fruitful without the established legal process for managing the confiscated assets. The effectiveness of freezing and confiscation measures also hinges on institutional capacity and cooperation. Specialized bodies, such as ***Asset Recovery Offices*** and ***Asset Management Offices***, play a critical role in tracing, identifying, and managing seized assets. Poor management can result in asset depreciation, eroding the value of confiscated property and undermining the purpose of recovery efforts. To prevent this, asset management frameworks allow for the sale of frozen property under specific conditions, such as when maintenance costs are excessive, or the asset is perishable.

Regardless of the opted idea behind the concept of asset recovery, that process can go in three directions: returning assets to the victims (restitution), re-allocation of the confiscated assets, and eradication of the illicitly acquired property.

When it comes to the economic crime, the process of asset recovery, particularly the sole returning of the crimes fruits needs to be put in force and employed in order to ensure the fundamental principle and aim of the criminal law reaction that could be in an illustrative way present through the sentence made by the justice Brown who reflected the case *Simon &Schuster*[40] who stated that „the crime should neither impoverish the victim nor enrich the criminal".

Somewhat, managing the confiscated assets is strongly related to the process of its re-allocation, but there is the difference regarding the issue of primary beneficiary, who derives advantage from the re-allocation. First, the criminal laws, particularly criminal procedure laws included the right of the authorized persons, at first place the victims of the crime, to claim for the restitution within the criminal procedure. Therefore, a claim for restitution arising as a result of commission of a criminal offence or of a wrongful act designated by law as a criminal offence shall be considered on a motion by authorized persons in criminal proceedings if those proceedings would not be substantially prolonged thereby. Regarding the structure of the claim, most of the laws provide for the solution that it may relate to the compensation of damage, return of objects or annulment of a certain legal transaction. That model of asset recovery also known as a restitution is a kind of direct reparation for the damage caused by the offence which by its very nature is adequate to be utilized within a wider concept of restorative justice. However, the first mentioned approach could be fruitful when the victim of the offence is known or can be easily determined. Thus, returning assets to victims of crime has to be a top priority of the enforcement bodies and confiscation programs which could be also realized through the granting of petitions for remission.

Re-allocation of the confiscated assets in the narrower sense is opening the issue of the way the confiscated assets is managing and how it can be disposed after the confiscation in terms of legality and morality considering the purpose of the asset

[40] U.S. Reports: *Simon & (and) Schuster, Inc. v. Members of the New York State Crime Victims Board et al.,* 502 U.S. 105 (1991).

recovery within the criminal law principles. In practice, this recovery method based on unknown victim or when the public funds are damaged, needs to be employed to undo the results of the committed crime. Normative framework that regulates this method must include safeguards designated to prevent the situation when one sentenced crime provokes and enables other crime. In other words, the transparency of the process is paramount when it comes to the re-allocation of the confiscated assets mostly derived from the corruption when the public funds are damaged. So far, a few approaches based on this method is established worldwide, but the one developed in Italy stands out for the reason of profound experience in the fight against mafia. In an effort to tackle criminal groups, the Italian State allows the confiscation of properties belonging to individuals convicted for mafia-related crimes and their reallocation to a new use which concept is considered both as an anti-mafia measure and as a way to partially compensate the society for the harm made by the criminal organizations[41].

The so-called new use for the confiscated assets that used to be in hands of mafia is primarily embodied in the process of revitalization of the areas that suffer intensive mafia activities through the mechanisms that contributes to adding value to the social and economic life of the targeted area and society.

Finally, the method set around the eradication of the illicitly acquired property is according to the relevant empirical findings beneficial for the criminal law purpose. For instance, it has been shown that the confiscation orders of organized crimes economic assets are positively associated with entrepreneurial entries at the provincial level, so it is to be expected for the number of firms operating in the market to increase as a response to the reassignment of mafia firms[42]. Furthermore, the confiscation measures against criminal organizations have also been proved to have spillover effects on their legal counterparts in terms of higher performance, turnover, and investments and in addition, removal of a mafia firm is positively correlated with both the number of active firms and the number of firms' employees[43].

5. Conclusions

The immense financial losses incurred by countries through corruption, economic crime and illicit financial activities underscores the critical need for robust asset recovery mechanisms.

Asset recovery plays a vital role in upholding justice by ensuring that illicit gains are removed from offenders and channeled toward victims or public welfare. This necessitates a balance between the effective enforcement of criminal law and the protection of fundamental rights such as due process and ownership. However, the hidden nature of economic crimes and corruption, characterized by collusion and secrecy, poses significant challenges for law enforcement, often resulting in insufficient evidence and unprosecuted cases.

To address these challenges, the regulatory frameworks must include measures for extended confiscation, non-conviction based confiscation, and third-party confiscation,

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[41] F. Boeri, M. Di Cataldo, E. Pietrostefani, *Out of the darkness: Reallocation of confiscated real estate mafia assets,* 2019.

[42] F.M. Calamunci, L. Ferrante, R. Scebba, *Closed for mafia: Evidence from the removal of mafia firms on commercial property values*, Journal of Regional Science, no. 62(5), 2022, pp. 1487-1511.

[43] *Ibidem*.

accompanied by international cooperation and robust asset management systems. However, the implemented legal solutions in terms of recovery mechanisms need to be coordinated with the specific requirements of the socio-economic factors in targeted society and with the other relevant legal provisions in order to be properly fitted in legal system. Additionally, aligning national legislation with international standards, such as the UNCAC and EU Directive, is essential not only for ensuring effective cross-border operations and victim restitution, but also for ensuring that basic criminal (procedure) law principles are not violated.

Proper management of confiscated assets, whether through restitution, reallocation, or eradication, is critical to sustaining public trust and achieving long-term societal and economic benefits. By continuously refining asset recovery mechanisms, governments can disrupt criminal enterprises, deter illicit activities, and reinforce the integrity of the legal and financial systems.

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The Criminal Code's Response to the Act of Stalking – Implementation of the Istanbul Convention 10 Years Later

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Abstract

In order to prevent and combat all forms of violence against women, Istanbul Convention recognize stalking as a serios form of gender – based violence against the women, equal as all other forms of physical, sexual and psychological harassment. Topic of this work is to discuss where are border lines between socially acceptable conduct in which one person tries to get in touch with another, and when this conduct became form of violence that requires a criminal code reaction to protect victims right to private life. Furthermore, stalking is predicate crime, especially for domestic violence. Repeated attempts to unwanted contact can have seriously psychological consequences for the victim. To prevent that persistent contact from having serious consequences on the victim's private life, it is crucial for the victim to identify in time when the behavior becomes stalking, in order to file a complaint appropriate timely manner, so that state law enforcement can react and provide protection. But the question is whether the Criminal Code requests that stalking is a repeated behavior how much intrusion is enough or is there any time frame in which intrusion must last longer, for reasonable and prompt reaction before the stalking gain some of the form of domestic violence.

Keywords: *stalking, psychological violence, Istanbul Convention, Criminal Code*

I. Introduction

Ten years after the adoption of the Istanbul Convention1, stalking has been recognized as a serious criminological and sociological phenomenon, which significantly threatens the right to a person's private life. In basic, stalking is considered every act in which one person repeatedly attempts to make unwanted contact with another person. Not all unwanted contact is an act of stalking, threatening conduct directed at another person, which instils fear for one's own safety, is considered stalking in the light of Convention. Recognizing stalking as a type of serious psychological abuse is important to prevent gender-based violence against women.

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[1] Council of Europe *Convention on preventing and combating violence against women and domestic violence,* signatured 11th of May 2011, came into force on 1 August 2014. As of March 2019, it has been signed by 45 countries and the European Union.

In terms of gender-based violence most of the victims are women. More often the perpetrator of stalking women are men. The women also can commit stalking, but these cases are significantly low in total number of victims. Studies show that about 7%-19% of women and 2%-10% of men are being stalked at least once in their lifetime[2].

The Survey conducted among representative sample of women aged 18 to 74 living in Serbia, a total 2,023 interviews, in a period between April and August 2018, shows high prevalence of a different forms of violence against women, in which is 11% of total 62 % of all violence[3]. Notwithstanding the fact that stalking appears to account for a small proportion of 11% of all forms of violence against women, the proportion of stalking is significant precisely because it is a predicate crime for serious forms of violence against women.

The statistical data collected in surveys in the EU, show that 18% of women have been stalked at some point since the age of 15, while 5% of women have experienced stalking in the 12 months prior to interview. Also, out of all stalking victims in the EU, one in five had been stalked for over two years. When it comes to the consequences in the victim's private life, the data show that 23% of stalking victims have changed their email address or phone number due to the most serious case of stalking[4].

In general, the literature suggests that being the victim of stalking is associated with significant psychological distress. One study found that 83% of the sample of stalking victims reported anxiety symptoms, and many victims reported distressing recollections, flashbacks, nightmares, appetite changes, and depressed mood[5]. Another study of stalking victims, of which 68% were stalked by an ex-partner, concluded that 78% had symptom levels that indicated the presence of at least one psychiatric disorder.

The data show that stalking is a significantly represented form of violence. Every form of violence, including stalking, affects one of the basic human rights. It is the right of every person to be afforded effective and timely protection of his or her fundamental rights guaranteed by the European Convention on Human Rights. The need to recognize and protect against stalking is also recognized by the ECtHR[6]. The Court reiterates that in cases raising issues of domestic violence States have positive obligations under Articles 2, 3 and 8 of the Convention[7] to take preventive operational measures to protect victims, or potential victims, from real and immediate risks to their life and from breaches of their physical and psychological integrity[8].

II. Definition of stalking

Persistent and repeated attempts to contact another person can also be interpreted in a positive sense, as one of the ways of expressing emotions and courtship, especially

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[2] C. Kuehner, P. Gass, H. Dressing, *Mediating Effects of Stalking Victimization on Gender Differences in Mental Health*, Journal of Interpersonal Violence, vol. 27(2), 2012, pp. 199-221.

[3] N. Sami, *Violence Against Women: An EU-wide survey,* European Agency for Fundamental Rights, 2014.

[4] *Ibid*.

[5] T.K. Logan, R. Walker, *Partner stalking: Psychological dominance or "business as usual*, Trauma, Violence, & Abuse 2009, 10.3, pp. 247-270.

[6] Council of Europe- European Court of Human Rights.

[7] European Convention on Human Rights.

[8] *Kurt v. Austria, App. No. 62903/15; Volodina v. Russia, App. No. 40419/19; Malagić v. Croatia, App. No. 29417/17.*

when directed from a man to a woman. However, in order to separate the sociological phenomenon of stalking as a form of courtship from behavior that constitutes a criminal offense that violates the right to privacy of another person, it is necessary to start from the criminal definition of stalking. More specifically, it is necessary to determine when a certain behavior that shows persistence in resetting communication with another person, becomes a behavior that is illegal.

The problem of defining stalking as a criminal offense among EU countries is that until the entry into force of the Istanbul Convention, the regulation of stalking differed among the legislation of the EU member states. Namely, various forms of criminal, civil and misdemeanor protection were provided to victims from stalking, but in many countries stalking was not regulated as a separate criminal offense. For example, in *Italy, Poland, Slovakia, Portugal, Spain, Sweden,* protection is provided under other crimes, which mainly relies on the consequences suffered by the victims of stalking. Therefore, providing protection through the criminalization of various criminal offenses does not raise the question of the quality and frequency of stalking, i.e. its definition, but the focus is on eliminating the consequences of harmful behavior.

In *Poland,* protection is provided under Penal Code as Article 156 "Bodily harm", Article 190 "Threat", Article 216 "Insults", Article 288 "Damages", Article 189 "Deprivation of liberty", Article 191 "Illegal duress (threat)"; in *Slovakia* as crimes against persons, offences against public order and peace, sex offences, crimes of passion, offences against reputation and good name; in *Italy* under Penal Code Article 660 "Harassment or disturbance to persons"; Article 610 "Private Violence"; Articles 582 and 583 "Bodily Harm"; Article 594 "Insults"; Article 612 "Threats"; Article 635 "Damage to private property"; in *Portugal* under Penal Code Article 143 "Simple offences to physical integrity"; Article 153 "Threat", Article 152 "Physical or psychological ill-treatments of a spouse or analogous", Article 154 "Coaction"; article 190 "Violation of home"; Article 192 "Inquest of the private life", Article 199 "Illicit records and photographs"; in Spain under Article 620.2 "Misdemeanor of humiliation or coercion"; Article 172 "Offence of coercion"; Article 173 "Tortures and other offences against moral integrity"[9].

Therefore, there is no unique definition of stalking as a criminal offence, because the criteria for defining stalking vary between legislations. Antistalking laws differ not only regarding what behaviours comprise stalking but also regarding the minimum number of occasions required before a person's conduct is considered as stalking (2,3 or more than 3 occasions) and existence of stalk intent[10]. For example, the Austria is one of the countries that has defined stalking as a separate crime in the Criminal Code since 2006., through Section 107a of Penal Code "Persistent pursuit"[11].

Unlike Europe, where the recognition of stalking behavior varies from country to country, and was first prescribed in law in Belgium[12], stalking was recognized as a

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[9] *Protecting Women from The New Crime of Stalking: A Comparison of Legislative Approaches within the European Union Final Report*, Modena group on stalking, University of Modena and Reggio Emilia, 2007, pp. 2-149.

[10] P.L. Sheridan, E. Blaauw, M.G. Davies, *Stalking: Knowns and Unknowns*", Trauma Violence Abuse; Sage publication, 2003, no. 4, pp. 148-159.

[11] *Protecting Women from The New Crime of Stalking: a Comparison of Legislative Approaches within the European Union Final Report*, Modena group on stalking, University of Modena and Reggio Emilia, 2007, pp. 2-149.

[12] In Belgium the anti-stalking law came into force in 2003.

criminal offence in California-USA much earlier in 1990. Since then, there have been several attempts in theory to describe the definition of stalking.

Stalking can be described as an unwanted and repeated course of conduct directed toward a specific individual that induces fear or concern for its own safety[13]. In the United States, most legislation depicts stalking as an intentional pattern of repeated or unwanted pursuit that a reasonable person would consider threatening or fear inducing[14]. It also points out that stalking definition generally includes some reference to "intentionally harassing, threatening, and/or intimidating a person by following them about, sending them articles, telephoning them, and waiting outside their house"[15]. The common is that stalking refers to a course of conduct by which one person repeatedly inflicts on another unwanted intrusions to such an extent that the recipient fears for his or her safety[16].

The issue of stalking in Europe jurisprudence was considered also through the cases of the ECtHR as a form of psychological violence against women. But these came later than there have been cases of stalking in EU Member States. Furthermore, until 2007 domestic violence had not been directly addressed substantively by the European Court of Human Rights[17]. Certainly, as a criminal and social phenomenon stalking was early known. Some important studies were conducted at the European Union (EU) level, starting in 2003 with the multidisciplinary so-called Modena Group[18], from whose work some articles of the Istanbul Convention are clearly derived[19]. However, since 2007 the Court has directly addressed this issue in a series of cases involving violence against women in the home20. Violation of the European Convention on Human Rights were found in all these cases[21]. In these cases, it is established that domestic violence can breach the right to life (Article 2), the right to be free from torture and from inhuman or degrading treatment (Article 3), the right to respect for ones private and family life (Article 8) and the equality provision (Article 14).

