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TEMATSKI ZBORNIK RADOVA MEĐUNARODNOG ZNAČAJA

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THEMATIC CONFERENCE PROCEEDINGS
OF INTERNATIONAL SIGNIFICANCE

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„DANI ARČIBALDA RAJSA“

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PREFACE

Dear readers,

In front of you is the Thematic Proceedings of the International Scientific Conference "Archibald Reiss Days 2013", which was organized by the Academy of Criminalistic and Police Studies, with the support of the Ministry of Interior and the Ministry of Education, Science and Technological Development of the Republic of Serbia, and held at the Academy of Criminalistic and Police Studies.

The International Scientific Conference "Archibald Reiss Days", is held for the third time in a row, in memory of one of the founders and directors of the first modern police high school in Serbia, Dr. Rodolphe Archibald Reiss, after whom the Conference was named.

The Thematic Conference Proceedings contains 138 papers written by eminent scholars in the field of law, security, criminalistics, police studies, forensics, medicine, as well as members of national security system participating in education of the police, army and other security services from Russia, Ukraine, Belarus, China, Poland, Slovakia, Czech Republic, Hungary, Slovenia, Bosnia and Herzegovina, Montenegro, Republic of Srpska and Serbia. Each paper has been reviewed by two competent international reviewers, and the Thematic Conference Proceedings in whole has been reviewed by five international reviewers.

The papers published in the Thematic Conference Proceedings contain the overview of contemporary trends in the development of police educational system, development of the police and contemporary security, criminalistics and forensics, as well as with the analysis of the rule of law activities in crime suppression, situation and trends in the above-mentioned fields, and suggestions on how to systematically deal with these issues. The Thematic Conference Proceedings represents a significant contribution to the existing fund of scientific and expert knowledge in the field of criminalistic, security, penal and legal theory and practice. Publication of this Conference Proceedings contributes to improving of mutual cooperation between educational, scientific and expert institutions at national, regional and international level.

Finally, we wish to extend our gratitude to all authors and participants at the Conference, as well as to reviewers of the Proceedings, Mr Vladimir Tretyakov, PhD, Mr Mykhail Cymbalyuk, PhD, Mr Wang Shiquan, PhD, Mrs Snežana Nikodinovska-Stefanovska, PhD and Mr Vid Jakulin, LL.D. We also wish to thank the Ministry of Interior of the Republic of Serbia on its support in organization and realization of the Conference, as well as the Ministry of Education, Science and Technological Development of the Republic of Serbia, for its financial support in publishing of the Thematic Conference Proceedings

We sincerely hope that the "Archibald Reiss Days 2013" will become a traditional, internationally renowned scientific conference.

Belgrade, March 2013

Programme and Organizing Committees

CONCLUSIONS AND RECOMMENDATIONS

During the third International Scientific Conference "Archibald Reiss Days 2013", there was a meaningful and fruitful discussion within the topics, current problems were analyzed, solutions de lege ferenda *were proposed, and new developments in various scientific fields were presented. The key recommendations and conclusions of the presented papers, grouped by topics, are as follows:*

1. Management in Public Administration

- The economic and financial crisis affecting the modern world renewed the dilemma about the role of government and administrative system; there is a need to establish a rational, responsible and efficient government that would allow foreign investment and ensure the proper and effective exercise of the rights and interests of citizens and other subjects. In line with the changing environment, it is necessary to change *modus operandi*, modernize procedures and processes and ensure admission of highly skilled personnel.
- Many countries have adopted public administration reform strategies and action plans for the management of the new changes; although most of the countries adopted reform strategies, special problem is the implementation of the strategic framework. The Action Plan needs to provide the liability of competent authorities for undertaking certain measures and to establish a time frame for their implementation.
- New approach to reform of the state and public administration must be in accordance with the economic and financial situation. It is necessary to strengthen the capacities in terms of development and institutional capacity building, to be able to efficiently and effectively implement the European Union policy. Bodies and organizations of state and public administration have a special role in the fight against corruption and organized crime.
- The implementation of the methods of functional analysis to identify the tasks that need to be performed and streamlining of administration are necessary.
- It is necessary to establish effective cooperation between national administrative systems, since due to the strong European convergence, the differences between administrative systems have been overcamed. By adopting common standards, Member States modify and enhance their systems under a strong influence of European coherence. Cooperation between countries through the exchange of best practices and experiences and comparison of successful methods, affects the overall improvement of functioning of administrative bodies (including judicial and other authorities).
- New solutions in the field of human resources management, providing a strong position and role of the central body for human resource management and the implementation of permanent process of professional development of civil and public servants are required. The general professional training of civil servants must be tailored for police officers, given the specific tasks they perform.
- The adoption and application of modern management principles are required, and special responsibility for their introduction and effective implementation belongs to managers in bodies. They must be professionally trained in terms of new methods of performing work and tasks.
- It is necessary to set out efficient system of protection of civil servants' rights (in proceedings before administrative bodies and competent courts).
- Provision of the rule of law and the legal security of citizens and other subjects, the adoption of necessary regulations and changes to the existing ones, as well as establishment of mechanisms for their effective implementation are necesary. Acceptance of regulations by the citizens, and their compliance with them, raising awareness about the new and accountable public administration, raising the level of professionalism and competence of the employees, which affects the quality of work of administration in whole, are reqired.

2. Current Problems of Structuring and Functioning of Police Organization

- Problems were analyzed, and solutions related to contradictions of police organization, past, present and future of police organization, which attract significant attention of professional, civil and general public, were proposed.
- Contradictions in police organization represent professional challenges for all police officers, whether they are executives or managers.
- Sinergy that the police organization should enable is a prerequisite of optimal connection of process (managing, for example control, etc.), branch (executive, for example. traffic safety, etc.), and auxiliary (analytics, link and cryptographic, computer support, etc.) functions of the police organization, and its structuring.
- If optimal organization is not followed by the proper organizational culture and generally acceptable organizational behavior of police officers, police organizations will not be able to meet the needs of the state and society.
- The problems and proposed solutions in the field of policing and professionalism of the police, standardization of policing, regular, emergency, specific and special police tasks, were analyzed.
- It was pointed to the need for optimization of policing using modern decision theory, based on the application of quantitative methods and information technology in order to support decision making, team method and work, systematic way of thinking about the police issues etc.

3. Contemporary Concepts in Criminalistics

- It is necessary to improve criminalistic practice in accordance with the possibilities of modern scientific and technological achievements.
- It is necessary to define models of information and continuous training of police officers and magistrates regarding the possibility and necessity of the application of modern scientific and technical achievements in the procedures of prevention, detection and solving criminal offences, locating and arresting perpetrators and providing evidence.
- It is necessary to define the procedures of police officers during the implementation of specific measures to prevent and combat crime (especially regarding the use of methods based on the achievements of science and technology).
- Continuous evaluation of working methods and the legal framework of criminal police conduct in the prevention, detection, clarification and proving of committed criminal offences is necessary.
- The improvement of the existing and finding new scientific methods for more efficient prevention and combat agains crime are required.
- It is necessary to review the basic elements of job profile of a criminalist, and continously work on developing police integrity and improving the level of professionalization of criminal police.
- It is very important to develop programs of specialization of police officers of criminal police in line with current trends and the basic characteristics of crime (defining the pyramid of education in line with the organizational model of the police).
- Continuous analysis/evaluation of models of police organization is necessary, in order to increase efficiency.
- The development and implementation of criminalistic strategic approach to the prevention and combating crime is required.
- It is crucial to improve systematic approach to preventing and combating crime, organization and coordination of various state bodies in preventing and combating crime.

4. Crime and Penal and Legal Reaction

- Organized crime, crime of violence, human trafficking, corruption, cyber crime, are modern, often very serious forms of crime, whose expansion is characteristic not only for our country and the countries in the region. Fighting these forms of crime requires engagement of many subjects in various fields, ranging from establishing criminal policy, creating legislative and institutional framework for the criminal justice action, especially preventive mechanisms in this area, through the application of modern methods of detection and prevention of these types of crime to further development and expansion of institutions of international police cooperation.
- The Law on Amendments to the Criminal Code of Serbia of December 2012 harmonized the substantive criminal legislation with European standards, particularly when it comes to crimes related to corruption, terrorism, as well as some issues of general criminal law, in particular those related to sentencing. However, a lot of issues remain unsolved by these amendements, which require a certain audit, so it seems necessary to continue the already initiated reform of criminal legislation.
- Some forms of modern crime (economic crime, organized crime, corruption, money laundering, etc.) and their expansion imposed the necessity of introducing criminal liability of legal persons in our legal system, which was done by passing the Law on the Liability of Legal Entities for Criminal Offenses . However, although it has been a while since it was passed, the results of its practical application can be assessed as unsatisfactory.
- Although the Criminal Code of Serbia of 2005 and its subsequent amendments significantly altered the system of criminal sanctions, the use of the so-called alternative sanctions in our country has not produced satisfactory results. Reasons should be sought in the inadequate system of institutions responsible for monitoring and enforcement of these sanctions, the conservatism of judges, and the negative attitude of public opinion towards their implementation.
- Despite great efforts in finding new, alternative sanctions, imprisonment sentence remains the most important and the most serious sentence in majority of modern countries. Its full effects can be achieved with its appropriately weighted prescribing and imposing, as well as its carefully implemented execution, since only in that way it can, in addition to repressive, have a preventive character.
- Protection of children from various forms of abuse and harassment gains a growing importance at the international and national level. Our country is also making significant efforts in that direction, by improving the legislative solutions in this area and strengthening institutions dealing with the protection of children and their rights. One of these certainly is the institution of the school police officer.

5. Forensic Methods in Criminalistic Identification

- Within the analysis of the current state of forensic laboratories in connection with the acceptance of material evidence by the court, it was pointed to the importance of certification of forensic laboratories and the overview of the current situation in the region.
- In the field of forensic accounting, the need for economic and financial expertise in the process of proving criminal cases of economic crime has been emphasized, given the fact that the current legal solutions fail to solve many dilemmas.
- Within the forensic chemistry, it was pointed to the importance of using chromatographic methods of analysis in forensic identifications. A brief overview of the thin-layer, liquid and gas chromatography, which can be used to identify explosives, drugs and other substances, was presented.
- Within forensic genetics, the results of research were presented, which, with the application of genetic statistical analysis, showed a high degree of homogeneity of the studied sequences and scientifically based justification for the formation of a STR reference database for the entire territory of Belarus.

- Within dactyloscopy, the possibility of using directional filtering techniques (Log-Gabor) to improve the quality of the fingerprint images, as a result of extensive researches by the authors, was presented.
- Since in recent years the use of biometric facial identification has increased, the results of the research of strengths and weaknesses of these forensic methods in terms of reliability were presented at the Conference. In fact, it was concluded that the technology used for biometric identification is accurate when it comes to verification, but not always when it comes to identification. The problem arises when a person has a different make-up, glasses, or a different hairstyle when it comes to spotting the differences and in cases of identification of twins.
- In the field of forensic examination of documents, the paper that has pointed out the advantages and disadvantages of the old and new ways of protection of euro banknotes from forgering, was presented.
- Multidisciplinary papers, for example, in the field of forensic medicine and forensic entomology, which stressed the importance of cooperation between different subjects to determine the time of death based on the life stages of insects found on the body of the victim, were also presented at the Conference. The paper presented the results of the research, which proved the claim that in determining the time of death of a victim of a crime (e.g., murder), methods of forensic entomology are more reliable 72 hours after death.
- Also, among multidisciplinary papers, the paper that highlights the importance of cooperation between forensic engineer and jurist that studies the connection between the explosion effects on the environment and different possibilities for qualification of crimes committed with them, given that different masses of used brisant explosives indicate different intentions of the perpetrator, was presented. This paper presents a statistical analysis of cases of explosive devices activations on the territory of the City of Belgrade Police Administration. The results of the research show the relevance of the type and mass of used explosive for the occurrence of the consequences in the form of property damage, injury and death of people, and the importance of other factors such as location, time, manner of placing and activating an explosive device.
- It was also pointed to the possibility of application of thermal imaging techniques in forensics – in biometric identification, forensic processing of fire sites and explosions.
- By presenting a number of new and current forensic methods related to the identification of persons and unknown substances, the conclusion of the necessity of innovation, development and great potentials of application of forensic methods, especially in criminalistics, imosed itself. During the Conference, it could be concluded that the interests of all authors were focused on modern methods of identification. Depending on financial resources, some authors have presented results unattainable for the other participants in the Conference. Precisely this ability, to perceive and understand these researches, with discussion and clarification of the authors, directly provides the possibility of expanding scientific knowledge. The purpose of this kind of scientific conference, in terms of meeting people and future professional and personal inter-institutional cooperation, has been fully satisfied.

6. Contemporary Security Studies and Security of the Republic of Serbia

- *Contemporary security studies* have become extremely current area of research in the social sciences in our country, the region and the world.
- The authors of papers made a special contribution to areas such as: critical review of the development of security studies in the world; expanding the security study field and development of theoretical concepts of safety - from individual, societal and national, to regional and international security; sectoral approach to the study of current security issues, with an emphasis on environmental, economic and energy security; safety in emergency situations, security and crisis management.
- All papers reflect meticulous research methodology according to required rules, which were implemented on the basis of a comprehensive analysis of the rich research and scientifically relevant material; hence the results presented in papers are clear, critical, and provide a good basis for further scientific development of contemporary security studies.

- The quantity of scientific work in the field of security indicates the necessity of a formal institutionalization of scientific field of security studies, by normative introduction in the national nomenclature of sciences. Within the security scientific field, more specific scientific fields, particularly the field of national security, international security, security in emergencies would be developed, which would lead to a change in the national nomenclature of educational profiles. Many new jobs in the area of security, which require amendment to the national nomenclature of job profiles, emphasize this fact.
- In addition, the practice of organizing scientific conferences that are fully or prtially devoted to solving contemporary problems of security, such as "Archibald Reiss Days", should be continued. This is an excellent opportunity to promote the results of numerous research projects of multidisciplinary, and, as a rule, of security nature, such as those implemented by the Academy of Criminalistic and Police Studies.

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TOPIC IV
CRIME AND PENAL AND LEGAL RESPONSE

TOPIC IV

CRIME AND PENAL AND LEGAL RESPONSE

UDC: 343.24(487.11)

ALTERNATIVE SANCTIONS IN SERBIA

Director, Principal Research Fellow **Jovan Ćirić**, PhD
Institute of Comparative Law, Belgrade

Abstract: In the Serbian criminal-law system there are several alternative sanctions, but in reality, in court practise those sanctions are implemented only sporadically. Because of that, prisons are overcrowded, and consequently, there are many economic problems, but first of all, problems regarding human rights. In this article, the author tries to answer why the Serbian courts do not apply alternative sanctions. He thinks that there are several reasons for such a situation. Social institutions are not developed in Serbia. It does mean that new alternative sanctions are not followed up by the adequate social institutions that are very important for the implementation of alternative sanctions. It could also be said that judges are conservative, but the main problem is, thinks the author, the manipulations that come from the politicians and media. The politicians and media are spreading the fear of the criminality among ordinary people and ordinary people demand the retributive action of the judiciary. In such a situation it is very difficult to implement alternative sanctions. There is too much populism in Serbia, when it comes to problems of criminal policy and those political, extra-legal influences are very present nowadays in Serbia.

Keywords: overcrowded prisons; alternative sanctions; statistical data; developed social institutions; judges and prosecutors; media manipulations, penal populism; Serbia.

INTRODUCTION

In Serbia, prisons are overcrowded. This problem has been in the focus of interests of many Serbian lawyers and analysts over the last few years.[1] Serbia is not a country that is on the first place when it comes to the number of convicted persons, but when it comes to the number of imprisoned persons, the situation is different.[2] It is an interesting paradox. It leads to the problem of alternative sanctions. Those sanctions could replace the penalty of imprisonment, but in Serbia those sanctions are applied only sporadically. The question is why? It is our opinion that judges are in the fear that they would be criticized for being so lax. The practice of public commentary and criticism of the courts is established in Serbia. Those criticisms are directed through the media and most of them come from the politicians. Those critics say that the courts should be more severe than they are.

The risk of crime in Serbia is exaggerated. In fact, it could be argued that greater attention is paid to the protection of victims of crime, rather than to the rights of prisoners. So, we could speak about the abuses of victims and victimology.[3]

Anyway, the problem of overcrowded Serbian prisons is not only an academic question for professors and scientists. There are many technical and economic problems related to the basic problem of overcrowded prisons. It is also a problem of human rights and a problem of negative influence of the prison atmosphere on prisoners, especially on those who are facing the prison for the first time.

The problem of stigmatization of those who are in prisons has to be mentioned also. According to Ivana Jovanović, from the "Southeast European Times" from Belgrade, in 29 prisons in Serbia there are approximately 11,000 prisoners. The European standards say that Serbian prison capacity is for 7.500 persons only.[4] Damir Joka, an official from the Serbian Ministry of Justice, says that in Serbian prisons there are 10,211 prisoners and that the real capacities in Serbia can cater

1 Zoran Stojanović; - Strategija ostvarivanja svrhe krivičnog prava; - „Arhiv za pravne i društvene nauke", 3-4/2008, pp.176; See also: Nataša Mrvić-Petrović; Đorđe Đorđević; - „*Moć i nemoć kazne*" – Belgrade,1998.pp. 89, or. Đorđe Ignjatović; - „*Pravo izvršenja krivičnih sankcija*", Belgrade 2010, pp.13.

2 Among European countries, Serbia is among those countries with an average rate of criminality. (Đorđe Ignjatović; - Poređenje stopa prijavljenih učinilaca krivičnih dela :Srbija-ostale evropske zemlje; - in the book „*Kaznena reakcija u Srbiji*" *II part*, edited by Đorđe Ignjatović, Belgrade 2012, pp. 18-50)

3 Jovan Ćirić; - Viktimološke zloupotrebe; - „Pravni život" 9/2010, str. 17-32

4 http://www.setimes.com/cocoon/setimes/xhtml/bs/features/setimes ...

for about 6.000 prisoners.[5] The Ombudsman also pointed out that in some situations in some prisons in Serbia there are almost 100% more prisoners than is required for normal life, normal re-socialization and work with prisoners.[6]

Having all that in mind, the former Serbian government started to build a new modern prison near Belgrade. It was finished in November 2011, but its capacity is for only 450 prisoners.[7] Because of that, in November 2012, the new Government (or rather, the Parliament) adopted the Amnesty law, which will result in the release of about 30% of prisoners.[8] The process of adoption of that Amnesty law was heavily criticized by the opposition and by some media. The cover page of one very popular newspaper, read: „The new Government is going to release dangerous criminals".[9] Therefore, the problem of penal policy, releasing prisoners and consequently the problem of alternative sanctions in Serbia became an issue of everyday politics. In such a situation the arguments of the profession and science cannot be discussed in a right way; moreover, due to that, the Serbian courts do not apply the new alternative sanctions. It also has to be said that the number of convicted persons released on parole is nowadays smaller than it was before. In that sense one case was very paradigmatic. It was Bracanović, who was sentenced to two years of imprisonment for failing to prepare the murder of Ivan Stambolić and Vuk Drašković, and later for failing to report offenders. The court decided to release Bracanović on parole, just a few weeks before the expiry of his sentence. The reaction of the politicians in Serbia, including the Minister of Justice, was very negative.[10] The Minister said that she would launch the procedure for removal of three judges from the Supreme Court of Serbia who released Bracanović on parole. [11] That was a very clear message that was sent to all judges: "Be careful, do not impose alternative sanctions, or do not release on parole."

But, when it comes to the Amnesty Law, one thing has to be said, one objection has to be made. The general amnesty is not a solution for overcrowded prisons. It is a solution for one very short period of time. People who find themselves at liberty, in some new difficult economic conditions, usually cannot find a job and in such conditions nobody takes care about them. They are without any social help and in such a situation they are trying to find a help from the "old friends" and they return to the "old habits". So, we can expect that they will return to prison very soon. The first day at liberty could be a shock for prisoners, almost like the first day in prison, especially having in mind rapid changes in a nowadays world. Former prisoners are very often rejected by their own families and in nowadays poor economic situation they cannot expect very much from the state, from the society. So, they could be released at liberty, but with many other economic, social and psychological problems. In that sense, the amnesty is not the real solution for them, nor for the society and we can expect that very soon shall we have the similar situation with overcrowded prisons. So, it is better not to put those people to prisons and to release them after a while. Alternative sanctions are better solution.

It also has to be said that in the Serbian theory and in scientific books and articles, there are many discussions about alternative sanctions, about the advantages of alternative sanctions compared to the classical imprisonment and about the necessity of the introduction and the implementation of alternative sanctions.[12] It also has to be said that the Serbian judges and prosecutors are informed and well-educated about alternative sanctions through many symposiums and training courses organized by the Judicial Academy. They are informed about the alternative

5 http://zatvorenik.blogspot.com/2011/04/damir-joka-uprava-za-izvrs...
6 http://danas.rs/danasrs/iz_sata_u_sat/ombudman_zatvorski...
7 http://www.smedia.rs/vesti/vest/80386/Otvoren-novi-zatvor-Kazneno-popravni-zavod-Padinska-Skela-Nova-Skela-Padinska-Skela-Otvoren-novi-zatvor-FOTO.html.
8 http://www.b92.net/info/vesti//index.php?yyy=2012&mm=11&dd=08&nav_category=11&nav_id=65845
9 http://www.pressdisplay.com/pressdisplay/viewer.aspx
10 http://www.b92.net/info/vesti/index.php?yyy=2009&mm=03&dd=04&nav_category=120&nav_id=348217
11 http://b92.net/info/vesti/index.php?yyy=2009&mm=03&dd=05&nav_category=120&nav_id=348345
12 So-called restorative justice is not an unknown phenomenon to Serbian judges and prosecutors. There were many symposiums where those problems were discussed. The Serbian Society of Victimology (VDS – Vikitimološko Društvo Srbije) has paid special attention to problems of restorative justice. Many articles in the Journal „Temida" published by VDS, are dedicated to those problems of restorative justice, like it was in a special number edited in 2007 (http://www.vds.org.rs/File/Tem0701.pdf). Anyway, the knowledge about alternative sanctions and restorative justice exists in Serbia, but in practice, almost everything is different.

measures, but in reality, in practice, they do not apply those sanctions. For the Serbian judges, the imprisonment and (ordinary) suspended sanction/imprisonment are the main sanctions. On the one hand, courts are very severe, but on the other hand, they are very mild.

Fine, which was often implemented in the 70's and 80's, is now rare. Fine is in the third place, probably because of poor economic conditions. If you commit an offence, it is most likely that you shall be sentenced to "(ordinary) suspended imprisonment." The second most frequent sanction is imprisonment and the third is a fine. The chance to be sentenced to some other alternative sanctions, like community service or home prison is negligible. We think that it is because the general public perceives only imprisonment as a sanction. Therefore, when we talk about sanctions, about the penal policy of the courts in Serbia, in some way we are talking about different political and media manipulations.[13] People are afraid of crime and there are many exaggerations about that fear. That exaggeration comes from journalists and politicians. In such a situation it is very difficult for the judges to apply alternative sanctions. The general public, the journalists and the politicians expect the judges to be retributive and to pass severe sanctions. Ordinary people believe that severe penalties, first of all imprisonment, are the best way to resolve the problem of criminality.[14] Consequently, we could talk about politicians and mass-media that manipulate with the fear of criminality. They manipulate with uneducated general public. In such a situation it is very difficult for the judges to apply something else, some alternative sanctions. If we take a look at the table which shows us the general trends of criminality in Serbia, we can see that the changes are not so big in the last few years.

TABLE 1 - The number of convicted persons for all crimes in Serbia[15]

Year	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number of convicted persons	33. 967	31. 949	33. 168	33. 675	33. 017	34. 239	36. 901	41. 422	38. 694	42. 138	40. 880

It is also interesting to see the statistics regarding the most frequent sanctions in the last few years. The most frequent sanctions in the practice of the Serbian criminal courts are suspended sanction (ordinary suspended sanction of imprisonment), imprisonment and fine. Other alternative sanctions, like community service, revocation of driver's licence, home imprisonment, are very rare in practice. It is therefore interesting to take a closer look at the statistical data concerning the sanctions that were passed by the Serbian courts, in the period from 2006 on (when the new Serbian Criminal Code was adopted).

TABLE 2 – Imprisonment; fine; suspended sanction[16]

Year	Imprisonment	Fine	Suspended sanction	other alternative sanctions
2006	27,09%	19,39%	51,91%	1,59%
2007	22,22%	19,15%	56,08%	2,59%
2008	22,91%	17,25%	57,26%	2,53%
2009	23,88%	16,51%	57,19%	2,40%

On the basis of these data, we could make two conclusions. The first is that the proportion of suspended sanctions imposed each year is higher and the second thing is that the percentage of fines is lower every year. The percentage of imposed imprisonment did not change significantly.

It is also interesting to see the number of short-term imprisonments.

13 Jovan Ćirić;- „*Društveni uticaji na kaznenu politiku sudova*"; Beograd, 2001.
14 The problem that is practically not so big in Serbia.
15 We got the information from the official publication of the Serbian Office (Institute) for Statistics
16 ibidem

TABLE 3 – Short-term imprisonment[17]

	2003	2004	2005	2006	2007	2008	2009
Up to 6 months	60,12%	60,73%	63,46%	65,30%	57,60%	54,65%	53,13%
6-12 months	24,83%	23,02%	21,88%	19,65%	21,17%	21,88%	22,32%
1-2 years	9,14%	8,41%	8,03%	7,79%	12,39%	13,54%	14,22%
More than 2 years	5,90%	7,83%	6,61%	7,24%	8,82%	9,90%	10,30%

The number/percentage of short-term imprisoned people in 2009 is not as high as it was a few years ago, but we can say that the changes are not so significant. The number of people who are sentenced to short-term imprisonment is still very high.

There is also another table that shows us some data about the number of short-term imprisonments.

TABLE 4 - The total number of people sentenced to up to 1 year and more than 1 year imprisonment[18]

	2006	2007	2008	2009
Total number of people sentenced to imprisonment	11,224	8,576	9,658	9,763
Up to 1 year	9,536 (85%)	6,756 (79%)	7,393 (77%)	7,368 (75%)
More than 1 year	1,688 (15%)	1,820 (21%)	2,265 (23%)	2,395 (25%)

We must say that there are some changes, but it has to be said that the number of persons who were released on parole has considerably decreased in the last few years. Before 2009, it was much easier to release someone on parole. The Criminal Code of 2006 stated that "the court may release on parole a convicted person who has served a half of a penalty on which he/she was sentenced..." but after the 2009 amendments it reads "the court may release on parole a convicted person who has served two-thirds of a penalty on which he/she was sentenced...". Therefore, if someone was convicted to a prison sentence, it was very difficult for him/her to be released. Until the beginning of 2000 almost 50% of imprisoned persons were released on parole, but from that time, the situation has changed. In that sense, for example in 2007 – there were 21.87% of imprisoned persons who were released on parole, and in 2011, the percentage was only 12.49%. That was a very important objection of different European observers.

TABLE 5 - Persons released on parole[19]

Year	% of persons released on parole
2007	21,87%
2008	18,48%
2009	19,22%
2010	21,94%
2011	12,49%

17 ibidem

18 Đorđe Đorđević; - Kućno zatvaranje – nov modalitet izvršenja kazne zatvora; - in the publication „Kaznena reakcija u Srbiji" II part, edited by Đorđe Ignjatoivič; - Belgrade, 2012, pp. 122

19 Information got from the Department for the execution of sanctions in the Ministry of Justice

In order to obtain a clear picture about the situation in Serbia, information about the community service, revocation of driver's licence and judicial caution, which are also important alternative sanctions (measures), has to be taken in consideration.

TABLE 6 - Number of alternative sanctions (community service, revocation of driver's licence, judicial caution)[20]

Year	2007	2008	2009
Community service	48 (0.12%)	35 (0.08%)	51 (0.12%)
Judicial caution	472 (1.21%)	524 (1.24%)	485 (1.18%)
Revocation of driver's licence	2	4	3

Having in mind all these statistics, we can make a question about "revocation of driver's licence". Is it necessary to have such a sanction that nobody implements in practice? What is the reason for the existence of such a sanction that is implemented so sporadically in only two or three cases? The legislator has to think about the changes in the law.

Anyway, the possibility for someone to be sentenced to community service, judicial caution or to revocation of driver's licence is very low. The Ministry of Justice had made an agreement concerning community service with public enterprises in only seven cities in Serbia. In only 7 cities in Serbia, it is/was possible to serve community service. We can hope that this will change in the future. This is only the beginning of the implementation of new sanctions.

Here we have to mention two other alternative sanctions, two modifications of classical sanctions. These sanctions are fine in daily amounts and home imprisonment. These modifications, new sanctions, were implemented in the Serbian system in 2009.

To understand the situation in Serbia, one has to read one article that was written by the President of the Appellate court from Novi Sad (Vojvodina)[21] Slobodan Nadrljanski and his assistants.[22] In that article the authors have conducted a research about the fine and especially about the new modification of the fine – fine in daily amounts. They conducted a survey among the judges on the territory of the Appellate court of Novi Sad. They asked the judges: "Do you apply the fine in daily amounts?" Nobody answered "yes", and after that the researchers asked them: "Why don't you apply this measure (alternative sanction)?"[23] The judges answered: 1) this is an unnecessary delay in the proceedings; 2) the court does not have an efficient mechanism to obtain accurate information about someone's incomes; 3) there is no clear definition of income, especially if someone works on the black market, or works in the agriculture; 4) sometimes it is necessary to engage a financial expert to resolve the entire situation; etc.[24] According to this paper, fines are the most frequent sanction when it comes to 1) traffic offences; 2) offences against human health; 3) offences against property; 4) offences against honour and reputation (insult and defamation). The fines[25] are the least frequent sanction pronounced for sexual criminal offences and criminal offences against intellectual property.[26]

The arguments that the judges gave in their answers to the question "Why don't they apply fines in daily amounts?" could also be used in some other situations: why don't you apply any other alternative sanction? The answer could be similar: the general social circumstances are not favourable for applying new, alternative sanctions. Social institutions are not built and developed for such an innovation. The judges are aware of this.[27] They respect the reality in which they live. Maybe it could

20 Information from the official publication of the Serbian Office (Institute) for Statistics

21 We must have in mind that Vojvodina is the most developed region in Serbia.

22 Slobodan Nadrljanski; Slobodanka Milić-Žabljac; Anđelka Gazivoda; - Novčana kazna u teoriji i praksi, in the publication „Kaznena politika (Raskol izmežu zakona i njegove primene); Istočno Sarajevo 2012. pp. 417

23 Ibidem

24 ibidem

25 Regular fines or more precisely "fines in particular amounts", because as we have seen, in the practice, there are no "fines in daily amounts".

26 S.Nadrljanski; S.Milić-Žabljac; A.Gazivoda; - op.cit.

27 Đorđe Đorđević; - Novčana kazna u KZ Srbije i problemi njene primene u praksi; - in the publication „Aktuelna pitanja krivičnog zakonodavstva (normativni i praktični aspekt)"; - XLIX redovno godišnje savetovanje Srpskog udruženja za krivično pravnu teoriju i praksu", Zlatibor 2012, pp. 394-410

be said that the judges in Serbia are conservative. It also has to be mentioned here that there are big differences between Belgrade and a few big cities, centres in Serbia on the one hand, and some other towns on the other hand. The equipment, information technology, data bases, and the education and knowledge of ordinary people, including judges in Belgrade are higher than in some other towns, in some other parts of Serbia. It is much easier to get clear information and to make a right decision in Belgrade, than in other parts of Serbia. Belgrade is not Serbia and Serbia is not Belgrade, first of all in economic sense, but also in the sense of the mentality. Having that in mind, we could say that the people from Belgrade are not so conservative like they are in small towns, or better to say that people, the judges from Belgrade are more open minded than people in some other regions.

Anyway, it could also be said that Serbian legislator is ready to accept some novelties and that is good, but what is not good is that those novelties are not followed up by the adequate social conditions and institutions. All institutions for social and health care have to be very developed if we want to implement such novelties in our criminal law system.