Therefore, the jurisprudence of the ECtHR in individual cases of domestic violence has led to the need to describe and define domestic violence more closely through the adoption of the Istanbul Convention. This is also stated in an explanatory report by Council of Europe. Consequently, the ECtHR and the Istanbul Convention contribute to a uniform understanding of the concept of stalking. The Istanbul Convention in its Article 34 prescribed obligations for Countries to take necessary legislative measures to ensure that the intentional conduct of repeatedly engaging in causing her or him to fear for her or his safety, criminalize. Apparently, for a behaviour to become stalking,

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[13] T.K. Logan, R. Walker, *cited,* p. 247-270.

[14] P.L. Sheridan, E. Blaauw, M.G. Davies, *cited,* pp. 148-159.

[15] M. Brewster, *Trauma symptoms of former intimate stalking victims*, Women and Criminal Justice, 2002, no. 13, pp. 141-161.

[16] R. Purcell, M. Pathe, E.P. Mullen, *Editorial: When do repeated intrusions become stalking?,* The Journal of Forensic Psychiatry and Psychology, Vol.15 No. 4, 2004, pp. 571-583.

[17] R. McQuigg, *The Istanbul Convention, Domestic Violence and Human Rights*, Routledge, London, 2017, p. 79.

[18] *Female victims of stalking and helping professions: Recognition and intervention models: A European study*, Franco Angeli, Milano, 2005, pp. 75-77.

[19] *Case of Giuliano Germano v Italy App.No. 10794/12.*

[20] *Kontrova v Slovakia App. No.75/04: Bevaqua and S v Bulgaria App. No 71127/01; Branko Tomasic and Others v Croatia App. No 46598/06; Opuz v Turkey 33401/02; Hajdukova v Slovakia App. No.2660/03; E.M, v Romania App. No. 43994/05.*

[21] R. McQuigg, *cited*, p. 79.

Convention recommends that only such behavior that is repeated and causes fear, can be treated as stalking. This is a widely definition. Because it is not further prescribed which harmful forms of repetitive behavior can cause fear in the victim. Most legislation depicts stalking as an intentional pattern of repeated or unwanted pursuit that a reasonable person would consider threatening or fear inducing. However, in order to distinguish stalking as a crime from conduct that is not, it is necessary to take a closer look at the relations between the stalker and the victim.

III. Stalker – victim

When describing criminal behavior, the question always arises as to who can be the perpetrator and who is most often the victim. When it comes to defining stalking, in theory, it is found that by observing who the victim might be, also the quality of the previous relationship between perpetrator and the victim, it is possible to predict whether stalking will occur, or how long such harmful behavior will last.

Statistics show that women are victims of stalking significantly more often than men. Results suggest that stalking is largely a crime against women perpetrated by men. There are studies that indicate that women's violence is significantly different from men's violence in terms of frequency, nature, intensity, intention, physical and emotional consequences, which is why it is considered that there is no consensus in the literature on the question of whether women's violence in inter-partner relationships is most often the result of self-defense, i.e. a woman's reaction to male violence, or whether women are aggressive as their partners[22]. The results of research regarding the issue of stalking do not cast doubt that this form of behavior is more associated with men as perpetrators.

The gender disparity in stalking cases parallels other violent cases. The specific crime of domestic violence pre-existed the stalking behavior in one-third of research cases – a pattern first noted also by other studies – which accentuates the further need for combined domestic violence and stalking research and risk management[23].

Furthermore, the Modena Group conducted study that includes 100 police records about cases in which social workers of the police, counselled with victims of stalking. The tested period was from 1999 to 2003 in Belgium. The goal of analyses of police records was to study the characteristics of reported stalking cases[24]. The total stalking cases concerned 104 stalker and 106 victims. The study suggests that most stalking victims were women (91,5%), versus 8,5% men. Most of the victims were single when the stalking incident started, 42,4 % were unmarried, 38,7 % divorced. 17% were married and 1,9% of the marital state was unknown. The mean age of the victims was 37. The youngest was 14 and the oldest victim was 85. The stalker group considered of 73% of males, 15% of females and 12 % unknown. The mean age of this group was 38. The youngest stalker was 13 and the oldest was 75. Most stalkers were single

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[22] N. Lukić, *Violent Crime of Women*", in Punitive reaction in Serbia, Edicia Crimen, Belagrade, 2019, pp. 327-348.

[23] K. Mohandie, J. Reid Meloy, G.M. McGowan, *The RECON Typology of Stalking: Reliability and Validity Based Upon a Large Sample of North American Stalkers*", J. Forensic Sci, January 2006, Vol. 51, No. 1, pp. 147-155.

[24] Modena Group of Stalking: *Female Victims of Stalking: Recognition and Intervention Models a European Study*, Roma, 2005, p. 75.

during the stalking, specifically 75% of whom 44% were unmarried and 31% divorced. Also, the study results suggest that the end of romantic relationship was the reason for the stalking in 63% of the cases.

The meta-analysis which included 103 sample of studies stalking related phenomena, representing more than 70,000 participants, conclude that approximately one fifth of people have been stalked, 24% of women have been stalked, 10% of men have been stalked, 75% of victims are female and 25% of victims are male, half of all stalking emerges from prior romantic relationships. Further information regarding gender differences is available across studies by examining the proportion of stalking by gender. For example, across 43 studies, almost 75% of stalking victims are female, and 25% of victims are male[25].

Another study analyzed the association between previous intimate relationships between the perpetrator and the victim with subsequent behaviors consisting of two or more unwanted contacts between the perpetrator and the victim, that induced a reasonable fear in that victim[26]. The study also suggests that the intimate stalkers are far the most malignant.

Previously, there was an opinion that stalking as a social phenomenon was present between persecutors and public figures. But scholars since have continued to demonstrate that most stalking victimization emerges from the decay of preexisting relationships. This meta-analysis revealed a similar picture across studies, an average of 49% of stalking emerged from relationships that were previously romantic, whereas almost 18% of stalking was perpetrated by strangers[27]. Today, we can conclude that the most surveys are based on the earlier intimate relationship between the stalker and the victim, believing that this form of stalking is crucial as a predictive behavior for other forms of violence, especially domestic violence.

Therefore, many researchers suggests that prior sexual intimacy substantially increases the risk of personal violence by intimate stalkers[28]. Many stalkers pursue their victims because they both yearn for affection and are very angry. Some express only a desire for a relationship, while others disparage and devalue their object. Each rejection may humiliate him and intensify his anger[29].

Previous intimate sexual intercourse is also important as a predictor of how long the stalker can be persistent in accordance with his behavior towards the victim. Study implies that the best predictor of stalking duration is the type of prior relationship shared by stalker and victim, with rejected ex-partners thought to be the most persistent, and strangers least[30]. Rosenfeld (2003) did examine factors associated with stalking recidivism in his New York study. He found that ex-intimate partners and those with personality disorders were most likely to be charged with further stalking offences, indicating that these individuals might be more persistent in their stalking behavior[31]. Meloy concludes that most stalkers are males whose victims are "prior sexually intimate

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[25] B.H. Spitzberg, *The tactical topography of stalking victimization and management*, Trauma, Violence, & Abuse, no. 3.4 (2002): pp. 261-288.

[26] K. Mohandie, J. Reid Meloy, G.M. McGowan, *cited,* pp. 147-155.

[27] B.H. Spitzberg, *cited,* pp. 261-288.

[28] K. Mohandie, J. Reid Meloy, G.M. McGowan, *cited,* pp. 147-155.

[29] *Ibid.*

[30] T.E. McEwan et al., *A Study of the Predictors of Persistence in Stalking Situations*, Law and Human Behavior, vol. 33, no. 2, 2009, pp. 149-158.

[31] T.E. McEwan et al., *cited,* pp. 149-158.

females". Victims of former intimate stalkers have reported common perceptions regarding their stalkers' motives, including the desire for reconciliation, obsession with the victim, retaliation and jealousy. Research suggests that most stalkers are not physically violent; however, simple obsessional males stalking former intimates are more likely to be violent than other types of stalkers[32].

The literature also discusses that the duration of time in which the victim suffers stalking is one of the criteria for recognizing the frequency of harassment.

One study suggests that there are two types of stalking, the first one, which is a self-limited intrusiveness, characterized by intense but short-lived harassment, the behavior usually abates within 1 or 2 days, though may continue for up to 2 weeks. This type of stalking is usually carried out by someone who is a stranger to the victim[33]. In contrast, victims pursued beyond 2 weeks were most likely to be harassed by someone previously known to them (82.5%), including former intimates in 21.4%, casual acquaintances in 30.3%, individuals encountered in a work context in 22.2% and estranged family or friends in 8.5%[34].

The duration of stalking is a criteria that is important for determining the type and severity of the consequences suffered by the victim. The longer the stalking lasts, the more likely it is that serious consequences will occur for the victim.

Victims who have suffered stalking for a long time, especially for more than two weeks, are significantly more exposed to post-traumatic stress than those exposed to brief harassment[35]. Researchers also suggests that the longer stalking continues, the greater the potential for psychological, social and physical damage, making gauging the potential for persistence an important aspect of stalking risk assessment[36]. Research shows that stalking can last for different lengths of time, and contrary to the opinion that any stalking that lasts longer than two weeks can cause serious consequences for the victims, there is no clear destination for what is the longest average duration of stalking. A study conducted among interviewed 50 Chicago women who had been harassed either after a relationship had ended or after they turned down romantic overtures, show that they were harassed for an average of 13 months, with an upper range of 120 months[37].

As mentioned, the definition of stalking suggested by the Istanbul Convention, as the decisive demarcating element of behavior that is stalking from that which is not, is precisely the fear that the victim suffers. The problem with such a broad construction of stalking is that many instances of intrusiveness overlap with the mundane, albeit irritating, commonplaces of social life[38]. The fact that the definition of stalking in legislation has different criteria according to which certain behavior is considered a criminal offence has, in the practice of the courts, the consequence of determine boundaries when a particular behavior is considered stalking. **In this regard, the**

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[32] *Ibid.*

[33] R. Purcell R., M. Pathe, E.P. Mullen, *Editorial: When do repeated intrusions become stalking?,* The Journal of Forensic Psychiatry and Psychology, Vol.15 No.4, 2004., pp. 571-583.

[34] *Ibid.*

[35] *Ibid.*

[36] T.E. McEwan et al., *cited,* pp. 149-158.

[37] P.L. Sheridan, E. Blaauw, M.G. Davies, *Stalking: Knowns and Unknowns*, Trauma Violence Abuse; Sage publication, 2003, 4:148, p. 148-159.

[38] R. Purcell R., M. Pathe, E.P. Mullen, *cited,* pp. 571-583.

question is whether stalking as a criminal offense of persecution is constituted by a single act or several repeated actions, or whether under certain circumstances even one act of stalking is sufficient to cause fear in the victim.

IV. Consequences of stalking

Gaps in the interpretation of complex social behaviors, such as stalking, are attempted by science to compensate by conducting certain studies aimed at helping those who engage in stalking, especially police officers, to recognize when a particular behavior can be considered stalking. This is important both from the point of view of workers who provide assistance to victims who report a stalking, and to all those victims who cannot recognize that they are suffering stalking.

One of the forms to describe particularly what kind behavior constitute acts of stalking as a criminal offence is to give specific examples of which acts of stalking are most often considered stalking.

In the literature, it is considered that stalking typically includes a variety of behaviors, but physical approach and phone calls are among the most common[39]. Another study suggest that the most frequent types of stalking include unwanted telephone calls (78%), wandering nearby (63%), unwanted letters, e-mails or faxes (50%), following (38%), approach via a third party (36%), standing in front of the door (33%), silently hanging around (24%), leaving messages at doors (19%), pursuing by car (19%), property damage (17%), invading the home damage (17%), sending unsolicited goods (18%), placing orders under the victim's name (10%), and sending offensive materials (9%). Written messages contained statements of love (50%), abusive language or denouncements (47%), threats (35%) and sexual content (24%). Physical assaults were reported by 31% of victims, including physical restraint (24%), beating (12%) and hitting with objects (9%). Sexual harassment was reported by 42% (33) harassment was reported by 42% and 19% had experienced sexual assaults[40].

In one study conduct between 1844 respondents of which 23% met the legal criteria for stalking, in that they acknowledged experiencing two or more harassing intrusions by the same person that rendered them fearful (female=324; male= 104)[41]. Respondents were asked to indicate whether any person, male or female, had ever:

(a) followed them;
(b) kept them under surveillance;
(c) wandered around their home, workplace or other places they frequent;
(d) made unwanted approaches;
(e) made unwanted telephone calls;
(f) sent unwanted letters, faxes or emails;
(g) sent offensive materials;
(h) ordered things on their behalf that they did not want; or

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[39] T.E. McEwan et al., *cited,* pp. 149-158.

[40] H. Dressing, C. Kuehner, P. Gass, *Lifetime prevalence and impact of stalking Lifetime prevalence and impact of stalking in a European population in a European population,* British Journal of Psychiatry, 2005, 187, pp. 168-172.

[41] R. Purcell R., M. Pathe, E.P. Mullen, *cited,* pp. 571-583.

(i) interfered with their property. For each item endorsed, respondents were asked to indicate the frequency with which it occurred (once, twice, 3–9 times, 10 or more times)[42].

In this survey, in order to make for respondents clearer to understand what stalking behavior encompasses, the research started from as listed the characteristic forms of stalking that appear in practice, in accordance with the legal definition of stalking that requires the frequency and repetition of behavior that causes fear in the victim.

In all studies, the starting criterion of the behavioral model required that the stalking was repetitive, a certain number of times, usually minimum twice, and that such behavior caused a certain consequence. Therefore, each of the above forms of behavior that will most often appear in practice as stalking, it produces certain consequences, more severe or either lighter in the psychological or physical state of the victim. The severity and duration of the consequences will depend on the previous relationship between the stalker and the victim, as well as on the duration of the stalking, but also on the general psychological state of the victim.

Women stalked by a violent partner or ex-partner typically experience more psychological abuse and controlling behavior, more serious threats, more severe physical assault, and more of them experience injury as well as sexual assault during the relationship[43]. In one study the respondents who indicated any incidence of harassment were asked to answer additional questions relating to the stalking incidence, for example, on the nature, duration, and frequency of the intrusions, and their relationship with the perpetrator. The stalking definition restricted the presence of stalking to more than one episode of harassment that had to be present over a minimum of 2 weeks, involved more than one form of intrusive behavior, and provoked at least some fear[44]. More of those who experienced stalking reported problems concentrating at work, job performance problems, more illness that interfered with work, and more frequently reported they were unable to go to work because they were upset. Also, perceived intrusion or lack of reprieve (time in between episodes) may also play a role in psychological distress. For example, one victim summarized how her stalker was just "constantly there," which could be interpreted as literally or figuratively in her mind[45].

This is important to emphasize that the importance of early recognition of stalking lies precisely in preventing the occurrence of serious consequences for the psychological health of the victim. One recent study found that only about 40% of women who reported stalking type victimization labelled the experience as stalking victimization although the definition of stalking in this study was very broad. Analysis of the National Violence Against Women Study found that of those that met the study definition of stalking (defined by repeated behavior that made the victim feel very frightened) a quarter of them (26.2%) did not label the experience as stalking[46].

The survey which analyzed 51-item self-report stalking questionnaire assessing the experience of harassing intrusions. When it comes to consequences that occur in

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[42] *Ibid.*

[43] T.K. Logan, R. Walker, *Partner stalking: Psychological dominance or "business as usual*," Trauma, Violence, & Abuse 2009, 10.3, pp. 247-270.

[44] C. Kuehner, P. Gass, H. Dressing, H., *Mediating Effects of Stalking Victimization on Gender Differences in Mental Health*, Journal of Interpersonal Violence, 2012, no. 27(2), pp. 199-221.

[45] *Ibid.*

[46] T.K. Logan, R. Walker, *cited,* pp. 247-270.

victims' mental health, this survey shows that women reported higher levels of depressive, anxiety, somatic, and stress-related symptoms and a more severe global impairment of psychosocial functioning due to mental health problems. Also, it identified a higher-point prevalence of any mental disorder and a more frequent use of psychotropic medication in women. According to numerous studies, depression and post-traumatic stress disorder are the most prevalent consequences of mental health[47].

Further, study results consistently showed that women who were stalked by their partner experienced psychological abuse, physical abuse, sexual abuse, and injury at significantly higher rates compared with women who were not stalked by their partners[48]. In addition to experiencing more violence, women in the stalking group also had more PTSD and anxiety symptoms, even after controlling for severe threats, severe physical violence, and sexual violence[49]. Other studies point out another consequences as a sleep disturbances and depression[50].

Definitions of stalking require specific key elements, regardless of the victim–stalker relationship. These key elements typically include the experience of unwanted attention that is repeated and that invokes fear. One of the common issues of stalking is changes that occur in private life of the victim. Many victims make changes in their routines and activities of daily life. Victims respond to stalking by changing phone numbers, jobs, or residences, and many seek counselling51. The tendency of the victim, who is afraid of repeated unwanted intrusion, is to change something in the daily routine. If the stalking has the form of an unwanted contact, through e-mail of phone or social network, the victims first reaction, when she acknowledges the threat of repeating such behavior, she will usually avoid such intrusions by blocking stalkers e-mail, phone number or his profile on the social network. The change in routine does not have to be drastic, it is enough for the victim to change the direction in which she travels to work every day, or to start looking behind her in fear when she enters the building where she is living. Participants indicated any day missed from school or work or any social activity missed because of stalking violence and any specific behavior used in response to dating violence[52]. Regardless of duration of stalking, this is one of the first alarms which sign that one repeated behavior become stalking. The quality of a change in the behavior of the victim must be indicator to the state authorities to provide effective protection when the victim files a complaint**.** The fear that the victim feels can last indefinitely and will depend not only on the length of the stalking, the quality of the previous relationship between the stalker and the victim, but also on the personal character of the victim.

Victims of stalking also report changes in personality traits, post-traumatic stress disorder, fear, powerlessness, greater paranoia and cautiousness, distrust, depression, and other symptoms[53]. Although stalking constitutes a form of psychological violence,

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[47] *Ibid.*

[48] T.K. Logan, L. Shannon, J. Cole, *Stalking victimization in the context of intimate partner violence*", in Violence and victims, 22.6, 2007, pp. 669-683.

[49] *Ibid.*

[50] M. Brewster, *Trauma symptoms of former intimate stalking victims*", Women and Criminal Justice, 13, 2002, pp. 141-161.

[51] F.A. Amar, *College Women's Experience of Stalking: Mental Health Symptoms and Changes in Routines*", Archives of Psychiatric Nursing, Vol. 20, No. 3, 2006, pp. 108-116.

[52] *Ibid.*

[53] M. Brewster, *cited*, pp. 141-161.

it has also been identified as a form of violence that may lead to physical injury. Population-based surveillance data collected through random-digit-dialed telephone surveys revealed that 42 of the 132 women who reported being stalked (32%), also reported injuries from being physically assaulted by their stalker, such as swelling, cuts, scratches, bruises, broken teeth, and knife or gunshot wounds[54].

By reviewing the consequences of stalking that the victims most often declared, it can be concluded that each of the consequences that occur can cause significant damage to the mental or physical health of the victim. Especially when considering that all the psychological consequences can last for a long period of time. Also, regarding the length of the stalking, its frequency of repetition over a longer period, even after short-term pauses in the behavior of the persecutors, it is undoubted that the longer the disturbing behavior lasts, the more severe the consequences the victim will suffer. Faced with continuing intrusions over which they have little or no control, victims of this form of stalking often report significant disruption to their daily functioning and elevated rates of psychological distress[55].

In order to recognize in a timely manner that frequently repeated behavior that harasses the victim can grow into more permanent stalking, the Istanbul Convention requires states to prevent the undesirable effects of stalking by effective measures in the initial stages of harmful behavior. Believing that stalking is just as harmful to the mental state of the victim as any other form of psychological violence by a partner. Therefore, it is believed that as the potential of stalking is to disturb the peace of the victim, it is predictive behavior and indicates the possibility that some of the other forms of domestic violence may occur. In the initial stages of harmful behavior, the victim primarily feels fear and discomfort. According to the Istanbul Convention, this will also be the first sign to be recognized by both the victim and the official authorities.

V. Criminal code response

There are opinions that the major source of harm to the greatest number of victims of stalking is not from assault, as might be expected, but from prolonged, unwanted, and unpredictable intrusions that produce a sense of powerlessness and fear[56]. As the theory points out, the problem with stalking is that they are not in themselves criminal acts, in the classical sense of mala in se, which are recognized as evil. On the contrary, stalking involves repetitive actions on a daily basis, which do not have to be deviant in nature. Therein lies the danger of stalking as a behavior that only under certain conditions requires a criminal reaction. Recognizing the boundaries when a repetitive behavior becomes so undesirable that it produces a feeling of discomfort and then fear in the victim is the limit of necessary criminal repression.

Therefore, the Istanbul Convention proposes the definition of stalking which includes beside repetitive conduct and fear consequently. In primary step, the fear as a concern for its on safety is the first predictor that one behavior could persist in prolonged unwanted intrusion. The presence of fear is a criterion that requires a criminal response to provide protection to the victim.

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[54] *Ibid.*

[55] R. Purcell R., M. Pathe, E.P. Mullen, *cited,* pp. 571-583.

[56] T.E. McEwan et al., *cited,* pp. 149-158.

When we talk about sociably acceptable behaviors, then we can start from the fact that even a persistent suitor to a beautiful woman becomes a persecutor. Therefore, there is opinion that it is advisable to exclude specific behaviors, a minimum number of occasions or behaviors, and consequences for the victim[57]. The problem with such wide and general definition is that any persistent, unwanted behavior can considered to harassment, but in that case, police can intervene before the behavior escalates to violence[58]. Although there are opinions that human rights are violated in this way, especially situations of persistent courtship, there is a reasonable need to react in a timely manner due to the prevalence of the problem. On the one hand, the general definition extends the range of cases that are considered stalking to those cases that are not initially stalking but may become, while on the other hand, prescribing certain alternative forms of stalking, and requiring that such behavior be repeated in a certain number of cases and over a certain period of time, can reduce the severity and significance of the consequences that can occur as a result of stalking in a short period of time and in two repeated behaviors.

It should also be noted that Article 35 of the Istanbul Convention stipulates that Parties shall take the necessary legislative or other measures to ensure that appropriate orders for prohibition or protection are available to victims of all forms of violence falling within the scope of this Convention. Thus, the Convention does not provide for an obligation for Parties to punish stalking as a criminal offence, but it leaves members the legislative freedom to decide how to provide the most effective protection to victims of stalking, either by making stalking a misdemeanor or a felony. However, in setting the boundaries of when stalking becomes harmful behavior, the Istanbul Convention has played a significant role in clearly defining stalking as a behavior that should be criminalized and under what conditions. The aim of the Convention is to ensure that States Parties recognize stalking as harmful conduct and take all legislative measures to detect and sanction such conduct at an early stage.

Although the Convention refers to the definition of stalking, the Criminal Code of the Republic of Serbia prescribes in its article 138a the act of stalking, where, apart from persistence and attempts to achieve unwanted contact, fear is not an important element of the crime. This does not mean that victims won't suffer a fear, but only that the Criminal Code, when prescribing the criminalization of this criminal offense, does not require that the victim has suffered a consequence in the form of fear. Therefore, the Criminal Code of Republic of Serbia didn't follow Convention, when prescribing the criminalization of this criminal offense, because it didn't not require the victim to suffer fear because of a criminal behavior.

Contrary to the general definition of stalking, the Criminal Code of the Republic of Serbia, also prescribes alternative behaviors that are considered stalking. The law prescribes that the act of stalking is committed by the perpetrator who, during a certain period, persistently undertakes one of the alternatively prescribed actions[59]. For example, when someone follows another person without permission or takes other actions with the aim of getting physically closer to such a person contrary to his will; 2) Contrary to the will of another person attempts to establish contact with him/her directly, through a third person or through means of communication; 3) Abuses

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[57] P.L. Sheridan, E. Blaauw, M.G. Davies, *cited,* pp. 148-159.

[58] *Ibid.*

[59] *The Criminal Code of the Republic of Serbia: "Official Gazette of RS" no. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014, 35/2019, 27/2021, 62/2021.*

personal data of another person or of a person close to him/her for the purpose of ordering goods or services; 4) Threatens to assault the life, body or freedom of another person or a person close to him/her; or 5) Takes other similar actions in the manner that may perceptibly jeopardize the personal life of the person vis-à-vis whom such actions are taken, shall be punished with a fine or imprisonment of up to three years. According to the case law of the Supreme Court of the Republic of Serbia[60], for the existence of the criminal offense of stalking, it is sufficient that the perpetrator has achieved one of the alternatively prescribed legal actions by his behavior. Through examples of how the perpetrator most often stalks the victim, the research conducted so far has shown that the perpetrator most often tries to get in touch with the victim, through means of communication, monitoring, and it has been noticed that intimidation and various forms of threat are also present.

Thus, the Code requires that stalking is not an isolated action, but it is necessary that one action be repeated. How long a period it takes and how many times it is necessary to repeat the action, is left to the jurisprudence to answer the question in each individual case.

In the practice of courts in Serbia, it is considered that stalking as a criminal offence exists even when the stalker, against the will of another person, persistently tries to establish contact within a period of 24 hours. A criminal offense will also exist when communication between two persons on a voluntary basis lasted for a certain period of time, but at some point the will to communicate in one person ceased and this was clearly made known to the other person[61]. From that moment on, when one person makes it certain that he wishes to cease all further communication and communicates it to the other person, any further attempt to establish contact will constitute stalking, certainly only when it begins to cause fear in the victim. As studies have confirmed, stalking most often occurs between former intimate partners, and therefore an important moment has been recognized in practice, that regardless of the length of the previous intercourse, it is necessary that the victim made it clear to the perpetrator that she no longer wants contact with him. The absence of a clear signal from the victim to the perpetrator will be one of the aspects of the defendant's defense in court proceedings aimed at proving the absence of intention to stalk through the lack of awareness that the victim no longer wanted contact and that she did not inform the perpetrator about it.

In the similar manner, the Criminal Code of the Republic of Austria provides in its Section 107a four different forms of persistent pursuit, 1. seeking the victim's proximity; 2. getting in touch with the victim by way of telecommunications, by using other means of communication or via third person; 3. ordering goods or services for the victim by using his or her personal data; 4. prompting others to contact the victim by using his or her personal data. If these acts happen unlawfully and are in addition likely to infringe upon private life of the victim, imprisonment up to one year may be imposed on the perpetrator. Persistent behavior is necessary, but the law does not state a minimum of acts[62]. Important is the general intent (*dolus eventualis)* of the

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[60] *Judgment of the Supreme Court of the Republic of Serbia, No. Kzz 1240/22 from 23.11.2022.*

[61] V. Turanjanin, *Criminal Policy in the Criminal Offense of Persecution*, in Criminal Policy and Adequacy of Reaction to Crime, 2024, pp. 188-205.

[62] *Protecting Women from The New Crime of Stalking: a Comparison of Legislative Approaches within the European Union Final Report*, Modena group on stalking, University of Modena and Reggio Emilia, 2007, pp. 2-149.

perpetrator to continue his behavior. If that intent is proven, even one single act can be punishable. Therefore, the impact persistent pursuit has on the victim is not a criterion for making the behavior a criminal act; the concrete reaction of the victims is not relevant. If an objective threshold is passed in a manner that the way of living of an average victim is unacceptably affected, Section 107a Penal Code can be enforced[63]. Thus, according to Austrian law, even though the description of the crime does not contain fear as a consequence of the perpetrator's behavior, when from an objective point of view the behavior of the perpetrator affects a change in the victim's routine, there will be a criminal offense of stalking.

As we discussed above, due to the difference in the definition of stalking, the Istanbul Convention stipulated the obligation and duty of member states to respond to stalking in the earliest way, believing that this is the only way to prevent other serious forms of violence, especially psychological violence as one of the forms of domestic violence.

It should not be ignored that stalking is one of many forms of psychological violence and as such is difficult to recognize, which makes it difficult to provide timely and effective protection to the victim. In its form, stalking is an example of coercive behavior which consists of the act or pattern of acts of assault, threats, humiliation, intimidation or other abuse that is used to hurt, punish or intimidate its victim[64].

In practice the ECtHR has taken the view that a timely and effective response is needed in the light of the protection of the right to private life in accordance with Article 8 of the Convention.

In its rulings, which are particularly related to victims of stalking, the European Court of Justice pointed out that the state authorities, after the victim's reported harassment, did not take all available measures and provided effective protection, which resulted in more serious consequences[65]. The ECtHR recognizes in its decisions that stalking is conduct related to domestic violence, especially psychological violence, and falls under the right to private life.

In theory, it is emphasized that "stalking is significantly traumatizing and is traumatizing in ways that display a broad array of potential symptoms. It is easy for practitioners to view stalking as a relatively mild trauma because there is often the same sense of urgency from law enforcement and counsellor's [as] victims of domestic violence or assault. In other words, stalking victimization is harmful to victims, but may be more difficult for mental health providers and justice system personnel to respond to when compared with other kinds of interpersonal victimizations[66]. The view that stalking is at least as traumatizing as other forms of interpersonal violence, is disagreeing, especially if we have in mind the importance of recognizing and preventing stalking as a predictive behavior for other forms of domestic violence. Furthermore, seen through the prism of the consequences in the mental health of the victim, stalking due to its long-term effect and the changes it can cause in the victim's everyday life, can be considered as one of the most serious forms of behavior that violate the victim's right to private life, but also the peacefulness.