It is interesting to say that in the practice of Serbian courts, the new sanction "home imprisonment" is not so rare. In 2011, 380 sanctions of home imprisonment were pronounced and in the first 10 months of 2012, 600 such sanctions were pronounced.[28] On the other hand, suspended sentence with protective supervision was passed only in 100 cases in the last 6 years. Therefore, the question is what the reason for such a difference is. In order to implement "protective supervision" a very well organized system of social control– probation service and very-well educated officers - must be in place. This is not so easy to organize in a short period of time, especially at the time of economic crisis. On the other hand, the system of home imprisonment is much cheaper, especially if we have in mind the fact that Serbia got 500 electronic monitoring bracelets as a donation from different European partners.[29]

It also has to be said here that one case was very important for the propaganda of such a measure and alternative sanctions in general. It was the case of a very popular folk-singer Ceca Ražnatović. In 2011, she was sentenced to home imprisonment for an economic crime.[30] The case has sparked numerous debates. Due to those *pro et contra* discussions, the general public understood this new measure and accepted it, even though it could be said that home imprisonment is a privilege for the rich people. People who live in good and rich houses are in a better position than those who live in poor conditions.[31] That is one of the biggest objections to this new measure,[32] but in reality this alternative sanction is now present in the practice of courts, more present than other alternative sanctions.

This shows that propaganda and understanding are very important. When the government wants to introduce a novelty, it is necessary to explain to the citizens what it is. The mentioned case of the popular folk singer helped the government in those explanations. When it comes to judges and prosecutors, we have to say that over the last few years the Serbian Judicial Academy had organized a number of trainings, educational courses and seminars in Belgrade, and also in other Serbian cities. Some 40 such courses and seminars were held. Here we present one seminar that was held in Kragujevac in March 2010. The topics discussed were the following: Alternative sanctions – Comparative legal framework; Alternative sanctions in domestic criminal-law system; Alternative sanctions – Prosecutor's aspect; Execution of alternative sanctions – Social service system. The lecturers at that seminar were one judge, one prosecutor and one official from the Judicial Academy.

To get a real impression, here we present a few introductory words from a seminar organized in Novi Sad in February 2010.

"The aim of alternative sanctions is to reintegrate perpetrators of crimes rather than to expel them from the society, from the family. Those sanctions will prevent the infection of the perpetrator in a penal environment. The essence of the application of these sanctions is that the individual

28 See about that on http://www.dnevnik.rs/hronika/narukvica-se-postuje Also see it on http://pravniportal.rs/index.php?id=37318&cat=159

29 www.uiks.mpravde.gov.rs&cr&articles&iyvestaji/i/statistike

30 http://www.blic.rs/Vesti/Hronika/261620/Ceca-u-kucnom-zatvoru-do-marta-2012

31 Jovan Ćirić; - Krivični zakonik kao instrument prevencije kriminaliteta; in the publication: „Kontrola kriminaliteta i evropski standardi: stanje u Srbiji", Beograd, 2009. pp.80

32 Đorđe Đorđević; - Kućno zatvaranje – mov modalitet izvršenja kaznezatvora; - in the publication „Kaznena reakcija u Srbiji" part II edited by Đorđe Ignjatović, Belgrade, 2012. pp.126.

be active, to participate more actively in his/her treatment, which increases the effectiveness of the treatment. The experience in countries with a longer tradition of alternative sanctions shows that the percentage of recidivism is less than the recidivism in prison punishment conditions."

All in all, we can say that much has been done to educate judges concerning alternative sanctions; however, the results are not satisfactory and in practice, alternative sanctions are still rarely implemented in Serbia. The question is why? We think this is because the problem of penal policy, as well as the problem of prevention of the criminality in Serbia, always gets a political dimension. The politicians in Serbia like to use almost every opportunity to say something about the criminality and about the fight against criminality. This can be illustrated by a statement given a high Ministry of Justice official a few years ago. With regards to the riots of young hooligans on the streets of Belgrade, he said on TV that the reaction of the state would be sinister, (very strong).[33] The role of the media is also very negative. In Serbia, the so-called "trial by media" is not something extraordinary. In that sense, the general public cannot accept alternative sanctions. It is therefore necessary to work with the general public, in order to educate it.

As a conclusion we can say that alternative sanctions are new in Serbia, and that we can expect some changes in the future. A lot has been done on the education of judges and prosecutors concerning alternative sanctions, but it is also necessary to do many things regarding the education of the general public. In that sense, the journalists can do very much, but also the politicians. They need to stop resorting to populism in resolving general problems of criminality. In Serbia in the last few years the extra-legal, social influences have had considerable impact on the penal policy.[34] If this changes, then the situation regarding alternative sanctions will also change.

33 For more information please visit http://nspm.rs/politicki-zivot/reakcija-drzave-ce-biti-jezivaq.htnl
34 Jovan Ćirić; - Društveni uticaji na kaznenu politiku sudova; - Belgrade, 2001.

UDC: 343.85:343.37
343.85:343.53

CORPORATE CRIME AND THE MEASURES OF THE CRIMINAL LAW REACTION[1]

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Abstract: The legal entities' criminal responsibility issue becomes topical in the modern age, considering the enormous economic power and great social influence of legal entities (corporations, multinational companies, enterprises) which often undertake criminal activities more serious than those carried out by individuals. Related to that, some forms of crime characteristic for the development of the modern society (corruption, money laundering and organized crime) require a wider use of various legal measures, and also require a forecast of the possible criminal responsibility. Therefore, there is a wide acceptance of the criminal liability of legal entities in modern criminal law, so the amount of criminal legislation and the contemporary states which predict this kind of liability, is increasing. This paper shows the way in which certain states have resolved the issue of corporate liability for criminal acts, as well as the correlated situation in Serbian legislation. Analyzing the present Corporate Criminal Liability Law which exists in our country from the year 2008, and the fact that is nearly not even applied, the authors of this paper have concluded that, despite the criminal-political need to react to the offenses of the legal entities via vital sanctions, and the existing of appropriate legislation, there are numerous barriers and problems on the road to consolidation and application of this kind of liability.

Keywords: criminal acts, legal entities, legislation, criminal sanctions, economic offenses.

THE REASONS FOR THE INTRODUCTION OF CRIMINAL LIABILITY OF THE LEGAL ENTITIES IN SERBIAN LAW

One of the challenges of modern society challenges is, without doubt, a rapid development of certain forms of criminality. Among those forms, a special place is taken up by legal entities criminality, which, considering the enormous economic power and large social influence of legal entities (corporations, multinational companies and enterprises), causes a serious harm to individuals and to the society as a whole.[2] Legal entities are often in the situation to undertake criminal activities which are much more serious than the criminal activities for which individuals are able to act for, and thus their operations, at times, cause inestimable harmful consequences in all areas. In the excessive desire for profit acquisition, some legal entities have no regard even for the most important benefits of individuals and society, so the damage caused by the criminal acts of legal entities is large for the whole of society.[3] All of the mentioned contributes to the issue of criminal responsibility of the legal entities becoming very important for contemporary conditions in the world, as well as in our country.

But along with the rapid expansion of this kind of criminality, there are also other factors which had an impact on the introducing of criminal liability for legal entities in our criminal law. This is above all the fact that certain acts of the Council of Europe's Committee of Ministers and the acces-

1 This paper is the result of following realizing scientific and research projects: *Penalties in Serbia as a key element of legal state* (no. 179051), realized by the Faculty of Law in Belgrade 2011-2014 (project manager Professor Djordje Djordjevic) and Development of institutional capacities, standards and procedures for fighting organized crime and terrorism in conditions of international integrations (no. 179045), realized by Academy of Criminalistic and Police Studies, 2011–2014 (project manager Professor Sasa Mijalkovic), which were financed by Ministry of science and technological development of Republic of Serbia, and the project *Status and Role of the Police in a Democratic State*, which is financed by the Academy of Criminalistic and Police Studies.

2 Z. Stojanovic, Criminal law, general part, Belgrade, 2011, p.181.

3 N. Tanjevic, Society as a victim of legal entities' criminal action, Temida, no. 2/2011, p.26

sion of our country to the International Convention,[4] create for all states and Serbia an international commitment to undertake mandatory measures for legal entities in the purpose of improving the struggle against modern forms of criminality.[5]

In undertaking the necessary measures for liability regulation of legal entities, first of all there is the issue of adequate forms of legal entity liability in cases which the mentioned conventions relate, but, also, regardless of the mentioned convention's obligations, there is the need to undertake efficient measures for the legal entities. The mentioned international documents do not place strict demands regarding the type of legal entity liability, but insist that it is stronger and more comprehensive.[6]

In that sense, all kinds of liabilities in Serbian law should be considered, which can be applied to the legal entities: civil, misdemeanors, economic leap and criminal responsibility. Even if civil liability is largely present and applicable to legal entities and their misdemeanors, it is not sufficient. This primarily is due to the fact that, after the implementation of certain 'institutes' (damage compensation, dissolution or annulment of legal work, etc.), legal entities do not suffer significant consequences, but only compensate for the damage caused, for what they are normally obligated to do, if the damage has been caused by their actions.[7] Also, misdemeanor responsibility is not completely adequate when it involves severe forms of criminal activities, even if the penalties in the Law on Misdemeanors were significantly stepped up, as that would lead to undesirable solutions: for the same criminal acts, individuals would be responsible for offenses, and legal entities for felonies, which are by their legal nature the easiest form of criminal offense.[8] Finally, the economic leap responsibility of legal entities which exists in Serbian law is not suitable as a needed measure for the suppression of modern criminal activities of legal entities to which the mentioned conventions are related, as they are activities which cannot be treated as economic offenses.[9] This means that economic offenses represent transgressions which are defined in Serbian law as 'socially harmful violations of regulations of economic and financial businesses',[10] and the acts referred in the conventions are not that, and cannot be treated as offenses of the Commercial Criminal Law, because they represent specific forms of general crime and, as a rule, the most difficult forms of the crime.

Taking into account all this, a prediction of the criminal liability of legal entities as an adequate form of responsibility for listed serious crimes appears as a necessary measure for the suppression of the modern forms of legal entity criminal activities, and also as the most suitable solution for Serbian law. Its founding should significantly contribute to the suppression of legal entity criminal actions in Serbia and beyond, and at the same time our country would carry out the international legal commitments created by joining the mentioned conventions.

THE FORMING AND DEVELOPMENT OF THE IDEA OF LEGAL ENTITY CRIMINAL LIABILITY

The legal entity criminal liability issue is one of the subjects which have always preoccupied those who have theoretically or practically dealt with criminal law. From the historical point of view, there were different understandings of the mentioned issue. Certain solutions to the issue, which have appeared in different countries and different historical periods in criminal law, such as accepting or rejecting liability, depended on the needs of the society in a certain time period and existing circumstances, and varied between complete denial of liability and its acceptance and its implementation in criminal law.

4 The United Nations Convention Against Transnational Organized Crime (2001), The Criminal Law Convention on Corruption (2002), The International Convention for the Suppression of the Financing of Terrorism Act (2002), The United Nations Convention Against Corruption (2003). See also: D. Jovasevic, Corporate Criminal Law, Nis, 2012, p. 35

5 D. Kolaric, Corruption and responsibilities of legal entities for criminal acts, Science, Security, Police, no. 2/2006, p.113.

6 G. Ilic, Responsibility of legal entities as a subject of (special) criminal legislation, published by "Constitution of Republic of Serbia, criminal legislation and organization of judiciary", Zlatibor, 2007, p.207.

7 M. Vrhovsek, Legal entity as an executor of criminal act according to Law of responsibility of legal entities for criminal acts, Science- Security- Police, no. 1/2010, p.24.

8 Dj.Djordjevic, Law on Offences, Belgrade, 2010, p. 19.

9 Dj.Djordjevic, Facing the new law of legal entities' liability for criminal acts, published by "Application of new legal code of criminal proceedings of Serbia", Kopaonik, 2007, p. 258.

10 M. Cetinic, Economic Offences Law, Belgrade, 2002, p.39.

The oldest form of liability can be found in Hammurabi's Legal Code (Art. 23 and 24).[11] In Roman law, this liability did not exist (*societas delinquere non potest*),[12] but in the later period of the Roman Empire, there were exceptions. In the Middle Ages, the situation regarding this question was changed, so legal entities were often punished by accepting collective responsibility of all group members, meaning legal entities. The truth is that the legal entities which existed then are not the legal entities which exist in modern society (corporations, enterprises, organizations, institutions), but primarily villages, towns, monasteries, universities and some other institutions.[13] The same situation continued until the period of the French Revolution when social relations were based on the private initiative of the individual, and the idea of the liability was focused only on individuals, and not on the collective. The codification of criminal law at the end of the 18th century and the beginning of the 19th century and new perceptions in criminal law science influenced the development of criminal law which, regarding legal entity criminal liability, had the standpoint that only an individual can be an offender and that only an individual can be criminally responsible.

This issue is becoming current again, in the later periods of social development when individual legal entities (corporations, multinational companies, firms, institutions, organizations) acquire enormous economic power in regard to a huge social influence, and therefore also undertake serious criminal acts. It again opens up the question of implementing criminal liability to legal entities,[14] first of all within the area of commercial criminal law, which has developed rapidly after the Second World War and to a certain degree separates itself from general criminal law and establishes itself as a separate aspect of criminal law.[15] Finally, certain forms of crime which are characteristic for the development of modern society (corruption, organized crime, human trafficking, money laundering, drug distribution, etc.) demand an even wider application of different measures toward legal entities, including the anticipation of criminal liability. For that reason, an even wider acceptance of criminal liability of the legal entities takes place in modern criminal law, and therefore the number of criminal codes of the modern states which include this type of responsibility has risen. For instance, such is the case within the criminal codes of France, Holland, Belgium, Denmark, Finland, Sweden, Spain, Portugal, Switzerland,[16] and also in various forms in different cases in Great Britain, United States of America and Australia.[17] It is also implemented within the criminal legislation of all the states of former Yugoslavia, including Serbia.

Until the passing of the Law of liability of legal entities for criminal acts, Serbian Criminal Law has been unfamiliar with this type of responsibility. However, viewed from a historical perspective, certain forms of such responsibility have existed in certain periods of Serbian legal history. For instance, in Serbian medieval law the criminal liability of legal entities had been accepted in various forms, mostly related to settlements, villages, towns, etc. It is mentioned in many historical monuments from this period,[18] and it has particularly been included in many regulations of Dusan's Law Code.[19] Recent criminal law, starting from the 1860 Criminal Code, did not include the criminal liability of legal entities, except for the Criminal Code-general part from 1947 which in Article 16 regulates the criminal liability of legal entities for criminal acts which are specifically prohibited by law[20] (such is the case of the Law of criminal acts against people and the state for doing business with the enemy during the occupation and the Law on forbidden trade, forbidden speculations and economical sabotage for forbidden speculation), which has been terminated by the implementation of the new Criminal Law in 1951. After that, the criminal liability of legal entities within our legal system has ceased to exist, even though there was a need for it even in 1953 when, by implementing a new economic system based on self-governing, business organizations acquired independence when it comes to managing social resources which they had at their disposal, and whose authori-

11 Lj. Kandic, Selection of choices from the general history of state and law, Belgrade, 1992, p. 37.
12 J. Radulesco: La responsabilite pénale de personnes morales, Revue internationale de droit pénal, No. 3-4/1929, p.289.
13 T. Zivanovic, Basics of Criminal law of Kingdom of Yugoslavia, general part, vol. II, Belgrade, 1937, p.10.
14 D. Jovasevic, Crime of legal entities and state reaction, published by "Criminal and state reaction: Phenomenology, possibilities, perspectives", issued by Institute for criminal and social research, Belgrade, 2011, p.123.
15 P. Vriij: Le droit pénal social-économique, Revue internationale de droit pénal, No. 3/1953, p. 726.
16 Z. Stojanovic, New tendencies in science of criminal law, Yugoslavian review of crime and crime law no. 2-3/05, p.21.
17 M. Vrhovsek, Comment on Law of responsibility of legal entities for criminal acts, Belgrade, 2008.
18 A. Solovjev, The history of the Slovenian Law, Stefan Dusan the Emperor of Serbs and Greek's Law Code, Belgrade, 1998, p.453-454.
19 T. Taranovski, The history of Serbian Law in the state of Nemanjic, Belgrade, 1996, p.379-381.
20 Comment of general part of Criminal code, group of authors edited by M. Pijade, Belgrade, 1948.

ties in economic and financial activities often infringed the legal legislation which this area of social relations was regulated by. Even despite such a situation, the legislator had not decided to implement the criminal liability of legal entities by including appropriate articles within the Criminal Code, but had chosen to regulate a harsher violation of regulations of economic and financial activities undergone by legal entities, and which by their severity correspond to criminal acts not as criminal acts, but as a special category of offenses called economic offenses, and for which is imposed a criminal liability of the legal entities (with a parallel liability of the responsible individuals in those acts). Thus, we come to a tripartite division of criminal acts in Serbia criminal law in: criminal acts (to which is the Criminal Code is applied), economic offenses (to which the Law on Economic Offences is applied) and misdemeanors (Law on Misdemeanors), and therefore, Serbian criminal law can be divided into three areas: criminal law, economic leap law and misdemeanor law. In our criminal law today, the situation is the same.[21]

A COMPARATIVE ANALYSIS OF THE SOLUTIONS OF LEGAL ENTITY CRIMINAL LIABILITY IN THE FORMER YUGOSLAV REPUBLICS

As it is stated above, all the states within the area of the Former Yugoslavia were covered, including Serbia, in the process of introducing criminal liability of legal entities in the criminal law system of modern states. So is very interesting and useful to look at comparative legal solutions which are accepted in those states. There are numerous reasons for this comparative approach. First of all, those states in their common history were based on self-governing socialism, with a delegate system management, a planned economy and specific system of worker self-management. Also, those states for many years had the same or similar criminal justice systems, which are characterized by an absence of criminal, but existence of a misdemeanor and economic leap responsibility of legal entities. This refers to the appropriateness of the comparative approach to the analysis of the adjustment of those countries to the new socio-economic system and of related side effects and experiences. Also, all Former Yugoslav states, except Slovenia (which is already a member of the European Union), are on the path to European integrations which consider a harmonization of the regulations with European requirements and standards. However, certain solutions about criminal liability of legal entities are significantly different u the former Yugoslav republics.

Croatia opted for a specific criminal liability of the legal entities law,[22] simultaneously with the abolition of the existing legislation on economic offenses. This Law predicts that a legal entity will be punished for criminal acts if these acts violate a company's legal person's duty, or through this act a company legal person had, or should have obtained, some illegal property gain for itself or for some other person. The liability of the legal entity is based on the quilt of the responsible person, but the legal entity will be punished even in the case of the existing of legal or real obstacles for establishing responsibility of the responsible person. Article 5 of the Law predicts an enforcement of the single criminal proceedings and making a single judgment to the legal and responsible entity. Also, Croatian legislation predicts three types of criminal sanctions that may be imposed on the legal entity, namely: penalties (fines or penalty of legal entity abolition), suspended sentences and security measures (prohibition of certain activities and businesses, prohibition of the acquisition of licenses, authorization, concessions or subsidies, prohibition to operate with state budget users and confiscation). In the end, in Croatian legislation principle of prosecution opportunity in criminal cases is present, as the State Attorney may decide not to initiate legal proceedings, if this is not practical, in cases when the legal entity has not property or the property is insignificant to sufficient to cover the costs of the proceedings, or bankruptcy proceedings are in place against the legal entity (Article 24).

The essence of the solution accepted by the Republic of Slovenia is that a principal provision is contained in the Criminal Code,[23] until its further elaboration and amendment is carried out by a

21 Z. Maric, The structure of literary writings in legal system of Republic of Serbia, Archives for legal and social sciences, no. 1-2/2007, p.78.
22 The law on liability of legal entities for criminal acts, National newspapers, no. 113/03 and 151/03.
23 Article 33. Kazenskog zakonika, "Uradni list RS", no. 95/04.

particular legal entities criminal liability Law.[24] The Slovenian legislator has accepted concept about the subjective responsibility of the legal entity, which means that there are two parallel, simultaneous and independent responsibilities – one is the liability of the legal entity and the other is the responsibility of the individual as a perpetrator.[25] In all the mentioned cases, the liability of the legal entity for criminal act exists even when the perpetrator of the criminal act is not criminally responsible, as the existing of the legal entity's liability for criminal act does not exclude the liability of the individual (Article 5, legal entities criminal liability Law). The Law predicts further criminal sanctions that may be imposed on the responsible legal entities: a fine, confiscation of the property and the termination of the legal entity (Article 12). But the court has the opportunity to impose a suspended sentence to the responsible legal entity (Article 17), and along with general safety measures prescribed by the Criminal Code, the court may impose two different measures specially adapted to this kind of the liability: an announcement of the verdict and prohibition of carrying out certain activities (Article 18).

The solution in regards to this issue which exists in the legislation of Bosnia and Herzegovina is significantly different from the issues mentioned above. In this solution, the regulations about the mentioned matter are divided into two legal codes – the regulations of a material character are contained in the Criminal Code, and the norms of the procedural character are in the Code of Criminal Procedure. Thereby, the Criminal Code contains the regulations specific for the criminal liability of the legal entities for the criminal acts which are in Section 14, under the name 'Legal entity liability for criminal acts', and there are also regulations which make all the norms in the general part of the Criminal Code, and which are applied to the legal entities by a specific order of the legislator, except if differently stipulated by the Law (Article 13). Here also, the principle of the subjective responsibility of the legal entities is also accepted in regards to criminal sanctions, and refers to the legal entities whose responsibility is determined, and penalties and security measures may be imposed. The penalties in question are fines, confiscation of property and the termination of the legal entity, while the security measures are: deprivation of the legal cases, publication of the judgment and the prohibition of performing certain economic activities.

The criminal proceedings are carried out according to the provisions of the Code of Criminal Procedure (Article 122), same as in Slovenian legislation, and here also, an indictment is raised, single proceedings of the same criminal act are conducted against a legal entity and the individual as perpetrator, and a judgment is pronounced (Article 375 of the Code of Criminal Procedure). Exceptionally, proceedings just against a legal entity may be instituted only if the same proceedings cannot be instituted against the individual as perpetrator, caused by regulations stipulated by law, or the same proceedings are already being conducted against that individual. In the end, here, same as in Croatian and Slovenian law, the principle of prosecutions opportunity in criminal cases is present, and the State Attorney may decide not to initiate legal proceedings if this is not practical, in the cases when a legal entity has no property or the owned property is insufficient to cover the costs of the proceedings (Article 376 of the Code of Criminal Procedure).

The legislation of Republika Srpska also predicts a criminal liability of legal entities. In that regard, Republika Srpska's Criminal Code[26] (Chapter XIV, Article 127) stipulates that a legal entity is responsible for a criminal act carried out by the perpetrator in the name of the legal entity for the corporate account or in the behalf of the legal entity in the following situations: when the features of the committed crime are the result of the decision, order or the approval of the management or the supervisory authorities of the legal entity; when the management or supervisory authorities of the legal entity exerted an influence on the perpetrator or allowed the committing of the crime; when he legal entity disposes of illegal gain, or uses objects acquired by the criminal act and when the management or supervisory authorities of the legal entity fail the required monitoring of the workers' actions legality.[27] With the clauses of the mentioned Article, the legal entity may be responsible when the perpetrator is not criminally responsible for the committed crime. Also, the responsibility

24 Zakon o odgovornosti pravnih osoba za kazniva djelanja, "Uradni list RS", no. 98/04.

25 V. Jakulin, Legal entities' liability for criminal acts (legal solutions' basics and the experiences in their application in Slovenia), published by "Constitution of Republic of Serbia, criminal legislation and organization of judiciary", Zlatibor, 2007, p.245.

26 Official Gazette, no. 49/2003

27 V. Ikanovic, Legal frame about responsibility of legal entity for criminal acts in Bosnia and Herzegovina and compliance with international standards, in "Criminal legislation of Serbia and the standards of European Union", Zlatibor, 2010, pg.349-350.

of the legal entity does not preclude the criminal responsibility of the individual or of the responsible persons for the committed criminal act. The legal entities may be sentenced for the committed act by fines, confiscation of property and termination. Along with the security measure of being deprived of legal cases, the measure of publication of the judgment may be imposed on the entity as well as a prohibition of carrying out certain economic activities.

The Criminal Code of the Republic of Montenegro,[28] by provision of Article 31, named 'Responsibility of legal entities for criminal acts', stipulates that the legal entity responsibility for criminal acts and sanctions for which a legal entity may be liable, will be stipulated by law. Related to this, in the Republic of Montenegro in 2007 the Law on the responsibility of legal entities for criminal acts was passed. The Law, among other things, stipulates that a legal entity is responsible for any criminal acts of responsible persons who were acting in the name of the legal entity in the area of its authority and if those persons had the intention, at least in part, to achieve a material or other gain for the legal entity, if the actions of the responsible persons were in conflict to business policy or the instructions of the legal entity. The penalties in place for the legal entity which had committed a criminal act are: penalties (fines and termination), probation and security measures (deprivation of legal cases, publication of the judgment and prohibition of performing certain economic or other activities). As a rule, proceedings against the legal entity are initiated and implemented with the proceedings against the responsible person for the same criminal act. Also, in the joint proceedings, an indictment is submitted against the accused legal entity and responsible person, and a joint judgment is brought. The Law predicts that proceedings only against the legal entity may be started and conducted, only in the case of an inability to start and conduct the proceedings against the responsible person caused by specific law regulations, or in the cases when the proceedings against the responsible person are already being carried out.

In the Criminal Code of the Former Yugoslav Republic of Macedonia,[29] a special chapter under the name 'Criminal liability of a legal entity' has the subtitle 'The conditions for criminal liability of a legal entity'. This regulation stipulates that in the case when it is determined in a specific part of criminal law, or in another specific law in which offenses are prescribed, the legal entity is liable if the offense is occurred by an act or by a failure of the supervision on the part of the management or by the responsible person in the legal entity, or by the another person who was authorized to act in the name of the legal entity according to their authorization, or who exceeded their powers in the purpose of achieving some benefit for the legal entity. Also, the criminal liability of the legal entity does not exclude the responsibility of those who have committed the criminal act. For the acts that are legally defined as criminal acts, all legal entities except for the state are responsible. Foreign legal entities are criminally responsible if they have committed a criminal act on the territory of the Former Yugoslav Republic of Macedonia, regardless of the fact whether they have their representing office or subsidiary which carries out business activities on this territory.

BASIC THESES REGARDING LEGAL ENTITY CRIMINAL LIABILITY ACCORDING TO THE SERBIAN LAW ON LEGAL ENTITY RESPONSIBILITY FOR CRIMINAL ACTS

In Serbia in, October 2008 the Law on the responsibility of legal entities for criminal acts'[30] was passed. In the next year, or, to be more precise, in August 30, 2009 the Law on Amendments and Additions to the Criminal Code[31] was passed, which, among other things, changed the provision of Article 12. By its new formulation, a legal entity responsibility for criminal acts regulated by a particular law (passed in the previous year) was stipulated. What is unusual here is the 'sequence of actions'. First a particular law is passed, and then afterwards Criminal Code is altered and the basis for this kind of liability introduced within in. regardless of this, a new type of criminal responsibility

28 Official Gazette of the Republic of Montenegro., no.70/2003 and 13/2004.
29 Law on Amendments to the Criminal Code," Official Gazette of the Republic of Macedonia", no. 19/04.
30 Official Gazette of the Republic of Serbia, no. 97/08.
31 Official Gazette of the Republic of Serbia, no 72/09.

which did not exist before was introduced into Serbian legislation in this way. Thus, Serbian legislation was classified with those, nowadays more numerous, legislation systems which within their own legal systems stipulate this type of responsibility.[32] With its introduction in the legal system some existing dilemmas were resolved, as well as some new issues touched upon to which theory and practice should give answers in the future.

In Article 1 of the Law on legal entity responsibility for criminal acts, it is stipulated that this law regulates the conditions of legal entity responsibility for criminal acts, criminal sanctions which may be imposed on the legal entities and the regulations of the procedure that decide about the responsibility of the legal entities, the imposition of criminal sanctions, decisions on rehabilitation, termination of security measure or legal consequences of conviction and enforcement of court decisions. This provision decides that determining legal entity responsibility and criminal sanctions may be done only through the procedure prescribed by this law, or rather, by an appropriate application of the numerous regulations of the Code of Criminal Procedure indicated by the Law. So, related to basic criminal justice institutes and criminal procedure issues, the Law relies on the relevant provisions of the Criminal Code and the Code of Criminal Procedure. It is obvious that the legislator has applied a rational solution not to stipulate what is generally adopted by criminal law and what can be adequately applied to legal entity responsibility for criminal acts and the proceedings to determine that liability. That is the reason why Article 34 specifies which regulations of the Criminal Code are applicable to legal entity criminal responsibility. Also, it should be noted that provisions of the Criminal Code about the issues contained in the provision of Article 34 of the Law cannot be directly applied, but with regards to the nature and singularity of the legal entity.

The issue of determining criminal offences for which legal entities may be responsible is differently solved in the legislations of particular countries in the world, the solutions generally being divided into two groups. [33] The first group is made up of legislations which precisely determine the criminal acts for which individuals as well as legal entities can be responsible. A typical example has already been mentioned in Slovenian legislation, which in Article 24 stipulates that legal entities may be held responsible in court for criminal acts from the special part of the Criminal Code and for other criminal acts, if it is stipulated by law. Article 25 specifies all criminal acts from the special part of the Criminal Code for which legal entities may be responsible. The second group includes legislations which determine that legal entities may be responsible for all criminal acts stipulated by criminal law and by secondary legislation. Our Law in provision of Article 2 has accepted the latter solution, which means that legal entities may be responsible for all criminal acts stipulated by the Criminal Code and other legislations, if all the conditions for legal entity liability, stipulated by this law, are met.

The law also stipulates that a legal entity is responsible for the criminal act which is carried out by the person held accountable, according to its authority, with the intention to achieve an advantage for the legal entity (Article 6). The responsibility of the legal entity, from Paragraph 1 of this Article, exists even if the criminal act from which the legal entity can benefit and carried out by the individual who acts under the monitoring and control of the responsible person, is enabled due to a lack of monitoring or control of the person held responsible. This implies that in those cases, the criminal act is carried out by an individual, but the legal entity, under specific circumstances, is responsible for the committed criminal act.[34] There are numerous reasons to object this solution. It is normal that every person is responsible for their own actions, so it is necessary to accept that a legal entity cannot be held responsible for the actions of another legal entity but only its own, especially when it concern serious offenses like criminal acts for which is liability of the legal entity is stipulated. Otherwise, the legal entity will be held responsible for the act which it had not committed, and then the choice of representatives would be the responsibility of the legal entity, or, the responsible persons to which the legal entity has entrusted actions performing in the name or for the account of the legal entity or for an eventual omission of control over their work or the omission of an official guidance on legal

32 M. Vrhovsek, Legal entities' responsibility for criminal acts, Archive of Legal and Social Sciences, no. 3-4/2007, p.335.
33 G. Ilic, Marginalities of Law of responsibility of legal entities for criminal acts, published by "The state of crime in Serbia and legal means of action, IV part", Belgrade, 2010, p. 196.
34 M. Vrhovsek, The conditions of responsibility of legal entites for criminal acts, Annals of Faculty of Law in Belgrade no. 2/2008, pg.294; G. Ilic, Draft of the legal entities' liability for criminal acts Law, published by "Adaptation of criminal legislation with the Constitution of Serbia", Kopaonik., 2008, p.214.

actions. It would also be hard to find an excuse for penalizing someone for another one's offense, especially for applying safety measures to the one innocent party.[35] But, the Law has accepted this solution, most probably to impose the conception that the individual is the perpetrator of a criminal act, that their responsibility is subjective and based on quilt (mental capacity, culpability and consciousness, meaning an awareness of the prohibited act), which is equivalent to the objective-subjective conception of the criminal act idea which is adopted in the Serbian Criminal Code.

A consequence of the acceptance of this comprehension of the legal nature of legal entity liability for criminal acts[36] is the comprehension of the legal base of this type of liability and a number of other consequences.[37] There is a viewpoint accepted by law, by which responsibility of the legal entity derives from the quilt of the responsible person who acts in the name and for the corporate account of the legal entity, and due to the responsibility of the legal entity there is a need to establish the quilt of the person who acted or was authorized to act on behalf of the legal entity (the responsible person in the legal entity or the person authorized to act in the name of the legal entity).[38] This comprehension has the elements of subjective responsibility which excludes legal entity liability for the actions of its authorities, done without the quilt of those persons, but the responsibility of the legal entity remains even without quilt, as the quilt is in fact acted upon from the responsibility of the responsible person.[39]

The introduction of legal entity liability for criminal acts in Serbian criminal law has requested additions to the existing system of criminal sanctions, in order to adapt it for legal entity liability for criminal acts. The system of sanctions stipulated in the general part of the Criminal Code contains some sanctions which may be applied to legal entities, while the others, due to their nature, cannot be applied in this case. That is the reason why some of the sanctions stipulated for individuals, have been retained, while others have changed and adjusted to the legal entities, and some new added.[40]

For legal entities responsible for criminal acts, three types of criminal sanctions have been stipulated: penalties, probation and security measures. This involves criminal sanctions which are generally accepted in all legal entity criminal liability laws of the EU Member States, but also in non-EU member states.

Fines and the termination of the legal entity are in place as penalties, and they can be imposed only as major penalties when the fine cannot be lower than a hundred thousand and not higher than five hundred million dinars. Also, a fine is the most common sanction due to the fact that 'a loss of funds for the company is the same as the loss of freedom for an individual'.[41] On the other hand, fines have a number of deficiencies which are reflected in a negative effect on blameless employees, shareholders, and fiduciaries. The penalty of termination of the legal entity can be imposed if the actions of the legal entity were, in whole or in part, in the function of the committing of the offense (for example: money laundering, tax evasion, fraud, etc.).

The stipulated penalties which can be imposed on legal entities for criminal acts act in response to the legal entities as subjects to which those penalties are applied, and it can be considered that the penalties, are adequate for the given purpose. But the way of their stipulated can be a point of argument, as it represents a certain deviation of the principle that punishment must be stipulated by law for each criminal act, which here is not the case. The fine for legal entities is stipulated by general regulations which are valid for all criminal acts, while there are five stipulated penalties for this penalty, each one being applicable for a particular crime, depending on the type and level of the penalty stipulated for the individual as perpetrator. The penalty of termination of the legal entity can be imposed for any criminal offense for which the legal entity can be held responsible, with the mentioned condition to determine that the activity of the legal entity was mainly or completely in

35 Dj. Djordjevic, Legal entities' criminal liability in Penal law and crime prevention, published by ''Penal law and the crime prevention", Belgrade, 2008, p.163.
36 V. Jakulin, op.cit., p. 244.
37 G. Ilic, Responsibility of legal entities as a subject of (special) criminal legislation, published by ''Constitution of Republic of Serbia, criminal legislation and organization of judiciary", Zlatibor, 2007, p.207.
38 N. Lukic, Defining corporate crime, published by ''The state of crime in Serbia and legal means of action, part IV '', Belgrade, 2010, p.302.
39 N. Mrvic-Petrovic, Criminal law, general part, Belgrade, 2011, p.163.
40 Dj.Djordjevic, Liability of legal entities for criminal acts in the Law of the Republic of Serbia, published by ''Contemporary tendencies in criminal repression as an instrument of crime prevention", Bijeljina, 2010, p.244.
41 J. Suput, Legal entities' criminal acts liability, Foreign criminal life, no. 1/2009, p. 182.

the function of criminal act commission. Thereby, that circumstance itself is not a criminal act, but its existence is a condition for the imposition of the penalty 'termination of the legal entity' to the liable legal entity for any criminal act.

The law stipulates two grounds for exemption from the punishment: 1) the detection and reporting of crime by the legal entity before awareness about the criminal proceedings; and 2) the voluntary and swift removal of the damaging consequence of the committed criminal act, or a voluntary and swift reimbursement of all material gains acquired through criminal activity.

The possibility of imposing the suspended sentence is stipulated by Article 20 of the Law, and the court can impose on the legal entity the fine of five million dinars and at the same time it can find that the penalty will not be carried out if the convicted legal entity, in the timeframe determined by the court which cannot be shorter than one and longer than three years (probation period), is not responsible for the criminal act in terms of Article 6 of the Law. In the purpose of preventing any further criminal activity, according to Article 22 of the Law, the possibility of imposing the suspended sentence with the protective supervision for a certain time in the probation period is stipulated. The protective supervision may include one or more of the following obligations: 1) an organizing of supervision in the purpose of preventing any further criminal activity; 2) refraining from business activities, if those activities can be an opportunity for recommitting criminal acts; 3) elimination or mitigation of the damage done by criminal activity; 4) carrying our work of public interest; and 5) delivering intermittent business reports to the competent authorities for execution of protective supervision.

The following security measures can be imposed for criminal acts for which legal entities are responsible: the prohibition of performing certain registered and economic activities, withdrawal of legal cases and setting of judgments. In regards to the first of the mentioned measures, the Law limits its duration and thus it may be imposed for the duration from one to three years from the day of the final verdict. The withdrawal of legal cases and the publication of the judgment can be imposed if the liable legal entity is given a suspended sentence. The legal cases in place for committing an offense or created by committing an offense can be used if they are the property of the legal entity, but there is a possibility predicted by the Law that those legal cases may be used even if they are not the property of the legal entity, but are rather, required in the interest of general safety or moral reasons, and it do not affect the third party's right for damage compensation. The court will impose a publication of the judgment if it considers that it would be useful to make the public aware of the judgment, and especially if the publication of the judgment contributes to the eradicating of danger to people's lives or health, or as protection of public interest.

The Criminal Code regulations, related to the measure of the confiscation of the proceeds acquired by the criminal offense which has for purpose to embody the principle that anyone can not keep the material gain obtained through criminal act, shall be applied on the legal entities also. Implementation of this measure on the legal entities has complete legitimacy, because the criminal act for which legal entities are responsible, mostly are done for acquiring of the material gain.

Conviction of the legal entity for criminal act can take certain legal consequences of the conviction which may be: termination or loss of certain rights or prohibition on acquiring certain rights (Article 27 of the Law). Those legal consequences may be determined by laws related to those activities, and they take effect by the force of law, when certain conditions, determined by law, are fulfilled.

The adoption of the responsibility of the legal entity for criminal act required adopting relevant regulations related to the criminal proceedings against the legal entities for committed criminal acts, with regard to the introduction of the new criminal sanctions for the legal entities, it was necessary to adopt relevant regulations about the enforcement of those sanctions and about the enforcement of the existing sanctions in cases of their application on the legal entities. In this regard, the legal entities' criminal liability Law, besides the regulations from the general part, contains regulations related to the criminal proceedings against the legal entity, and the regulations of criminal sanctions enforcement imposed to the legal entity in the proceedings. The Law, here, has opted for the formula by which it regulates only those questions which differ the proceedings from the criminal proceedings which are applied on the individuals, and for solving of all other issues related to the criminal proceedings, the law has required appropriate application of the Criminal Code regula-

tions, 'if the law provides otherwise' (Article 54 of the Law). This is the way on which the legislator has acted with the question of proceedings of the economic offences.

About the regulations of criminal sanctions enforcement to the legal entities, those are also present in the Law when there is a question about new sanctions which do not exist in K3 or which exist, but are regulated differently, and the Law, here also, predicts appropriate application of the Law on Execution of Criminal Sanctions with all other questions "if the law predicts otherwise' (Article 71 of the Law).

THE EFFECTS OF THE INTRODUCTION OF THE LEGAL ENTITIES' CRIMINAL LIABILITY IN OUR LEGISLATION AND PROBLEMS OF ITS PRACTICAL APPLICATION

Based on the all facts given above, it can be concluded that legal entities' criminal liability introduction in our legislation, represents not only the fulfillment of the international obligation (which could be fulfilled otherwise), but, also, the most efficient way of confrontation to some new types of criminality. But, the time tells us, that this, theoretically acceptable and in practice of numerous countries efficient system, is shown as difficult to be applied. Meaning, even from the adoption of the mentioned Law on the liability of the legal entities for criminal acts, four years have passed, the results about its applicability are unsatisfying. According to the Public Prosecutor's data in year 2011 against the Serbian companies, based on various grounds, are filed 27 criminal complaints, and mostly for criminal act of fraud, abuse of power in economy, theft, tax avoidance and abuse of an official position. The complaints are filed and against 12 individuals, authorities in those companies. In the particular cases, against 16 legal entities are run pre-trial proceedings and investigations are conducted, while in the other cases criminal charge is dismissed.[42] As it is known for the authors of this paper, until today is not made any final judgment by which some legal entity is sentenced for a criminal act. Even if it had happened in the meanwhile, it is about sporadic cases which hardly can to disprove the conclusion that this new type of the responsibility is in our law, generally, or maybe at all, does not apply. It does not correspond, for sure, to the real situation in this area, because in the corporate crime cases, or 'white-collar crime', the 'dark' number is extremely high.

Reasons for the existing situation, that, despite the criminal-political need to react on the offenses of the legal entities through serious sanctions and there is no adoption of the appropriate legal regulations, are different and numerous. Those are, first of all, lack of the tradition on that field, no fitting of some new solutions in our existing criminal responsibility system, insufficiently clear distinction between certain types of criminal liability, etc. The impression is, that in the purpose for our country to fulfill its international obligations, there was rush to implement mentioned type of the liability in our legal system, and thereby all needed conditions wasn't fulfilled, especially those which are related to harmonization with the existing types of liability in our law. On the other side, the Serbian judicial system is traditionally inert when comes to the application of some new solutions in criminal legislation (for example, an alternative sanctions appliance), especially when the applying of the new solutions is connected with numerous issues.

But, regardless of the current problems in the application, the criminal responsibility of the legal entities in our law is necessary and it must not remain dead letter. That imposes obligation to all authorities (from the inspection, police, Prosecution and the Courts) to take seriously the value of the responsibility of the legal entities for criminal acts, and to do all what is under their jurisdiction to apply this responsibility everywhere where conditions for its appliance exist. Mentioned problems create an obligation for the legislator to de lege ferenda bring in legislation, in this area, new regulations with which will resolve certain dilemmas that are placed now in the front of the practice. In that order good and bad experiences which we had, according to responsibility of the legal entities for economic offenses, can be used, because different from the most of the European

42 See http://www.politika.rs/rubrike/hronika/protiv-firmi-u-Srbiji-podneto-27-krivicnih-prijava.lt.html, article titled" Against Serbian companies filed 27 criminal charges" (searched 09/06/2011).

countries, criminal liability of the legal entities in Serbia is something completely new.[43] In addition, we should bear in our mind the positive experiences which other countries, including some in the Region, have with appliance of this kind of the responsibility.

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EVIDENTIAL VALUE OF EYEWITNESS IDENTIFICATION IN CRIMINAL PROCEEDINGS

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Abstract: In order to establish the state of fact in the course of criminal proceedings, are often conducted an eyewitness identification of individuals and objects, whose results can play a vital role in pronouncing judicial and prosecutorial decisions. Eyewitness identification of individuals and objects includes a specific identification process, whose aim is to establish compatibility of the present individual or object with previously perceived. A witness appears as a subject of identification, who, as prescribed by law, performs identification of an individual or object, first describing or naming signs of identification, followed by presenting him several compatible and mutually similar objects of identification.

Since criminal proceedings and criminalistic theory and practice hold different opinions in terms of evidential value of the results acquired through eyewitness identification, this paper shall, after introductory considerations, present a critical view of the opinion of some authors on the evidential significance of identification, including a short review of case law, with special attention to the decisions of the International Criminal Court for Former Yugoslavia, and the Court of Bosnia and Herzegovina, based on identifications performed by witnesses who have perceived an individual in the light of traumatic war circumstances.

Keywords: criminal proceedings, witness hearing, eyewitness identification of individuals and objects, evidential value.

PREAMBLE

The current procedural legislation in Bosnia and Herzegovina, modeled on the other legal systems, has introduced a lot of new legal solutions, which has brought many discussions, analysis, research and making of certain conclusions and instructional documents that allow the establishment of better mechanisms for cooperation between participants in the criminal proceedings and proper and legal implementation of actions. With this modernization of criminal proceedings there are achieved certain advantages in terms of efficiency in criminal proceedings, especially the initiation and conduct of investigations. Efficacy of investigation is the product of the active participation of the prosecutor who has access to the course of the investigation, either individually take action to prove or to supervise the work of authorized officials, thus providing the legality of the evidence. Certain actions, such as eyewitness identification of individuals and objects, remains on the margins of interests and new researchs, probably because the legal regulation of this action hasn't changed significantly, and the different legal systems regulates the methods in a similar way.

Eyewitness identification of individuals and objects is standardized by the Criminal Procedure Code of Bosnia and Herzegovina, in the chapter called "evidence acts" in the provisions which regulate witnesses examination, wcich is regulated in the same manner by acts in Criminal Procedure Law of Republic of Serbian, Federation of Bosnia and Herzegovina and the Brcko District of Bosnia and Herzegovina.[1] If we look back in the history of this matter, these regulations were not significantly modified since Code of Judicial proceeding in criminal acts which has been written

1 In the article 85 of the Criminal Proceeding Low in Bosnia and Herzegovineis specified that the recognition is performed if it is necessary to establish that the witness recognizes the subject or the object, and he will be asked to first describe or state the clues of witch the subject or the object can be recognized, and than the witness will be shown multiple similar objects of identification, and if it's not possible doing a eyewitness recognition, it will be done through photo recognition. Paragraph 4 : If the recognition is not possible in the compliance with paragraph 3 in this article, the recognition will be executed over photo recognition of that character or object planted in the photographs of multiple similar, to the witness unknown, subjects or objects of the same kind.

in Princedom Serbia, year 1865., where this action is regulated in the fallowing manner: "When it is necessary to show to an eyewitness of some factes or things, the witness will primary have to describe the particular marks of distinction, after that he can see thing or person that is significant for that case".[2] In the same way this action has been regulated by article 177. Criminal proceedings for Bosnia and Herzegovina, in article 173. Judicial Code of Criminal Procedure of the Kingdom of Yugoslavia, article 233. Criminal Procedure Code of Yugoslavia, as well as laws on criminal procedures in the countries of the former Yugoslavia.

Since there are obvious problems with determining the credibility of the testimony in general, and knowledge about the inherent unreliability of witness testimony and the results of recognition in criminal proceedings that have arisen from the study of jurisprudence, and performing experiments, both in the professional and lay public we can find some opposing views in eyewitness identification results. In the criminal process and crime theory and jurisprudence we can find different interpretations and different usability to witnesses identification. Here we must bear in the mind the fact that the testimony of witnesses in different periods have different importance. Sometimes we can fully justify opinion of the unreliability of eyewitness identification, when we consider general unreliability which is attached to the witnesses testimony, and when we add some possibility of errors made during the recognition. Percentage of false identifications increases undoubtedly, this is coused by mistakes in the preparation and implementation of presentation in order to identify subject. That is clearly showed by judicial errors which are based only on evidence obtained by applying these actions.[3] However, the role of the witness can not be disregarded in any criminal case, because it does not exist in the criminal process where does not appear at least one witness whose statement would not significantly affect the judicial decision. Because of that, in this section we will try to explain different perceptions given by theorists of the criminal procedure low and criminology of the evidential value of recognition, after that we will tray to explain the understanding of judicial practice.

THEORETICAL UNDERSTANDING

In terms of giving probative value (legal power) to recognize actions in criminal proceedings, we can distinguish between three groups of authors, theoreticians of criminal low and criminology. The first group of authors belive that eyewitnesses identification can be used only as circumstantial or indirect evidence and it can't be used as evidence,[4] second group of authors says that recognition is not evidence, it can be used only as tool for checking (establishing) witness testimony,[5] and the third group of authors belives that recognition is evidence,[6] probative action (investigation activity),[7] or a special type of testimony.[8]

2 Niketic G. , Criminal code and Criminal Procedure Low, Belgrade, 1924, page 363.

3 Simonovic B. , Representation for recognition, part 2, Security number 5, Belgrade, 1999, page 591-612

4 Markovic, T. , Contemporary technique resarching criminal acts (Criminalistics), Zagreb, 1977, page 439; Aleksic, Z. , Criminalistics, Belgrade, 1985, page 194.; Aleksic, Z. , Skulic, M. , Criminalistics, Belgrade, 2010, page 201.

5 Markovic, B. , Criminal Justice act Textbook, Belgrade, 1937, page 340-341; Vasiljevic, T. , Sistem of criminal processeding rights, Belgrade, 1964, page 262; Dimitrijevic, D. , Criminal Procedure Low, Belgrade, 1982, page 221; Bejatovic, S. , Criminal Procedure Low-general part, 1995, page 361; Bejatovic, S. , Banovic, B. , Criminal procedural legislation of Serbia, 2005, page 97; Grubac, M. , Criminal Procedure Low, Belgrade, 2009, page 228; Simovic, M. , Criminal Procedure Low-general part, Bihac, 2005, page 239; Kokolj, M. , Criminal Procedure Low, Bjeljina, 2009, page 144; Cvijovic, O. , Popovic, D. , Criminal Procedure Low, Belgrade, 1977, page 184.

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7 Simonovic, B. , Criminalistics, Kragujevac, 2004, page 254 and 272; Simonovic, B. , Matijevic, M. , Criminalistics tactics, Banja Luka, 2007, page 391; Simonovic, B. , Pena, U. , Criminalistics, Ists Sarajevo, 2010, page 310; Jekic, Z. , Skulic, M. , Criminal Procedure Low, Belgrade, 2005, page 249; Skulic M. , Criminal Procedure Low, Belgrade, 2009, page 227; Aleksic, Z. , Milovanovic, Z. , Criminalistics, Belgrade, 2001, page 138 and 144; Zarkovic, M. , Criminalistics tactics, Belgrade, 2009, page 302 and 304; Modli, D. , Eyewitness identification of persons and object with direct choice of recognition (identification parade), Zagreb, 1996, page 159; Krapac, D. , Criminal Procedure Low, Zagreb, 2000, page 258; Pavisic, B. , Criminal Procedure Low -authorized lectures, Rijeka, 2008, page 239; Pavisic, B. , Modil, D. , Veic, P. , Criminalistics, Zagreb 2006, page 483.

8 Strogovic, M. , Criminal Procedure Low, Belgrade, 1948, page 159; Krivokapic, V. , Criminalistics tactics 3, Belgrade, 1997, page 90; Skulic, M. , Minors as perpetrators and as victims of criminal acts, Belgrade, 2003, page 169; Milosevic, M. , Stevanovic, C. , Criminal Procedure Low, 1997, pages 264-265; Nicevic, M. , Stevanovic, M. , Criminal Procedure Low, 2008, page 329;

In terms of reviews of the first group of authors, we consider that eyewitness identification of individuals and objects in a criminal proceeding in any case can not be considered as an indication, or as indirect proof, because current laws in criminal proceedings such as in the application in all modern legal systems, and in Bosnia, do not accept the division of evidence both direct and indirect, and therefore there is nothing formal, or legal criteria for the treatment certain facts as indications, or direct or indirect evidence.[9] The legislator completely surrendered to the court to freely estimates which fact will be treated as evidence, not classifying it into any category, even in direct or circumstantial evidence, except that the court imposed obligation of valid explanation to evidentiary conclusions in terms of their free certificates.

Also, we can not agree with the opinion that the eyewitness identification is tool for verifying witnesses statements, to argue that we analyze eyewitness identification from the material and formal aspects. From the point of view of content recognition can be explained as special type of testimony, or a part of overall witness testimony, because, as a witness, person has to have certain knowlage about an event from the past in terms of object of recognition. It is necessary for a witness to appropriately express his attitude in terms of determining a person's identity, or make comparasions between one pereption from the present an the past one, that matches the presented object recognition and performances based on the knowledge of the past which, in respect of the object exists (positive identification) or nonexistent (negative identification). In this sense, every eyewitness who had testified about an event, said his version of the criminal event, except that this version of the criminal event can't be complete, but it is incomplete (fragmented). Eyewitness identification is always a continuation af a original statement, which appears later, but not necessearily, only when it is necessaty to identify some person or a thing which is very important to the testimony. Eyewitness identification is carried out if some persons aren't familliar to a witness, of which he cen not give any more informations but a personal description, because, if a witness knew them before, there isn't any need for this type of recognition, and the testimony will be carried out without detection.[10] When a eyewitness spots a person in some incriminating actions who he knew frome before the criminal event, he had made his "recognition" at the time of the crime, as opposed to recognition in terms of process, when the witness subsequently, at the time of taking procedural actions, recognizes a person who has noticed and remembered at the time of the criminal event. If witness identify of same things, it aims to determine whether that is an item that has been described previously, and the determination of that fact, the issue can be determined prior ownership or possession of the said cases, which is sometimes crucial to identify elements of unlawful seizure.

Every eyewitness, before final testimony, has been informed about their rights and duties, especially the duty to testify, he can't lie and nothing should remain silent, and warned that giving false testimony is a criminal offense. Because of indentifying witness just continues his testimony, this procedure can be carried out without his re-introduction of the duties and rights. For exemple, when witness testifies what he saw in the crime of robbery with a detailed description of the unknown attacker, and after certain time he had been called to make identification as an eyewitness, which is a continuation of the whole testimony or the testimoiny of a particular part. Because of that we can not agree that a eyewitness recognition is verification of earlier testimony, because previous statement can be partially or completely false or incorrect, and we can not verify is it true. Lets say that a eyewitness truthfully and thoroughly stated all the details he could think about both the act and the suspect. After a while, the eyewitness is called to perform suspect identification, and the result of identification was negatively wrong (after observing peoples, witness said that among them isn't a described robber, and later was determined that the suspect who was in-line, performed offense), or it was positively wrong (the eyewitness showed to the indisputable face). It is reasonable to

9 More on that in: Skulic, M. , Criminal Procedure Low, Belgrade, 2009, pages 175-290.

10 In english speaking area foreign literature, there are two types of recognition, so called eyewitness identification and recognition. In Holand Psychologists Vagenaras thinking, Recognition is a term for a psychic process, a Eyewitness identification is a term in criminal justice procedures and there are different methodes for analysis of the witnesses statements. In fact, during the observations previously knowed person, the basic issue is assessment of so-called. variable «appraiser», ie. Witness (the distance, lighting, stress, quality of sensory organs ...), and if the observation is made for the previously unknown people, then in addition to the basic variables, «appraiser», ie. Witnesses should be tested and its ability to recognize and recall, as well as the so-called system variables, which are related to the influence of the organizers of recognizing and conditions under which recognition is performed. Wider see transcript testimony in the case Vagenara Fatmir Limaj et al., No. IT-03-66-T International Criminal Tribunal for the former Yugoslavia.

ask how the credibility of the witness's established recognition of his story before, in one or another situation. If we take as a fact that the witness was warned that the false testimony is a criminal offense, and he does that anyway, we think that against the witness investigations may be initiated.

This is another peace of the evidence that the eyewitness investigation is a part of testimony, ie. recognize that the results can not be viewed independently but as part of the objective and subjective factors that influence the testimony of witnesses.

However, we shall not forget to point out that recognition may represent operational-tactical action of authorized officials, which no one disputes. First of all, we belive that the identification of dead bodies and identification of events may have only operational significance, but considering that face recognition and recognition of objects represents the action of proof, it should be carried out under the supervision of the prosecutor. There have been created same normative basis for more effective criminal procedure with the reform of the criminal law in Bosnia and Herzegovina, primarily by prescribing a higher level of prosecutors activity during the investigation. Thus, when the authorized person determines that there are grounds for suspicion for a criminal offense for which a punishment of imprisonment greater than five years, it shall immediately inform the competent prosecutor and under his supervision shall take all necessary measures and actions, including the identification of persons or objects. In case where there are grounds for suspicion that it has been done criminal offense for wich the law prescribes imprisonment of up to five years, the authorized officer shall notify the prosecutor of all available information and investigations undertaken within seven days from the date of knowledge of the existence of reasonable doubt. During this period, the authorized officer may take the necessary measures for eyewitness investigation of individuals and objects, in terms of documenting these actions, authorized officer have to make the record.[11] However, a result of a eyewitness testimony and identification will only have operational significance,[12] it is necessary to repeat witness testimony so that the evidence could be "strengthened", this conclusively proves the pointlessness of performing repeated recognition.[13] Therefore, it must be given maximum attention to the preparation and implementation of eyewitness testimony. Eyewitness investigation of individuals and objects should be converted into evidence,[14] by the prosecutor, who after the notication, will order the eyewitness investigation, in wich should participate himself.

With a proper and lawful execution of eyewitness investigation, which we observe as a part of a group called the examination of witnesses, the whole system will be completed to determine the truth. In fact, in the whole system of determining truth are certain subsystems, which are also specific integrated systems. In every system (as a whole) there are parts (elements) that are related to each other. These elements, if they are composed of their individual elements, can also do special systems (subsystems). Thus, accepting the notion of building a complex of interacting components (elements) continues to reveal his line: the system generates a specific unity with their environment, as a rule, each element of the system is the system of higher order, the elements of each system are systems of lower order elements, their relationships and functioning of the system as a whole are

11 Criminal Procedure Low of Bosnia and Herzegovina, Criminal Procedure Low of Brcko District, as well as the entity laws on criminal procedure state that police officers in order to find and apprehend the perpetrator, dislocure and preserve evidence of a criminal offense and objects that could serve as evidence and collect all the information that may be useful in criminal procedure, may take the following actions: obtain the necessary information from persons; perform inspection of the means of transport of passengers and baggage; restrict movement in a particular area, take the necessary measures in relation to establishing the identity of persons and objects; announce a search for a person and the things that are being searched , in the presence of the responsible person search specified structures and premises of state authorities, public enterprises and institutions; examine specified documents belonging to, and take other necessary steps and actions. Identical solutions provided the Criminal Procedure Low SFRY in Article 151, and today continues to provide criminal procedure in other countries of the former Yugoslavia.

12 Decision of the Constitutional Courtof Bosnia and Herzegovina, No. AP 3222/06 of 17.03.2009. states that authorized persons can before an investigation (without a warrant prosecutor) to perform the action recognition, unless acting under the provisions of procedural law are relating to undertake operational and tactical activities. With this decision, he explained that in this particular case it was necessary to first identify the perpetrator (to determine the identity of detection), and then to listen.

13 The witness will with each repetition of actions, mainly stay at the pre-given opinion, and if the first recognition is made by the mistakje, it will be repeated at some other recogniztion. In judicial practice, there is a recorded number of false identification during the investigation, when a witness at trial confidently demonstrates hand on the previously «recognized person».

14 Phrase «dressed in robes procedural» prof. Vodinelic used explaining the necessity of converting information into evidence that can prove to criminally relevant. Vodinelic, V., Criminology, detecting and proving, II Tom, Skopje, 1985, page 55

the constituents of the system.[15] Each of these systems can be defined as a complex of some objects or elements that are in a particular mutual respect and relationships. These relationships and connections exist both on the horizontal level, with other subsystems where there is mutual reciprocity (correlation), which is reflected in the mutual cooperation (cooperation) and complement (complementarity) and the vertical level, where higher subsystem in relation to the lower subsystems achieves a certain hierarchical role and coordination. If we take one criminal event as one system (one unit), then each set of specific actions can be viewd as a subsystem, such as the presentation of evidence. Thus, among the systems that we have called the act of proving other subsystems, such as crime scene investigation, expert opinion, testing of the suspect, the questioning of witnesses and others. Examination of a particular witness is a separate system, which consists of a lower-order system. One of these subsystems is a eyewitness investigation of individuals and objects, and which again consists of its sub-systems, ie. from obtaining a description and presentation for recognition. Finally, these subsystems consisting of its elements, ie. from legal, psychological and tactical rules which we had explained earlier.

Some systems are more flexible and adaptable to other higher systems, and some of them are rigid and do not approve the "overflow", so we can not find them in other sub-systems. If we take these facts, we can realize that a eyewitness investigation have a certain flexibility, and it can be operational-tactical, but also it can be investigative action (proof action), which depend of the stage of the procedure. If it is implemented in the organization of police departments, then eyewitness investigation of individuals and objects is a operational-tactical action, but if it is undertaken during the investigation by prosecutor's order, then it is the act of proving.

JUDICAL REVIEW OF THE EVIDENCE OBTAINED BY EYEWITNESS RECOGNIIZING

Although witness testimony is generally unreliable, the court freely appreciates the success of eyewitness recognizing, along with all other evidence, based on the principle of free evaluation of evidence and on the basis of their free beliefs. The results of recognition, ultimately, depends of the court decision, because recognition, as part of testimony, is evidence in criminal proceedings, regardless of whether it is done by law enforcement agencies, prosecutors, or by Court.[16] Largely eyewitness investigation is performed by police agencies. The last reform of the criminal legalization in Bosnia and Herzegovina explicitly stated that if the performance and registration of the statmens are collected by the authorized officials under the supervision of prosecutors, and if such statements applicable procedural provisions relating to witness testimony, such testimony can be used as evidence in criminal proceedings.

As regards the possibility of committing mistakes in identification, they are not dramatically higher than the possibility of making mistakes in the "rest" of statements, to which, for a number of years, suggests the practice courts around the world. As it has been said, the witness's version of the events an his level of knowlage of the criminal event, depends of many objective factors, possibilities of perception, memory, thinking and ability to reproduct mantioned, so that any part can lead to mistakes that will point to the lack of credibility witnesses. Therefore, recognition (faces and objects) can not be isolated, independently considered, but in a wider context as part of the examination of witnesses. The examination of witnesses is act of proving, means or method for obtaining evidence that is not so simple and consists of a series of actions and procedures, some of which must be taken (calling, taking directories, giving lessons and warnings...), and some only under exceptional circumstances, such as recognition.