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[63] *Ibid.*

[64] J. Igracki, D.M. Brasovan, *Protection of Victims of Psychological Abuse as Type of Domestic Violence in Criminal Procedure", in.* Journal of Eastern European Criminal Law, No.2, 2022, pp. 74-90.

[65] *Case of Volodina v. Russia, App. No. 40419/19.*

[66] T.K. Logan, L. Shannon, J. Cole, *Stalking victimization in the context of intimate partner violence*, in Violence and victims, 22.6, 2007, pp. 669-683.

VI. Conclusion

Stalking is a social behavior that most deeply affects the personality of the victim. The consequences that the victim suffers can be of different severity and range from fear as a primary reaction to the threat that the victim feels from the outside world to a different spectrum of disorders in the victim's mental health. The importance of the issue of early detection, timely response and prevention of stalking has been recognized by the Istanbul Convention, which therefore prescribes the obligation of state parties to take measures in their legislation in order to effectively prevent and punish stalking as one of the forms of domestic violence. It is up to states to decide whether to make stalking a misdemeanor or a criminal offense. By defining stalking through the Istanbul Convention, it has gone a step further in the legislative technique in terms of unifying the behavior that is considered stalking. Through the provisions of the Criminal Code, the Republic of Serbia has fulfilled its obligation as a member state to the Convention and regulated stalking as a criminal offense. Stalking is considered a complex behavior that is difficult to recognize, both from the point of view of the officers dealing with the issue and the victim. The complexity is reflected in the fact that stalking manifests itself in various forms and can be considered acceptable social behavior. Setting boundaries when a socially acceptable behavior becomes harmful is important for a timely and effective response to prevent and punish such behavior. The starting point for setting the boundary we have seen is in the definition of the concept of stalking, duration of stalking and consequences that occur.

A victimological approach to defining stalking would start from the thesis of how the victim feels, which would result in the fact that, depending on the psychological state of the victim before the incriminated behavior, especially if he suffers from mental illness, persecution mania, and an isolated unwanted attempt to establish contact is considered persecution. Such an approach is too broad and would include those behaviors that did not have a motive on the part of the perpetrator to stalk the victim.

The second approach, which requires stalking to be a multi-act action that lasts for a certain period, aims to demarcate socially acceptable behaviors from those that enter the criminal zone. From the point of view of legislative technique, the boundary will be made by the victim's refusal to establish contact, her avoidance of the perpetrator for further contact. The consequence in the form of fear for one's own safety does not necessarily have to be determined by law, but in criminal proceedings when it occurs, it must be determined. Fear for one's own safety is what the Istanbul Convention sees as a motive to prevent more serious forms of violence against women through the prevention of stalking. For the victim, the feeling of fear will be the moment to change his behavior, to start avoiding the perpetrator, and to make it clear that he no longer wants contact with him. This is the limit of the entry of the behavior of the perpetrator of stalking into the criminal zone. Then it is important that the criminal justice reacts repressively when it comes to stalking, and preventively in order to prevent further forms of domestic violence.

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Exercising And Protection of the Child's Right to Personal Relationships With Parents

Ranka Vujović, PhD*

Abstract

The child's right to contact with parents is recognized as one of the basic rights in international and national legislation. According to the Convention on the Rights of the Child, children have the right to maintain regular contact with their parents, except when this is not in their best interest. The issue of contact becomes particularly important in situations of divorce, guardianship, adoption, but also in situations where the parent is far away, such as work migration.

New technologies, such as the Internet, mobile phones, video calls (Zoom, Skype, WhatsApp), social media and messaging applications, play a key role in preserving and promoting this right. They enable children and parents, regardless of geographical distances, to stay connected and maintain quality communication. The challenges of such communications concern the protection of the child's privacy and safety.

Despite everything, sometimes the child, willingly or under the influence of others, and sometimes the parent who is obliged to do so, expressly refuses the possibility of any communication, which seriously endangers the best interest of the child.

After a brief review and critical assessment of the existing mechanisms for exercising and protection of the right to personal relationships in Serbian, comparative and international law and practice, this paper will address newer theoretical approaches to the aforementioned legal institute and its legal protection, which could lead to further improving the normative framework in this delicate matter.

Keywords: *child, parents, family life, close family ties, right to personal relationships, contact concerning children, court, litigation, enforcement*

I. The child's right to personal relationships in Serbian, comparative and international law

The child's right to personal relations with the parent with whom they do not live is recognized by a large number of modern national legislations, since the relationship between the child and the parents is one of the essential conditions for healthy emotional development of the child. Modern family law attaches great importance to

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the child's personal relationships with close relatives and other persons who, due to the nature of the relationship with the child, have an important role in the child's life and/or who participate in their growth and development in the earliest and most sensitive age of life, especially when there is a lack of responsible and supportive parenting.

In Serbian family legislation, a child is recognized as having the right to live with his parents and the right to be taken care of by his parents before anyone else. It is the right of the parents to decide how to take care of the child, which includes the right to decide how to maintain personal relationships. If the joint life of a child and a parent is interrupted for various reasons, the child has the right to maintain personal relations with the parent with whom he or she does not live. The right to personal relationships can only be limited by a court decision, when it is in the best interest of the child. The court is also authorized to decide on the separation of the child from the parents if there are reasons to completely or partially deprive the parent of parental rights or in the case of domestic violence. A child has the right to maintain personal relationships with relatives and other persons with whom he or she has a special closeness, if this right is not limited by a court decision. At the end of the fifteenth year of life, if he or she is capable of reasoning, the child acquires the right to decide with which parent he or she will live, as well as the right to independently decide on maintaining personal relations with the parent he or she does not live with.

Since personal relationships are of inestimable importance for the proper emotional development of a child, parents have a legal duty, which is also their right, to take care of the child before all others, by personally taking care of his or her life and health. The Family Law of the Republic of Serbia[1] stipulates that it is the right and duty of parents to develop a relationship with their child based on love, trust and mutual respect, to direct the child towards the adoption of universal values, and that in order to fulfill these duties and rights, they receive all information about the child from educational and health institutions (PZ RS Art. 68-70). A parent who does not exercise parental rights has the right and duty to maintain a personal relationship with the child and to decide on issues that significantly affect the child's life jointly and by agreement with the parent who exercises parental rights, and if the child is cared for in another family, with the child's guardian (PZ RS Art. 78, par. 3 and Art. 120).

Since the rights and duties of children and parents are correlated, the correlate of the child's right to personal relationships with the parent and other persons close to the child is the parents' duty to enable the child to exercise the right to maintain personal relationships. This duty belongs to the parent exercising parental rights, regardless of who the participants in the specific relationship are. A parent who does not exercise parental rights, in addition to the duty to maintain personal relationships, has an independent right to contact with the child, which derives from the *right to family life*. On the other hand, the child's right to personal relations with the parent is not the child's duty, nor does it depend on whether the parent exercises parental rights or is deprived of parental rights. The only criterion is the best interest of the child.

Although the parent is legally obliged to maintain personal relations with the child (PZ RS Art. 78, par. 3), it is not possible to force him or her to do so, if he or she does

[1] Porodični zakon [Family law], Službeni glasnik RS, br. 18/05, 72/11, 6/15 (PZ RS).

not want it him/herself. Coercion is not allowed, it is simply transcendent to personal, family relationships. On the other hand, any interference or preventing the child or parents to maintain personal relationships is subject to civil and criminal sanctions. Thus, a parent who avoids maintaining personal relations with his or her child with whom he or she does not live or prevents the maintenance of personal relations between the child and the other parent, risks being deprived of parental rights, because not maintaining personal relations with the child, as well as preventing the child from maintaining personal relations with a parent with whom he or she does not live, is defined by law as gross neglect of parental duties (PZ RS Art. 81, par. 3, item 3). At the same time, behavior that prevents the execution of the decision of the competent authority, which determines the way of maintaining the personal relations of the child with the parent or another person close to him or her, can be qualified as a criminal offense[2] (CC RS, Art. 191, par. 3). In the court enforcement procedure for obstructing the execution of the decision on personal relations, a parent can be fined (from RSD 10,000 to RSD 200,000) and this penalty can be imposed repeatedly, if necessary. In addition to a fine, the court can impose a prison sentence on the parent who obstructs the execution, which lasts until the child is handed over to the person with whom he or she should have personal relations, and up to 60 days at most3 (LES RS, Art. 373 and 374).

The solutions contained in the *Convention on the Rights of the Child*[4] (CRC, 1989) were conceived in a similar way, from which it follows that the signatory states will respect the right of a child separated from one or both parents to regularly maintain personal relationships and direct contact with parents on a permanent basis, unless it is contrary to the child's interests. In cases where the separation is the result of a measure taken by a Member State, such as, for example, detention, imprisonment, exile or deportation of one or both parents or the child, the Member State shall, upon request, provide the parents, the child or, as the case may be, another family member with basic information about the whereabouts of the absent family member if the provision of such information does not harm the well-being of the child (CRC, Art. 9).

In an era of increasingly pronounced population migrations, the Council of Europe, at the very beginning of this millennium, with the aim of harmonizing on the European level the fundamental principles of substantive law in the area of legal protection of the child's right to personal relationships and mechanisms for resolving cross-border disputes related to the exercise of that right, as well as their additional improvement, bearing in mind that the mechanisms created in the Hague *Convention on the civil aspects of international Child abduction*[5] (CAC, 1980) i *European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children* (ECR, 1980), had not given the expected results in that matter, adopted the *Convention on Contact concerning Children*[6] (CoCC, 2003). That convention has confirmed the right of the child and his or her parents to establish and maintain

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[2] Krivični zakonik [Criminal Code], Službeni glasnik RS, br. 85/05, 88/05, 107/05, 72/09, 111/09 (CC RS).

[3] Zakon o izvršenju i obezbeđenju [Law on Enforcement and Security], Službeni glasnik RS, br. 106/15, 106/16, 113/17, 54/19, 9/20 (LES RS).

[4] Convention on the Rights of the Child, 20 November 1989, UNTS 1577, I-27531 (CRC).

[5] Convention on the civil aspects of international Child abduction, Hague, 25 October 1980 (CAC).

[6] Convention on Contact concerning Children, Strasbourg, 15. May 2003, CETS no. 192 (CoCC).

regular mutual contacts, which can be limited or excluded only if it is necessary to protect the child's well-being. If it is not in the best interest of the child for contact with the parent to take place without supervision, it is the duty of the competent authorities to consider the possibility of personal contact under supervision or some other way of achieving personal relations between the child and the parent with whom he or she does not live. The signatory states are allowed to, respecting the best interests of the child, extend the right of the child to personal relationships also to other persons who have family, kinship or other close ties with the child (CoCC, Art. 4 and 5). Among other things, the importance of this convention is reflected in the fact that the English term: *access to children*, which until then had been used in international family law, was replaced by a new, more modern expression: *contact concerning children*, which to a greater extent reflects the essence of this legal institute, i.e. the fact that the right to personal relationships primarily belongs to the child. According to the Explanatory Report accompanying the Convention, the expression *contact concerning children* corresponds to a greater extent with the modern concept of children's rights and the modern concept of the legal relationship between children and parents, which shifts the focus from "parental rights" to "parental responsibility". Another important reason for its introduction is the frequent use of the term "contact" in the case law of the European Court of Human Rights, which subsumed under the autonomous term "family life" from Art. 8 of the *European Convention on Human Rights*[7] (ECHR, 1950) the rights of children and parents to maintain "contacts", as well as cases when the child has the right to contact with other persons with whom he or she does not usually live but has *close family ties*[8] (Explanatory Report – ETS 192 – Contact concerning Children, par. 6).

In comparative law, there are different understandings of this legal institute. Thus, in contrast to Serbian, and in general, European family law, in the United States of America, the child's right to personal relationships is not recognized as an independent right. The right to contact is the right of the parent who does not live with the child (*parenting time*), while the child only has an interest, i.e. the need to maintain continuous contacts with both parents[9]. Unlike European continental law, in which the parent is obliged to maintain personal relations with the child, in American law the parent is not obliged to exercise his or her right to contacts with the child, if he or she does not wish to do so[10]. However, if the court has ordered a certain visitation schedule or parenting time, parents are obliged to respect it. A parent who has been granted parenting time is not legally obliged to use all the time allocated to him or her, but his or her eventual lack of interest will be taken into account during future changes related to the visitation plan and, in general, the exercise of parental rights[11]. This solution is based on the belief that coercion in personal relationships is not effective and that any

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[7] Convention on Human Rights, 4 November 1950, as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16 (ECHR).

[8] Explanatory Report – ETS 192 – Contact concerning Children https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800d380d, accessed 12 November 2024.

[9] J.G. Dwyer, *The Relationship Rights of Children*, Cambridge University Press, New York, 2006, pp. 40-41.

[10] *Idem*, p. 50.

[11] K. Kuehle, L. Drozd, (ed.), *Parenting Plan Evaluations: Applied Research for the Family Court*, Oxford University Press, 2012.

punishment imposed will not guarantee the establishment and maintenance of parent-child contact if the parent does not really want that contact.

II. Determining the manner of maintaining personal relationships – between family autonomy and state interventionism.

The Convention on contacts related to children stipulates three basic ways of establishing personal relationships:

(1) direct stay of the child with the parents or in the household of another person close to the child, with whom he or she does not usually live, or meetings and seeing each other in a public or other place for limited time intervals;
(2) communication with the child via telephone, Skype, letters, fax, e-mail and other available means of communication;
(3) providing information about the child to the parent or other person who is entitled to it, i.e. providing information to the child about the person with whom the child has the right to have personal relations, which includes the delivery of the latest photos, medical findings, various reports, school diplomas, certificates etc.

When determining how to maintain personal relationships, according to the CoCC, contact decisions made by a court and contact agreements accepted by a competent court have the same effect. The CoCC pays special attention to the agreements of the parties in the proceedings, so Art. 7 stipulates the obligation of Member States to take appropriate measures to ensure that both parents are informed about the importance of establishing and maintaining contact with their child, both for the child and for themselves, to encourage parents and other persons who are in a family relationship with the child to reach an agreement regarding contacts (through family or other mediation and other forms of alternative dispute resolution), as well as to ensure that, before making a decision, the competent authorities have the necessary information about the child from the parent exercising parental rights and/or the person taking care of the child and, if necessary, obtain additional information from other authorities and other persons or institutions, and all with the aim of making a decision in the best interest of the child. In enforcement proceedings in cross-border disputes as well, when preparing for the enforcement of a foreign decision, in addition to possibly changed circumstances, the agreements reached by the parties to the dispute in the meantime must be taken into account, with the fact that under no circumstances can the foreign decision be reviewed in terms of its merits[12] (CoCC, Art. 15).