A particular issue in theory and in practice, is during evaluation of the eyewitness identification of the faces. Here theory and court practice have a clear position. Categorical recognition can have

15 Vodinelic, V., Criminology, detecting and proving, II Tom, Skopje, 1985, page 46

16 Recognition had evidentiary significance in the pre-war period in Yugoslavia, a certificate to that is the judgment of the Supreme Court of Croatia, No. 356/82 of 30.06.1982. years, at which recognition is done by the authority of the Interior, if it is done in a proper way, then the record of this action is valid evidence in criminal proceedings, and the judgment of the Supreme Court of Macedonia Kz-152/82, of the same year, in which it is stated that if the recognition is done according to the rules laid down procedural provisions may be used as evidence in criminal proceedings.

greater probative value than probable, because the probative value of recognition does not depend on the witness's appearance and shape of his court. Cautious witness can accurately recognize and give his opinion in the form of probabilities, while reckless witness tilted peremptory Court, which may, nevertheless, to be false. The Trial Chamber makes its belief not based on the witness's court, but based on the fact that he says and what he put in his court on the basis of identity and diversity. Often, probably based on the recognition of small numbers and not enough quality elements, but it can happen that the Trial Chamber adopt probable recognition as true, and categorically rejected as untrue.[17]

There are numerous examples of case law in which they carried out the identification process and identify criminals from World War II, but also there was many mistakes that led to a number of erroneous convictions. A striking example of committing errors in recognition is the Demjanjuk case, when it came to the release of John (Ivan) Demjanjuk from criminal liability due to incorrect or incomplete identification recognition.[18]

Evidentiary significance of the results obtained by recognizing can be concluded by analyzing the conclusions from Devlin's Comittee report, year 1976. Devlin Comittee was formed in Great Britain, whose task was to examine the reliability of eyewitness testimony. Committee has taken and examined a number of cases ranging from 1908. to 1972. , in which there were numerous errors in identification parades. From about 2,000 identification parade, 900 (45%) resulted in the identification of the suspect, and of them all 82% complete in convictions. In over 300 cases of eyewitness recognition is the only evidence, and 74% of them ended in a conviction. Among these cases, the most representative are Adolf (Alfred) Beck, Oscar Slater, Luke Dougherty, and Laszlo Virag. The Devlins report discovered and described many cases where innocent individuals are convicted, particularly in the case of Laszlo Virag, 1969. , where eight witnesses made theirs 'identification', despite Virags alibi, and so concluded and recommended rule that many of the witnesses can not do recognizing properly.[19] Professor Glenville Williamshas commented the report saying that the case of Beck, at the beginning of the twentieth century, have to make everyone to think about the dangers of misidentification and the many mistakes made of justice, particularly when it has in mind that, in just a few months of 1967. and 1968. the reported three such cases. In addition, he mentioned memorandum National Union of Civil Liberties published 1968., in which he described 15 cases since 1966. to 1968. years in which there has been a mistaken identification.[20]

Looking at these problems, the International Criminal Tribunal for the former Yugoslavia in their judgments challenged a number of "safe" recognition, but also in accordance with the principle of free evaluation of evidence, and the judge on the basis of free opinion, accepted the evidence obtained through the identification of recognition by eyewitnesses. After consideration of Kupreskic and others, the Trial Chamber considered the practice in other cases and referred to the standards

17 Vodinelic, V., Criminology, detecting and proving, II Tom, Skopje, 1985, page 586

18 Demjanjuk case is known as the recognition of Ivan the Terrible. In fact, Israeli prosecutors and Investigative Unit of Nazi crimes (INZ) have tried to identify Ukrainian who participated in the killing of some 850,000 Jews from August 1942nd to August 1943rd year at Treblinka in Poland. Because of extreme brutality and very high growth Ukrainian nicknamed Ivan the Terrible, and no one knew his exact data. When suspicion fell on John Demjanjuk from Cleveland (Ohio - USA), a native Ukrainian, in 1987. he has been his arrest and trial in Jerusalem. Numerous errors have been made during eyewitness identification, and that led to the fact that during the trial of five survivors from Treblinka testified that they are absolutely sure that the man in front of them in the dock (John Demjanjuk) is "Ivan the Terrible." Later it was determined that "Ivan the Terrible" was a completely different Ukrainian person (Ivan Marchenko), and that Demjanjuk volunteered in the German radio services and taking an active role in the mass murder of Jews, but in the second camp - Sobibor. Thus the mistrial John Demjanjuk convicted by the court of first instance to the death penalty, the appellate court relased him. Upon his release, John Demjanjuk was retired and lived in Cleveland until 2009. year, when, as a 89-year-old was deported to Germany, where he held accountable for complicity in the murder of 29,000 Jews and others at Sobibor death camp in Poland. After a two-year trial in May 2011. John Demjanjuk was pronounced the first instance verdict sentencing him to a term of imprisonment of five years, but he was released from custody until the decision of the appellate court decision obout Demjanjuk ability because of the age and illness that is importent for serving his sentence. Pending the outcome of the appeal proceedings, 17 March 2012. year in Germany died John Demjanjuk. A trial to John Demjanjuk more see: Wagenaar, WA, Identifying Ivan: A Case Study in Legal Psygology, New York, 1988.

19 More about: http://132.181.2.68/Data/Library4/law_reports/criminlaw_97949.pdf; http://www.scribd.com/doc/43548204/Report-of-Devlin-Committee.

20 Devlin Commission Report is actualized 2005th during the investigation into the murder of Brazilian tourists Menezes (Charles de Menezes). Menezes was killed july 22, 2005th , fifteen days after the bombing, a terrorist attack on the subway in London, because of the misidentification made by the police. See http://en.wikipedia.org/wiki/Death_of_Jean_Charles_de_Menezes.

of evaluating the testimony in other jurisdictions. That's an exemple taken from a case Neal against Biggers (Neil v Biggers 409 U.S. 188, 34 L.Ed.2d 401.93 S.Ct.375, 1972), where the U.S. Supreme Court devised a five-step test to test the reliability of recognition in context of circumstances. These five steps are:

1) the ability of the witness to see the defendant at the time of the commission of the offense;
2) the witness's degree of attention;
3) the accuracy of the witness's prior description or identification of the accused;
4) the degree of certainty demonstrated by the witness during a confrontation at trial; [21]
5) the time elapsed between the commission of the crime and the confrontation.

The above standards are further enhanced in the case of Utah v. Long (State v. Long 721 493 P.2nd, Utah, 1986) and in the Supreme Court of Utah (Utah) has defined five factors:

1) the ability of the witness to see the perpetrator during the event;
2) the witness's degree of attention to the perpetrator at the time of the event;
3) the ability of the witness to observe the event, including his physical and mental accuracy;
4) whether the witness's identification was made spontaneously and remained consistent thereafter, or whether the recognition result of suggestions;
5) the nature of the event being observed and the likelihood that the witness would perceive, remember and relate it.[22]

Defining the same five factors as relevant to determining the proper identification recognition, were conducted in numerous cases by the International Criminal Tribunal for the Former Yugoslavia, and the Court of Bosnia and Herzegovina.[23]

Criminal justice systems all around world recognize the need for extreme caution before they convict the accused on the basis of the testimony of witnesses who had identified in aggravating circumstances. The principles developed in these systems show an awareness of the weaknesses of human perception and the existence of a serious risk that a judgment based solely on the testimony of a witness, in which he claims that he recognized the defendant.this especially refers to situations when there are high confidence in the testimony of witnesses, and there is no possibility to verify his observation. In the famous case of the British Queen against Turnbula (R. v Turnbull, 63 Cr. App. R. 132, 1976), the court found that, in cases where a witness claims he recognized the suspect, but in the difficult circumstances, the judge should "withdraw the case from a consideration of the jury and decided to acquit the accused of the charges if there is no other evidence to support the accuracy of identification ... ". The same court also noted that the jury always should be warned of danger of testimony in wich eyetitness is confirming a person's identity. Similar principles apply in other countries of Anglo-Saxon law system, such as Canada, Australia, British Malaya, where it is stated that the danger is very great for the suspect when the witness did not have enough good opportunities for observation, so that it was susceptible to suggestion, and this testimony, unless corroborated by other facts, is not a strong enough fundation for a conviction.

The judges in civil law countries have a large area for the evaluation of the evidence presented, including the testimony of only one witness, since the most civil law countries endoresed the principle of "free evaluation of evidence". Thus, the Federal Court in Germany, the Austrian Supreme Court and the Supreme Court of Sweden noted that the court must carefully and with maximum extreme care to appreciate the credibility of witnesses who identified the defendant.

The International Criminal Tribune tor the former Yugoslavia, in making decisions with this problemacy, has taken the position that the judicial council must take into account all the problems

21 Under confronted implies the presence in the courtroom at the place which is reserved for witnesses during the testimony, while at the same time in the dock facility it is located subject of previously performed recognition.

22 Primarily thought to whether the event was plain, ie, normal or not, and what kind of stressful circumstances might influence the witnesses.

23 See item Dusko Tadic, Judgment ICTY No. IT-94-1-A, from 15.07.1999, subject Zlatko Aleksovski judgment MKSKJ number IT-95-14/1-A, on 24.03.2000, the Zoran Kupreskic etc. , Judgment ICTY No. IT-95-16-A of 23.10.2001; subject Zejnil Delalic et al, judgment of the ICTY No. IT-96-21-A of 20.02.2001; subject Mitar Vasiljevic judgment of the ICTY No. IT-98-32-T dated 29.11.2002; subject Milorad Krnojelac judgment of the ICTY No. IT-97-25-T dated 15.03.2002; subject Fatmir Limaj et al, judgment No. IT-03-66-T dated 30.11.2005, the Marko Škrobić , the judgment of the Court of X-KR-07/480 of 22.04.2009; subject Ranko Vukovic, a verdict of X-KRŽ-07/405 of 30.06.2009; Momir Savic verdict of X-KRZ-07 / 478 from 03.07.2009, subject Mejakic et verdict of X-KR/06/200 of 16.02.2009; subject Zijad Kurtovic verdict of X-KRŽ-06/299 from 25.03.2009; subject Lelek, verdict of X-KRŽ-06/202 of 12.02.2009.

associated with proving the identity of a person recognition, and that any testimony that it used must be carefully evaluated before they are accepted as the only basis of conviction. Although the Trial Chamber is not obliged to comment on the verdict in each exhibit contained therein, in cases where a finding of guilt is based on the identification by the witness under difficult circumstances, the Trial Chamber must be careful to rigorously fulfill its obligations and to give reasons for its decision. Specifically, the opinion must be particularly careful to describe the factors that have a negative impact on the reliability of the identification evidence of the testimony of a witness who gives the identification of the accused, and adequately handle all significant factors that negatively affect the reliability of the testimony of a witness who gives identification.[24]

Statutes and Regulations of the International Criminal Tribunal for the Former Yugoslavia, do not bound Trial Chamber to seek medical records or other scientific evidence to prove any material fact. Similarly, legally speaking, the testimony of a single witness of material fact, does not require any other corroboration. The only rule that directly relates to that question is Rule 89. In particular, in Sub-rule 89 (C) states that the Council can not accept any relevant evidence which it deems to have probative value, and Sub-rule 89 (d) provides that the Council may exclude evidence if the need to ensure a fair trial substantially outweighed its probative value.[25] Thus, the mantioned court, and the Court of Bosnia and Herzegovina, held that the testimony of a single witness may have probative value, in which he performed the identification on the accused, but this kind of testimony must be carefully evaluated and with a detailed explanation of the judgment. Analyzing numerous judgments of the courts in Bosnia and Herzegovina can be concluded that the judges gave credence to the results of the recognition, if they are carried out in accordance with the provisions of the criminal procedure and criminal rules.[26]

CONCLUSION

Eyewitness identification of individuals and objects occurs in everyday forensic criminalistics and criminal proceedings practice as a form of verification of establishing identity of persons previously seen faces or objects with one of the given. The laws on criminal procedure about eyewitness identification of individuals and objects in Bosnia and Herzegovina are classified within the examination of witnesses and that primary have investigative evidence character, but it can also have an informal character and as an operational-tactical action and that happends when enforcement are conduct by the authorized officers in pretrial criminal-operative work. Speaking of acts of recognition, we must stress that this is a factual actions, we can say that it is a kind of giving testimony, that particular form of evidence based on observation and the subsequent identification of the presented individuals or objects, as an object that was seen in some stage of the criminal event. At first sight, this procedure is simple and the results obtained by its implementation in lay and professional public is often given unrealistic significance. Recognition in any case is taken as a planning process that follows a set of problems and difficulties which can largely be attributed to the unreliability of human perception, and memory and reproduction, and inclination that every person of witness's environment can have influence on witnesses testimony, especially when that person is the prosecuting authority which conduct improper procedure. Therefore, it is necessary to prepare and implement these actions with special attention, so that the results that have been obtained can not complain'd about omissions committed by the organizers of recognition.

24 See the Zoran Kupreskic et al, judgment of the ICTY No. IT-95-16-A of 23.10.2001. couple. 39, the subject of Fatmir Limaj et al, judgment No. IT-03-66-T of 30.11.2005, para. 17, the Marko Škrobić verdict of X-KR-07/480 of 22.04.2009, para. 63rd and 64; subject Ranko Vukovic, a verdict of X-KRŽ-07/405 of 30.06.2009, para. 58, Momir Savic verdict of X-KRŽ-07/478 of 03.07.2009, p.76.

25 See item Dusko Tadic, Judgment ICTY No. IT-94-1-A, of 15.07.1999, para. 65, subject to Zlatko Aleksovski judgment MKSKJ number IT-95-14/1-A, on 24.03.2000, para. 62, and Zoran Kupreskic et al, judgment of the ICTY No. IT-95-16-A of 23.10.2001, para. 33, subject Zejnil Delalic al judgment of the ICTY No. IT-96-21-A of 20.02.2001, para. 506th; subject Mitar Vasiljevic judgment of the ICTY No. IT-98-32-T dated 29.11.2002, para. 19, the Milorad Krnojelac judgment of the ICTY No. IT-97-25-T dated 15.03.2002, para. 71st

26 The author of this paper conducted an empirical study in which he analyzed the criminal records of the District Court in Doboj where they made eyewitness identification of people and objects in the period of january, 1st 2004 year to december, 31 2009th year. At the end of the study it was concluded that the courts in 86.6% of cases gave their trust to eyewitness testimony and gave significance to the results of the recognizing, and made a conviction, while in 13.4% of cases brought acquittal.

Finally, we conclude that the practice of the criminal courts has eliminated doubts regarding the probative value of recognizing persons and objects and it is irrefutably confirmed that the recognition is a part of the testimony of a witness of a special kind of testimony, ie. action of proving has its own rules, procedural importance and probative value, but that can not be seen separately and in isolation without a complete testimony of witnesses, as well as for the original testimony and the subsequent recognition of the same source of evidence - a witness.

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SENTENCING POLICY IN SLOVENIA
(DISCREPANCY BETWEEN EXPECTATIONS AND REALITY)

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Abstract: The author deals with the sentencing policy in Slovenia. He believes that sentencing policy in Slovenia is too mild and for victims even offensive. The author considers a statutory penal policy, court sentencing policy and prosecutorial sentencing policy. He is in particular critical towards prosecutorial sentencing policy for which he is convinced that it leads towards the infringement of equality before the law, which is one of the most important principles of every legal system.

Keywords: Slovenia, criminal policy, sentencing policy, statutory penal policy, judicial sentencing policy, prosecutorial sentencing policy.

INTRODUCTION

Sentencing policy can be defined and assessed in different ways. It could be simply considered as a kind of policy, while its assessment depends on a value judgement and expectations of the estimator. Such an assessment is of course inevitably subjective. Arising from the belief that the sentence imposed should represent a just recompense to a perpetrator for the evil he caused, the current sentencing policy in Slovenia cannot be considered in an appropriate and fair way. Sentencing policy in Slovenia is in my opinion too lenient and even offensive for victims of crime. This problem has been dealt in more detail by the philosopher, Professor Rok Svetlič, Ph.D., who pointed at an extremely high percent of probation sentences imposed in Slovenia (77 percent), which means that a victim might encounter the offender who was granted probation practically the next day in front of his house. [1]

It has been known for a long time that courts in Slovenia impose sentences which are near the minimum of prescribed frame of penalty for a given criminal offence. It is simply not possible to believe that the majority of criminal offences processed by courts deserve in terms of their seriousness and dangerousness a sentence which is near the minimum sentence set out for a given criminal offence. If this was really true, it would mean that prescribed penalties are disproportionally heavy. This presumption does not however hold true, because a comparative overview shows that prescribed penalties in Slovenia are quite comparable to the penalties in other European countries or that they are even much lighter. The argument that courts impose sentences that do not even approach the maximum of prescribed penalties, was used for reducing penalties for the majority of property offences (as well as for some others) in the Penal Code entered into force in 1994 (Official Gazette of the Republic of Slovenia, no. 64/94). [2]

My belief that sentencing policy in Slovenia is inappropriate and too lenient, can be illustrated by the following case, told by Mitja Deisinger, LL.D.[3] In the criminal proceedings against an international group of illegal drug dealers, one of the female defendants from the South America quite frankly admitted that Slovenia was chosen as a country through which illegal drugs were to come to Europe, because their lawyers (counsellors of the cartel in question) established that Slovenia had the lightest proscribed penalties for this kind of criminal offences, that Slovenian courts imposed the mildest sentences and that Slovenian prisons compared to the prisons in some other European countries were true »hotels« of a high category. Such a statement seems to be quite a sufficient reason for harshening sentencing policies in Slovenia.

1 Rok Svetličič, »Letenje pod radarjem in kazenska politika«, Delo, 28. 2. 2012, p. 5
2 More about that in: Katja Filipčič, »Kaznovalna politika v Sloveniji«, 3. Konferenca kazenskega prava in kriminologije, Zbornik 2010. Ljubljana: GV Založba in Pravna fakulteta v Ljubljani, 2010, p.16
3 In that time a judge of the Supreme Court of the Republic of Slovenia, at present a judge of the Constitutional Court of the Republic of Slovenia

In spite of the fact that penal policy is treated in this paper as a kind of policy, it could be nevertheless defined in a more concrete way. We can make a distinction between statutory penal policy (in terms of penalties laid down in statutes) and court penal policy (sentencing policy). While a statutory penal policy consists of a deliberate prescription of penalties for criminal offences contained in a criminal code on the ground of their dangerousness for protected goods, a court sentencing policy refers to a type and severity of sentences imposed by courts on offenders for concrete criminal offences. [4]

For a more objective assessment of the adequacy of penal policy it seems reasonable to make a short analysis of both types of penal policies, their relationship and also to examine the non-reaction of state agencies in the cases, when elements required for the commission of a serious criminal offence have been fulfilled. Something has also to be said about a prosecutorial discretion regarding sentencing, which becomes increasingly important.

STATUTORY PENAL POLICY

Professor Katja Filipčič, LL.D. has considered the issue of statutory penal policy from two points of view: one is the extent of criminal offences prescribed by law and other concerns the modification of prescribed penalties. On the basis of both criteria, Filipčič has come to the conclusion that penal policy in Slovenia is getting tougher. [5] Yet, a more profound analysis indicates that neither the adding of new criminal offences nor the increasing of penalties for the existing criminal offences, do not necessarily mean a real harshening of penal policy.

In order to illustrate how the introduction of the new criminalisation does not necessarily mean harsher penal policy and can even represent a *de facto* amnesty of perpetrators of certain criminal offences, we can take the most recent amendment to the Criminal Code that came into force on May 15, 2012.[6] This amendment contains a new criminal offence, called »Misuse of Public Funds«, which reads as follows:

" (1) An official, public officer or any another empowered person of the user of public funds who in ordering, acquiring, managing these funds or disposing with them knowingly violates regulations, fails to exercise necessary supervision or otherwise causes or facilitated an illegal or non purposive use of public funds although he foresees or should and could foresee that such conduct might cause a major property damage and such a damage actually occurs, shall be punished by a fine and sentenced to imprisonment for not less than three months and not more than five years.

(2) If by the perpetration of the offence referred to in the preceding paragraph a substantial damage was caused, the perpetrator shall be punished by a fine and sentenced to imprisonment for not less than one and up to eight years.

(3) The user of public funds under this Article is any legal entity of public law or its unit or any legal entity of private law or physical person, provided that it performs with these funds or on their behalf public services or any other activities in public interest or provides public goods on concession basis or any other exclusive of special rights.

(4) Public funds under this Article are immovable property, movable assets, financial means, claims, capital investments and other forms of the financial property belonging to the state, local self-government communities, European Union or to any other legal entity of public law".

In the explanation of this article it is written: "In order to provide an efficient criminal law protection of budgetary and other public finance funds, a new criminal offence has been created – Misuse of Public Funds. It is a special form of the already existing criminal offence of Misfeasance in Office under Article 258 of the Criminal Code-1 (hereinafter CC-1), which constitutes according to its objective elements, possible perpetrators, a degree of culpability and consequences – a special act (lex specialis) in relation to the already existing act". This provision, which could be seen as the harshening of penal policy, will in fact enable perpetrators of the criminal offence of Misfeasance in Office under Article 258 and the criminal offence of Abuse of Office or Official Duties under Article 257 of the CC-1[7] , to appeal to the argument that they fulfilled in fact the elements of a new criminal

4 Željko Horvatić, »Kaznena politika«, the entry in the book Rječnik kaznenog prava. Zagreb: Masmedia 2002, p.167
5 Filipčič, op. cit, pp. 15-17.
6 Act amending the Criminal Code (KZ-1B), Official Gazette of RS, no. 91/2011
7 Criminal Code KZ-1, Official Gazette of RS, nos. 55/2008, 66/2008 (amendment) and 39/2009

offence, although this one cannot be used against them, due to the prohibition of a retroactive use of criminal code. In this way this new criminalisation will actually lead to the amnesty of perpetrators of the mentioned criminal offences, instead of making penal policy tougher. [8]

A special problem regarding penal policy is the rule on mandatory use of a more lenient law, derived from the first paragraph of Article 15 of the International Covenant on Civil and Political Rights. We are referring to the rule, well known to lawyers, according to which it is mandatory in the case, when a criminal code has been modified subsequent to the commission of a criminal offence until the final judgement and a provision is made by law for the imposition of the lighter sentence, to use a new, more lenient law. Disputability of this rule, which was by various theoreticians even further extended, can be best illustrated by the following example. Let us take, for example, two defendants who committed the same criminal offence. One would comply with a court summons and would be convicted by a final judgement, while the other would evade in different ways a court summons (by concealing, escaping to a foreign country, by non-acceptance of summons) and would luckily live to see the modification of the criminal code prescribing a less harsh penalty for the offences he committed. On the ground of the rule, described above, a court should use for this perpetrator a new, more lenient law, which could mean that the legal order rewards those who are able to outwit it. This is an anomaly which, in my opinion, should be eliminated.

The case described above becomes even more disputable, if it is a question of an accomplice or an accomplice involved in the same crime. To illustrate this situation, I shall mention the case of three accomplices involved in the criminal offence of robbery (a qualified form of criminal offence). In a time when a court rendered the first instance judgement, the criminal code was altered and pursuant to the modifications set out in the new law, a different legal qualification of the act committed was introduced and consequently the imposition of a less severe sentence, different from the previous one for a couple of years. The fact that the imposition of the considerably lighter sentence on the two of the accomplices was not influenced by their personal circumstances, but was rather due to the circumstance that the new law was more lenient, indicates that not only a problem of justice is in question, but also a problem of equality before the law, which is one of the most important principles of constitutional law.[9]

The increase of penalties for the already existing criminal offences does not contribute to the harshening of penal policy either. If we followed through a longer period of time criminal offences related to illicit drugs (narcotics), we would perceive a slow trend of increasing penalties, which could lead us to the conclusion that penal policy has gradually got tougher. Yet, the inactivity of prosecution agencies shows that the harshening of penal policy is only apparent. This statement can also be best illustrated by the following example. Let us take the so-called »methadone programme«. By the widely known fact that a "therapy" by methadone is not really a treatment and that methadone is a psychoactive substance which leads to drug addiction and is under the Regulation on the Categorization of Illicit Drugs ranged among illicit drugs (in the group II), [10] it is not possible to avoid a statement that the implementation of methadone programme constitutes by itself the elements of a criminal offence of Rendering Opportunity for Consumption of Narcotic Drugs or Illicit Substances in Sport under the second paragraph of Article 187 of the CC-1.[11] Although it is evident that carrying out a methadone programme contains statutory elements of the qualified form of this

8 Professor Ivan Bele, LL.D., was the first one to call attention to this problem. For more detail see: I. Bele, »Kazenski zakonik: bomo še pravna država? «. Delo, 18. 10. 2012, p. 5

9 See the judgement of the District Court in Ljubljana under no. III K 39/2008 from 4. 9. 2008 and the judgement of the Higher Court in Ljubljana no. III Kp 160/2008 from 5. 2. 2009

10 Regulation on the Categorization of Illicit Drugs, Official Gazette of RS, no. 40/2000 and Regulation amending the Regulation on the Categorization of Illicit Drugs, Official Gazette of RS, nos. 42/2001, 78/2002, 53/2004, 37/2005, 122/2007, 102/2009, 95/2010, 58/2011.

11 Rendering Opportunity for Consumption of Narcotic Drugs or Illicit Substances in Sport, Article 187: 1. Whoever solicits another person to use narcotic drugs or illegal doping substances or provides a person with drugs to be used by him or by a third person, or whoever provides a person with a place or other facility for the use of narcotic drugs or illicit substances in sport shall be sentenced to imprisonment for not less than six months and not more than eight years; 2. Whoever commits the offence under paragraph 1 against several persons, a minor, mentally disabled person, person with a temporary mental disturbance, severe mental retardation or person who is in the rehabilitation, or if the offence is committed in educational institutions or in immediate vicinity thereof, in prisons, military units, public places or public events, or if the offence under paragraph 1 is committed by a civil servant, priest, doctor, social worker, teacher or educator, and thereby exploits his position, shall be sentenced to imprisonment between one and twelve years; 3. Narcotic drugs, illicit substances in sport and the tools for their consumption shall be seized.

criminal offence for which a sentence of imprisonment between one and twelve years is provided, the prosecution agencies do not react and the state even finances this programme from its budgetary funds. The third paragraph of Article 187 of the CC-1, which stipulates the mandatory seizure of illicit drugs, is of no use as well.

A message of such a penal policy is to put it mildly, schizophrenic. What can possibly think a small marihuana dealer who is persecuted for the trafficking of a couple of "joints", while those who fulfil the elements of a qualified form of a criminal offence even enjoy a financial support from the budgetary funds. The similar applies to those forms of the criminal offence that constitute in fact the assistance in consumption of illicit drugs. How can someone, who has been persecuted for providing once a place for the use of illicit drugs, understand that those, who render opportunity for consumption of illicit drugs regularly and on the large scale, even enjoy a state support. In a similar way nobody persecutes various societies and associations which distribute to drug addicts injection needles free of charge, although it is quite clear for what purpose they will be used. Chronic patients, who have to buy by their own means syringes, do not understand quite well why syringes are distributed to drug addicts free of charge, while they have to buy them with their money in spite of a medical indication for their use.

If there are some well founded reasons for the implementation of methadone programme (if it is possible to argue professionally that the benefit of such a treatment considerably exceeds its harmful consequences), the matter should be regulated in a way to make it perfectly clear in advance when and under what conditions a conduct, containing all elements of a criminal offence, is not punishable. With the Act Amending the Criminal Code, which entered into force on May 15, 2012,[12] the Article 187 of the CC –I was complemented by the fourth paragraph, which reads as follows: "The act referred to in the first and second paragraph of this Article is not unlawful, if the offender acts in conformity with the programme of drug addiction treatment or controlled consumption of drug, which is certified in accordance with the statute and carried out in the frame or under the supervision of the public health service." Unfortunately I am not sure that the mentioned provision represents a solution to all problems mentioned above, because it is generally known that a "therapy" by methadone is not a treatment. Besides, it is not clear to me on what ground can whatever statute, issued within the competence of public health service, certify (allow) a distribution of a psychoactive substance that leads to drug addiction and does not constitute any sort of treatment.

COURT SENTENCING POLICY

Professor Katja Filipčič estimates that sentencing policy of courts in Slovenia is getting tougher. Such a conclusion is made on the basis of the analysis of statistical data. She established that the number of prisoners in Slovenia had been increasing since 1990. The reason for such a situation can be attributed either to a more frequent imposition of a prison sentence or/and to the imposition of longer prison sentences. Statistical data do not however indicate a more frequent imposition of prison sentence, which means that the increase in the number of prisoners results from the imposition of longer prison sentences. Professor Filipčič presents three possible explanations for the imposition of longer prison sentences: a structure of committed criminal offences, recidivism of criminal offenders and the public opinion which is favourable to a more severe punishment. Statistical data actually indicate a rise in the rate of recidivists, while the public opinion has been traditionally more inclined to a harsher punishment. Although Professor Filipčič admits that it is not possible to assess the seriousness of crimes committed only from statistical data, she nevertheless concludes that the structure of criminal offences has not changed greatly after 1990.[13]

Contrary to Professor Filipčič, I am convinced that the structure of criminal offences has considerably changed after 1990. There is an increasing number of property criminal offences with elements of violence, for example robberies with the use of firearms, resulting in deaths. A decline of social control after 1990 resulted in increased possibilities for the operation of organised criminal groups. Law enforcement agencies have already detected in Slovenia the operation of powerful for-

12 Act Amending the Criminal Code (CC-1B), Official Gazette of RS , no. 91/2011
13 Filipčič, op.cit., pp. 17-21.

eign criminal groups, dealing with narcotic drugs, trafficking in human beings, trafficking in arms and with similar serious forms of crime. All of this makes me think that the court sentencing policy has not become more severe, but has rather adapted to the changed structure of crime.

A special problem in Slovenia represents a failure to pay contributions, a relatively extended phenomenon, which has many faces; it takes place when companies do not pay contributions for health and social insurance for their workers, contributions for their pension and disability insurance. Relatively frequent are also the cases when companies do not pay salaries to their workers for several months. Although such a conduct is defined in CC-1 as a criminal offence [14], nobody has been so far convicted for this conduct in Slovenia. In one of the rare cases resulting in charges, a court accepted the pleading of the accused, claiming that the company, due to a financial crisis, did not have money and thus could not for objective reasons comply with this obligation. The accused were acquitted and the message of this judgement is quite clear: "You can proceed with these acts, because nothing will happen to you".

In connection with this problem, Professor Ivan Bele, LL.D. remarks that the changed provision on necessity, introduced by the Act Amending the Criminal Code-1 (necessity under the new regulation does not exclude only the culpability of a perpetrator, but can also exclude under certain conditions the unlawfulness of a conduct), will cause that perpetrators of the criminal offence of Violation of Fundamental Rights of Employees will not be pursuant to the first paragraph of Article 196 of CC-I only acquitted of this criminal offence, but also acquitted of a duty to pay the prescribed contributions. That means that the provision on necessity will not provide to injured parties the same legal protection as to perpetrators. In this connection Professor Bele points out that although criminal code defines as criminal offences only those acts which are in general considered in law as unlawful, it is not authorized to declare which acts are not (or are) in accordance with the law.[15]

PROSECUTORIAL DISCRETION REGARDING SENTENCING

A gradual renunciation of the principle of legality and giving more and more discretionary powers to public prosecutors have led to the development of prosecutorial sentencing policy, which also deserves all attention.

The current Criminal Procedure Act (hereinafter CPA) already vests public prosecutors with large powers.16 A public prosecutor may transfer under certain conditions a crime report or a summary charge sheet to a settlement procedure 17 , he can suspend prosecution with the consent of

14 Violation of Fundamental Rights of Employees, Article 196; 1. Whoever, to his knowledge, acts contrary to regulations governing the conclusion and termination of employment contracts, salary and compensations thereof, working time, break and rest, annual leave or absence from work, protection of women, young people and disabled persons, protection of workers due to pregnancy and parenthood, protection of older employees, prohibition of overtime or night work, or the payment of the prescribed contributions, thereby depriving or restraining an employee or job-seeker of any of his rights shall be punished by a fine or sentenced to imprisonment for not more than one year; 2. If the act under the preceding paragraph results in unlawful termination of the employment relationship, unjustifiable non payment of three successive salaries or loss of the right that originates from unpaid contributions, the perpetrator shall be sentenced to imprisonment for not more than three years.

15 For more details see: Bele, op. cit., p.5

16 Criminal Procedure Act, Official Consolidated Text (ZKP-UPB 4), Official Gazette of RS, no. 32/2007; Act Amending the Criminal Procedure Act, Official Gazette of RS, nos. 66/2008; 77/2009 and 91/2011

17 Article 161a of the CPA

(1) The public prosecutor may transfer the report of or the summary charge sheet for a criminal offence

for which a fine or imprisonment of up to three years is prescribed and for criminal offences referred to in the second paragraph of this Article into the settlement procedure. In so doing, he shall take account of the type and nature of the offence, the circumstances in which it was committed, the personality of the perpetrator and his prior convictions for the same type or for other criminal offences, as well as his degree of criminal liability.

(2) If special circumstances exist, settlement may also be permitted for the criminal offences

of aggravated bodily harm under the first paragraph of Article 123, grievous bodily harm under the fourth paragraph of Article 124, grand larceny under the point 1 of the first paragraph of Article 205, misappropriation under the fourth paragraph of Article 208 and damaging another's object under the second paragraph of Article 220 of the Criminal Code; if the criminal report is submitted against a minor, this may also apply to other criminal offences for which the Criminal Code prescribes a prison sentence of up to five years.

(3) Settlement shall be run by the settlement agent, who is obliged to accept the case into procedure.

the injured party 18 or he is not obligated at all to initiate criminal proceedings or can abandon prosecution.[19] The mentioned provisions show that a public prosecutors can exercise sentencing policy even before the case comes before a court (if a defendant complies with the instructions of a prosecutor and carries out tasks that he imposed on him, the case will not even be brought to court, because a crime report will be rejected by a prosecutor). These provisions are in my opinion very questionable, because they mean that a public prosecutor is vested with powers to set »sentencing frameworks« in each individual case, what represents a relatively large risk for the violation of the principle of equality before the law.

Settlement may be implemented only with the consent of the suspect and the injured party.

The settlement agent is independent in his work. The settlement agent shall strive to ensure that the content of the agreement is proportionate to the seriousness and consequences of the offence.

(4) If the content of the agreement relates to the performance of community service,

implementation of the agreement shall be organised and managed by centres for social work

in collaboration with the settlement agent who ran the settlement procedure and a public prosecutor.

(5) On receiving notification of the fulfilment of the agreement, the public prosecutor shall dismiss the report. The settlement agent is also obliged to inform the public prosecutor of any failure of settlement and the reasons for such failure. The time limit for the fulfilment of the agreement may not be longer than three months.

(6) In the event of the dismissal of the report from the previous paragraph, the rights referred to in the second and fourth paragraphs of Article 60 of this Act shall not be enjoyed by the injured party, who must be informed thereof by the settlement agent before the agreement is signed.

(7) General instructions issued by the Public Prosecutor General shall define in greater detail the conditions and circumstances referred to in the first paragraph of this Article and the special circumstances referred to in the second paragraph of this Article which influence the transfer of the report to the settlement procedure.

18 Article 162 of the CPA

(1) The public prosecutor may, upon consent of the injured party, suspend prosecution of a criminal offence punishable by a fine or prison term of up to three years and of criminal offence referred to in the second paragraph of this Article if the suspect binds himself over to act as instructed by the public prosecutor and to perform certain actions to allay or remove the harmful consequences of the criminal offence. These actions may be:

1) elimination of or compensation for damage;

2) payment of a contribution to a public institution or a charity or fund for compensation for

damage to victims of criminal offences;

3) performance of community service;

4) fulfilment of a maintenance obligation.

(2) If special circumstances exist, criminal prosecution may also be suspended for the criminal offences of Rendering Opportunity for Consumption of Narcotic Drugs or Illicit Substances in Sport under the first paragraph of Article 187, Grand Larceny under point 1 of the first paragraph of Article 205,

Misappropriation under the fourth paragraph of Article 208, Extortion and Blackmail under the first and the second paragraphs of Article 213, Business Fraud under the first paragraph of Article 228, Damaging Another's Object under the second paragraph of Article 220, Embezzlement and Unauthorised Use of Another's Property under the first paragraph of Article 209 and the Presentation of Bad Cheques and Abuse of Bank or Credit Cards under the first and second paragraphs of Article 246 of the Criminal Code; if the criminal report is submitted against a minor, this may also apply to criminal offences for which the Criminal Code prescribes a prison sentence of up to five years.

(3) If the public prosecutor imposes the task of rectifying damage from point 1 or the task from point 3 of the first paragraph of this Article, the work shall be organised and managed by centres for social work, in collaboration with the public prosecutor.

(4) If within a time limit no longer than six months, and in respect of the obligation from the point 4 no longer than a year, the suspect fulfils the obligation undertaken, the crime report shall be dismissed.

(5) In the event of the dismissal of the report from the preceding paragraph, the injured party shall not have the rights referred to in the second and fourth paragraphs of Article 60 of this Act. The public prosecutor shall be obliged to inform the injured party of the loss of these rights before the injured party gives consent under the first paragraph of this Article.

(6) The special circumstances that have a bearing on the decision of the public prosecutor relating to the suspension of criminal prosecution shall be laid down in more detail in general instructions, issued by the State Prosecutor General.

19 Article 163 of the CPA

The public prosecutor shall not be obligated to start criminal prosecution, or shall be entitled

to abandon prosecution:

1) where the Criminal Code lays down that the court may or must grant remission of penalty to a

criminal offender and the public prosecutor assesses that in view of the actual circumstances

of the case a sentence alone without a criminal sanction is not necessary;

2) where the Criminal Code provides for a specific offence a fine or imprisonment up to one year

and the suspect or the accused, having genuinely repented of the offence, has prevented

harmful consequences or compensated for damage and the public prosecutor assesses that in view of the actual circumstances of the case a criminal sanction would not be justified.

The most recent Act Amending the ACP, which came into force on November 29, 2011 and has been applied since May 15, 2012, represents even a more profound intervention in this subject matter. [20] This amendment namely introduced the institute of guilty plea agreement or plea bargaining.

A defendant, his defence counsel and public prosecutor can propose in criminal proceedings to the injured party a conclusion of agreement about a defendant's admission of guilt for the criminal offence he committed. A conclusion of such an agreement can be made on the motion of a public prosecutor even before the beginning of proceedings, if there is a reasonable suspicion that a suspect committed the criminal offence which will be the object of proceedings. A public prosecutor, who proposes the agreement, must in this case inform a suspect in written form about a description and legal qualification of the act in regard of which he proposes the conclusion of agreement. If a suspect has not been interrogated yet, he must inform him about his rights under the fourth paragraph of Article 148 of this Act.[21]

If a motion is filed according to the first paragraph of this Article, the parties can negotiate about the conditions of admission of guilt for a criminal offence for which pre-trial or criminal proceedings are conducted against a suspect or defendant and about the content of the agreement. A public prosecutor can also negotiate only with a defence counsel, if a suspect or defendant gives consent to this. The plea agreement has to be concluded in a written form and has to be signed by both parties and a defence counsel. A criminal offence for which the agreement was concluded has to be described in a form which is required for the description of the act in a charge sheet (point 2 of the first paragraph of Article 269). The agreement shall be enclosed to the filed charge sheet or summary charge sheet; if the agreement is reached later, a public prosecutor has to submit it immediately to a court and the latest until the beginning of the main hearing. [22]

In the agreement by which a defendant pleads guilty for all or for some of the criminal offences which are the object of the charge, a defendant and public prosecutor can agree upon the following:

1) about the penalty or admonitory sanction and the manner of the enforcement of sanction;
2) about a public prosecutor's abandonment of criminal prosecution of criminal offences which are not included in a defendant's admission of guilt;
3) about the costs of criminal proceedings;
4) about the performance of some other task.

On the other hand, there are some issues that cannot be the object of plea agreement, such as the legal qualification of a criminal offence, security measures, when they are mandatory, and the forfeiture of proceeds of crime, except the manner of forfeiture. A court shall decide on the hearing, set out in Article 285 č of this Act [23], what is not or should not be the object of agreement.

The agreement on sentence contains a type and extent or the length of the sentence to be imposed on a defendant for the criminal offence he committed. The agreed sentence has to be within the limits of prescribed penalty; the imposition of a mitigated sentence and the manner of its enforcement can be proposed in the agreement only under conditions and within limits stipulated in the criminal code. If statutory conditions exist, the parties may agree to impose on a defendant an admonitory sanction instead of penalty. The agreed admonitory sanction must contain all elements which are pursuant to provisions of criminal code required for the imposition of such a sanction.

A public prosecutor can agree with the defendant about the abandonment of prosecution for those criminal offences which are not included in the guilty plea agreement, only if it is a question of criminal offences under the first and second paragraph of Article 162 of this Act and provided that the injured party gives his consent. A criminal offence in regard of which a prosecution will be abandoned by a prosecutor, must be described in the agreement as accurately as possible, inclusively with the mention of its legal qualification. A consent given by the injured party shall be enclosed to the agreement. The parties can agree in a plea agreement that a defendant, notwithstanding the provisions of the articles 94, 95 and 97 of this Act, can be exempted from the obligation to reimburse all costs or part of the costs of criminal proceedings. In this case costs shall be charged to the budget.

20 Act Amending the Criminal Procedure Act (ZKP-K), Official Gazette of RS, no. 91/2011
21 The first paragraph of Article 450 a of the ACP
22 The third and fourth paragraphs of Article 450 a of the ACP
23 Article 450.b of the CPA

A defendant can also bind himself by a plea agreement to compensate the injured party for the damage caused by a criminal offence, to fulfil a maintenance obligation or to carry out some other task under the first paragraph of Article 162 of this Act. [24] This should be done at the latest until the submission of agreement to a court.

A plea agreement concluded between a defendant and public prosecutor shall be decided by the court before which criminal proceedings are conducted either at pre-trial hearing or, if the agreement was concluded later, at the main hearing. When the court decides about the concluded plea agreement, it will consider whether:

1. the agreement is in conformity with the provisions of Articles 450.a, 450.b and 450.c of this Act and

2. the conditions regarding the admission of guilt from the first paragraph of Article 285.c of this Act are met. If a court establishes that whatever requirement from the preceding paragraph does not exist or that a defendant failed to meet an obligation from the fifth paragraph of the preceding article, a court shall render a ruling by which it rejects the agreement and shall continue proceedings as if a defendant declared not to plead guilty. If a court estimates that all requirements are met, it adopts a decision to accept a plea agreement and proceeds with the proceedings as a defendant pleaded guilty to the charge (Article 285.č). There is no appeal against this ruling. [25] It is evident that a court is bound to make a formal examination of plea agreement on the one hand, and on the other, it is limited in regard of criminal sanction to be imposed on the motion of public prosecutor, because it cannot impose a more severe criminal sanction as it was proposed by a public prosecutor. [26]

The listed provisions of the CPA, brought about by the Amending Act, are in my opinion very problematic and at least for two reasons even unconstitutional. Provisions, by which a judge's decisions are restricted to the formal examination of plea agreement and in respect of sentencing, to the motion of public prosecutor, deprive a judge of his basic function – that is a function of judging; this is by no doubt disputable by itself, because a judge cannot exercise the function for which he was elected. What seems even more problematic is that a public prosecutor and defendant (or his defence counsel) set "sentencing frameworks" in each case, which implies that they create an ex post facto paradigm for each individual case. Such a conduct necessarily results in the violation of equality before the law, which constitutes one of the basic legal principles of every legal order.

INSTEAD OF CONCLUSION

Courts still render their judgements in the name of people. It is neither desirable nor convenient if people wonder about or even disdain judgements rendered in their name. In such a case people either do not understand a message given by a judicial branch of government or something might be wrong with this message. The time will show how the mentioned novelties concerning prosecutorial sentencing policy will function in practice and how the "bargaining with justice" will be accepted by people.

24 Article 450.c of the CPA
25 Article 450.č of the CPA
26 The sixth paragraph of Article 285 č of the ACP

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MORAL OF THE SOCIETY IN TRANSITION AND CRIMES AGAINST OFFICIAL DUTY IN THE REPUBLIC OF MACEDONIA

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Abstract: In the early nineties the Macedonian society entered a period of transition of the basic features of a multiparty system and market economy with private ownership as a basic ownership category. These changes caused numerous moral deviations in the whole society and, of course, in public services. The overestimation of money and other material goods appeared in the society.

The consequence of overestimation of money and other material goods are the appearance of morally negative personality characteristics in society and so in civil and public servants as: material goods assuming all other values; indifference for common-state's property, dissipation etc. In addition to these moral deviations, other frequent moral deviations to the work of civil servants, such as: negligence and irresponsibility, unconscientiousness work and so on.

Moral deviations in civil and public servants corps follow moral evasion of duties, non-devotion to duty, bad attitude to work, laziness, indifference, inattention, superficiality, indolence, absenteeism, lack of a sense of responsibility and duty, ignoring work commitments, indifference to negligence, parasitism and damage making, caring only for one's own income and not for the results of work etc. as morally negative features.

Moral deviations, in its totality, constitute corruption in the ranks of public service and stimulate criminal behavior of civil servants. The basic aim of this paper is to see negative influences of moral deviation on occurrence of illegality in work of civil servants of which the most extreme forms enter the sphere of criminal responsibility as a criminal offenses against official duty, such as: abuse of power and authority, dereliction of duty, fraud in the service, self-serving in the service, receiving bribery, giving bribery, illegal representation, illegal money collection and payments and other crimes. These crimes are the result of the corruption in the ranks of the civil and public servants which is the most extreme moral personality deviation.

Keywords: morality, society, transition, moral deviation, negative moral qualities, crime.

INTRODUCTION

The Constitution of the Republic of Macedonia determines the rule of law as one of the fundamental values of the constitutional order of the Republic. The rule of law implies, on the one hand, the existence of a state legal system, with constitutional, legal and secondary normative regulation and, on the other hand, the existence of social functions and institutions for its implementation.

Social functions - such as protective function, administrative, judicial, supervisory control and other functions are performed by people organized in state institutions: parliament, government, administration, judiciary, public prosecution, public attorney and others. People live, act, and work in state institutions and out of them - in private life: self-organized into economic and non-economic organizations and associations. Their life and work are regulated by the norms of social regulation. These norms consist of three components. The first component consists of legal, the second of customary norms and the third component of moral norms. We are interested in legal and moral norms.

Legal norms are grouped in the Constitution, laws and relevant regulations of by-laws. They make up the legal system of the state or society that exists and is built within its borders. Moral norms constitute the morality of society.

Social morality as a set of moral norms is a subsystem of the system of social regulation. It is a result of the need to regulate interpersonal relationships in society. It begins where man aligns his

personality with the needs of a social life with other people that align those needs. As such, it contains a set of rules, norms and ideals for the good, as the common human need, which is opposed to evil, as a negation of humanity. Moral norms are unwritten regulatory rules of the society imposed to certain individuals or social groups with their obligation to act, acting and reasoning, or for a particular form of behavior in society. Morality itself, as a set of moral norms, is influenced by conditions in the society, above all, by the situation in its economic structure, then by its development and differentiation in the interests of social groups and social dynamics.

Man, as an individual, can accept moral norms and behave in accordance with them, can partially accept them or not accept completely. Complete acceptance of moral norms and behavior in accordance with them is a reflection of the morality of the human person. In contrast, we have a state of partial or complete immorality of human personality. With respect to the moral values of a human, the state of morality is equal to the state of complete humanity and state of immorality to the state of inhumanity. Morality is the basis of humanity. Only man can be a moral being, because he / she is able to distinguish between good and evil, between fairness and unfairness, between regularity and irregularity. The animal does not know how to do it and, because of that it cannot be a moral being. "Without morality the man would be surrendered by the flow of happenstances and would be the covenant that would be made by the development of the circumstances, and he will be the victim of the natural elements." [1]Inspired by morality the man develops energy, efforts, and overcome obstacles on the way to become and remain a man, to be more humanized, he develops his human abilities, his initiative and creative spirit. The quality of the man, as a person, directly depends on the quality of moral norms in his possession. As much, the man is more ethical as he is the more human, as the quality of his personality is better.

Human society is a set of human individuals - persons and their associations. Morality of a society is the result of moral of individuals that comprise it. This means that the morality of a society is in direct proportion to the morale of the people as individuals who live in it. The more moral individuals, the better moral of the society and vice versa. Proliferation of amoral individuals leads to a state of moral anomy in society. Moral anomy means total absence of morality. The absence of morality means total absence of regulations in a society and the absence of regulation implies chaos in a society. Then we have a situation in which the human person is really a wolf to other person[2].

No doubt that only the society, in which there is at least minimal social regulation, can exist. The absence of minimal social regulation leads to the downfall of the society. Thus, morality is directly a function of social regulation, and thus a function of the survival of the society. As a system of moral norms, it is one of the subsystems of social regulation. Besides, each society has a legal system as a system of state regulation of social relations and there is a system of common rules. These systems, all together, constitute the system of social regulation. However, the legal system, like morality, is a creation of the people. It depends on them whether and to what extent it will be implemented, or not implemented. Of course, the legal system will be implemented and it will be in function if people are moral and, as such, they feel the need of having peace and order in society, and therefore they understand it and accept the implementation of the legal system as their civic duty. Otherwise, the legal system cannot be implemented, i.e., it cannot function. In this connection, we are free to conclude that the functioning of the legal system of the country most directly depends on the state of morality in the society. This dependence is proportional. If the state of the morality of a society is better, much better is the functioning of legal system and vice versa. Thus, in terms of ethics and psychology of the person, we can say that, by the aspects of social significance for the establishment of a system of rule of law, and by the order and organization in society, morality stands above the law. In a society may bring the most perfect laws, but if citizens are not morally conscious, as the sum of knowledge of moral rules and moral conscience and as a component of the structure of the personality of each individual, those rules will not be respected, laws will not be implemented, the system of rule of law will not be in function, as we can see in practice of social life in many countries.

1 R. Lukic: Sociology of Morality, Scientific Book, Belgrade, 1982, p. 509th (Serbian).

2 Homo homini lupus est - the idea came from the Roman playwright Plautus (3-2 century BC). It is elaborated by English philosopher Thomas Hobbes (17th century) for explaining the high degree of competitiveness among people in society.

POLITICAL AND SOCIOLOGICAL FOUNDATIONS OF MORAL DEVIATIONS IN MACEDONIAN SOCIETY IN TRANSITION THAT AFFECT THE FUNCTIONING OF THE STATE (PUBLIC SERVICE)

Macedonian society entered a period of social transition in the early nineties. From the aspect of the morality of society, the most important is the transition in ownership relations. Before the beginning of the nineties, in the Republic of Macedonia, basic component of property was social property. Apart from it, there were private property and personal property of citizens. Social ownership was favored over other forms of ownership. According to the basic principles of the Constitution of the Socialist Republic of Macedonia, from 1974,[3] Section II, it was one of inviolable fundamentals of the position and role of man in society. Section III, of the basic principles of the Constitution, refers to a status of base of the free associated labor and the ruling position of the working class in production and social reproduction. Accordingly, there is no doubt that social ownership was a basic proprietary form of the society and the private and personal property had a secondary role in social reproduction.

The 1991 Constitution of the Republic of Macedonia[4] that was adopted at the beginning of the second year of social transition completely changed the situation in property relations. Social ownership was abolished. Instead, the Constitution guarantees the citizens of the Republic the right to property which is the basis for management and decision-making in economic matters. Ownership results the rights and obligations of individuals and the community. Property and the rights granted hereunder, no one can be limited or revoked, unless it comes to the public interest determined by the law. There is no doubt that private property has become a new foundation of socio-economic relations in the Macedonian society.

Changes in the social base, and before all, changes in property relations as the basic relationships in society, caused turbulent changes in the social upgrade. Above all, the relationship of citizens to property was changed. Property becomes a basic driving force of society. The acquisition of the property and possession, become the main goal of the vast majority of Macedonian citizens. In the pre-transition period, the man was most estimated according to what he is rather then by how much he has. To be in a position in the government, in the economy, meant to be someone and something, meant to have power, to have privileges. In the transition period the situation is distorted. Social success of the man mostly is estimated according to how much he has, especially how much money he has as well as other property - immovable, movable or both. Acquisition, possession and profit making became sacred and inalienable rights of individuals in transitional society. It does not matter what the origin of private property is and how it is acquired. It is also not important for which goals it is used. In this connection, Erich Fromm formulated the following principle: "Nobody is interested where and how I acquired my property and what I do with it. My right is unlimited and sacred until I breach the law." "To be," as a fundamental human motivation power for social action in the pre-transition period has been replaced by "to have."[5] To have as much money, as much property, has become a dream of the majority of Macedonian citizens. A greed for acquiring property appeared. In many of them the desire for the acquisition of property received even pathological proportions. Greed leads to psycho-pathological state that resembles the situation when a person drinks seawater. The more he drinks the thirstiest he is. Fromm would say that society is very sick. In sick society, the morality is sick. Insatiable desire for the acquisition of property caused numerous moral deviations with all citizens, and of course with the state and public officials.

According to the Law on Civil Servants[6] (Article 3, paragraphs 1 and 2), a civil servant is a person employed in the civil service who performs professional, normative, legal, executive, administrative, administrative oversight, planning, material and financial, information and other items in competencies of state administration bodies and other state organs.

3 Official Gazette of SRM, number 7/74 (Macedonian).
4 Official Gazette of RM, number 51/92 (Macedonian).
5 From E.: To Have or to be, the National Book - Alfa, Belgrade, 1998, p. 67th. (Serbian)
6 Official Gazette of RM – consolidated text, number 76/10 (Macedonian).

Law on Public Officials[7] (Article 3, item 1) defines public employees as employees who perform works of public interest in the activities of education, health, culture, science, labor, social work, social care, child protection, then the institutions, funds, agencies, public enterprises established by the Republic of Macedonia, municipalities and the City of Skopje, which are not covered by the Law on Civil Servants.

Civil and public servants are citizens of Macedonian society that perform state or public service. It is a notorious fact. Therefore, any changes in the social relations of citizens which come because of the change of ownership relations in society has not left civil and public servants untouched. Given the fact that the state or public officials perform the civil or public service, and as such, they have greater social power, which gives the service they perform more opportunities to use that power to meet the personal goals at the expense of other citizens and the state, as a community, they, from an ethical point of view, represent a specific category of citizens. Due to the specific position, they have in society certain moral deviations, which do not exist with other citizens, or exist to a lesser extent.

The question is what is the relation between general civil morality and professional morality of the state and public officials? Seen through the prism of dialectics, it is a relation of the general to the particular and the individual and vice versa. Basic moral principles, rules or norms of behavior of the citizen, in everyday life, are basis on his conduct in the profession. In a certain sense speaking, profession is part of his everyday life. A citizen firstly, a part of his everyday life spends working in the performance of professional activities. But, there is not any citizen, especially intellectual citizen (public or civil servants are intellectuals), who his cognitive activities related to the profession limit on his working hours. He thinks about professional issues during the leisure, at home, vacation, etc. Many intellectuals - public or civil servants, used a significant portion of their free time to prepare for work activities. Thus, the judge, notaries, lawyers and others: study subjects, read law and other professional literature. The state or public officials do the same. Professors prepare for teaching, write lessons, textbooks, consider certain scientific problems, take down notes, etc. But the rules of conduct in the profession influence the behavior of the citizen in everyday life. Thus, for some citizens in whose personality is stressed behavior in everyday life according to moral rules of conduct in the profession, we say that they have a professional deformation. For example: professional educators, whose work mainly consists of counseling and teaching, tend to do it at home. Officers who in job order and command, frequently authoritatively apply at home, and receive comments from their home persons like: "Dad here you are not in the barracks" or "Dad, we are not your soldiers." Many of treasurers and other financial officers show emphasized austerity in private life and remark to their home persons any more or less unrestricted expendable dinar.

Considering the mutual influence between the general rules of moral behavior in everyday life and the rules of professional morality, we can conclude that morally valid holder of a certain profession can only be a citizen who is morally valid in everyday life and vice versa. Somebody, who is immoral in everyday life, cannot be a good and moral professional - state or public officer, judge, prosecutor, professor, teacher, etc.

But, to be morally valid man and also, morally valid state's or public servant in a morally sick society is very difficult. The run for money, property and other material goods causes numerous moral deviations in Macedonian society. These moral deviations are most numerous in the field of labor morality, then in relation to the state or public property, in relation to the state or public interests etc.

In the area of the labor morality there are moral deviations of person such as: absence of autonomy in work, negligence, irresponsibility, laziness, parasitism etc.

The most frequent moral deviations in relation to of the state or public property are: greed, negative attitude towards property, neglect of common property and profligacy.

In relation to the state or public interests there are moral deviations as egotism, narcissism, careerism, giving priority to personal interests in terms of common and other deviations.

The man is a social being - zoon politicon, as Aristotle said[8]. Society affects him, he affects society. It is a dialectical legality. No better society then the people that make it up. Civil or public servants are people. As people they are members of a society. All positive and negative processes in society affect them. Thus, the moral deviations in society affect them, and given their specific social position reflected in a specific way in relation to the performance of their official duties.

7 Official Gazette of RM, number 52/10 (Macedonian).
8 Aristotle, Politics, Belgrade Publishing and Graphic Institute, Belgrade, 1984, p. 5. (Serbian).

MORAL DEVIATIONS IN THE RANKS OF THE CIVIL AND PUBLIC SERVANTS THAT NEGATIVELY AFFECT THE FUNCTIONING OF THE PUBLIC SERVICE AND PRODUCE CRIMINAL IN IT

State (public) service is the most salient social activity for the protection of the rule of law, as a fundamental value of the constitutional order and the protection of law and order in society.

Working in state bodies and institutions of public administration, civil and public servants, stand on the bumper of the constitutionality and legality and law and order in the Republic of Macedonia. On the bumper of these social values only professional and responsible government (public) servants can stand.

Responsible public or civil servants may be only those that act in accordance with generally accepted moral principles during the state or public service. In order to provide the knowledge and observance of these principles, the Minister of Information Society and Administration, on September 19, 2011, adopted the Code of Ethics for Civil Servants, and on 27 of September, the Code of Ethics for Public Officials.

According to the Law on Civil Servants (Article 18) and the Law on Public Servants (Article 24), as well as, according to the provisions of the relevant codes of ethics, a civil or a public servant is obliged to perform his duties conscientiously, professionally, efficiently, orderly and timely in accordance with the Constitution and law. The civil or public servant shall be obliged to carry out their work impartially and without influence of political parties. He cannot be guided by his own political beliefs, personal financial interests, not abusing powers and status of the civil servant and he must protect reputation of the organ or institution in which he is employed.

But, formal provisions, contained in the laws and ethical codes, are not a guarantee of moral behavior of civil and public servants in the performance of public service. Moral deviations are deviation of a person's character. A person's character, as an element of personality structure, and it is a psychological category.[9] A person's character cannot be changed by written rules, but with education and re-education. The reason for this is the lack of moral values that will suit new social relations created by the transformation of property relations. If an individual's morality is a psychological category, the morality of a society is a social category or, more precisely, the social-psychological category, because the society is composed of people.[10] Because of that, opposite to moral values, prescribed by laws and ethical codes, there are moral deviations that are dialectically opposed, such as partiality, injustice, dishonesty, negligence in working, irresponsibility in working, political affiliation, improper valuation and estimation of material goods and personal interests, negative attitude towards state property and assets of the institution, carelessness for the state property and assets and similar.

Partiality, as moral deviation of the state and public officials is commonly manifested by favoring in the performance of official duties of their relatives, friends, fellow, countrymen, and members of the same ethnic or religious community, people who can expect any benefit and so on.

Injustice as a moral deviation in terms of fairness includes the following morally negative traits that can influence criminal behavior of the state and public servants: subjectivism, inflicting injustice, denial of the rights of the clients, arbitrariness, violence, oppression, unequal treatment the people, illegal behavior towards people etc.

In close connection with injustice is dishonesty with the state (public) servants which is manifested by the disregard of other people, propensity to cheat, lies, non-maintenance of the given word, non-respecting people and their rights and duties, subjectivity, selfishness, ignorance of moral principles and attitudes and similar.

Negligence in the work of an officer is usually followed by a bad attitude towards labor, laziness, indifference, quackery, superficiality, stinginess in providing assistance no dedication to work malingering, tardiness in work and in carrying out their tasks, extracting work responsibilities, irresponsible attitude towards work responsibilities and no honesty in relation with colleagues, coworkers and clients.

9 Rot N.: Personality Psychology, Institute for textbooks and teaching aids of Serbia, 1973, p.61-65.(Serbian).
10 Zvonarevic M.: Social Psychology, Educational Book, Zagreb, 1989, p.300-302 (Croatian).

Negligence produces irresponsibility as a moral deviation which is followed by morally negative features of an officer: recklessness, frivolity, irrationality, lack of a sense of duty and responsibility, ignoring the work responsibilities; tolerance and indifferences to negligence in the working, to laziness, damage making of subordinates and associates; concern only for their profits and their position in the service and not the performance of the results, and other morally negative traits.

Political affiliation is often present moral deviation among the state or public officials which manifests in public statements about membership in certain political parties, expression or representation of their own political beliefs in the performance of official duties and giving priority to the current political interests of his party in terms of the constitution and the law; performing political activities during working hours; putting pressures on colleagues to vote for members of their political party; partiality to members and supporters of the party which is a member and their favoritism in the performance of official duties etc.

Improper valuation and estimation of material goods and personal interests with the state (public officials) is manifested by non- avoidance conflicts of interest, especially when it comes to his personal financial interests and the public interest, acceptance of the collaboration with legal entities (individuals and legal entities) who have had or have a financial interest in the decisions or actions of the body in which the officer works, requesting or receiving gifts for himself or others, offering services, assistance or other benefits from other people that could be affected or believe that can have influence on decision-making within their jurisdiction which may compromise the professional relationship in the course of his official duties, receiving gifts and other tangible expressions of gratitude that could be considered as a reward for performed work, which represents and is part of his official duty, revealing secret data and misuse of the data and so on.

The officer's negative attitude towards the state property and assets of the institution, as moral deviation, features an irresponsible attitude towards material goods in general, with pilfering state and social property, not keeping account and disregard for common property, indifference to them, squandering property thefts, dispersion and destruction of property, a negative attitude towards the state property and assets of the institution, egoism, parasitism, fraud aimed at acquiring money and other material goods to the detriment of the state property or the property of the institution in which works, damage making etc.

Carelessness about the state property and assets of the organ - the institution, as a moral deviation in working is characterized by gross mismanagement of funds and materials which is used in work with a lack of discipline in the use of funds, lack of accountability in handling funds and materials of the body or institution, inconsiderate attitude towards resources and materials for work with extravagance in terms of state assets and the assets of the institution in which it operates as the worst morally negative trait.

Moral personality deviations of the state and public officials, with all the attendant moral negative traits which are analyzed above, forward the creation of a favorable environment for crime in public administration. It, as a pathological phenomenon manifests in criminal acts which are performed by the state and public officers. They, in service and in connection with the service, perform a variety of offenses intentionally or by negligence: crimes against labor, crimes against freedoms and the rights of man and citizen; crimes against honor and reputation; crimes against property; crimes against public finance, payment and commerce and crimes against official duty.

There is no doubt that the functioning of the public administration is influenced by crimes against official duty that pursue officers from its ranks. The following crimes are included in this group: abuse of official position and authority(art. 353 of Criminal Code)[11], injury to save the state border (art. 353-a), non- fulfillment of order (art 353-b), negligent working in the service(art. 253-v), embezzlement in service (art. 354), fraud in the service (art. 355), self-serving in the service(art. 356), bribery (art. 357), giving bribes (art. 358),unlawful mediation, (art. 359), concealing the origin of acquired disproportionate assets (art. 359-a), disclosing official secrets (art. 360) abuse of state, official or military secret (art 360), forging official documents (art 361) and unlawful encashment and payment (art. 362).

Only by cursory review of the legal descriptions of mentioned criminal offenses we will recognize moral deviations of person with morally negative qualities by which they are accompanied. If

11 Official Gazette of RM – consolidated text, number 19/04 (Macedonian)

corruption as a socio-pathological phenomenon is treated widely in sense of the Latin word "corruption" which in terms of administration means wickedness, depravity, moral debauchery, bribery, forgery, decay, moral rot, moral decay;[12] having in view the titles and legal descriptions of these crimes, we will come to the conclusion that, in all of them, there are fewer or more elements of corruption and dishonesty of the personality of civil and public servants.

INSTEAD OF CONCLUSION

Frequent occurrences of crime in an administrative system are an expression of its ultimate degradation in social environment to which the system serves. Criminal is a violation of legality about which an administrative system should worry and which it should implement; contrary to the law and order in a society that needs to be accomplished with the protection of legality. The causes of its appearance and expansion in administration are in all the above-mentioned socio-pathological phenomena. But, this crime is most undoubtedly affected by expressed presence of corruption in the administration. Corruption actually is another phase of crime in the state or public administration. Therefore, the fight against corruption, with all the above mentioned methods, means and social mechanisms, means a struggle against crime. Victory in this fight means victory over crime. But corruption is in a dialectical relationship with other socio-pathological phenomena. They all represent a milieu for the development of corruption and corruption is an ideal ground for crime. Therefore the elimination of all the above socio-pathological and morally negative appearances from administration is actually a removal of the social background that appears, grows and helps crime flourish.

Laws of the state and public administration, and especially ethical codes, undoubtedly well profiled moral character of the Macedonian public and civil servant, to citizens, service-oriented administration. Unfortunately, the mismatch between the normative and factual is also expressed here.