In Serbian family law, the rule applies that when parents do not live together, they can agree on how to maintain the child's personal relationship with the parent with whom the child does not live. An agreement that formally regulates the way of maintaining personal relationships (model of seeing) parents can conclude independently or with the participation of a mediator, before or during divorce proceedings or other court proceedings related to family relations in which contact with the child is also discussed. The agreement must be made in writing and accepted by the court. If it finds that such an agreement is not in the best interest of the child, the court will modify it, respecting the principle of the best interest of the child. In general, the court

[12] Convention on Contact concerning Children, Strasbourg, 15. May 2003, CETS no. 192 (CoCC).

has significant official powers in the matter of family relations. The court is *ex lege* authorized to decide on the maintenance of personal relations between the child and the parent with whom the child does not live, even when there is no separate claim for regulating such contact. If the court, performing its activity in the procedure concerning family relations, finds that it is necessary to provide judicial protection of the child's right to personal relations, it will initiate an *ex officio* adhesion procedure in which it will make an appropriate decision on contacts. The court can also, following the principle of the welfare of the child, limit or prohibit the parents from having personal relations with the child (PZRS, Art. 75-78 and Art. 243, par. 4).

A child has the right to judicial protection of the right to personal relationships, regardless of age (PZRS, Art. 263, par. 1). In addition to the child and the parents, the guardianship authority and the public prosecutor also have the right to sue for the purpose of regulating or changing the manner of maintaining personal relationships, restrictions or prohibitions (PZRS, Art. 263 and 264). Regardless of who, in the capacity of the authorized initiator of the proceedings, has demanded judicial protection of the right to personal relationships, the court, before making a decision, is obliged to determine the opinion of the child, if the child is capable of forming that opinion, as well as to pay due attention to the opinion of the child. In addition, it is obliged to request a finding and expert opinion (which generally includes a proposal for a model of contact) from the guardianship authority[13], family counseling center or other institution specialized in mediation in family relations, in order to ensure that the court decision is in accordance with the best interests of the child (PZRS, Art. 65, Paragraph 3 and Articles 266 and 270). As a rule, the child is represented in the proceedings by the parent who exercises parental rights, but the court is obliged to appoint a temporary representative for the child in the event that it assesses that there is a collision between the interests of the child and the parent or that the child is not represented in an appropriate manner (PZRS, Art. 266 Paragraph 1). A temporary representative (temporary guardian in court proceedings or collision guardian, if the interests of the child and parents are in conflict) can also be appointed by the guardianship authority, on their own initiative or at the request of the child who has reached 10 years of age (PZRS, Art. 265). The model of contact determined by the court decision is subject to change, since the child grows up, so his or her needs change, and so do the circumstances in which he or she lives[14]. Following the principle of family autonomy, the case law has taken the position that in every case when the parents live separately, and there is no dispute between them about the way of seeing the child, it is not necessary to initiate and conduct court proceedings in order to regulate personal relations: "when the manner of maintaining

[13] In Serbian law, the duties of the guardianship authority are performed by the local center for social work.

[14] Changed circumstances are a universal reason for seeking a change in a court decision. The very fact that a child grows up implies that, with age, his or her needs also change, which is a circumstance of importance for determining/changing the model of contact. Time plays a very important role in a child's life and is perceived differently than time in an adult's life. The passage of time, under certain conditions, justifies the change, i.e. an extension of the previously determined model of maintaining personal relationships. Thus, for example, in one court decision, it was stated that it is in the interest of the child who had contact with the father according to a certain model that implied the obligatory presence of the mother and "who has built an emotional relationship with the father, whom he perceives positively, and has overcome separation difficulties [...]that his contacts with the father intensify, which cannot be achieved in the future in the situation of seeing the child in the presence of the mother" (Ruling of the Supreme Court of Cassation, Rev. 1436/17 of 5 July 2017).

personal relations between a parent and a child is not regulated by a court decision, the maintenance of personal relations between a parent and a minor child can also be regulated by the agreement of the parents, because not every agreement that is in the interest of the child have to result from a court decision" (Ruling of the Appellate Court in Novi Sad, Gž2 108/16 of 22 February 2016).

Similar rules exist in other legal systems belonging to European continental law. In this place, the material and procedural solutions contained in the German and Swedish family legislation will be briefly presented. Firstly, because the Serbian law is traditionally modeled after it, and it has recently been reformed, and secondly – because according to the level of achieved social rights and freedoms, it is considered one of the most advanced. In addition, given the peculiarities of Anglo-American law, the solutions applied in the field of personal relations in the United States of America will be briefly presented.

In German law, as a rule, the parents decide on the way of maintaining personal relationship between the child and the parents (*Umgangsrecht*) by an agreement, and only exceptionally, if there is a dispute between the parents on this issue or if the child's well-being is at risk for other reasons, the decision is made by the court. As a rule, parents' agreements are not subject to checks and they do not need to be certified, except when the parents themselves request a court certification or a court decision in accordance with the agreement, in order to have an enforceable document. The court itself is obliged to advocate for a peaceful resolution of the conflict between the parents, except in the case of domestic violence, to encourage them to conclude a court settlement or to refer them to a specially appointed judge – mediator in order to try to conclude an amicable agreement[15] (FamFG, Art. 36). Also, the court can order them to undergo mandatory professional counseling (FamFG, Art. 151. par. 1), and is also authorized to issue an order to the expert, if it deems appropriate, to advocate for an agreement between the parents during the expert examination (FamFG, Art. 163. par. 2). The court is assisted in making a decision by the State Youth Office (*Jugendamt*). The parents' agreement is drawn up in writing and must contain clearly defined duties, both of the parent who shall take over the child in order to maintain personal relationships, and of the parent with whom the child lives – to prepare him or her to go to the other parent. The same rule applies to court decisions. The court is required to precisely determine the day, place and time, i.e. the exact date of the beginning and end of the contact, as well as the place of pick-up and return of the child and possibly, the need for the presence of the other parent or a third person, up to the setting of the number of letters and the number of telephone conversations that can be conducted with the child. Although in German legal theory this way of regulating contact with the child is criticized as extremely inappropriate and inflexible[16], only a precisely defined dictum of the court decision can be suitable for execution. Also, only a precisely defined parental agreement can be court certified (approved) and thus become enforceable (FamFG, Art. 156. par. 2). The court can limit personal relationships, to the extent that deviates from the usual models of visitation, it can determine that contacts are maintained only under the supervision of an official, and it can also prohibit the maintenance of personal relationships between a child and a parent, for a certain period, and only exceptionally

[15] Gesetz uber das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit [Law on the Procedure in Family Matters and in Matters of Voluntary Jurisdiction] (FamFG).

[16] D. Schwab, *Familienrecht*, 12. Aufl age, Verlag C.H.Bech, Munchen, 2003, p. 326.

for an indefinite period, if it is necessary to protect the well-being of the child[17] (BGB, Art. 1684). According to the German constitution, the right of parents to independently decide on raising a child is proclaimed as a natural right[18] (BRD, Art. 6 par. 2), thus any interference of the court in regulating that right without a justified reason is a violation of the Constitution[19]. Since it is a matter of natural law, it is not possible to completely and permanently prohibit parents' contact with the child, even when they do not have parental rights, nor can the parents waive that right (BGB, Art. 134 and 138). In connection with this, there is also a rule according to which in the court proceedings, in which it is decided to deny or significantly limit the right to personal relations with the child, the child him/herself must have an independent legal representative. This is one of the situations in which the court is obliged to appoint a special person for the child to provide legal support in the procedure (*Verfahrensbeistand*), unless the child already has a lawyer or some other representative in the procedure (Fam FG, Art. 158). A parent, in any case and regardless of his or her legal position when it comes to exercising parental rights and the right to contact, has the right to information about the child. This right can be limited to the parent, if contact with the child is limited or temporarily denied and if it is required in the best interests, i.e. welfare of the child (BGB, Art. 1686).

In Swedish law, there is also a rule that the way of maintaining personal relations between the child and the parent with whom the child does not live is primarily agreed upon by the parents. Formal agreements are not required, nor are court decisions. Given that the joint exercise of parental rights is a principle and that even after the end of the partnership, the parents continue to take care of the child together, it is often the case that the child alternately (usually for one week) stays with one and the other parent. Indirect contacts (via phone and other means of communication) are maintained only in exceptional circumstances, when the parent is e.g. in long-term hospitalization, in prison or living in a remote location. Parents can decide to enter into a written agreement, in which case it only becomes legally binding when it is approved by the National Health and Welfare Service (*Socialstyrelsen*) after it has been assessed as being in the best interests of the child. If the parents do not reach an agreement on personal contacts, then the decision on this must be made by the court, with a previously attached report from the aforementioned social service or, as necessary, some other office or authority. The report must be submitted to the court within the time limit and according to the guidelines determined by the court for each specific case. The court is competent to decide on the restriction or prohibition of contacts only in exceptional cases, such as the absence of any contact between the child and the parents for a long period of time or cases of violence against the child, various forms of abuse, serious conflicts between parents that prevent reaching an agreement on contacts, cases of illegal detention or abduction of children, and the existence of a risk of violation of other rights of the child[20]. When making a decision, the court must take into account only what is in the best interest of the child. The Family Law stipulates

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[17] Burgerliches Gesetzbuch [Civil Code] (BGB).

[18] Grundgesetz für die Bundesrepublik Deutschland [Basic Law for the Federal Republic of Germany] (GBD) 23 May 1949, Bundesgesetzblatt 1949 I.

[19] *Idem*, p. 324.

[20] Family Law, Information on the rules, Justitiedepartementet, SE-103 33 Stockholm, 2013, pp. 37-38, https://www.government.se/4a767e/contentassets/1e0263a0318e47b4b8515b535925941b/family-law.pdf, accessed 9 November 2024.

that the child must not be exposed to any risk, that good and close contact with both parents is important and that the child's own will should be taken into account, depending on the child's age and maturity. The court must also consider the parent's ability to cooperate in decisions concerning the child. Other adults who are important to the child, in addition to the parents, for example, grandparents or step-parents, do not have the right to initiate legal proceedings (right to sue) and must contact the social services, which can submit a request for contact if they establish that it is in the best interest of the child. The right to sue rests only with the parents[21].

In the US case law, the tradition of protecting the autonomy of parents in deciding the best interests of the child is firmly rooted, so the right to determine the model of contact primarily belongs to the parents. The right to sue for the protection of the right to contact with the child is the right of the parent who does not live with the child. In some federal states, the right to file a lawsuit is also recognized for the child's closest relatives, such as grandparents, with the fact that third parties who claim contact with the child are required to prove that there are particularly justified reasons for the lawsuit and that contact with the child is in the best interest of the child (the so-called *best interests test*). Otherwise, such a claim could be assessed as a violation of the constitutional rights of parents. Only if the parents are not capable of making a decision on maintaining personal relationships that is in the best interest of the child, the decision will be made by the court, applying the principle of *parens patriae.* The said principle ensures the intervention of the state in family relations when it is necessary to protect the health and best interests of the child[22].

Already from this brief presentation of the convention, domestic and comparative legal rules, it is quite clear that the principles of family autonomy and joint and consensual decision-making by parents regarding the exercise of parental rights, which includes the duty and right to maintain personal relations with the child, are represented in all systems and represent primary principles. Family autonomy, as one of the basic principles, and family integrity, as a protected asset, mean that the state's intervention in family relations should be strictly limited and based on strictly defined legal assumptions. Considering the position of the child in the family and his or her rights, as well as the special protection of the child and family proclaimed by the Constitution, the intervention of the state in family relations must be limited and conditioned by the best interest of the child[23]. When determining the type and extent of interference that is necessary, states have a certain leeway known as the "field of discretion." The width of that field of discretion varies according to the circumstances. The state bears the burden of proving *proportionality*, which means that the court is always obliged to consider whether the presented reasons for state interference in the personal relationships of children and parents are relevant and sufficient in terms of the nature of the interference and the case as a whole, i.e. whether in each specific case there was an alternative measure that would have led to less interference (*Olsson v. Sweden, App. No 13441/87*). Thus, for example "when parents have reached an agreement on how to maintain personal relationships between parents and children [...], the

[21] Swedish Children and Parents Code, Chapter 6.

[22] J.G. Dwyer, cited, p. 197.

[23] R. Vujović, *Uticaj promene položaja deteta u porodici na njegov položaj i prava u sudskim postupcima u vezi sa porodičnim odnosima [The impact of a change in a child's position in the family on his or her position and rights in court proceedings related to family relations], Pravni život*, pp. 55-61, Udruženje pravnika Srbije, Beograd, 2012, p. 56.

judgments of the lower courts in that part should be in accordance with the agreement reached by the parents[24].

Despite the guarantees provided by international conventions and national legal regulations, due to parental misunderstandings, a considerable number of children after the end of the parents' partnership fail to exercise their right to regular contact with the parent with whom they do not live or with other close persons. According to the data of the Republic Institute for Social Protection, in the Republic of Serbia, an average of about 4,000 procedures initiated to regulate the personal relationships of children and parents are registered annually. Parents' consensual proposals on the way of exercising parental rights make up a fifth of the total number of proceedings, measured by the number of findings and opinions submitted by the centers for social work at the request of the courts in the proceedings in which the exercise of parental rights was decided (without further differentiation of the subject of the proceedings), while in the total number of children whose rights from the relationship with their parents required court protection, the share of children from families in which an agreement on the exercise of parental rights was reached is only 10.7%[25]. These indicators do not deviate significantly from the statistics given for the previous ten years, with the fact that in the last five years there has been a gradual decrease in the number of court proceedings for regulating the personal relationships of children and parents (in 2019 it was lower by 23.2% compared to 2015). There is no special research on the relationship between the number of models of visitation regulated by a court decision according to the accepted agreement of parents and the models of visitation established by the court itself, but the above data indicates that the percentage of models of visitation determined by the court is high. In contrast, research conducted in recent years in several European and American countries has shown that only in 10% of cases the courts decide on the way of maintaining personal relationships between children and parents[26]. In all other cases, these issues are regulated by the parents' agreement.

It should also be borne in mind that, according to the established practice in the application of the ECHR, any *ex officio* judicial decision on the relationship between children and parents when there is no special need for judicial protection of the rights and interests of the child is a violation of the right of parents to freely and independently decide on the exercise of parental rights and it is considered an impermissible interference of the state in family life.

III. Legal consequences of not exercising the right to personal relationships between the child and the parents

In recent decades, the focus of family law relations has been on the child, so this approach also affects changes in the understanding of which persons should be considered the holders of the right to personal contacts. Maintaining personal

[24] Ruling of the Supreme Court of Cassation, Rev. 4897/2019 of 5 December 2019.

[25] The Republic Institute for Social Protection, 2020, pp. 51-57.

[26] See M. M. Casals, *Divorce Mediation in Europe: An Introductory Outline*, Electronic Journal of Comparative Law, Vol. 9.2, 7/2005, p. 8; J. Wallbank, *Getting tough on mothers: regulating contact and residence*, Feminist Legal Studies, vol. 15, 2007, p. 191.

relationships has traditionally been considered the right of the parent with whom the child does not live, and that approach, as stated above, is still valid, especially in Anglo-American law. After the adoption of the CRC, the right to personal relationships is primarily considered a child's right. The Convention on Contact concerning Children confirms both the right of parents and the right of the child to establish and maintain regular contact. (In addition, it allows the signatory states to, respecting the best interests of the child, extend the right of the child to personal relationships also to other persons who have family, kinship or other close ties with the child.)

Why is it important who the formal legal holder of the right to contact is?