Formally written moral rules, systematized in the Codes of Ethics, do not guarantee that the civil and public servants will respect and apply them in their work. Adherence to ethical standards has more in common, with mental code of civil and public servants, rather than the existence of written moral principles and rules. The citizens of the Republic of Macedonia are daily confronted with flagrant violations of fundamental ethical standards by officers. Therefore, we can rightfully say that Macedonian administrative space is not a favorable environment for the rule of ethics. Unethical behavior of officers commonly is manifested as unlawful, unethical, incompetent and unprofessional conduct in the procedures of decision in administrative subjects for clients, then through biased and selective behavior towards clients, through abuse of official position and status of civil or public servant for personal benefit through improper behavior in the workplace and in private life, etc. These and other morally negative actions and behaviors of the officers, in the long run, result in the increased distrust of the clients in the functioning of the public administration. To eliminate this condition it is necessary to apply the range of instruments and procedures that will neutralize unwanted fashions and trends in the behavior of officers and will create conditions for their correct behavior and attitude towards the working in administrative subjects. This can be achieved by effective mechanisms of control over the work of the public administration, with vigorous sanctions for not complying; with the prescribed rules of conduct and work; then by the creation and existence of active citizenship, which will react to all, even the smallest deviations the prescribed rules of conduct of officers; with permanent training and educational work with officers and with the creation of solid working conditions and, of course, proper and equitable reward for quality in work and behavior by which the efforts and demonstrated inventiveness in work of the state or public official will be valorized.[13]

The Government of the Republic of Macedonia has been making some efforts to eliminate this situation by applying some of the above mechanisms. Some, though modest, movements for the better, does not mean much, but represent the positive momentum of a process, which if completed as it is intended, will undoubtedly lead to the creation of the service-oriented administration in the right sense of the word. According to the current state of affairs, this future looks far.

12 See the meaning of the word "corruption" in Vujaklija M.: A dictionary of foreign words and expressions, Education, Belgrade, 1972 (Serbian).

13 Vitanski D.: Ethics and decadence, Nova Makedonija, number 2204 of 22. July 2010 (Macedonian).

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К ВОПРОСУ О ЛЕГАЛИЗАЦИИ КРИМИНАЛЬНЫХ ДОХОДОВ ПРИ ВЗАИМОДЕЙСТВИИ ОРГАНИЗОВАННОЙ ПРЕСТУПНОСТИ И ТЕРРОРИЗМА В РОССИИ

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В современных условиях одной из значимых угроз безопасности личности, общества, государства и всего международного правопорядка не без оснований считается терроризм. На рубеже XX—XXI столетий это явление, на первых порах представлявшее собой разрозненные акты применения насилия для решения прежде всего политических целей, прибрело черты полномасштабной, повсеместной, организованной криминальной практики, посредством которой отдельные лица, группы лиц, религиозные или этнические общности, а порой и целые государства стремятся решить широкий круг задач: от экономических и политических до глубоко психологических проблем самоидентификации. Признание высочайшей степени опасности терроризма обусловлено возрастающей террористической активностью в мире, увеличением количества совершаемых террористических актов и числа жертв таких преступлений, расширением географии и масштабов терроризма, участившимися фактами организованного вовлечения в террористическую деятельность все большего числа людей, тщательным планированием террористической деятельности и использованием террористами новых и обладающих повышенной поражающей силой видов оружия, выходом терроризма за национальные рамки, превращением его в реальную угрозу международному миру, порядку и стабильности.

Возникнув как заметное социальное явление на Западе в 60-х гг. XX столетия, терроризм сразу же приобрел тенденцию к устойчивому росту. Стимулом к его развитию в России в конце 80-х — начале 90-х гг., явились проблемы переходного периода, связанные с резкой сменой экономического и политического курса, принципов социальной организации, нравственных ориентиров российского общества, с крушением двуполярного мира и становлением новых принципов и стратегий международной политики.

Федеральный закон Российской Федерации «О противодействии терроризму»[1] определяет терроризм как идеологию насилия и практику воздействия на принятие решения органами государственной власти, органами местного самоуправления или международными организациями, связанную с устрашением населения и (или) иными формами противоправных насильственных действий.

Суть терроризма, отличающая его от других видов преступности, заключается в специфическом насилии, а именно в незаконном применении физической силы (или демонстрации готовности ее применения), связанном с устрашением ради достижения каких-либо целей.

Среди основных признаков, характеризующих терроризм, большинство исследователей выделяют следующие:

– высокая общественная опасность, возникающая в результате безграничного насилия;
– преднамеренное создание обстановки общественного страха, подавленности, напряженности;
– публичный характер его исполнения (терроризм без широкой огласки, открытого предъявления требований существовать не может);
– применение насилия в отношении одних лиц, а оказание психологического воздействия на других в целях их склонения к определенному поведению[2].

1 См.: О противодействии терроризму : федер. закон от 6 марта 2006 г. № 35-ФЗ // Собрание законодательства РФ. 2006. № 11. Ст. 1146.

2 См., например: Белявский Д. Г. Законодательство Российской Федерации в борьбе против терроризма // Законодательство и экономика. 2006. № 12; Горбунов Ю. С. К вопросу о правовом регулировании противодействия

Эти и некоторые иные характеристики позволяют утверждать, что современный терроризм – это совокупность насильственных преступлений, демонстрирующих особым образом организованную социальную реакцию, которая по своим целям, средствам, способам и результатам является одной из форм ведения войны путем антиобщественной деятельности крайне агрессивных, организованных, идеологически подготовленных субъектов.

Ряд ученых подчеркивают, что особенно резкий рост терроризма на рубеже XXI в. связан с тем, что социально активные группы населения все чаще отдают предпочтение организованному насилию перед санкционированными способами решения социальных, национальных, религиозных и других конфликтов[3], это, на наш взгляд, связано с определенным кризисным состоянием существующих легальных механизмов разрешения социальных противоречий, эффектом «столкновения цивилизаций» (С. Хантингтон), наличием двойных стандартов в разрешении противоречий для стран «первого» и «третьего» мира. Такое понимание причин терроризма в последнее время прочно входит в российскую криминологическую науку. В частности, Ю. М. Антонян в рассуждениях о причинах этнорелигиозного терроризма справедливо обращает внимание на следующее: «Современный этнорелигиозный терроризм представляет собой главным образом столкновение двух мировых культур — ислама и христианства, Востока и Запада, если понимать их не географически, а как ареалы распространения определенных цивилизаций. Это столкновение двух ментальностей, двух мировосприятий, двух отношений к жизни и труду» [4].

Принимая во внимание фундаментальные цивилизационные и культурные противоречия как источники терроризма и экстремизма, все же вряд ли можно в полной мере согласиться с утверждением, что «фактически любая программа криминологической профилактики экстремизма не способна воздействовать на его истинные детерминанты, а противодействие лишь внешним криминальным проявлениям национальной вражды является в определенной степени паллиативом»[5]. Уяснение цивилизационной природы терроризма несомненно значимо для выработки политических путей и средств его минимизации. Однако изучение терроризма именно как криминологического феномена (прежде всего с позиций мотивации и связи с иными видами преступности) позволяет должным образом классифицировать террористические проявления и на этой основе определить ряд важных, дифференцированных по видам терроризма тактических мероприятий, направленных на его предупреждение.

Неоднородность мотивации терроризма является одной из основ для его классификации. Наряду с этим признаком, специалисты используют и иные (особенности субъектов, сферы проявления терроризма, его цели и т. д.). Так, В. Замковой и М. Ильчиков классифицируют современный терроризм на следующие виды: революционный и контрреволюционный; субверсивный (направленный на дестабилизацию системы) и репрессивный (связанный с подавлением); физический и духовный; селективный (индивидуальные теракты) и слепой (против неопределенного круга лиц); провокационный (свойственный международному терроризму); превентивный (осуществляемый спецслужбами государств); военный (когда в доктрину ведения войны входят особая бесчеловечность, беспощадность и жестокость военных операций в отношении мирного населения, детей, объектов Красного Креста, военнопленных и т. д.); криминальный (состояние преступности, когда она выходит из-под контроля правоохранительных органов) [6].

Многообразие видов терроризма в реальной жизни позволяет усомниться в правильности подхода, формирующего представления о терроризме только и исключительно на основании данных о преступлениях террористического характера. Последние, по большому счету, отражают состояние лишь одной его разновидности — внутригосударственного политического терроризма, который может диктоваться идеологическими, религиозными

терроризму // Журнал российского права. 2007. № 2; Горбунов Ю.С. Об определении понятий «террор» и «терроризм» // Журнал российского права. 2010, № 2; и др.

3 См.: Миньковский Г. М., Ревин В. П. Характеристика терроризма и некоторые направления повышения эффективности борьбы с ним // Государство и право. 1997. № 8. С. 84; Зубков В.А., Осипов С.К. «Международные стандарты в сфере противодействия отмыванию преступных доходов и финансированию терроризма: Учебное пособие». М, 2010; Мартыненко Б.К. Разграничение категорий «терроризма» и «террора» // Общество и право. - Краснодар: Изд-во Краснодар. ун-та МВД России, 2011, № 3 (35). - С. 34-36; и др.

4 Этнорелигиозный терроризм / под ред. Ю. М. Антоняна. М., 2006. С. 39.

5 Пудовочкин Ю. Е. Некоторые философские подходы к объяснению феномена экстремизма и пределы его криминологического анализа // Российский криминологический взгляд. 2007. № 2. С. 188

6 См.: Замковой В., Ильчиков М. Терроризм — глобальная проблема современности. М., 1996. С. 9.

или националистическими мотивами. В целом же терроризм есть широкая практика применения насилия для достижения тех или иных целей. А потому прав В. В. Кафтан, когда указывает, что терроризм — это сложное социально-политическое явление, в основе которого лежит спектр социальных противоречий, оказывающих прямо или косвенно свое влияние на экстремистскую террористическую идеологию, представляющую собой радикальный взгляд на проблему изменения реальной действительности путем насильственного воздействия на личность, социальные общности, народы, государства и их группы в целях получения политических, экономических, духовных выгод и преимуществ[7].

Нужно иметь в виду, что времена, когда террористы были побуждаемы чисто политическими целями и идеалами, безвозвратно уходят в прошлое[8]. В условиях усиливающейся деморализации населения, утраты социальных ориентиров целыми его группами, резкого снижения правовой культуры граждан террористы, как правило, оказываются простыми уголовниками, лишь прикрывающимися политическими, религиозными или какими-либо другими идеями[9].

Следует также подчеркнуть, что российский терроризм изначально был преимущественно криминальным, поскольку террористические преступления совершались членами преступных группировок в ходе борьбы за сферы влияния, контроль за выгодными «точками» и в ходе криминальных «разборок». В числе жертв криминального террора оказывались в первую очередь предприниматели, «несговорчивые» представители власти, состоятельные граждане и лица, отвечающие за распределение ресурсов в центре и на местах. Позже услугами преступных организаций стали пользоваться для устранения конкурентов в экономической и политической деятельности, оказания давления на различные органы власти при распределении материальных благ (в частности, льгот на экспорт). Под прицелом террористов оказывались крупные промышленные предприятия стратегического значения, железнодорожные, автомобильные и морские пути, трубопроводы, крупные компании, руководители предприятий и т. п.

Эти сугубо криминальные (не межцивилизационные) корни российского терроризма позволяют констатировать наличие тесной связи между ним и иными видами преступности, в первую очередь, организованной. Представляется, что среди всего многообразия связей терроризма и организованной преступности можно с известной долей условности выделить три основных направления их взаимодействия.

Во-первых, это обращение преступных сообществ и иных субъектов организованной преступности к практике террора (терроризирования) для достижения своих собственных (в т. ч. и экономических) целей. В. С. Овчинский отмечает даже, что активное использование для достижения сверхприбылей, устрашения власти и конкурентов — методов уголовного терроризма является особенностью российской организованной преступности[10]. При этом терроризм организованных преступных сообществ (внутренних и международных) направлен прежде всего против государства и его экономической деятельности, а также его представителей с целью воспрепятствовать расследованию уголовных дел и исключить проведение жесткой уголовной политики, а иногда и для того, чтобы обеспечить ликвидацию активных сотрудников правоохранительных органов или принудить судей к вынесению мягких приговоров и т. д.

Данное направление проявляет себя не только во внутригосударственной сфере, но и в сфере международной и транснациональной преступности. «Хотя терроризм и не является непосредственной сферой деятельности транснациональных криминальных сообществ, многие специалисты и эксперты ООН в своих документах отмечают, что при анализе криминальных акций транснациональных организованных сообществ неизменно возникают вопросы использования тактики террора и связей с террористическими организациями.

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7 См.: Кафтан В. В. Терроризм как общественное явление современности. М., 2004. С. 12—13.

8 См.: Авксентьев В., Медведев Н., Семенов В. Политический экстремизм: метаморфозы нормы // Северо-Кавказский регион. 1998. № 4. С. 33—37.

9 См.: Морозов Г. И. Терроризм — преступление против человечества (международный терроризм и международные отношения). М., 2001. С. 13—24, 35—41; Корнелюк О. В. К вопросу о мотивации терроризма // Проблемы борьбы с терроризмом и организованной преступностью. Уфа, 1999. С. 62—66; Яни П.С. Угроза совершения теракта // «Законность», 2012, N 2; и др.

10 См.: Овчинский В. С. XXI век против мафии. Криминальная глобализация и Конвенция ООН против транснациональной организованной преступности. М., 2001. С. 15.

Характеристики террора и международного терроризма в той или иной мере присущи криминальной деятельности организованных преступных формирований» [11].

Вторым направлением взаимосвязи оргпреступности и терроризма является стремление террористов к организованности собственной террористической деятельности. В этой связи А. И. Долгова прямо указывает: «Если говорить о широкомасштабной террористической деятельности, то она всегда бывает результатом объединения усилий большого числа субъектов, создания специальных криминальных структур, разработки систем ее финансового, кадрового и иного ресурсного обеспечения. В таких условиях терроризм нереален без совершения системы разнообразных преступных деяний, а конкретная террористическая акция выступает именно как элемент сложной, многоходовой криминальной деятельности» [12]. В настоящее время террористы пользуются помощью различных структур, поддерживающих в той или иной форме международный терроризм, для расширения руководства сетью своих организаций, подготовки кадров, транспортировки оружия и распространения своих идей за пределами государств дислокации. Террористические группировки, использующие возможности организованной преступности, стали в большей мере самодостаточными, причем грань между терроризмом и различными видами организованной преступной деятельности становится все более размытой.

Наконец, третьим направлением связи терроризма и организованной преступности является обращение террористов к организованным преступным сообществам за финансовой поддержкой и собственно финансирование террористической деятельности субъектами организованной преступности. Именно это направление позволяет установить место легализации криминальных доходов в системе взаимосвязи организованной преступности и терроризма.

Конфронтация террористических организаций с государственной властью, утрата ими поддержки со стороны широких слоев населения заставляет террористов искать альтернативные источники финансовой поддержки своей деятельности. С 90-х гг. прошлого столетия террористы стали активнее интересоваться методами, используемыми в мире организованной преступности для финансирования собственной деятельности. Транснациональные преступные организации, возникшие в 90-е гг., во многих отношениях послужили примером для террористических групп, которому они следовали, когда им были нужны деньги для финансирования своей деятельности. Причем делать это было сравнительно просто, так как большинство форм организованной преступной деятельности не требовали ни особых навыков, ни больших первоначальных вложений или инвестиций. С учетом низких первоначальных затрат на эту деятельность, с одной стороны, и ее высокой рентабельности – с другой, террористы стали шире заимствовать методы, используемые организованной преступностью. Не случайно Международной конвенцией о борьбе с финансированием терроризма[13] предоставление денег фактически признается соучастием в международном терроре.

Особое место в ряду источников финансирования терроризма со стороны организованной преступности занимают доходы от производства и оборота наркотических средств. Сегодня большинство ученых сходятся во мнении, что основные средства для финансирования международного терроризма (с последующей их легализацией) поступают главным образом от продажи наркотиков, включая героин в Афганистане и Юго-Восточной Азии, а также кокаин — в Латинской Америке[14]. Постепенно в криминологической литературе для обозначения этого явления появился даже особый термин — «наркотерроризм»[15]. И

11 Яценко В. А. Транснациональная организованная преступность: криминологическая характеристика и предупреждение : автореф. дис. … канд. юрид. наук. Ростов н /Д, 2003. С. 16.

12 Долгова А. И. Преступность, ее организованность и криминальное общество. М., 2003. С. 504.

13 См.: Международная конвенция о борьбе с финансированием терроризма. Принята резолюцией 54/109 Генеральной Ассамблеи ООН от 9 декабря 1999 г. // Собрание законодательства Российской Федерации. 2003. № 12. Ст. 1059.

14 См.: Глобализация наркобизнеса: угрозы для России и других стран с переходной экономикой. М., 1999. С. 6—14.

15 Более 25 лет назад сформировалось мнение о связи терроризма с другими формами преступности, тогда же был введен в употребление термин «наркотерроризм» применительно к террористическим актам, совершаемым в Колумбии и Перу крупными организациями, занимающимися наркоторговлей. См. подробнее: Голик Ю. В. Одиннадцатый Конгресс ООН по предупреждению преступности и уголовному правосудию // Современные разновидности российской и мировой преступности: состояние, тенденции, возможности и перспективы противодействия : сб. науч. тр. / под ред. Н. А. Лопашенко. Саратов, 2005. С. 41—47.

это не случайно. С одной стороны, производство и продажа наркотиков — одно из наиболее экономически перспективных направлений деятельности организованных преступных сообществ. С другой стороны, особенности этого криминального бизнеса всегда требовали активного вмешательства наркобаронов в политику, вплоть до стремления поставить под свой контроль целые государства или создать собственные квазигосударственные образования. При этом методы террора во всех его разновидностях выходят на первый план. Применение террористических методов имеет целью устранить соперников в той или иной сфере наркобизнеса, а также запугать правительства и правоохранительные органы, пытающиеся противодействовать операциям транснациональных преступных сообществ. Насилие служит также средством поддержания порядка и дисциплины внутри подобных организаций.

Как отмечалось в материалах Совещания ФАТФ, «отмывание преступных доходов и финансирование терроризма представляют собой два типа финансовых преступлений с разрушительными эффектами, которые скрываются казалось бы за безобидными финансовыми транс-акциями. Криминальные доходы, от полученных мелкими наркодилерами до имущества, похищаемого из государственной казны правительственными чиновниками, обладают способностью коррумпировать и в конечном счете дестабилизировать общество или даже целиком национальные экономики. Террористы могут осуществлять свою неправомерную деятельность через свои сети посредством и при содействии скрытых структур финансовой поддержки организованной преступности. В обоих случаях для отмывания преступных доходов и поддержки террористической деятельности преступники или террористы используют несовершенства легальной финансовой системы» [16].

Следовательно, финансово-экономическая деятельность организованных преступных групп, включая наркоторговлю, контроль над банковской системой, коррупцию высокопоставленных должностных лиц, оказалась самым тесным образом связана с деятельностью и целевыми установками террористов-сепаратистов. Ситуация, сложившаяся в России, не являлась исключением из общего правила, а, скорее, отражала общемировую тенденцию. Крупнейшие транснациональные криминальные структуры проявили настойчивую активность в сфере установления взаимоотношений с целым рядом террористических организаций, например с отрядами Сендеро Люминозо в Перу, Революционными вооруженными силами Колумбии и др.[17] Поэтому связь терроризма с организованной преступностью очевидна.

Следует обратить внимание, что процессы отмывания денег в качестве элемента системы оборота средств, предназначенных для терроризма, имеют свою специфику.

Легализация по своему целевому назначению состоит в том, чтобы скрыть криминальный характер происхождения доходов и включить «грязные деньги» в легальный экономический оборот. Финансирование же терроризма, напротив, предполагает криминальное использование денежных средств, полученных от различных источников, в т. ч. доходов от преступной деятельности и доходов от легальной экономической деятельности. Однако очевидно, что эффективность финансирования терроризма требует легального прикрытия финансовых операций, придания правомерного вида как их источникам, так и целям. В силу этого финансирование террористов часто характеризуется как процесс, обратный отмыванию доходов. Хорошим примером служит сбор денег на благотворительные цели. В этом случае участие организаций, финансирующих террористов, не скрывается, так как они представляют легальный бизнес, однако скрывается цель их вложений.

Легализация в системе взаимосвязи организованной преступности и терроризма выполняет весьма значимую функцию – она, с одной стороны, обеспечивает видимость легального характера доходов организованных преступных групп, а с другой – видимость легального характера источника финансирования терроризма. Тем самым она становится как бы «связующим звеном» между оргпреступностью и терроризмом, выступая условием существования и развития обеих криминальных практик и позволяя им избегать легального контроля.

Сегодня правоохранительным органом большинства стран известно, что один из наиболее эффективных способов противодействия организованной преступности и террориз-

16 Об отчете ФАТФ по типологиям отмывания преступных доходов и финансирования терроризма за 2003—2004 гг.: указание оперативного характера ЦБР от 17 августа 2004 г. №100-Т // Вестник Банка России. 2004. № 51.
17 См.: Воронин Ю. А. Указ. соч. С. 16; Робинсон Дж. Всемирная прачечная: террор, преступления и грязные деньги в оффшорном мире. М., 2004. С. 464—466; Финансовые «прачечные» // ЭЖ-ЮРИСТ. 2006. № 40.

му — это пресечение их финансирования. Многие государства внесли изменения в правила и практику деятельности своих контролирующих структур, чтобы наиболее действенно выявлять, отслеживать и изымать криминальные денежные средства[18]. Основные усилия направлены на воспрепятствование доступа террористов к мировым организованным финансовым структурам, неофициальным системам перевода денег и различным благотворительным фондам.

Задача правоохранительных органов, осуществляющих борьбу с финансированием терроризма, заключается в том, чтобы лишить террористов их самого важного сырьевого компонента — денег на оружие, взрывчатку, каждодневную агентурную поддержку. Основная цель — разрушить альянс террористических групп и организованной преступности, сложившийся преимущественно вокруг деятельности по легализации криминальных средств.

Очевидно, что необходима скоординированная правовая база, обеспечивающая подъем на качественно новый уровень усилий мирового сообщества по противодействию организованной преступности и терроризму, а также сотрудничество государств с международными финансовыми и банковскими учреждениями для усиления борьбы с деятельностью по отмыванию денег, полученных от торговли наркотиками[19].

Резолюции Совета Безопасности ООН[20], например, требуют всесторонней поддержки государств в противодействии терроризму посредством широкого спектра мероприятий:

– запрещения и замораживания финансирования террористов;

– запрета на оказание любой поддержки террористам;

– отказа террористам и тем, кто их поддерживает, в безопасном убежище;

– предотвращения свободного передвижения террористов;

– обмена информацией.

Кроме того, Совет Безопасности ООН выступает за продолжение вовлечения всех государств в подписание, ратификацию и исполнение антитеррористических соглашений; оказание помощи странам в расширении возможностей по борьбе с финансированием террористов. В настоящее время большинство государств выразило свою готовность к этим действиям.

Опираясь на проанализированный материал, можно сделать общий вывод, что терроризм сегодня не в состоянии существовать и развиваться без поддержки со стороны организованной преступности. В свою очередь, последняя также не случайно стремится к альянсу с террористическими организациями: террор становится все более важным инструментом для организованной преступности, и она все чаще вынуждена прибегать к помощи «специализированных» террористических организаций. С другой стороны, финансирование деятельности террористов в основном замыкается на организованной преступности. Взаимозависимость приводит к своеобразной конвергенции структур организованной преступности и структур терроризма. Центральной точкой этой конвергенции, где прежде всего пересекаются их интересы, является финансово-экономическая деятельность организованных преступных сообществ, в т. ч. и по отмыванию криминальных средств.

Вместе с тем конвергенция международного терроризма и организованной преступности является лишь общей тенденцией, которая не может привести к их полному слиянию. Как нам представляется, существенное различие всегда будет сохраняться на уровне конечных целей и мотивов: если организованная преступность руководствуется прежде всего корыстными мотивами, то терроризм главным образом основан на идеологических, политических и этнических постулатах. В этом смысле представляется малоперспективным говорить об угрозе полного слияния терроризма и организованной преступности, о чем пишут некоторые отечественные криминологи. Более актуален вопрос об угрозе их дальнейшего сближения, которое в условиях глобализации приобретает системный характер. Определяя особенности взаимоотношений транснациональной организованной преступности и международного терроризма, можно отметить, что основная предпосылка для их

18 См.: Брусникин Н. Ю. Федеральный закон «О практических мерах по борьбе с легализацией доходов, полученных преступным путем, и с финансированием терроризма»: проблемы применения // Право и безопасность. 2002. № 2—3.

19 См.: Ерохова Н. В. Международное сотрудничество в борьбе с терроризмом // Труды юридического факультета Ставропольского государственного университета. Ставрополь, 2003. Вып. 3. С. 223—225.

20 См.: Резолюция Совета Безопасности ООН от 28 сентября 2001 г. № 1373 // Московский журнал международного права. 2002. № 1; Резолюция Совета Безопасности ООН от 12 ноября 2001 г. № 1377 // Московский журнал международного права. 2002. № 1; Резолюция Совета Безопасности ООН от 13 марта 2002 г. № 1397 // СПС «ГАРАНТ-Максимум. ПРАЙМ». Версия от 10 ноября 2012 г.

долговременного и постоянного сотрудничества также лежит в области интересов финансово-экономического характера.

Именно финансовая деятельность организованных преступных сообществ является условием их сближения и сотрудничества с международным терроризмом. Данный вывод имеет практическую значимость, поскольку ориентирует сотрудников правоохранительных органов на установление жесткого контроля прежде всего за финансовыми операциями организованных преступных сообществ в целях борьбы с международным терроризмом, включая и его предупреждение.

Одним из наиболее эффективных средств противодействия международной преступности в условиях глобализации становится выявление путей движения денежных средств организованных преступных группировок и террористов. Расследуя финансовую деятельность преступных сообществ, связанных с международным терроризмом, правоохранительные органы могут выявить и обезвредить тех лиц, которые стоят во главе этих групп, и оставить террористические организации без денежных средств, необходимых для финансирования дальнейших террористических действий. Сегодня противодействие организованной преступности — это в значительной мере перекрытие каналов движения и легализации преступных капиталов международной организованной (экономической) преступности. Именно в результате организованной преступной деятельности эти доходы достигают крупных и особо крупных размеров, успешно отмываются и приумножаются, используются для коррумпирования государственных и банковских служащих. Легализация криминальных средств стала одним из наиболее изощренных и сложных видов «интеллектуальной» преступности. Возможность предупреждения и борьбы с ней предполагает адекватный ответ российской криминологической науки, учитывающей передовой зарубежный опыт и наиболее ценные, перспективные наработки криминологии, к которым относится разработка и практическое применение комплексных моделей противодействия легализации материальных ценностей, приобретенных преступным путем.

АННОТАЦИЯ

В статье рассматривается сущность явления терроризма и его взаимодействие с организованной преступностью. Анализируются проблемы противодействия финансированию терроризма, указываются источники и каналы такого финансирования в России и мире, а также предлагаются конкретные предложения по оптимизации борьбы с финансированием терроризма путем воздействия на транснациональную преступность.

Автор приходит к выводу, что сегодня противодействие организованной преступности — это в значительной мере перекрытие каналов движения и легализации преступных капиталов международной организованной (экономической) преступности.

Ключевые слова: терроризм, террористическая деятельность, взаимодействие организованной преступности и терроризма, содействие и финансирование террористической деятельности.

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LEGAL AND PSYCHOLOGICAL BASIS FOR THE PREVENTION OF PROFESSIONAL DEFORMATION OF OFFICERS OF INTERNAL AFFAIRS

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Abstract: The paper summarizes and fully analyzes the amount of psychological- world-view, generally-scientific and special-scientific methods, which main discursion contains the objective analysis of the researched problem- professional deformation of the officers of the bodies of internal affairs of Ukraine.

Keywords: method, methodology, the bodies of internal affairs of Ukraine, professional deformation, prevention.

Professional deformation, emerging directly in the realm of official activities affects its dominant subject - a man. Representative features, observed in the activity of the "deformed» officials are: preconceived attitude to the object of administrative performances; arbitrarily-subjective interpretation of the legal type of behavior; transfer of the official style of communication with the object and some professional methods and techniques of professional activity into the private areas of communication and interaction with the nearest social environment; professional transformation of personality; changes in «self - image» - the system of employees' perceptions of themselves [1, p. 52].

Law enforcement institutions prosecute a certain list of constitutional functions and are the part of the mechanism of the state administration. Their extraction of this system and accommodation with quasi-preferential functions is not appropriate in general democratic tendencies of modern state-governing: all social transformations should affect them by inertia and with the same intense as the rest of the state institutions. Law enforcement agencies are, as the matter of fact, not only a part of the state mechanism, but should also be a mirror of the society – the mirror, that is often an object of complains of those, who traditionally forget about their own flaws.

A constant personnel rotation, internal disorders, lack of own institution within the structure of the police that would produce necessary new ideological attitudes and traditions - factors that all are leading to the decline of «fighting against crime» spirit of policemen consequently, determines such phenomena as corruption, social abuse of the office, suicidal behavior and so on.

As the factors of professional deformation have effect on the specialist's identity, the development of his personal background, along with the issues of diagnosis of this phenomenon makes the question of prevention in the police departments so important.

The "prevention of professional deformation" is usually interpreted as the system of preventive measures aimed at reducing the possibility of assumptions and manifestations of this phenomenon. This issue gained considerable attention in the researches of S. Borisova, A. Budanov, S. Slivka, V. Medvedev, V. Vasilieva, N. Granat, V. Stolbovoi, O. Porfimovych, N. Kalchenko, E. Reznikova, V. Kikot and other authors who have analyzed this phenomenon. S. Borisov, for example, dedicates a special role in the prevention of professional deformation to the psychological measures and offers to implement them into the diagnosis of personality process using the "business game" method of research during counseling as well as during the conduction of the police psychological training [3]. This goal is achieved by playing simulation modeling and solution-oriented professional situations in the combination group of "playing- activity" participants. The main advantage of this type of training is that in the process of professionally oriented situations modeling the development of professional conduct skills preventing the occurrence of manifestations of professional deformation arises.

A. Budanov, analyzing the effect of three groups of determinants on the development of professional deformation (caused by specific law enforcement activities related to personal characteristics of workers and psychosocial factors), concluded that the work on the prevention of professional deformation involves eliminating the causes and conditions that belong to this group of determi-

nants. These determinants annihilation include: a) improving professional psychological selection of the service through a better diagnosis of personality traits; b) regular psycho-diagnostics that is oriented towards changes in the expression of individual employees in the service indication; c) improvement of the moral and psychological levels and legal education of the individual; d) regular psychological training, games and psychological consultations with preventive and corrective orientation [4].

S. Slivka believes that preventing and combating police officers professional deformation will lead to: a) the formation of effective personal selection system in the police on a competitive basis; b) the formation of professional ethics; c) improvement of the police officers knowledge on their professional duties; d) compliance with internal and external imperatives while performing routine professional duties [5].

A wide range of preventive and corrective facilities are offered by A. Dulov. It consists of adequate powers of law enforcement, combined with permanent monitoring of their use, the development of useful skills and techniques of service, improvement of the mental health, continuous cultivation of the best moral and political qualities and improvement of professional ethics [6].

V. Vasiliev considers professional guidance, psychologically supported professional selection, and targeted training in educational institutions as the main means of prevention of professional deformation. In his opinion, resistance to professional deformation should be done by regular training at schools, by the use of highly-effective practices, introduction of advanced forms of work organization, effective supervision of the observance of legality in criminal investigations [7].

N. Kalchenko, E. Reznikov believe that the prevention of professional deformation should include a wide range of preventive measures of the non-psychological and psychological nature, such as: a) analytical work, which is aimed at indicating the quality of the personnel and analyzing the causes of violations of official ethics and discipline by police officers; b) pedagogical job that will promote the continuity between police officers and will increase the management culture, operation mentoring maintenance in the course of the professional performance etc. c) legal training that will facilitate the systematic influence on the minds and behavior of employees in order to create legal awareness and legal orientation, fostering the skills of legal knowledge practical application in their daily work; d) professional and moral training of police officers, including improving skills of professional ethics observance; e) the measuring of organizational and management character, involving the coordinated interaction of policemen, thinking through job descriptions, comparison and implementation of a reasonable schedule of work and taking care of the quality of their worker [8, p. 129-131].