When exercising subjective civil rights, the rule applies that the right to exercise the right also includes the right not to exercise the right. In other words, the holder of a subjective civil right may not exercise that right, if he or she does not want to, without consequences. This is not the case with the right to personal relations between the child and the parents. Although family rights belong to the corpus of subjective civil rights, failure to exercise the rights arising from the relationship between a child and a parent reflects on the best interests of the child. At the same time, the legal consequences of not realizing the right to personal relationships affect the child and the parents differently.

When it comes to the child, one of the fundamental convention principles is the principle of the best interests of the child, which, in the light of the right to personal relationships, we will consider separately. Both conventions (CRC, CoCC) bind the child's right to personal relationships to respect for the principle of the child's best interests. The best interest of the child is at the core of the right to personal relationships: personal relations with the parent are of inestimable importance for the proper full development of the child. Apart from the fact that the child's right to personal relationships is constituted in his or her best interest – the exercising and protection of that right must be ensured in a way that is in accordance with the best interests of the child. Therefore, the principle of the best interest of the child, in addition to the substantive one, also has its procedural dimension. The main problem in the application of the principle of the best interest of the child is that the derivation of specific legal rules from that principle is left to case law, more precisely, the ability of the court to recognize the factors on which the decision on what the best interest of the child is in a specific case depends. And when in a legal system there is a prescribed list of factors that determine the best interest of the child, that list is usually never final. In addition, the relevance of the factors varies from case to case. This gives the court a complex task of selecting relevant factors, which, again, implies the court's prior knowledge of family circumstances, relationships, emotional ties and other relevant factors, which the court generally does not have, or does not have enough of them[27]. Therefore, in most legal systems, there is a duty of the court to obtain the findings and expert opinion of the appropriate social service in the decision-making process.

Another type of problem arises when it is necessary to simultaneously ensure the realization of several different, mutually opposing rights of the child (which is a very

[27] D. Palačković, *Istražno načelo u porodičnim sporovima kao izraz najboljeg interesa djeteta*, in *Dani porodičnog prava – najbolji interes djeteta u zakonodavstvu i praksi [The investigative principle in family disputes as an expression of the best interest of the child, in Days of Family Law – the best interest of the child in legislation and practice],* Zbornik radova, Pravni fakultet „Džemal Bjedić“, Mostar, 2014, pp. 143-156.

common case when the assessed best interest of the child and his or her participatory rights are in conflict) – how to determine the right that has priority in exercising and protection. This applies equally to court proceedings (in which the contact itself is decided on the merit) and to proceedings for the execution of court decisions (when those decisions cannot be voluntarily enforced).

A particularly delicate issue in exercising a child's right to contact with a parent is the parent's refusal. What are the legal consequences of a parent's lack of desire or express refusal to have personal relations with a child with whom he or she does not live? How to protect the best interests of the child in that case? Comparative law and practice provide different answers. Some European legislation, such as the German one, protecting the right to personal relationships and the best interest of the child, try to force the parent to contact with fines[28]. Others, such as the Serbian one, try to use special measures of preventive and corrective supervision over the exercise of parental right to influence a change in the attitude and behavior of the parents, and in extreme cases of failure, the court deprives such a parent of parental rights, since the refusal and avoidance of the parent to maintain personal relations with a child in Serbian law is considered gross neglect of parental duties[29]. Punishing parents for not having personal relations with the child is a consequence of the fact that in German, as well as in Serbian law, the right to personal relations is not considered the exclusive right of the parents, but at the same time it is the duty of the parents (constituted with the aim of protecting the best interests of the child), and non-performance of duty has serious consequences for the child. And yet, it cannot be asserted that fines or prison sentences or deprivation of parental rights ensure effective protection of the child's right to contact, and even less that the best interests of the child are thus protected. Simply put, coercion in family relationships, due to their nature, and especially in the realization of personal contacts, is not effective, and is often harmful, which to the conclusion that the duty of parents to maintain personal relationships with the child in European law practically exists *in abstracto*.

From the child's point of view, the right to contact with a parent who does not want that contact is in reality *nudum ius*[30].

There may also be a lack of will to contact on the side of the child. Unlike the parents, the child can refuse contact with the parent, without any legal consequences, because the exercising of personal relations is the child's exclusive right, not duty. Although the refusal to have personal relations with a parent is usually against the best interests of the child, any forced contact of the child with the parent is fundamentally also against the best interests of the child, since the use of force is always at the expense of the child's well-being.

In comparative case law, this problem is overcome by applying two diametrically opposed approaches. One is the unconditional respect of the will of the child, and this approach is mostly characteristic of European continental law, while the other is – the deprivation of the primacy of the principle of the best interests of the child, a feature of Anglo-American law. Thus, in German and Swedish case law, and the same applies

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[28] D. Schwab, *Familienrecht*, 12. Aufl age, Verlag C.H.Bech, Munchen, 2003, p. 324.

[29] R. Vujović, *Lišenje roditeljskog prava [Deprivation of parental rights],* Belgrade, Official Gazette, 2019, p. 67.

[30] B. Rešetar, *Pravna zaštita prava djeteta na susrete i druženje [Legal protection of the child's right to meet and socialize]*, Pravni fakultet u Osijeku, Sveučilište Josipa Jurja Strossmayera, Osijek, 2011, p. 245.

to the case law of Serbian courts, the child's refusing will is respected almost unconditionally. Contrary to this, in precedent legal systems, the primary principle is the respect and unconditional implementation of legally binding court decisions, because they are of paramount importance for the functioning of the entire legal system. In American law, a child who refuses contact with a parent (and that contact is determined by a court decision) can be forced to do so by terminating child support, and even by physical coercion (although, in practice, physical coercion is rarely used). It is similar in England and Wales, where after the legislative reforms of 2006, the principle of the best interests of the child is no longer the most important element that must be taken into account in enforcement procedures, but it has equal importance as other elements, so the enforcement of the decision on contacts with the child will not be carried out only if there is a risk to the child's psychological and physical health[31].

Just as the best interest of the child is one of the basic principles of the CRC, the same applies to the right of the child to express his or her opinion in all proceedings concerning him or her (CRC, Art. 12). Participatory rights of the child are the focus of legislation, and even more of case law, since the issues of determining and respecting the child's opinion are both delicate and far-reaching, especially due to the responsiveness of the child's will to external influences. Since, unlike parents, a child cannot be punished for refusing contact with a parent with whom he or she does not live, parents who intend to prevent contact of the child with the other parent, instead of directly interfering with or preventing the maintenance of the child's personal relationship with the other parent (which is also punishable) resort to various techniques of influencing the will of the child him/herself to refuse contact. What the experts warn about is that interruptions and delays in the execution of the decision on contact between the child and the parents, when the indoctrinated or instrumentalized child expressly refuses contact, never reduce the "pressure" on the child, but only increase it, and complicate the entire relationship in the future[32].

Child's will can be influenced in many ways. Apart from the instrumentalization and indoctrination of the child, there is also the "buying of time". The passage of time actually has a significant impact on a child's attitudes and thinking. It is known that the perception of time and the time factor in the life of a child and in the life of an adult do not have the same effect. The changes in a child's life that growing up inevitably brings are very big, and they happen in very short periods of time. A child grows and develops very quickly, especially at a low calendar age, changes significantly both physically, mentally and emotionally, and with developmental changes, his or her developmental needs also change. All this must be taken into account when making (and enforcing) decisions concerning his family life[33]. Long periods of time in which the child's contact with the parent is absent or cannot be maintained, for any reason, as a rule, results in later authentic rejection of contact by the child him/herself, which

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[31] B. Rešetar, *cited,* p. 109.

[32] D. Vulević, *Uloga organa starateljstva u postupcima izvršenja odluka iz oblasti porodičnog prava – predaja i oduzimanje maloletnog deteta [The role of the guardianship authority in the procedures for the execution of decisions in the field of family law – surrender and confiscation of a minor child],* Beogradski centar za ljudska prava, 2009, http://www.bgcentar.org.rs/uloga-organa-starateljstva-u-postupcima-izvrsenja-odluka-iz-oblasti-porodicnog-prava-predaja-i-oduzimanje-maloletnog-deteta/, accessed 10 November 2024.

[33] R. Vujović, *Lišenje roditeljskog prava [Deprivation of parental rights],* Belgrade, Official Gazette, 2019, p. 104.

can significantly threaten the best interests of the child and cause irreparable damage to his/her development.

IV. Conclusion

Contemporary legislation has not found a suitable solution when it comes to responsibility for failure of the child to exercise his or her right to personal relationships when the court decision determined the way to maintain personal relationships between the child and the parents, and the child's negative attitude towards contact was projected within his/her family. Such a harmful influence on the will of the child also requires an answer to the question of what the duties of the state are in relation to the proclaimed principle of special protection of the child and his or her rights. The positive convention obligation of states, arising from Article 8 of the ECHR, consists in the implementation of measures to remove existing obstacles and requires "creativity in finding a solution that would be just"[34]. Otherwise, the established practice could lead to the conclusion that the primacy of the participatory rights of the child can be an eliminative factor for the application of the principle of the best interest of the child, and thus practically collapse both leading convention principles.

It is clear that in the area of family relationships, which are characterized by privacy and are largely conditioned and colored by emotions, the law as a regulator is quite powerless. And yet, neither law nor theory must give up the search for solutions that will enable children to exercise their right to personal relationships with parents they do not live with, despite all the difficulties. One of the measures should certainly be aimed at additional training and an interdisciplinary approach and preparation of officials of guardianship authorities, family counseling centers and other experts who participate in expert evaluation when making court decisions on the realization of personal relationships between children and parents, as well as during their implementation. Working with the family, educating the parents, preparing the child and adapting the methods and models of contact to specific circumstances are of inestimable importance. New technologies, such as the internet, mobile phones, video calls, social media and messaging applications, can be of great help to them in this, which, despite the distances, provide greater opportunities for both children and parents to stay connected and maintain quality communication. Many countries have begun to recognize the right to contact through new technologies, so courts and social services increasingly consider the possibility of virtual contact, not only when physical contact is not possible, but also when in specific circumstances it is not in the best interest of the child.

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[34] B. Rešetar, *cited,* p. 136.

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26. Zakon o izvršenju i obezbeđenju [Law on Enforcement and Security], Službeni glasnik RS, br. 106/15, 106/16, 113/17, 54/19, 9/20 (LES RS)

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Reconstruction and Demonstration in Three Dimensions

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Abstract

The continuous technological advancement in forensic science creates new opportunities for recording, analyzing, and demonstrating crime scenes in court. Three-dimensional (3D) modeling and reconstruction have become one of the most advanced tools in crime scene investigation and forensic evidence presentation, surpassing traditional documentation methods by providing more detailed and interactive visualizations. The application of 3D models enables the spatial and temporal reconstruction of events, contributing to a more precise interpretation of evidence and enhancing the efficiency of investigations.

This study explores the forensic applications of 3D reconstruction, focusing on crime scene examinations, forensic demonstrations, and courtroom evidence presentation. The research highlights that 3D technologies not only facilitate the digital documentation of crime scenes but also allow for testing alternative investigative hypotheses and verifying witness statements. Integrating 3D modeling into forensic investigations enhances objectivity in criminal inquiries and aids in informed decision-making within the justice system.

Furthermore, 3D printing and photogrammetry technologies expand the toolkit of forensic analysis by enabling injury reconstruction, the comparison of crime scene evidence and objects, and the creation of models suitable for courtroom demonstrations. The study emphasizes that while 3D technologies offer significant advantages, their application must consider data protection, procedural legal challenges, and admissibility issues.

In conclusion, the research finds that 3D modeling and reconstruction have become essential tools in forensic evidence analysis and courtroom proceedings, with the potential to play an even greater role in supporting criminal investigations and legal processes in the future.

Keywords: *3D reconstruction, 3D modeling, modern forensic tools, courtroom demonstration*

I. Introduction

The continuous evolution of forensic methods is essential for the accurate investigation of criminal cases and the effective support of the justice system. Over the past decades, technological advancements have introduced new tools and methodologies in crime scene investigation and evidence presentation, among which 3D modeling and

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reconstruction play a particularly significant role. Three-dimensional modeling not only adds a new dimension to crime scene documentation but also brings revolutionary changes to forensic science and the judicial process.

The application of 3D technologies allows for the realistic recording and detailed analysis of crime scenes. Instead of traditional two-dimensional photographs and sketches, prosecutors, defense attorneys, and forensic experts can now examine evidence using interactive three-dimensional models. These models enable the precise determination of shooting angles, the analysis of injuries, and even the reconstruction of an offender's movements, aiding in the development of various investigative hypotheses. Moreover, 3D scanning of crime scenes ensures that a given situation can be reexamined later, eliminating the risk of evidence distortion or destruction.

Beyond crime investigation, one of the most critical applications of 3D modeling is courtroom demonstration. Complex crime scenes and events are often challenging to present clearly to judges or juries. However, with the aid of 3D models, crime environments can be simulated in court, allowing forensic experts to accurately demonstrate how a particular event may have occurred. Realistic reconstructions enhance the transparency of judicial proceedings and contribute to well-founded legal decisions.

The aim of this study is to explore the forensic applications of 3D modeling, highlighting its role in crime scene investigation, evidence analysis, and courtroom presentations.

II. Crime Scene Reconstruction

The first recorded written references to crime scene investigations date back to the 22nd century BCE[1], while an official crime scene report from the reign of Pharaoh Ramses IX (circa 1100 BCE) documents the investigation of a tomb robbery.[2] However, it was not until the late 19th century that forensic science began to establish crime scene examination on a scientific foundation. This shift incorporated the systematic analysis of crime scene evidence, traces, and environmental conditions, significantly contributing to the advancement of objective forensic investigations. As natural sciences and technological procedures evolved, so did crime scene examination methods, becoming increasingly precise. The introduction of procedural safeguards, such as ensuring impartial witness testimonies and adhering to written documentation, further reinforced the objectivity of forensic investigations.[3]

The primary goal of crime scene investigation is to reconstruct and understand the circumstances of a crime while collecting evidence that can answer key investigative questions. This process is particularly complex, as crime scenes typically present only the aftermath of events, leaving room for multiple interpretations. Investigators must identify and analyze both apparent and latent traces, determining their origin and significance. However, crime scene evidence alone is often insufficient for reconstructing

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[1] P. Déri, A. Budai, *Korszerű bűnüldözés [Modern Law Enforcement],* Budapest, ORFK, 1991, p. 102.

[2] G. Kovács, *A helyszíni szemle normatív szabályozásának igénye éslehetőségei a büntetőeljárásban [The need for and possibilities of the normative regulation of crime scene investigation in criminal procedure]*, in K. Szoboszlai Kiss, G. Deli (eds.), Tanulmányok a70 éves Bihari Mihály tiszteletére *[Studies in honour of the 70-year-old Mihály Bihari]*, Győr, Universitas-Győr Nonprofit Kft., 2013b, p. 292.

[3] G. Gárdonyi, *A bűnügyi szemle [The Crime Scene Investigation]*, Budapest, Ludovika Egyetemi Kiadó, 2024. p. 19.

the full sequence of events. Additional sources such as police reports, witness statements, and forensic expert analyses are essential in forming a comprehensive understanding.

Crime scene reconstruction can be approached through both conceptual and technological methods. Conceptual reconstruction plays a crucial role in crime scene analysis, allowing investigators to infer the sequence of events and the possible behavior of perpetrators. This method has deep historical roots, as its importance in criminal investigations has long been recognized. A fundamental aspect of this approach is a thorough understanding of the crime scene and the modus operandi of the offense. Over time, conceptual reconstruction has evolved, with different scholars emphasizing various aspects, further enriching the methodological framework.

The dynamic phase of crime scene investigation often reveals evidence suggesting alternative methods of commission or different perpetrator behaviors. It is particularly important for reconstruction efforts to consider potentially irrational actions by offenders, as crimes frequently occur under emotional, psychological, or situational influences. Investigators must adopt the perpetrator's perspective to avoid cognitive biases and erroneous conclusions.

One of the main limitations of conceptual reconstruction is its potential reliance on a single, potentially flawed hypothesis. If investigators focus exclusively on one scenario, they risk overlooking alternative possibilities, ultimately leading to misleading conclusions. Therefore, a comprehensive and flexible approach is required for effective crime scene analysis. While conceptual reconstruction is an essential investigative tool, it should not be the sole method employed. A frequently overlooked aspect in the literature is that this method alone does not always provide sufficiently reliable results, necessitating the integration of alternative techniques such as technology-based reconstructions.

The inclusion of 3D modeling and digital reconstruction addresses many of the limitations associated with conceptual methods. The use of advanced forensic technologies allows for the precise documentation of crime scenes and the visualization of multiple hypotheses. This is particularly valuable in cases where an offender's irrational behavior, the crime's dynamic nature, and subjective human factors introduce uncertainties. A single misinterpretation or inaccurately constructed scenario can hinder the discovery of the truth and the consideration of alternative possibilities. By combining conceptual analysis with technological advancements, forensic investigators can enhance the accuracy and reliability of crime scene reconstructions.

Conceptual reconstruction relies on initial observations at the crime scene and the evaluation of witness testimonies. Both objective and subjective factors influence the effectiveness of an investigation, requiring investigators to consider three primary limitations:

- Offender Behavior Under Stress – Perpetrators often act irrationally due to stress or emotional influences, complicating reconstruction efforts.
- Deliberate Misdirection – Offenders may intentionally mislead investigators, further hindering the accurate reconstruction of events.
- New Evidence Consideration – Investigators must remain open to new evidence, as it may alter initial conclusions.

Misinterpretation of facts can lead to faulty assumptions, making it essential for investigative strategies to be flexible and adaptable to newly emerging information. During investigations, it is common for early versions of events to require modifications

in light of later evidence. Dynamically evolving situations can provide critical insights that contribute to a more accurate reconstruction of the crime. Ultimately, it is the collective responsibility of investigators to recognize and address the limitations of conceptual reconstruction, ensuring that the most precise conclusions are drawn in criminal investigations.[4]

Fenyvesi draws a parallel between the strategic elements of a chess game and the phases of criminal investigation. According to this analogy: the crime scene examination corresponds to the opening phase, the investigation process representing the middlegame and the court proceedings equate to the endgame. The crime scene examination initiates the investigation through primary measures, including evidence collection and the reconstruction of events. This phase requires rapid responses, error prevention, and meticulous evidence gathering and identification to ensure accuracy and reliability. The first decisive move, as a fundamental principle in criminalistics, holds critical importance. Establishing preliminary versions of past events during the crime scene examination is particularly essential. By formulating early hypotheses, investigators can guide the collection of physical traces and material evidence, ensuring that these elements are preserved and can later be effectively used in the endgame — the courtroom proceedings.[5]

The seven fundamental questions of forensic science (What happened? Where did it happen? When did it happen? How did it happen? Who committed the crime? With whom? And finally, why?) have now become a theoretical cornerstone of criminal investigations. Providing precise answers to these questions enables investigators to reconstruct past events and draw accurate legal conclusions. Without a thorough understanding of the facts, it is impossible to legally qualify a case. If an investigator lacks clear and well-defined answers, they cannot fully comprehend the event, making it difficult to formulate the case accurately and assess it from a legal standpoint. Without addressing these seven key questions, we cannot claim to have a complete and accurate understanding of the relevant facts, past events, and the legal situation to be adjudicated. The greatest danger in failing to answer these questions properly is judicial error, commonly known as "justizmord"—a wrongful conviction. Preventing and avoiding such errors is one of the most critical responsibilities of any legal practitioner.[6]

The substantive resolution of a case requires evidentiary procedures, which function as distinct cognitive processes. The reconstruction of events relies on evidence, which preserves traces of past occurrences and can thus be linked to the original chain of events. By applying rational thinking and logical principles, well-founded conclusions can be drawn from the known facts about what actually transpired.

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[4] G. Gárdonyi, *A gondolati rekonstrukció korlátai [The Limitations of Conceptual Reconstruction]*, in Belügyi Szemle, 2013/10., pp. 65–71.

[5] C. Fenyvesi, *A kriminalisztika, mint a bűnügyi sakkjátszma tudománya [Criminalistics as the Science of the Criminal Chess Game]*, in G. Gaál, Z. Hautzinger (eds.), *A határrendészettől a rendészettudományig [From border policing to police science]*, Pécs, Magyarország: Magyar Hadtudományi Társaság Határőr Szakosztály Pécsi Szakcsoport, 2016, p. 332, pp.189-201, p. 13.

[6] C. Fenyvesi, *A kriminalisztika alapkérdései [The Fundamental Questions of Criminalistics]*, in G. Gaál, Z. Hautzinger (eds.), *A rendészettudomány határkövei II. Válogatás a Pécsi Határőr Tudományos Közlemények második évtizedéből [The frontiers of police science II. Selections from the second decade of the Pécs Border Guard Scientific Bulletins]*, Pécs, Magyarország: Magyar Hadtudományi Társaság Határőr Szakosztály Pécsi Szakcsoport, 2022, p. 247, pp. 209-218, p. 10.

Just as Gárdonyi highlighted the limitations of cognitive reconstruction, it is equally important to recognize the constraints of judicial decision-making. Judges must not only be aware of their own psychological predispositions but also carefully assess personal evidence, such as witness testimonies. Even though we all perceive the same physical world, individual perception varies significantly, as it is shaped by neurological processes. Perception is a symbolic process linked to the brain's cognitive functions and relies on a continuous flow of external stimuli. If this flow is disrupted or ceases altogether, distortions in perception can occur, potentially leading to hallucinations. A judge's cognitive process differs from direct observation of past events; instead, it is an indirect and reversed process, in which conclusions about causes are drawn from effects based on the available evidence. These characteristics introduce uncertainty factors, making absolute mathematical certainty impossible in judicial reasoning. Neither logical deductions nor mathematical models can fully eliminate this uncertainty. Only a judge with experience and critical reasoning skills can apply an appropriate standard of judgment, considering real-life plausibility and typical patterns of correlation.

Uncovering reality is essential for the judicial process, but it does not inherently guarantee justice. Even if the facts of a case are established correctly, errors in legal application or the enforcement of laws perceived as unjust may lead to a verdict that appears unfair. Conversely, if a judge's decision is not based on factual reality, the ruling will inevitably deviate from the truth and fail to achieve justice. Therefore, the proper functioning of the judiciary fundamentally depends on the accurate establishment of facts. Psychological and perceptual differences in evidentiary procedures, along with the inherent uncertainties stemming from the indirect nature of evidence, significantly impact legal cognition and the effectiveness of the justice system. In this context, 3D models, crime scene reconstructions, and courtroom demonstrations play a crucial role, as they provide visual and spatial tools to present past events more accurately and comprehensively. Three-dimensional visualization enables judges, attorneys, and jurors to go beyond theoretical descriptions and photographs by examining the crime scene and event dynamics in spatial and interactive perspectives. This approach helps to reduce subjective misinterpretations arising from perception biases, while also enhancing the transparency and persuasiveness of evidentiary proceedings.[7]

Just as *Fenyvesi* defined the investigation as the middlegame in a chess match, it is clear that all necessary tools and methods must be employed to successfully reconstruct the past. This process must also keep pace with technological advancements and emerging trends. New forensic technologies, such as rapid identification systems, have revolutionized crime scene investigation. Instant DNA and fingerprint analysis now allows for immediate database comparisons, providing investigators with a highly effective tool. The ability to quickly identify individuals linked to evidence, even in the early stages of an investigation, significantly enhances both efficiency and accuracy in criminal inquiries. Beyond digital forensic analysis and the use of artificial intelligence, this study explores the role of 3D modeling and its applications in forensic investigations.

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[7] Kúria Büntető-Közigazgatási-Munkaügyi és Polgári Kollégiumai Joggyakorlat-Elemző Csoport: Összefoglaló vélemény. Az ítéleti bizonyosság elméleti és gyakorlati kérdései [Summary Opinion. Theoretical and Practical Issues of Judicial Certainty], available at https://kuria-birosag.hu/sites/default/files/joggyak/osszefogl_velemeny_iteleti_bizonyossag.pdf (accessed on 19.01.2025).

III. Modern Technologies: The Application of 3D Models

3D reconstruction technology has become widespread across various industries, demonstrating exceptional flexibility and practical utility. In medicine, it has become an indispensable tool, particularly in surgical planning and medical education, as it allows for detailed visualization of anatomical structures. Surgeons can better understand patients' unique anatomical features before procedures, improving surgical precision and outcomes. Beyond healthcare, the real estate industry has also been revolutionized by 3D technology, enabling virtual tours that provide immersive and detailed visualizations of properties. This innovation allows potential buyers to explore properties remotely, facilitating more informed decision-making. These examples highlight the diverse applications of 3D modeling across different fields.

The continuous development of 3D reconstruction technology is creating new opportunities, particularly in crime scene investigations. The ability to accurately and comprehensively represent physical crime scenes is crucial for reconstructing criminal events. By integrating 3D reconstruction into forensic investigations, investigators gain a more comprehensive understanding of events, enhancing evidence collection, interpretation, and courtroom presentation. The adoption of 3D technology in forensic science represents a significant advancement, reinforcing the role of cutting-edge digital tools in criminal investigations and law enforcement. This innovation improves investigative efficiency and increases the reliability of forensic evidence in judicial proceedings.[8]

3D modeling is an advanced technology in forensic investigations that enables the detailed, three-dimensional reconstruction of crime scenes, accidents, or other significant events. These models function as computer-generated animations, providing a comprehensive, multi-angle visualization of the incident. Traditional crime scene documentation, such as photographs and video recordings, has now been enhanced with 3D scanning and laser scanning technologies, revolutionizing forensic processes. By collecting millions of data points, the crime scene can be captured with high precision and detail in a matter of minutes. Unlike traditional photography, where factors such as lighting conditions and distortion issues can affect image quality, 3D scanning eliminates these limitations while providing additional valuable information.

3D modeling is becoming increasingly essential in forensic examinations, especially in cases where available evidence is incomplete or insufficient. Forensic expert evaluations are often necessary when new evidence or circumstances emerge or when the original crime scene has changed over time. In such situations, 3D reconstruction allows for the recreation of the scene and events using publicly available sources such as Google Maps, Google Street View, and architectural or construction archives. This technology enhances investigative accuracy, supports legal proceedings, and helps ensure that key forensic details remain preserved for future analysis.

The analysis of spatial relationships between different elements of a crime scene and the individuals involved is crucial in forensic investigations. Since both the spatial and temporal aspects of events are key factors in criminal analysis, three-dimensional

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[8] D. Rangelov, J. Knotter, R. Miltchev, *3D Reconstruction in Crime Scenes Investigation: Impacts, Benefits, and Limitations*, in K. Arai (ed.), *Intelligent Systems and Applications. IntelliSys 2024. Lecture Notes in Networks and Systems*, vol 1065, 2024, Springer, Cham, https://doi.org/10.1007/978-3-031-66329-1_4.

models provide a far more precise and detailed representation compared to traditional methods.

A notable example comes from the 3D Analysis Laboratory at the Wroclaw Medical University, which conducted a 3D reconstruction of a homicide case that had occurred nine years earlier. The primary objective was to support or refute conflicting witness statements. During the proceedings, the court accepted the 3D modeling as a visual aid to assess the credibility of testimonies, demonstrating the increasing forensic relevance of such reconstructions.

In another case, a 3D model was used to experimentally reconstruct events and compare different investigative scenarios. A woman was found dead in her home with multiple injuries and traces of two different weapons, yet no direct evidence pointing to the perpetrator was discovered. Investigators developed several possible hypotheses regarding both the manner of the crime and the identity of the offender. Through 3D modeling, forensic experts were able to test these hypotheses, reconstruct the sequence of events, and ultimately identify a single perpetrator who used two weapons simultaneously. The court accepted the model as valid forensic evidence, further emphasizing the growing role of 3D technology in modern criminal investigations.[9]

In another case, a 3D model was instrumental in reconstructing the sequence of events and comparing different investigative scenarios. A woman was found dead in her home, with multiple injuries and traces of two different weapons identified on her body. However, no direct evidence leading to the perpetrator was found at the scene. Investigators formulated several possible scenarios, exploring the "how?" and "who was involved?" aspects of the crime. The 3D modeling process enabled forensic experts to test these hypotheses, verify the plausibility of different versions, and ultimately reconstruct the crime scene. This led to the identification of a single perpetrator who had used two weapons simultaneously. The court accepted the 3D model as forensic evidence, further demonstrating the increasing role of three-dimensional reconstructions in modern criminal investigations.[10]

A research team analyzing publications from 2005 to 2021 reviewed 258 studies and concluded that research on 3D reconstruction has grown significantly in recent years. The study also found that nearly two-thirds of researchers in this field are based in Europe or North America. In Europe, countries such as Switzerland, Italy, England, and the Netherlands are particularly engaged in crime scene reconstruction and forensic research, highlighting the increasing adoption of 3D modeling technologies in forensic investigations.[11]

It is also necessary to briefly mention photogrammetry technology, which enables the three-dimensional reconstruction of objects and crime scenes based on

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[9] K. Maksymowicz, W. Tunikowski J. Kościuk, *Crime event 3D reconstruction based on incomplete or fragmentary evidence material – Case report*, Forensic Science International, Volume 242, September 2014, pp. e6-e11.

[10] I. Aquila, M.A. Sacco, G. Aquila, R. Raffaele, A. Manca, G. Capoccia, F. Cordasco, P. Ricci, *The Reconstruction of the Dynamic of a Murder Using 3D Motion Capture and 3D Model Buildings: The Investigation of a Dubious Forensic Case*, J. Forensic Sci., 2019 September, vol. 64(5), pp. 1540-1543, doi: 10.1111/1556-4029.14041.