Agreeing with the previous authors, we believe that the work on preventing the professional deformation of personality should include a complex of legal, organizational staff and other activities at various levels of government, starting with the Verkhovna Rada of Ukraine regulations that will change the actual state of the bodies of internal affairs of Ukraine, leading to the stability of the positive effect of the media in terms of creating a positive public opinion of the police and providing the comprehensive improvement of the police personnel.

The professional deformation of personality is a natural continuation of the deformation of our society so we can conclude that the elimination of the negative factors is the first step in the path of the prevention of professional deformation and correction of the typical police employee's individuality.

Therefore, the second step in the process of the prevention of an individual's professional deformation, in our opinion, is the increase of the management efficiency that consists of:

– the scientific construction of the socialization process;
– effective motivation and stimulation of employees;
– improvement of the methods of recruitment and selection of employees;
– organization of employees training;
– unconstructive conflicts overcoming in the process of law-enforcement;
– creation of a favorable psychological climate in the team;
– increasing the psychological competency of the officers;
– carrying out work on stress management in the course of professional activities and others.

The need to perform duties in dynamic and hardly-predictable conditions is usually associated with arrogance and aggressiveness of criminals. Working in the conditions of chronic stress requires not only presence of the highly-trained nervous system of the police officers, a high level of the professional skills, but also certain individual psychological qualities.

Therefore, the third step in the process of the prevention of professional deformation of police officers, as well as during the enhancement of the effectiveness of managerial influence on staff is a comprehensive implementation of the concept of prevention of professional deformation of the staff employed with the internal affairs.

Reviewing the problem of the prevention of professional deformation in the socio-psychological perspective, appropriate, in our opinion, will be the complex analysis of the motivational structure of the personality.

The problem of the activity determination influence on the development of professional deformation of policemen, in our opinion, comes from the concept of corporate (organizational) culture.

The main hypothesis of our study is the possibility of preventing or correcting deformations in the professional activity of the police personnel. Realizing this hypothesis, we decided to extract three main points of this problem:

– the negative impact of the professional deformation on the effectiveness of performance. Professional deformation can lead to errors in behavior and professional activity, the effects of which can cause significant losses as the officials while interacting with the «surrounding world» may cause negative evaluation of others that may lead to negative public opinion about the police;
– diagnostic value, due to the capacity of identification of professional deformation signs and organization of effective forms of its prevention and correction for the high quality of professionalism and correct selection of individual behaviors in different communicative situations[9, p. 646].

Nowadays, the preventive work emphasis is placed on the aspect of officials' training and on the border between «bad and very bad» aspects of education. Therefore, it is evident that the organization of prevention of professional deformation should include a comprehensive implementation of measures, dedicated to:

– legal regulation of the police officers' actions;
– measures of the organizational and managerial nature;
– organization of training and education of police officers in order to increase the motivation for effective performance of each employee;
– the system of legal guarantees and rights of police officers stabilization.

It should be noted that the prevention of the professional deformation, implementation of which is strongly-related with the contribution of the socio-economic ideology is impossible to be carried out without certain changes in the political and socio-economic spheres of the society. One of the main guarantees of the successful functioning of the state as a whole is the creation of appropriate conditions for effective state apparatus of power and control activity.

The important role in the prevention of policemen professional deformation belongs to the integral system of personnel establishment, which provides the following results:

– constant evidence-based assessment of the state of the staff providing psychological and operational activities in the police agencies and departments. On the basis of the introduction of the unified defining mechanisms for optimal management, the formation of domestic ideology and improvement of the law-enforcement structure image will be made;
– specification of different official procedure purposes indication system, depending on the need for preventing or overcoming professional deformation will be produced;
– the new methods of determinants that can cause the development of professional deformation in the police institutions diagnostic will be made;
– the modernization of work plans formation and setting new goals will be provided etc.

In this way, according to the previous facts, we can declare that the researches on professional deformation of all subjects of law-enforcement personnel is highly-important because it is undis-

putedly leading to the highest prioritization of the improvement process of law enforcement system, including the professional-psychological and managerial training, educational and preventive work in the police departments. Specific tasks to be solved in the realm of policemen professional deformation prevention include:

– development of professional police officers perceptional image and high culture in the official procedures;
– development of moral and psychological stability and business focus of all police officers;
– formation of policemen installation in compliance with the code of honor;
– improving the style and methods of personnel management;
– creating the optimal moral and psychological climate in services and law enforcement departments.

CONCLUSION

Thus, preventing and countering professional deformation is a necessary component of the modernization of the police system. The entire system of factors having effect on the employees during the service should be improved. And the integrative basis of these procedures should be a humanistic approach to law enforcement officials as professionals.

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9. Ожегов С.И. Толковый словарь русского языка / С.И. Ожегов. – М.: А ТЕМП, Азъ, У-ФАКТОРИЯ, Изд. группа, 2004. – С. 944.

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CRIME PREVENTION AND SOME ISSUES OF SUBSTANTIVE CRIMINAL LAW OF THE REPUBLIC OF SERBIA

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Abstract: The paper analyzes certain solutions given in the criminal legislation of the Republic of Serbia resulting from the amendments and modifications of the Penal Code of Criminal Law enacted in December 2012.[1] The first part of the paper which includes introductory remarks focuses on the contemporary issues dealing with the harmonization of the substantive criminal law with European standards. It is of great importance for Serbia as the country which is trying to become a full member of the European Union, to follow the activities of the EU and its members in the field of crime prevention. The most useful thing for all countries, including Serbia, is to revise certain incriminations in criminal legislations covering the issues which international agreements consider important as to be included in national criminal laws. The second part of the paper analyzes the institute and other legal solutions of the substantive criminal law regarding the criminalization of terrorism. Daily we witness terrorist incidents escalating all over the world. In the past few decades the international community has been intensively trying to create efficient mechanisms for the prosecution and punishment of offenders committing serious crimes such as terrorist acts. Countries are more and more focused on the harmonization of national criminal legislations with international documents with the aim of unifying the incriminations of terrorism and relevant criminal acts. In spite of increasing readiness and consensus among countries with regard to the reform and further development of legal solutions, this process has been facing a number of challenges. The third part of the paper deals with the issues concerning the harmonization of the Penal Code of the Republic of Serbia with the Council of Europe Criminal Law Convention on Corruption and the United Nations Convention against Corruption. The fourth part offers a more thorough analysis of the legal regulation of binding aggravating circumstances for hate crimes. Taking into account the relevant international documents, the aim of the new provision of Article 54a of the Penal Code is to provide more severe penalties and thus strengthen criminal law protection of extremely vulnerable social groups whose members are victims of various hate crimes. The conclusion of the paper includes the author's suggestions for viable legal solutions *de lege ferenda*.

Keywords: criminal legislation, criminal law, Penal Code, corruption, terrorism, hate crimes, organized crime, international standards.

INTRODUCTION

Globalization, as a dynamic economic, cultural political and legal process has strong influence on national legislations for numerous reasons. The comprehension of international intention to punish certain criminal offences such as offences provided by the Rome Statute as well as terrorism, corruption, hate crimes, human trafficking, organized crime, etc. is grounded on mutual interests closely connected with the process of globalization. A surge in criminal offences is the result of the growing mobility of both people and goods as well as the gradual erasure of state borders, especially in Europe. Profit is considered to be the paramount goal of capitalism in front of which all moral

1 This paper is the result of the research on the following projects: "Violence in Serbia – Causes, Forms, Consequences and Social Response", which is financed by the Academy of Criminalistic and Police Studies; "The Development of Institutional Capacities, Standards and Procedures to Fight against Organized Crime and Terrorism under the Conditions of International Integrations", which is financed by the Ministry of Education, Science and Technological Development of the Republic of Serbia (No. 179045) and "The Effects of Applied Physical Activities on Locomotive, Metabolic, Psycho-Social and Educational Status of the Population of the Republic of Serbia", which is financed by the Ministry of Education, Science and Technological Development of the Republic of Serbia (No. III 47015).

norms and criteria for acceptable and unacceptable behaviour retreat. Therefore, it is extremely difficult to prevent and combat such crimes.[2] Apparently, the late 20th century has both advantages and disadvantages. Alongside economic, political, and cultural globalization, environmental protection, crime and justice have also been influenced by the globalization.[3] The commission of criminal offences has become a worldwide epidemic. However, such a situation has influence on the forwarding of information, ideas, tendencies and activities within regional and international organizations resulting in the unification of incriminations and penalties for the above mentioned crimes. If globalization is considered from the aspect of the commission of crimes, it requires a global cooperation and proportionate reaction of all organizations responsible for the maintenance of public peace and order. A hundred years ago, Franz von List wrote that "the criminal law science" as "clearing up of general features of a crime… is imperatively international". There must be criminal law science whose purview will not be limited by national legislations and which will be grounded on the general knowledge.[4] Hence, the author reviews certain categories of behaviour qualified as criminal offences by the Penal Code of the Republic of Serbia the definitions of which have been extended by the latest amendments and modifications of the Penal Code[5] or which have been modified by new incriminations introduced in the Special Part, i.e. new provisions introduced in the General Part of the Code. Namely, such behaviours are qualified by criminal law science which is not limited by national legislation but is grounded on the consensus defined by certain international agreements.

Therefore, the process of globalization which has partly been influenced by the rapid flow of information, faster movement of people and partially by multinational bodies and corporations[6] has an impact on a uniform definition of certain criminal offences, penalties for such offences, as well as on new provisions introduced in the national criminal legislation. While implementing new provisions, special attention should be paid to the national legal system, our legal terminology, general principles and institutes of criminal law. Undoubtedly, it is a more difficult but definitely more adequate way of implementing legal international norms.[7]

The text below focuses on terrorist criminal acts, corruption and hate crimes.[8]

INTERNATIONAL STANDARDS IN THE FIELD OF THE COMBAT AGAINST TERRORISM AND THE PENAL CODE OF THE REPUBLIC OF SERBIA

Modern, i.e. the 21st century terrorism, presents one of the most serious global security threats leading to new, complex risks while the consequences caused by terrorist acts are more and more devastating. Terrorists use legal infrastructure of their enemies to commit terrorist acts. Beside conventional means, terrorists more and more frequently exploit petrol, fertilizers, chemical materials, computer networks and other objects used in everyday life as efficient means in terrorist acts. It indicates that nowadays the logistics of terrorism has become simpler and hard to detect.[9] The latest terrorist methods are the result of the utilization of new technologies, the crossings of terrorist groups across international borders and the change of the source of support. The employment of information technologies, such as the Internet and mobile phones has widened the scope of actions committed by terrorist groups. Precisely, the means of global information era has

2 V.Đ. Degan, B. Pavišić, V. Beširević: *Međunarodno i transnacionalno pravo*, Beograd, 2011, p. 21
3 M. Simović, Aktuelna pitanja materijalnog i procesnog krivičnog zakonodavstva: normativni i praktični aspekt, objavljeno u *Aktuelna pitanja krivičnog zakonodavstva*, Srpsko udruženje za krivičnopravnu teoriju i praksu, Beograd, 2012, p. 15
4 H.J. Hirsch, Internacionalizacija kaznenog prava i kaznenopravne znanosti, Hrvatski ljetopis za kazneno pravo i praksu, god.12, no. 1/2005, Zagreb, p. 161
5 Zakon o izmenama i dopunama Krivičnog zakonika Srbije, *Službeni glasnik RS* br. 121/2012
6 M. Cavadino, J. Dignan, *Penal Systems-a Comparative Approach*, Sage Publications Ins: London, 2006, p.3
7 More about the issue in: Z. Stojanović, Pravno-filozofske koncepcije u Predlogu KZ Srbije i Krivičnom zakoniku Crne Gore, Zbornik radova sa Savetovanja "Kazneno zakonodavstvo – progresivna ili regresivna rešenja", Institut za kriminološka I sociološka istraživanja, 2005, p. 10
8 Hate crime is a term which in criminal law refers to a crime motivated by hatred.
9 U. Sieber, Legitimation und Grenzen von Gefȁhrdungsdelikten im Vorfeld von terroristischer Gewalt, Neue Zetischrift für Strafrecht, 7/2009, p. 353

led to new activities closely connected with terrorism, primarily including the recruitment of potential new members and attracting sympathizers. Numerous terrorist groups launch powerful political messages *online* to the general public. They have easily browsed official and unofficial web-pages and almost all of them are presented in the English language.[10] The globalization enabled terrorist organizations to cross international borders easily, in the same way in which business and trade interests are connected. The erasure of barriers along the entire North American free trade zones and within the European Union has facilitated the flow of both bad and good things. Terrorism gets a special new dimension after the incidents of 11 September 2001. The whole world witnessed the emergence and maturing of a new era of terrorism – the era of global terrorism/global scope terrorism primarily motivated by ethnonationalism and religion.[11] Attacks on public means of transport in London, Madrid, and Moscow in the past years showed the public throughout the world that even European countries are endangered by terrorist attacks, leading to a number of reactions and activities of the European Union (meetings, conclusions, initiatives, and decisions). The forms of terrorism and means of its control and prevention have been considered by the UN and some regional organizations for a long time. On the international level, several important documents have been adopted with the aim of précising the concept of terrorism, as well as the measures and procedures taken in order to prevent it. Here we shall analyze two international documents important for the reform of our criminal legislation. They are: the European Union Council Framework Decision on Combating Terrorism dated 13 June 2002[12] with amendments and modifications from 2008[13] and the Council of Europe Convention on the Prevention of Terrorism CETS No. 196.[14] Although international sources bind countries to prevent and combat terrorism, they have failed as authorities in giving an adequate definition of a terrorist act. Additionally, the countries are bound to prevent and combat terrorism by fifteen international conventions and protocols, seven regional studies and numerous United Nations Security Council resolutions.[15]

The Council of Europe Framework Decision on Combating Terrorism has thirteen articles. The most important articles for national criminal legislations are: Article 1, which gives a single definition of terrorism for the whole territory of Europe, Article 2, which defines a terrorist group and Article 3, which lists criminal offences related to terrorism. EU Council Framework Decisions are aimed at harmonizing national legislations of the member states. They bind the member states to reach the defined goals leaving each country to choose its own methods for attaining them. Evidently, these decisions will come into force only after their implementation in national legislations. Framework Decision states robbery, document counterfeit and extortion (Article 3 of Framework Decision) as criminal offences related to terrorism. This article was amended in 2008[16], so that beside the above mentioned criminal offences the following are also considered to be related to terrorism: incitement to terrorism, terrorist recruitment and training. Incitement to terrorism includes any kind of message distribution inciting to terrorism no matter whether the criminal offence will be committed or not. Terrorist recruitment involves headhunt for individuals who will commit an offence stated in Article 1 of Framework Decisions. Terrorist training includes instructions for making and use of explosives, firearms or other weapons or injurious and dangerous materials, as well as instructions on other specific methods or techniques aimed at committing an offence stated in Article 1 of Framework Decisions.

The Council of Europe as the custodian of human rights, democracy and the rule of law in Europe, has been devoting its attention to terrorism issues for quite a long time. It has always been the

10 A. Kurth Cronin, Behind the Curve, Globalization and International Terrorism, in *Terrorism and Counter Terrorism, Readings and Interpretations – third edition*, prepared by Russell D. Howard, Reid L. Sawyer, Natasha E. Bajema, Higher education, 2009, p. 67

11 Ibidem, p. 63

12 *Council Framework Decision on Combating Terrorism*, 2002/475/JHA

13 *Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework decision 2002/475/JHA on combating terrorism*

14 The Convention was adopted in Warsaw on 16 May 2005 and came into force on 1 June 2007. Our country ratified the convention "Sl. Glasnik RS – međunarodni ugovori" no. 19/2009

15 E. Stubbins Bates, Terrorism and International Law, Oxford, Oxford University Press, 2011, p.1

16 *Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism*

forum of European countries committed to the development of joint strategies aimed at combating crime. Additionally, in broad terms, the Council of Europe is a regional organization because it comprises member states situated off European territory. After 11 September 2001, the Council of Europe decided to deal with terrorism issues once more. Namely, in 1977 European Convention on the Suppression of Terrorism (ETS No. 90)[17] was adopted in Strasbourg. Wishing to strengthen the combat against terrorism, the Council of Europe adopts Protocol Amending the European Convention on the Suppression of Terrorism ETS No. 190.[18] A Multidisciplinary Group on International Action against Terrorism, GMT which consisted of experts from 45 member states and a number of observer states and organizations worked on the Protocol. The Protocol amending Strasbourg Convention was adopted in 2003. Another group of experts (CODEXTER)[19] conceived a new instrument for the combat against terrorism – Council of Europe Convention on the Prevention of Terrorism CETS No. 196. It was adopted in Warsaw on 16 May 2005 and came into force on 1 June 2007. The new convention was adopted in order to intensify the efficacy of existing international instruments. It is aimed at strengthening the efforts of member states in preventing terrorism and sets out two ways for achieving this goal. The first one is the incrimination of certain types of behaviour: public provocations, terrorist recruitment and training. The other way is the strengthening of preventive measures both on the national and international level (modification of existing regulations on extradition and mutual aid). Provisions from articles 5 and 7 of the Convention (incitement to terrorism, terrorist recruitment and training) are of the utmost importance for the implementation in national criminal legislation.

The Amendment and Modification Act of the Penal Code of the Republic Serbia[20] has a number of amendments and modifications (Article 40 through 44), the most important of which are those arising from the new concept of terrorism offences, regarding crimes against humanity and other property protected by international law. In the past few years the international community has intensified the efforts to create mechanisms for the prosecution and punishment of offenders committing serious crimes[21], terrorism being certainly one of them. Article 391 of the Penal Code defines a terrorist act (no matter whether it is against the Republic of Serbia, a foreign country or an international organization), as well as numerous types of terrorist acts. This criminal offence and new terrorist offences, such as incitement to terrorism (Article 391a of the PC), terrorist recruitment and training (Article 391b of the PC), the use of lethal devices (Article 391v of the PC), destruction and damaging of a nuclear power plant (Article 391g of the PC) and terrorist alliances (Article 391a of the PC) were adopted and harmonized with a set of conventions aimed at preventing terrorism, particularly with the 2005 Council of Europe Convention ratified by the Republic of Serbia in 2009 and the Council of Europe Framework Decision on Combating Terrorism adopted on 13 June 2002 and amended by the Council of Europe Framework Decision on 28 November 2008. The enactment of these criminal offences guarantees extensive criminal law protection against all offences having the character of a terrorist act or preparatory terrorist acts. From a theoretical standpoint international institutions should play a leading role in preventing and combating terrorism.[22] That means that the definition of terrorism and related offences should be unified. The reasons are simple: easier international cooperation, information sharing among intelligence agencies, the monitoring of the evaluation of antiterrorist legislation and adopted strategies. Their proactive role may show good results because it gives detailed instructions on the means and methods countries may use within national criminal law.

It is interesting that terrorism does not fall within the competence of international criminal justice. The question remains whether some terrorist acts may be qualified as international criminal offences if they have been committed in the context of a wider and systematic attack against civilians (crimes against humanity). One opinion opposite to common belief is that terrorism, as an international criminal offence, exists and under certain circumstances may

17 Our country ratified this Convention, "Sl.list SRJ – Međunarodni ugovori", No. 10/2001
18 Additional protocol was ratified by our country, "Sl.glasnik RS – Međunarodni ugovori", No. 19/2009
19 In 2003 CODEXTER replaced the Multidisciplinary Group on International Action against Terrorism (GMT). CODEXTER is a group of intergovernmental experts on terrorism.
20 In further text the PC
21 D. Kolarić, *Amnestija u nacionalnom i međunarodnom krivičnom pravu*, Bezbednost, no. 1/2011, p. 116
22 K. Nuito, Terrorism as a Catalyst for the Emergence, Harmonization and reform of Criminal Law, *Journal of International Criminal Justice*, 4 (2006), Oxford University Press, p. 999

be qualified as a crime against humanity.[23] In the other opinion this interpretation of a crime against humanity is too extensive because, among other things, a terrorist organization cannot be identified with a country or state agencies involved in crimes against humanity (here a state's support to a terrorist organization would not be sufficient).[24] Two elements are indisputable for the existence of terrorism: an objective element which relates to the commission of either a violent or dangerous act and a subjective element relating to the intent to intimidate. We can conclude that there are defined, general characteristics of all terrorist acts no matter whether they are against one state and its constitution or international, i.e. jeopardize the interests of the international community and the relations within it. Terrorism has become a global issue and all nations are susceptible to this kind of attacks.[25]

INTERNATIONAL STANDARDS IN THE FIELD OF COMBAT AGAINST CORRUPTION AND THE PENAL CODE OF SERBIA

In the past few years, and we may freely say decades, corruption has become an issue of increased interest. Big corruption affairs have started to surface causing worries and increased interest both on the national and international levels. When we say "in the past few years" that does not mean that corruption is a new phenomenon that we are faced with for the first time. On the contrary, it existed in the past, it exists nowadays and undoubtedly it will exist in the future. Even in the past, rulers were familiar with the saying that the water may hold the ship, but it can also overturn it, and the danger of the boat being overturned originates from the officials' greed which causes people's discontent.[26] Over the years historical circumstances have changed. Corruption has evolved causing the general public's increased susceptibility to this phenomenon and requiring a wide range of measures against it.

Etymologically, the word corruption originates from the Latin word *corupcio* which, depending on the concrete situation, may mean immorality, dishonesty, perverseness, bribery, venality, subornation, vitiation…[27]

Although the international community has not found a general definition of corruption, everybody agrees that certain political, social or economic practices are corrupted. Depending on the point of view (psychological, sociological, criminal…) this word may have different meanings. Hence, corruption is generally defined descriptively indicating possible ambiguity of the concept.[28] The Penal Code of the Republic of Serbia to a great extent fulfils the standards defined by international documents in the field of combat against corruption.[29] International sources in the field of combat against corruption important for the criminal law reaction are the Council of Europe Criminal Law Convention on Corruption[30], Additional Protocol to the Criminal Law Convention on Corruption[31] and the United Nations Convention against Corruption.[32] The requirements defined by international documents that are to be implemented in the national penal code are as follows:

1) To incriminate bribery both in public and private sector;

23 Cassese, A: The Multifaceted Criminal Notion of Terrorism in International Law, *Journal of International Criminal Justice*, 4 (2006), Oxford University Press, p. 938

24 Stojanović, Z; Kolarić D; Krivičnopravno reagovanje na teške oblike kriminaliteta, Beograd, 2010, p. 72

25 Gardner, T; Andersen, T; *Criminal Law*, Thomson Wadsworth, 2006, p. 430

26 Z. Baisen, Combat against Corruption and the Participation of the Masses in China, *Seventh International Anticorruption Conference*, Beijing, China, October 6-10, 1995

27 M. Vujaklija, *Leksikon stranih reči i izraza*, Beograd, 1975, p. 479

28 N. Mrvić-Petrović, Korupcija i strategija njenog suzbijanja, *Temida*, 4/2001, p. 21

29 Group of States against Corruption, *Third Evaluation Round, Evaluation Report on the Republic of Serbia-Incriminations (ETS 173 and 191, GPC 2)*, Adopted by Greco at its 48th Plenary Meeting (Strasbourg, 27 September-1 October 2010)

30 The Convention was opened for signature on 27 January 1999 and came into force on 1 July 2002. This Convention was ratified by our country which thus assumed the obligation to harmonize provisions of the national law with this source of law. More about the issue in: Službeni list SCG, *Međunarodni ugovori, No. 2/2002*

31 The agreement was opened for signature on 15 May 2003 and came into force on 1 February 2005. Additional Protocol to the Criminal Law Convention on Corruption was ratified by our country on 6 November 2007. More about the issue in: Službeni glasnik RS, *Međunarodni ugovori, No. 102/2007*

32 The Republic of Serbia ratified the United Nations Convention against Corruption. The Convention came into force in Serbia on 30 October 2005. More about the issue in: Službeni list SCG, *Međunarodni ugovori, No. 12/2005*

2) To incriminate bribery both of foreign and domestic public officials;
3) To introduce accountability of legal entities for criminal offences of corruption (although the same accountability is required by some other international documents such as: *the Convention on the Laundering, Search Seizure and Confiscation of the Proceeds of Crime (No. 141), the United Nations Convention against Transnational Organized Crime, the Convention on the Laundering, Search Seizure and Confiscation of the Proceeds of Crime and on the Financing of Terrorism);*
4) In accordance with the Additional Protocol to the Criminal Law Convention (ETS 191) it is necessary to incriminate the bribery of foreign and domestic arbitrators, as well as foreign and domestic lay justices;
5) To incriminate trading in influence.

The Criminal Law Convention, although aimed at developing general standards concerning the criminal offences of corruption, does not give a unique definition of corruption. The Council of Europe Multidisciplinary Group on Corruption[33] began their work based on the following temporary definition: "Corruption is bribery and any other behaviour in relation to persons entrusted with responsibilities in the public or private sector, which violates the duties that follow from their status as a public official, private employee, independent agent or other relationship of that kind and is aimed at obtaining undue advantages of any kind for themselves or for others".[34] The aim of this definition was to ensure that nothing from its range of activities was left out. Although such a definition did not necessarily match the legal definition of corruption in most member states, particularly the definition provided for by the Criminal Law, its advantage was that such a definition did not reduce the discussion to the frame that would be too narrow. As the work on the Draft Convention on the Criminal Law progressed, so the mentioned general definition was changed into several other definitions (of active and passive bribery, bribery in private sector, abuse of influence, all closely related to corruption and generally comprehended as specific types of corruption), enabling their transposition into national laws. The United Nations Convention against Corruption, similarly as the previous one, does not define the concept of corruption, but in Chapter III titled Criminalization and Law Enforcement defines certain types of corrupt behaviour. Its goal, as stated in Article 1 is to promote and strengthen measures to prevent and combat corruption more efficiently and effectively; to promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery; to promote integrity, accountability and proper management of public affairs and public property. Taking into account that even the most important international documents in the field of combat against corrupt behaviour incriminate only certain types of such behaviour avoiding to give a single integral definition of corruption, proves the above mentioned statement that it is difficult to give a single general definition of corruption. On the other hand, criminal law should, as much as possible, avoid general clauses, i.e. behaviours defined as criminal offences and their respective penalties must be incriminated by the criminal law to a great extent (*lex certa*). Otherwise, there is the risk of interpreting inadequately defined provisions that may affect legal security of citizens. There is no need to introduce the concept of corruption either in the title of the chapter of criminal offences or in particular incriminations in order to make an impression that adequate measures have been taken in that field.[35]

33 On the 19th Conference held in Valetta in 1994, European Ministers of Justice reached the conclusion that corruption is a serious threat to democracy, legal state and human rights. The Council of Europe, as the leading European institution for the protection of these fundamental values, is responsible to deal with that threat. The Ministers of Justice suggested the Committee of Ministers to create a Multidisciplinary Group on Corruption. In the context of these recommendations, the Committee of Ministers created the Multidisciplinary Group on Corruption (GMC) in September 1994 which prepared *the Programme on Action against Corruption*, the document which involved all aspects of international combat against this phenomenon. The referent goal of this group was to prepare, under the jurisdiction of the European Committee on Crime Problems and the European Committee on Legal Cooperation, one or more international conventions on the combat against corruption. In accordance with the goals defined by the *Programme on Action against Corruption*, the Criminal Law Working Group by the Multidisciplinary Group on Corruption (GMCP) began to work on the Draft Convention on the Criminal Law.

34 Criminal Law Convention on Corruption, ETS 173, 1999, Explanatory Report

35 The former situation in the Criminal Law of Serbia (2002-1 January 2006) when corruption offences are concerned was atypical for many reasons. Firstly, because of the chapter title unconnected with the protected object. Secondly, the description

Additional Protocol to the Criminal Law Convention on Corruption includes arbitrators in trade, civil and other cases, as well as lay justices. The signatory states of the Additional Protocol must adopt measures necessary to criminalize active and passive corruption of domestic and foreign arbitrators and lay justices. Consequently, the Protocol should make the combat against corruption more effective, as well as improve the interstate cooperation with regard to the combat against it. The term "arbitrator" is interpreted in accordance with the national laws of the parties to the Protocol agreement and it invariably relates to the person who, according to the arbitration agreement, is chosen to render a legally binding decision in the case filed by the parties to the agreement. The term "lay justice" is interpreted in accordance with the national laws of the parties to the Protocol agreement, but it invariably denotes a person who is an unprofessional member of the mutual body whose duty is to decide upon the guilt of the defendant in a criminal procedure.

It is here important to mention GRECO (The Group of States against Corruption) which represents a mechanism of the Council of Europe designed primarily to develop anticorruption regulations and their implementation in the member states, and, in particular, the anticorruption conventions of the Council of Europe. Our country has been a member of GRECO since 2003. The main body of activities in the process involving GRECO takes place in the form of evaluations made by qualified representatives of some member states in other member states. The evaluations take place in rounds during which certain questions related to combating corruption are investigated. The former Serbia and Montenegro was subject of consideration in the first and the second rounds of evaluation. The visits of the evaluators took place in 2005 and their report was adopted and published in July 2006. The report resulted in 25 binding recommendations (for Serbia). The current, third round of GRECO evaluation (initiated on 1 January, 2007) focuses on two subject matters: 1) incriminations (that have to be harmonized with the Council of Europe Criminal Law Convention on Corruption (ETS No. 173) and Articles 1–6 of its Additional Protocol (ETS No. 191); and 2) transparency of political funding.[36] The focus of our attention is on the former. Serbia has restrained itself from the implementation of any of the provisions of the Criminal Law Convention on Corruption and its Additional Protocol. The Penal Code of the Republic of Serbia has been modified and amended several times in order to achieve better harmonization with the international requirements. The GRECO Evaluation Team (henceforth: GET) has found that the legislation in Serbia has met the requirements of the Criminal Law Convention on Corruption (ETS No. 173) and the United Nation Convention against Corruption to a great extent.

Criminal offences defined so as to suppress corruption within the Penal Code of Serbia have been classified as criminal offences in violation of the official capacity. These involve: abuse of official position (Article 359, PC), trading in influence (Article 366, PC), accepting bribe (Article 367, PC), and offering bribe (Article 368, PC). The Code also contains relevant incriminations for other criminal acts referred to in the Council of Europe Criminal Law Convention and the United Nations Convention against Corruption. Such incriminations are aimed at suppressing some forms of corruptive practices, i.e. they are aimed against perpetrating, concealing or disguising criminal acts of corruption or other offences related to corruption. Those criminal acts may not be expressed in the same terms as in the conventions, but they have the same objectives. These include: money laundering (Article 231, PC)[37], concealing (Article 221, PC), embezzlement (Article 364, PC),[38] etc. It should be pointed out that all the international documents in the field of combating corruption insist on introducing the liability of legal persons for criminal offences. Our country has fulfilled this obligation by passing a special Law on Liability of Legal Persons for Criminal Offences in 2008.[39]

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of these criminal offences matched the existing ones to a great extent leading to unnecessary double incriminations and serious problems in practice when the difference between newly prescribed and existing criminal offences had to be made. If the motive of the lawmaker was to tighten penalties it could have been achieved by amending the existing solutions. Thirdly, such casuistry approach was unacceptable when criminal law norms were concerned. Fourthly, the term corruption was used in the chapter title and when defining certain criminal offences although it was neither used for legal description of particular criminal offences nor was it precisely defined.

36 Group of States against corruption, *Third Evaluation Round, Evaluation Report on the Republic of Serbia-Incriminations* (ETS 173 and 191, GPC 2), Adopted by Greco at its 48 the Plenary Meeting (Strasbourg, 27 September – 1 October 2010)

37 The Council of Europe Criminal Law Convention refers to *Money laundering of proceeds from corruption offences* whereas the United Nations Convention against Corruption mentions *Laundering of proceeds from crime*.

38 The United Nation Convention uses the title *Embezzlement, misappropriation or other diversion of property by a public official* and explicitly demands incrimination of Embezzlement *of property in the private sector*.