[11] M.A. Maneli, O.E. Isafiade, *3D Forensic Crime Scene Reconstruction Involving Immersive Technology: A Systematic Literature Review*, in *IEEE Access*, 2022, vol. 10, pp. 88821-88857, doi: 10.1109/ACCESS.2022.3199437.

photographs. This method is increasingly recognized in international literature as an alternative to 3D laser scanning. The principle of photogrammetry lies in creating 3D models using a series of overlapping images taken from different perspectives, processed through specialized software. The required images can be captured with almost any imaging device, ranging from aerial drone photography to interior documentation of buildings, and even to smaller objects, such as bodies, crime scene evidence, or microscopic objects. Properly scaled 3D models are not only capable of high-precision measurements but also provide lifelike visual representation due to their photo-realistic textures. The detail and resolution of the generated models can be optimized without reducing the polygon count, making them easily displayable even on lower-performance computers, including those without dedicated graphics cards. Because photogrammetry does not require specialized equipment, it is highly accessible for forensic professionals and can be effectively used to document crime scenes, bodies, and physical evidence in three dimensions. One of the major advantages of photogrammetric imaging is its ease of use, as it can be executed using nearly any still or video recording device. In the absence of professional cameras, a compact digital camera, action camera, or even a smartphone can suffice for capturing the necessary images. For example, applications such as RealityScan can generate a highly accurate 3D model of a crime scene from a series of photographs taken with a mobile device. The resulting models can then be integrated into various software, such as the Unity game engine, allowing for dynamic reconstructions where virtual animated figures simulate movements based on real-world physics parameters. Moreover, photogrammetry enables the digital reconstruction of various objects, including damaged bones or forensic evidence, providing detailed analysis for forensic investigations. These models can be stored in a forensic database for future reference or even reproduced in physical form using 3D printing technology.[12]

While photogrammetry offers numerous advantages, it is crucial to acknowledge its limitations in forensic applications. The software processing of images can encounter difficulties or even become entirely unfeasible under conditions that complicate the accurate alignment of common points and overlapping areas from images taken at different angles. Particularly problematic factors include:

- Reflective or glossy surfaces, as these cannot be reliably captured using photogrammetric methods due to their tendency to distort light reflections.
- Uniform, monochromatic surfaces and transparent objects, such as glass, which lack distinct features necessary for precise alignment.
- Vegetation-covered areas, such as grass or leaves, pose additional challenges, as even the slightest air movement can shift plant elements, leading to distortions and inaccuracies in the 3D reconstruction.

These factors highlight the importance of selecting appropriate environments and objects for forensic photogrammetry and, when necessary, combining it with

[12] P. Fülöp, *Az igazságügyi fizikus szakértői terület jelene és jövője [The Present and Future of Forensic Physics Expertise]* in G. Gaál, Z. Hautzinger (eds.), *A biztonság védelme a rendészetben: Jubileumi kötet Zámbó Péter ny. rendőr ezredes 70. születésnapjára [Protecting security in law enforcement: an anniversary volume for the 70th birthday of Péter Zámbó, retired police colonel]*, Pécs, Magyarország: Magyar Hadtudományi Társaság Határőr Szakosztály Pécsi Szakcsoport, 2023, p. 406, pp. 309-314, p. 6.

other technologies such as 3D laser scanning to ensure accurate and reliable documentation.[13]

It is also important to highlight another area where modern forensic technologies can be effectively applied: network analysis. In criminal investigations, network analysis can help uncover connections between events, perpetrators, and locations. The application of network analysis techniques, especially when combined with crime mapping methods and 3D reconstruction technologies, allows for a more precise identification of the spatial and temporal patterns of criminal activities. As a result, investigations can become more efficient, while also enabling law enforcement to track offender movements, social connections, and identify potential crime hotspots.[14]

3D printing is increasingly becoming an integral part of forensic medical practice, offering new possibilities for injury reconstruction, comparing injuries with suspected weapons or objects, and providing visual demonstrations and identification tools. Additionally, 3D-printed models serve as highly effective tools for courtroom demonstrations, aiding judges and juries in better understanding the presented evidence. Modern 3D printers have now reached a level of accuracy suitable for forensic applications, providing a cost-effective solution for supporting forensic investigations. Beyond forensic demonstrations, it is also crucial to highlight the role of 3D printing in education. In forensic medicine, 3D-printed models are successfully used in: anatomy education, simulation-based training for investigating sexual assault cases (particularly for obstetrics and gynecology residents), skull trauma analysis and bone pathology training. Modeling skeletal and organ injuries presents a valuable opportunity for forensic education, as 3D-printed models serve as realistic visual tools. Since post-mortem imaging is a widely applied method in forensic investigations, the necessary 3D models can be easily produced and made widely available, thereby enhancing forensic training and case analysis.[15]

IV. 3D Reconstruction: Advantages and Limitations

As demonstrated above, 3D modeling and reconstruction can be applied in numerous fields. Summarizing its main advantages, the following points can be highlighted:

- Scale-accurate reconstructions are possible due to precise spatial representation, reducing distortion. The recorded scene can be zoomed in and examined at different levels of detail.
- Reconstruction of missing or altered crime scenes is feasible, even when the original site has significantly changed over time.
- Virtual crime scene walkthroughs can be created, allowing legal professionals to interactively explore the environment, making it a powerful investigative tool.

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[13] M. Metzger, Z. Újvári, G. Gárdonyi, *A fotogrammetria kriminalisztikai célú alkalmazása: helyszínek, holttestek, tárgyak rekonstrukciója három dimenzióban [The Forensic Application of Photogrammetry: Reconstruction of Crime Scenes, Bodies, and Objects in Three Dimensions]* in Belügyi Szemle, 2020/11, pp. 57-70.

[14] E. Nyitrai, *A hálózatkutatás és a bűnözésföldrajz kapcsolata [The Relationship Between Network Research and Criminal Geography]*, Bűnözésföldrajzi Közlemények 2024/5, pp. 3-4, pp. 65-80, p.16.

[15] S. Gábor, V. Soma Poór, *Applications of 3D printing in forensic medicine and forensic pathology. A systematic review*, Annals of 3D Printed Medicine, Volume 8, 2022, no. 100083.

- Publicly available sources, such as Google Street View, can assist in mapping crime scenes more accurately, filling in gaps where evidence may be incomplete.
- Eyewitness testimonies can be verified against the reconstructed 3D scene to determine whether the described events align with the physical evidence.
- Enhances comprehension of spatial and temporal relationships between past events for attorneys, prosecutors, judges, and jurors, particularly when used as a courtroom demonstrative tool.

In cases where the exact positioning of objects or victims is crucial, traditional 2D photographs may fail to convey depth or the spatial relationships between key elements. This can lead to misinterpretations that may distort the sequence of events and affect the investigation's outcome. By contrast, 3D reconstruction offers a clearer and more precise spatial representation, reducing ambiguity and providing a more comprehensive analysis of critical information.

- 3D reconstruction technologies not only enable more precise evidence analysis but also significantly contribute to increasing the efficiency and safety of investigations.

These tools allow for the rapid and detailed recording of crime scenes, minimizing the time investigators need to spend in potentially hazardous environments.

- The fast and accurate documentation process also reduces the risk of evidence contamination, as the technology requires minimal physical interaction with the crime scene.

As a result, crime scenes and the traces left behind remain as undisturbed as possible, preserving the integrity of the evidence. Collectively, these factors make 3D reconstruction not only more efficient but also safer for modern forensic investigations.

- Reevaluating Cold Cases

3D reconstruction plays a crucial role in reassessing unsolved criminal cases. Three-dimensional models allow investigators to re-examine old crime scenes, identifying previously unnoticed details that could be critical to the case. This is particularly valuable when misinterpretations or missing data in the original investigation prevented clear conclusions.

3D reconstruction can introduce new perspectives, potentially leading to new evidence, appeals, or retrials. For example, if the trajectory of a bullet is unclear, 3D modeling can precisely determine angles and distances, helping reconstruct the shooting dynamics. This is especially useful in complex crime scenes, such as crowded or chaotic environments, where the movements and actions of multiple individuals must be reconstructed. The technology enables a highly detailed and accurate sequence of events, potentially revealing new investigative leads that traditional methods could not uncover.

Ultimately, 3D reconstruction represents a significant advancement for the justice system, as it sheds new light on complex cases, contributing to more precise and fair legal decisions.[16]

3D crime scene reconstructions not only provide a more detailed visual representation of events but also offer interactive analytical possibilities. Investigators and legal professionals can examine the scene from different perspectives, cross-check witness

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[16] D. Rangelov, J. Knotter, R. Miltchev, *3D Reconstruction in Crime Scenes Investigation: Impacts, Benefits, and Limitations*, in K. Arai, (ed.), *Intelligent Systems and Applications. IntelliSys 2024. Lecture Notes in Networks and Systems*, vol 1065. Springer, 2024, Cham. https://doi.org/10.1007/978-3-031-66329-1_4 .

statements, and verify suspect testimonies. Due to its interactive nature, a 3D model allows investigators to revisit the crime scene virtually without the need for a physical return. Moreover, forensic analyses that would be challenging or impossible with traditional documentation methods become feasible through 3D reconstruction. These include bloodstain pattern analysis, trajectory reconstruction for ballistic investigations, body position modeling and movement analysis, enhancing jury understanding with 3D Modeling

In the past, jurors were often taken to crime scenes to better understand the evidence, but this process was time-consuming and costly. 3D modeling eliminates this need, allowing jurors to examine the scene multiple times and gain a clearer understanding of spatial relationships within the crime scene. This is particularly crucial in complex cases, where the accurate interpretation of witness testimonies and scene conditions plays a decisive role in determining the outcome of the case. By integrating 3D models into forensic investigations, crime scene reconstructions elevate traditional forensic procedures to a new level by ensuring greater accuracy in scene documentation, enhanced reliability of forensic analysis and interactive and repeatable investigation methods that traditional approaches cannot fully provide. Ultimately, 3D forensic reconstructions contribute to a more effective, transparent, and scientifically robust justice process, improving both investigative accuracy and courtroom evidence presentation.[17]

Over the past two decades, significant advancements have been made in forensic pathology and crime scene investigations, driven by the increasing application of imaging technologies such as CT, MRI, surface scanning, and photogrammetry. These methods range from traditional visualization tools to high-performance, three-dimensional crime scene reconstructions. A multimodal and multi-scale approach to crime scene documentation—where 3D models integrate the digital reconstruction of both victims and crime scenes—offers numerous advantages. Capturing all relevant evidence within a single 3D environment not only aids investigators in verifying hypotheses but also enhances the intuitive understanding of the scene and events during courtroom proceedings. Moreover, advanced computational models can be employed to analyze the dynamics of the crime, such as virtually reconstructing a victim's movement within the original environment. This enables a more precise reconstruction of possible event sequences, benefiting both investigators and legal experts in forming clearer, evidence-based conclusions.[18]

V. Limitations and Challenges

While 3D reconstruction technology offers numerous advantages in forensic investigations, it is essential to acknowledge its limitations and challenges. These include:

- The adoption and application of 3D reconstruction require significant resources, which can limit its widespread use.

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[17] D. Notowitz, *Using 3D Scans and Modeling as Evidence in Court*, Law Technology Today, 2023, https://www.americanbar.org/groups/law_practice/resources/law-technology-today/2023/using-3d-scans-and-modeling-as-evidence-in-court/ (accessed on 2.02.2025).

[18] C. Villa, N. Lynnerup, C. Jacobsen, *A Virtual, 3D Multimodal Approach to Victim and Crime Scene Reconstruction*, Diagnostics (Basel), 2023, August 25; vol. 13(17), p. 2764, doi: 10.3390/diagnostics 13172764.

The acquisition and operation of advanced 3D scanners and other equipment are costly, posing challenges, particularly for law enforcement agencies with limited budgets. This disparity in resources can lead to unequal investigative capabilities across different regions.The high cost of equipment and software can hinder the accessibility of 3D reconstruction technology. However, recent advancements, such as photogrammetry and neural radiance fields (NeRF), have introduced more affordable and widely accessible alternatives. These technologies enable cost-effective 3D reconstructions using standard cameras and computational models, reducing financial barriers for forensic applications.

- The Use of 3D Reconstruction Evidence in Court Proceedings Remains Controversial**:** While 3D visualization tools **can** greatly enhance the understanding of evidence, there is a potential risk that judges and jurors may find them overly persuasive, which could unintentionally influence verdicts. The realism and interactivity of 3D models might create an illusion of certainty, leading to bias in legal decision-making. Therefore, strict guidelines and judicial oversight are necessary to ensure that 3D reconstructions are used responsibly and evaluated critically within the context of forensic evidence.

Different legal systems regulate the acceptance of 3D reconstructions differently, making it essential to develop clear and standardized guidelines for their use in court. The legal recognition of the scientific reliability and credibility of 3D reconstruction technology is a crucial step toward its broader application in judicial proceedings. These regulations should aim to ensure objectivity, prevent the presentation of misleading or manipulated evidence, and establish standards for forensic accuracy. By implementing consistent legal frameworks, courts can maximize the benefits of 3D reconstructions while minimizing potential biases in criminal investigations and trials.

- The application of 3D reconstruction technology generates vast amounts of data, leading to significant storage and management challenges.

To preserve the integrity of evidence, an effective and secure data management system is essential. Unauthorized access to data or potential data leaks can severely impact the outcome of an investigation. Protection against cybersecurity threats is crucial when using 3D reconstructions, as a data security incident could expose confidential crime scene details, jeopardizing the investigation or the fairness of the proceedings. To prevent this, strict access and data management protocols must be implemented.[19]

Since digital modeling and reconstructions can be edited and manipulated, an important ethical and legal question is to what extent the presented 3D models correspond to the original evidence. To ensure the authenticity of reconstructions, standards and verification mechanisms must be applied.

VI. Conclusion

The technological advancement of crime scene investigation creates new opportunities for more accurate documentation and analysis of evidence. One of the most promising methods is 3D reconstruction, which enables the detailed digitization

[19] D. Rangelov, J. Knotter, R. Miltchev, *3D Reconstruction in Crime Scenes Investigation: Impacts, Benefits, and Limitations*, in K. Arai (ed.), *Intelligent Systems and Applications. IntelliSys 2024. Lecture Notes in Networks and Systems*, vol 1065, Springer, 2024, Cham. https://doi.org/10.1007/978-3-031-66329-1_4.

of crime scenes and the creation of three-dimensional models. This technology represents a significant improvement over traditional documentation methods, providing interactive and more precise visual representation for investigators and the court.

The application of 3D models and digital simulations in court trials allows jurors and judges to better understand the evidence and the dynamics of events. However, their legal admissibility is subject to strict regulations, and special attention must be paid to data protection and procedural legal requirements during their use.

3D modeling is becoming an essential tool in forensic analysis, particularly in the reconstruction of altered or no longer accessible crime scenes. The use of publicly available data and alternative sources can aid in supplementing evidence; however, their authenticity and applicability must always be thoroughly examined. In judicial proceedings, 3D technology is not merely a supplementary tool but is increasingly becoming indispensable. This study highlights that 3D modeling and reconstruction technologies are becoming a crucial part of forensic and legal practice, enhancing investigative efficiency and the accuracy of the justice system. While forensic investigations increasingly rely on technological innovations, success ultimately depends on the human factor. Experience, foresight, and strategic thinking continue to play a key role in the effectiveness of investigations.

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