39 *Сл. Гласник РС*, бр. 97/08. (The Official Gazette of the Republic of Serbia, No. 97/08)

In the above mentioned Third Round of evaluation, GET had identified a number of specific shortcomings which the Act on Amendments to PC subsequently removed. Namely, regarding the provisions on the territorial scope of the Republic of Serbia's criminal legislation - in addition to the principle of territoriality (Article 6) and the primary real principle (Article 7) - also provide for the relevance of Serbian criminal legislation for the Serbian nationals who commit any other criminal act apart from the criminal offences listed under Article 7 of this Code (Article 305 to 316, Article 318 to 321, and Article 223) which are under the primary jurisdiction of the Republic of Serbia, if the perpetrator is found in the territory of Serbia or is extradited to Serbia (Article 8, paragraph 10). In that case, the prosecution will take place only if the criminal offence is also punishable by the laws of the country in which the offence has been perpetrated (Article 10, paragraph 2). Similarly, Article 9, paragraph 1 of the PC points out that the criminal legislation shall apply to any foreigner who commits a criminal offence against Serbia or its citizen either in Serbia or abroad, even when the offence is not listed in the Article 7 of this Code, if he is in the territory of Serbia or if he is extradited to Serbia. In this case also the prosecution will be instituted only if the offence is punishable by the law of the country in which the offence has been perpetrated (Article 10, paragraph 2). However, the legislator allows that in the said cases, provided for in Articles 8 and 9, paragraph 1 of the PC - when the offence is not punishable according to the law of the country in which it has been committed, criminal prosecution can be instituted with the authority of the State Public Prosecutor. Therefore, the offences perpetrated abroad, as per Article 8, 9 (1) PC, Article 10 PC, requires that the conduct is incriminated both in our country and abroad. If the offence is not punishable by the laws of the country in which it has been perpetrated, criminal prosecution can be instituted only with the authority of the state public prosecutor. Practice has shown that the need for such approval in relation to criminal offences of bribery has never occurred so far. Otherwise, in cases of the international conventions that Serbia is a signatory to, this approval will most certainly be granted. However, in addition to this, GET finds that the condition of double incrimination as per Article 10 PC represents unnecessary restriction which departs from the Convention and that it should be abolished with respect to the offences of bribery and trading in influence perpetrated abroad. Serbia has not placed a reserve with respect to this and therefore it is considered not be harmonized with Article 17, paragraph 1, item b of the Convention.

Further, bribery as a criminal offence (including the private sector) is incriminated in two provisions: Article 367 of the Penal Code (accepting bribe) and Article 368 of the Penal Code (offering bribe). These provisions encompass all types of criminal offences of passive (demanding or accepting gratuities or other favours or accepting promises of gifts or other favours) and active bribery (giving, offering or promising gratuities or other favours) that are listed in the Convention. It also covers benefits in property or non-material property, as well as the benefits for third persons. GRECO Evaluation Team commended Serbia for the fact that it also incriminates passive bribery in retrospect, for instance, in cases when an official demands or accepts gratuities or some other benefit following certain action, refraining from an action, and related to such action.[40] GET points out to the need to cover all types of gifts or other benefits by the Penal Code to such an extent as to have an effect on the activities of public officials or civil servants. They emphasize that although some small gifts may be socially acceptable, the Penal Code must apply the criterion of unacceptability for all such gifts.[41]

Speaking of bribery in the public sector, according to the currently valid Penal Code, the actions have to be "within the scope of official powers". In practice, this means that the acts or refraining from acts that do not fall within the scope of official duties or legally defined powers of an official, and which he may perform because of the function he has been assigned to, would not be directly encompassed by the provisions on bribery (for instance, giving access to confidential information to which public officials have access during their term of office in the situation when collecting or disclosing such information is not strictly within the scope of the officials' powers). According to the view of the GRECO Evaluation Team, this concept is narrower than the conditions from Articles 2 and 3 of the Convention. GET recommends that the wording 'official or other action' be used with

40 Ibidem, p. 15.

41 Group of States against corruption, *Third Evaluation Round, Evaluation Report on the Republic of Serbia-Incriminations* (ETS 173 and 191, GPC 2), Adopted by Greco at its 48 the Plenary Meeting (Strasbourg, 27 September – 1 October 2010), p. 16.

respect to bribery in the private sector, i.e. taking legislative measures which ensure that the criminal offences of active and passive bribery in the public sector cover all forms of perpetration during the term of office of a public official, whether they are within the scope of duties of such an official or related to them.[42]

As regards the Additional Protocol to the Criminal Law Convention on Corruption that requires the domestic and foreign arbitrators and jurors to be explicitly included in the provisions on bribery, GET points out that using the terms 'a public official' (Article 112, paragraph 3) and 'a foreign official' (Article 112, paragraph 2) enables domestic jurors and arbitrators to be covered by the relevant provisions focusing on giving / taking bribe, whereas the situation is somewhat different in respect to foreign jurors and arbitrators. The formulation regarding foreign officials from Article 112, paragraph 4 defines them as "the members of legal institutions of a foreign state", whereas Article 112, paragraph 3, item 4 deems an official to be "the person to whom the actual discharge of certain official duties or jobs has been assigned", and item 3 relates such a person to an institution, company or another body entrusted with public use of power, that makes decisions concerning the rights, obligations or interests of natural or legal persons or concerning the public interest. GET points out that the provision of Article 112, paragraph 4 does not include foreign arbitrators who would not necessarily be deemed to be members of legal institution in a foreign state, because the same article gives an autonomous definition of a foreign official, without referring to the definition of a public official given in Article 112, paragraph 3 for additional explanation. State institutions of the Republic of Serbia have stated that the foreign arbitrators would also be covered by the Law on Arbitrage, because its Article 19 provides that arbitrators may be foreign citizens. Still, the GRECO Evaluation Team finds that this provision basically refers to the possibility of a foreign citizen to act as an arbitrator in keeping with the Law on Arbitration, until the parties, for example, reach an agreement, and resolve the conflict within the framework of regulations on arbitration in Serbia. This state of affairs does not meet the requirements of Article 4 of the Additional Protocol, because the concept of a foreign arbitrator within the Protocol is related to performing the functions "within the national law on arbitration of any other state," and therefore what prevails is not the nationality of the arbitrator but the law within which he acts. Speaking about foreign jurors, they are covered only to the extent in which they are regarded as "members of the legal institutions in a foreign state" (Article 112 (4) of the Penal Code). This is not in keeping with the Additional Protocol which incriminates the acts of giving/taking bribe by the foreign jurors regardless of their status in a foreign jurisdiction. The GRECO Evaluation Team recommends that necessary legislative measures be taken in order to ensure that the foreign arbitrators and jurors be covered by the provisions on bribery in the Penal Code in accordance with the Additional Protocol to the Criminal Law Convention on Corruption (ETS 191).[43]

When discussing the issue of bribery in the private sector, Article 367, paragraph 6 and 368 paragraph 5 of the Penal Code incriminate even the cases in which an official demands or accepts a gift or another benefit or accepts a promise of a gift or some other favour, just as if the official has been given, promised or offered the bribe. GRECO Evaluation Team finds that the Penal Code must unequivocally include all persons who manage or work in any capacity in any company. GRECO reminds of Articles 7 and 8 of the Convention that clearly include the whole range of persons who manage or work, in any capacity, for the entities in the private sector (employees in charge of maintenance, drivers, etc; lower rank employees). The representatives of the Republic of Serbia pointed out that judicial practice has known the cases that pertain to the lower-ranking employees and presented a court decision that referred to a storage house worker who had been convicted of the criminal offence of accepting bribery. Bearing in mind the statements of experts from the crime scene and the fact that it was related to only one case of giving/accepting bribe when concerning the lower-ranking officials, the GRECO Evaluation Team finds that there is a general miscomprehension regarding the term 'official person'. Therefore, the GRECO Evaluation team has recommended the term to be adequately explained, so that the legislation that refers to giving/taking bribe in the private sector should cover the entire range of persons who direct or work, in any capacity, in private sector entities.

42 Ibidem, p. 16.
43 Ibidem, p. 17.

GET has further remarked that, as regards the criminal offence of giving bribe in paragraph 4, there are special grounds for acquitting perpetrators of the charges if they report the offence before they realize that it has been uncovered. In such a case, the gift or other benefit can also be returned to the person who has given the bribe (paragraph 6, Article 368). This solution is aimed at encouraging reports on the cases of giving the bribe. The GRECO Evaluation Team has pointed out that such situations are very rare in the judicial practice and that the prosecutors in such situations more often resort to applying Article 18 of the Penal Code which provides for an offence of minor significance as grounds for dismissing unlawfulness. GRECO accepts the fact that it is an optional ground for an acquittal, but questions the possibility of returning the gift or other favour and therefore recommends abolition of the possibility to return the bribe to the persons who have given it if they report the offence before disclosure.

At the end of the report, GRECO concludes that following the latest modifications and amendments to the Penal Code, the harmonization with the Criminal Law Convention on Corruption has been achieved to a large extent. However, solutions for a number of rather specific shortcomings are yet to be found.

Towards this goal, the GRECO Evaluation Team has given the following recommendations to the Republic of Serbia:

1) The condition of double incrimination from Article 10 PC represents an unnecessary restriction which departs from the Convention and should therefore be abolished with respect to the criminal offences of bribery and trading in influence perpetrated abroad (paragraph 73);
2) Undertaking all the necessary legislative measures to ensure that the criminal offences of active and passive bribery in the public sector cover all acts or refraining from acting during the term of office of an official, whether an official duty has been performed or another action related with official duty (paragraph 65);
3) Undertaking all the necessary legislative measures in order to ensure that foreign arbitrators or jurors are covered by the provision on bribery of the Penal Code in accordance with the Additional Protocol of the Criminal Laws Convention on Corruption (ETS No. 191) (paragraph 67);
4) Ensure, in an appropriate way, that the legislation dealing with giving/taking bribe in the private sector covers the whole range of persons in managerial and basic positions, in whatever capacity, for the entities of the private sector (paragraph 68);
5) bolishing the possibility from Article 368 (6) of the Penal Code of returning the bribe to the giver if he/she reports the case before it is disclosed (paragraph 74).

The Act on Amendments to the PC has made the below listed modifications and amendments by way of fulfilling the recommendations from the report of the Group of States for Combating Corruption of the Council of Europe (GRECO). Firstly, Article 2 of the Code extends the possibility of the implementation of the criminal legislation of the Republic of Serbia even when the criminal offence is not punishable by the law of the country in which it has been perpetrated (Article 10, paragraph 2 of the Penal Code). An exception to the proposition of double incrimination as a prerequisite for criminal prosecution and the implementation of the domestic criminal legislation has been envisaged only in the case when a dispensation of the public prosecutor exists for this. The suggested amendment stretches also to the cases envisaged in the ratified international treaties, such as is the case with the criminal offences of corruption. This modality of extending the scope will call for modifications and amendments the Penal Code in future unless an international agreement envisages the obligation of the Republic of Serbia to implement its criminal legislation for certain criminal offences, although the act does not constitute a criminal offence in the country where it has been committed.

Article 12 of the Code has modified and amended Article 112 of the Penal Code which defines the terms used in the statute. In keeping with the recommendation of the Group of States against Corruption of the Council of Europe (GRECO), it more accurately defines and broadens the notions of an official, foreign official, and a responsible person.

In keeping with the recommendations of the Group of States against Corruption of the Council of Europe (GRECO), Articles 36 and 37 of the Code have broadened the provisions of Articles 367 and 368 of the Penal Code which prescribe the criminal offences of giving and taking bribe by expanding the legal description specifying that those criminal offences can be perpetrated not only within the scope of one's powers, but also in connection with them. Besides, paragraph 6 in Article 368 of the Penal Code, which envisaged the possibility of returning the bribe to the person who has given it, has been deleted, also in accordance with the said recommendations.

HATE-MOTIVATED CRIMINAL OFFENCES IN THE SERBIAN PENAL CODE

An important aspect related to the development of criminal law includes permanent efforts to create an international legal framework for defining the rules and norms that are aimed at combating crime. The manifestations of criminal offences, means for their prevention and control, along with the motives that inspire perpetrators, have long been the subject matter under consideration of the United Nations, as well as separate regional organizations. There is thus a comprehensive set of international and regional instruments that clearly define the obligations of states to respond to criminal offences motivated by hate.[44] The Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law directs the combat against racism and xenophobia in a unique way, striving to harmonize the legal solutions of the European Union member-states.

Article 6 of the PC introduces special circumstances for determining sentences for criminal acts motivated by hate. Namely, if a criminal offence is perpetrated because of hate towards a race or religion, national or ethnic origin, sex, sexual orientation or gender identity of another person, such an act will be deemed as an aggravating circumstance, except when the law defined it as a characteristic of a criminal offence (Article 54a PC). Starting from the relevant international documents, the purpose of the new provision of Article 54a of the Penal Code is to ensure stricter punishment and thereby enhanced criminal law protection with respect to certain particularly vulnerable social groups whose members are the victims of criminal offences motivated by hate. Criminal law defines hate crimes as such criminal offences in which the perpetrators assault the victims because of their actual or presumed affiliation to a certain social group. The victims of hate crimes are usually subject to attacks because of their race, religion, sexual orientation, disability, class, ethnic origin, nationality, (old) age, sex, gender identity, social status, political affiliation, etc. The offences may vary to a large extent and include, for instance the following: bodily injuries, property destruction, abuse and torture, insults murders, etc.

Personal characteristics that inspire hatred, which in turn motivates the perpetration of a criminal offence and therefore present mandatory aggravating circumstances have been listed in Article 54a and include: racial origin, religious confession, national or ethnic origin, sex, sexual orientation or gender identity. The characteristics such as race, religion, national or ethnic origin and sex do not call for additional definition. However, there are some personal characteristics that need to be defined, such as, for example, sexual orientation and gender identity. Sexual orientation is a term that refers to emotional, sexual and other attraction towards persons of the opposite or the same sex and gender. Three forms of sexual orientation are most commonly mentioned: heterosexual, bisexual, and homosexual. Gender identity is a personal experience of gender which can but does not have to match the sex of the given person.[45] It involves a subjective feeling of belonging or non belonging to a gender, which is not necessarily based on the sex and sexual orientation.

44 See: The United Nation *International Convention on the Elimination of All Forms of Racial Discrimination*, Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965, entry into force 4 January 1969, in accordance with Article 19; the *Council Framework Decision 2008/913/JHA OF 28. November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law* is also relevant. The Framework Decision, adopted in 2008, provides for the approximation of criminal legislations on offences motivated by hate, including an aggravating circumstance if the motive is based on prejudice.

45 С.Гајин, *Појам, облици и случајеви дискриминације*, у: Антидискриминациони закон, Београд, 2010, p.15.

Although Article 54 of the Penal Code provides that within general rules for passing sentences envisaged that the court will upon passing a sentence take into account the motives which led to the perpetration of crime, thus including hate, the provision is general and does not explicitly mention hate as an aggravating circumstance nor does it define it as a mandatory aggravating circumstance, as provided for in the provision of Article 54a of the Penal Code.

As an example of base motivation, hate used to be taken into account even before as a circumstance by courts when passing sentences. The ruling of the High Court of Serbia (Kž. 2105/57) mentions that base motives are deemed to be all such motives as are not worthy of a man and that do not comply with the adopted moral principles of the society. They include: hatred, envy, malice, greed, ill-will, intolerance, etc.[46] The justification for the new provision of Article 54a is that now it is a mandatory and optional aggravating circumstance. However, it would be wrong to ascertain that practice has shown that the cases of serious crimes, such as the murder of a Roma boy in downtown Belgrade by the members of Skinheads, were not sanctioned in an adequate way by the state authorities.[47] Thus the decision of the High Court of Serbia (No. 38/98) shows that a murder perpetrated because of the affiliation to a certain ethnic group should be treated as an aggravated murder with base motives. Namely, the perpetrators deprived a person of his life only because he was a Roma and because they belonged to the Skinheads, whose ideas proclaim that their nation and race should be pure.

Another possible way of suppressing hate crimes involves the introduction of special qualified forms of some criminal offences that are, as a rule, perpetrated out of hate towards certain persons. The third way exists in the countries that offer protection by the existing incriminations as part of the overall criminal legislation in the given country. Until the adoption of AA PC, the legislation of the Republic of Serbia was in this group.

CLOSING REMARKS

Finally, we can conclude that the process of globalization inevitably leads to "internationalization" [48] of criminal law. But this increasing internationalization does not occur, as some authors claim,[49] to the detriment of the state sovereignty. The state's right to punish, *ius puniendi*, is not limited even by the beginning of work of the International Criminal Court which starts from the principle of complementarity, which means that its jurisdiction is subsidiary. As the main reason for such a solution, Cassese quotes practical reasons, i.e. preventing the court from being overcrowded with cases from all over the world, but he also points out that the states have opted for respecting the sovereignty as much as possible.[50] The internationalization of criminal law should be regarded as a unification of criminal law or at least its part that provides for combating criminal offences in which most countries of the international community are interested in. As the Guiding decision of the Council of Europe for combating terrorism points out, the unification of the definition of terrorism and related criminal offences is aimed at facilitating international cooperation, exchange of information among intelligence agencies, evaluation of counter-terrorist legislation and adopted strategies. Proactive role of the international institutions can show, observed in the long run, good results because it more closely specifies the means and ways in which the states may respond within the national criminal law.

Analyzing the selected topic from the AA of PC, we can conclude that our country has fulfilled its international obligation, harmonized its national criminal legislation with certain international sources, but also retained its identity and general settings of its crime-related policy, having found the balance between the required and necessary repression, on the one hand, and the rights of the individual, on the other.[51]

46 Д. Коларић, *Кривично дело убиства*, Београд, 2008. година, p. 238.
47 Т. Дробњак, *Кривичноправна заштита од дискриминације*, у: Антидискриминациони закон, Београд, 2010, p. 90.
48 H. J. Hirsch, Интернационализација казненоног права и казненоправне знаности, *op. cit,* p. 161.
49 М. Симовић, Актуелна питања материјалног и процесног кривичног законодавства: нормативни и практични аспект, *op. cit,* p. 15.
50 А. Касезе, Међународно кривично право, Београд, 2005. година, p. 414.
51 For more detail, see: Б. Ристивојевић, *Актуелна питања садашњег стања материјалног кривичног законодавства Србије*, објављено у: *Актуелна питања кривичног законодавства*, Српско удружење за кривичноправну теорију и праксу, Београд, 2012. година, p. 43.

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SEARCH OF A DWELLING AND PERSON
CRIMINAL PROCEDURAL AND CRIMINALISTIC ASPECTS[1]

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Abstract: The search of a dwelling and person represents one of the traditional procedural actions for collecting the evidence relevant for the criminal procedure. The conditions for performing this procedural action are envisaged in the Criminal Procedure Code, but the action itself is realized according to the rules of criminalistics. In this paper, the historical overview of the legal regulation of the procedural action of the search of a dwelling and person in Serbia, is given, meaning its regulation by criminal procedural legislation from 1865 until today. The paper also contains the analyses of legal solutions, formal and substantive conditions which are necessary for performing this procedural action, object of the search, legal ground, basic criminalistic regulations and other relevant issues regarding this matter. The special attention is given to the positive legal solutions related to this procedural action, according to the two currently valid Criminal Procedure Codes, indicating the advantages and shortcomings of earlier and now valid legal solutions which are related to the search of a dwelling and person. In this paper, the authors have emphasized the dynamic of changes and type of changes and they have given certain propositions *de lege ferenda*, on the basis of the advantages and shortcomings of the positive legal solutions, which they indicated in the paper.

Keywords: search, evidentiary action, criminal procedure, criminalistics.

INTRODUCTORY REMARKS

The present time is beyond doubt marked by specific forms of criminality as a negative social phenomenon, which has, for its consequence, the introduction of new evidentiary actions in criminal procedure for the timely and successful uncovering and proving of criminal offences. However, the new special investigation actions are used *ultima ratio*, which means as a last means used in uncovering and proving of highly sophisticated forms of crime, if the goal cannot be achieved by using the regular – traditional evidentiary actions, or that would be connected with disproportionate difficulties and severe consequences. Although new evidentiary actions are significant, the search as a traditional procedural action still has a very important role in criminal proceedings, and also it is very frequently used in practice. For this evidentiary action can be said that it is traditional for two reasons, its period of duration and existence in criminal procedural legislation and same conditions (formal and substantive) which are necessary for it to be performed. Although it was named differently, in theory and legislation, as investigation action,[2] inquiry action, action of proving by which the evidence are collected,[3] a measure for securing objects necessary in criminal proceeding,[4] a measure of procedural coercion to objects,[5] it remained the same and survived with minimal modifications through historical changes of criminal procedural legislation. That can be regarded as a confirmation of the quality and significance of this procedural action.

1 This paper is the result of the research on the following projects: the project of Ministry of Education and Science which is realized by the Academy of Criminalistic and Police Studies under the name "The development of institutional capacities, standards and procedures for confronting terrorism and organized crime in terms of international organizations", number 179045, head manager of the project Prof. Dr. Sasa Mijalkovic; "Criminalistic-forensic processing location of criminal events", which is financed by the Academy of Criminalistic and Police Studies.

2 B. Krivokapić, Crminalistic Tactic 3, Belgrade, 1997, pp. 207-209, quoted at M. Kresoja, Criminalistic, Novi Sad, 2006, p. 322.

3 M. Škulić, Criminal Procedure Law (Third edition), Belgrade, 2011, p. 260.

4 B. Marković, The Manual of Judicial Criminal Procedure of The Kingdom of Yugoslavia, Belgrade, 1930, p. 312.

5 M. Grubač, Criminal Procedure Law (Sixth revised edition), Belgrade, 2009, p. 319.

SEARCH OF A DWELLING AND PERSON IN CRIMINAL PROCEDURAL LEGISLATION FROM 1865 TO THE END OF THE SECOND WORLD WAR

According to ***the Code on Judicial Procedure in Criminal Offences***[6] of April 10, 1865 in the Chapter VIII it was envisaged a procedural action of investigation in the house, search of objects and persons and seizure of letters (Articles 73-88). Search and investigation in a dwelling of citizens was possible when there were reasons for suspicion that certain person possesses or that in someone's house, building or other premises is a concealed person or there are objects which are necessary for inquiring a criminal offence or to find an offender (Article 73, Paragraph 1). A formal condition for the search was a written decision of the investigation authority against which was allowed a complaint to a court of the first degree and which did not have suspensive effect. The search was performed in a presence of two citizens, after which a person whose dwelling has been searched received a certificate about the outcome of the search and signed list of seized objects for further investigation. Search was performed in the daytime and during the night only in urgent cases or when someone called for help and in those cases at the search was present a representative of a municipality or two invited citizens, except when someone called for help. Public authorities, which acted contrary to these provisions, have been punished for the illegal violation of a dwelling.[7]

Besides ***the Code on Judicial Procedure in Criminal Offences,*** there were some other regulations which allowed the search[8] like: *Law on Monopoly of Tobacco* of March 14, 1890, *Criminal Procedure for Monopoly Offenders* of July 14, 1902 and *Law on Organization of Financial Control* of February 28, 1922. According to the Article 163 of the Law on Monopoly of Tobacco, the search of a dwelling and other premises of a person suspected to be a smuggler, could be performed by a monopoly supervisor, monopoly staff and other public authorities envisaged in this Law. The search was compulsory performed in the presence of a police officer, president of a municipality or his/her representative and two citizens. According to the Criminal Procedure for Monopoly Offences which, in its provisions on the search of smugglers of monopolized objects, relied on the Constitution and the Law on Monopoly of Tobacco (Articles 6-13), it was envisaged that the search could be performed only in the daytime in private facilities and on public places also during the night (Article 7). In order to perform the search in a military building or a camp, it was necessary to inform about that the competent military authorities which had the obligation to answer to that request (Article 8). The search of smugglers on the road or in other distant place was possible without the presence of municipal or state authorities (Article 9). Interesting was a provision of the Article 13, according to which all persons that were present at the search, were put under monitoring in order to prevent a potential removal, destruction or change of smuggled objects. The Law on Organization of Financial Control (Articles 23-27) envisaged that an authority of financial control could perform a search of a dwelling and other premises of a suspect, or a person her/himself[9] if there was a suspicion that object, perpetrator, accomplices, traces and subsidiary means (instruments) for the commission of a criminal offence could be found or if an activity which should be under a financial supervision was performed. The search was performed on the basis of a decision which was given to the person to whom the decision was related to, before the beginning of the search. The search without a decision was possible in buildings and premises subjected to a financial monitoring, if a perpetrator was caught *in flagranti* or if he/she was running from the authorities and in doing so entered in someone's house. If there was a search of premises subjected to a financial monitoring, the owner of a shop or his/her representative was called and if they did not want to participate at

6 G. Niketić, The Penal Law and Criminal Judicial Procedure – interpreted and reasoned by the decisions of divisions and general session of the Court of Cassation (Third revised edition), Belgrade, 1924.

7 Op. cit., p. 350.

8 See: G. Niketić, The Penal Law and Criminal Judicial Procedure – interpreted and reasoned by the decisions of divisions and general session of the Court of Cassation (Third revised edition), Belgrade, 1924, pp. 350-353.

9 It was interesting a provision according to which a search of a woman could be performed only by another woman, even when a person who should be searched gives a consent to be searched by a man (Article 25) and if the search of a person should be performed in a train and all the conditions for that were not fulfilled that woman was put under monitoring and the search was performed at the first station (Article 27).

the search, then, as a witness of this procedural action a member of police or municipal authority was called. In all other cases, at the search should be present a police officer or president of a municipality (or his/her representative), the owner or possessor of a dwelling or someone of the family or neighbours, and two other citizens. In the case that the presence of the listed persons was not possible, there was a possibility for the competent authorities to put the object of the search under monitoring, and if it was evident that the situation will last for a long time, the object of the search could be sealed by a commission. This Law envisaged the cases of search of a person who is traveling or who is in a distant place and had smuggled objects or means for committing criminal offence and also situations of the search of a train, ship, railway storehouses. if there is a suspicion that they contain smuggled goods.

The Code on Judicial Criminal Procedure of February 16, 1929[10] came into force on January 1, 1930 for the entire country, except Serbia and Montenegro. On January 1, 1931, it came into force for the area of Belgrade Court of Appeal and on January 1, 1932, for the area of the Court of Appeal in Skopje and the Grand Court in Podgorica.[11] This Code envisaged procedural action of a search of a dwelling and person in Chapter XI (Articles 135-142). The search could be performed if there was a possibility that during the search a defendant would be captured or that objects which are important for the investigation would be found. Except in these cases, when the object of search was a person, a substantive ground could be a suspicion on a person for a crime or if that person was familiar to the authorities from a previous period because of his/her "bad behaviour".[12] The search could be performed always and without the given substantive condition in the premises in which a criminal offence had been committed, in which the defendant hided because of the prosecution or it was caught there and also in public houses (inns). The object of the search was not only a building in which people live but also all other buildings and premises which belong to them, like basement, attic, shed, stable and other premises, then mobile object (Article 135) in a dwelling or premises that belong to it (armoires, beds and other objects).[13] The formal condition was an order of an investigative judge which was executed by other investigative judges, judicial clerk or an organ of public safety which it determines. The order could be issued also by a canton judge or a police if there was a danger of delay or in emergency cases it could be done also by the state prosecutor. Against the order, an appeal could be submitted to the court and appeal did not have suspensive effect (Article 139 Paragraph 5). Besides that, it is necessary to mention that police had very wide competences for the independent search, in the cases of public facilities, premises where criminal offence had been committed, were the defendant was hiding or ran away (Article 136 Paragraph 2) and in a case of war, to seize the offender who escaped, when someone called for help, when the owner of a house or other premises wanted that or when there was an order to bring in or detain a person or when a person had such objects on the basis of which it can be concluded that he/she was an accomplice (Article 139 Paragraph 4). The search was attended by the owner of a dwelling or his/her representative that means one of adult members of his/her household or neighbor if he/she was not present and two witnesses as a rule. All the objects that were found during the action of search have been temporarily seized. About that, a special list of objects had been created which was signed and given to a person from whom the objects have been taken. If during the search nothing was found, the signed certificate has also been issued. The found objects which were not connected with the criminal offence from the search order have been taken and about that fact a public prosecutor has been informed and if he/she did not suggest the institution of criminal proceedings, the objects were returned to a person involved.

10 G. Niketić, The Collection of laws interpretated and reasoned with judicial and administrative practice, Belgrade, 1929.
11 Ibid., pp. XIII and XIV.
12 Article 137.
13 B. Marković. op. cit., p. 313.

SEARCH OF A DWELLING AND PERSON FROM THE SECOND WORLD WAR UNTIL TODAY

The Law on Criminal Procedure of 1948[14] envisaged in the Chapter XIV, in the part about the inquiry actions, search of a dwelling and person (Articles 146-151). The substantive condition for a search was the same as in the previous Law on Criminal Procedure and that was a possibility that by this procedural action a defendant could be caught or traces and object for inquiry could be found. The formal condition was a decision of a competent investigation authority in the form of an order which was enforced by investigation authorities, authorities determined by them or by the police. In the urgent cases and for fulfilling the purpose of a search, it was possible, in justifiable cases, to perform a search on the basis of an order enacted by the police. About that situation, immediately or in the shortest possible period, they informed a competent public prosecutor or investigation authorities. The issued order was given to a person at whose facilities or on whom this action had been undertaken before this action began or after the search in a case when there was a danger of an armed resistance or the action should be undertaken suddenly, when someone called for help, when a person was deprived of liberty or he/she should be detained. As in the earlier Law, always before an action of the search has been undertaken, the person had been called to willingly deliver the requested objects and only if he/she did not deliver them the procedural action has been undertaken, unless (Article 148 Paragraph 2) that was connected with a certain danger or the object of the search was a public facility, when the search was beginning immediately. At the search, there were present: a holder of a dwelling, or someone of the adult members of a household or neighbour if he/she was not present or, if the search object was a public institution, there were present: head of that institution and military commander in a military institution. In all cases there was obligatory presence of two adult citizens as witnesses.

According to the **Law on Criminal Procedure** enacted on 10 September 1953[15], a search of a dwelling and person was envisaged as an action which has been undertaken in a crime scene inspection and in investigation (Chapter XVIII, Articles 200-204). The subject-matter for a search could be a dwelling and other premises of a defendant or other persons or the persons themselves. The substantive condition was the possibility that by acting in that way a defendant can be caught or the objects important for a criminal proceedings or traces of a criminal offence can be found. Formal condition was written and reasoned order from the court or competent internal affairs authority. The procedure of the search was the same as in the previous laws, meaning that order was delivered to a person before the search and person was called to voluntarily hand over person or requested objects, except in a case when an armed resistance could be predicted or the search action had to be performed immediately and suddenly or the action was undertaken in public facilities (Article 201 Paragraph 3). The persons who should be present at the search were the holder of a dwelling or the representative, an adult member of his/her household or a neighbour, as well as two adult citizens. When the search of state facilities, institutions or commercial organizations was performed, their chief was present at the search, while in military facilities search was undertaken on the approval of a competent military officer. The report was made on the search, and temporarily were taken only those objects and documents which were connected with the purpose of the search (Article 202 Paragraph 7) with a certificate issued to a person from whom they were taken. Also, the objects which were not connected with the criminal offence for which the order was issued and which indicated that there was a criminal offence which was prosecuted *ex officio* were taken temporarily, and about that fact the public prosecutor was informed for initiating criminal proceedings (Article 203). The search without an order could be undertaken only by a competent internal affairs authorities and members of the People's Militia if the holder of a dwelling wanted that, if someone called for help, if it was necessary to catch a perpetrator of a criminal offence who was found *in flagranti*, if in the dwelling or other premises was a person who should be detained or coercively brought in according to an order of a competent state authority or a person who hided there due to a prosecution or it was obvious that evidence could not be provided in the other way (Article 204).

14 V. Kalember (Editor), Collection of laws of the FPRY Number 23, Edition „Official Journal of the FPRY" 1948.
15 Official Journal of the FPRY No. 40/53, 4/57, 52/59, 30/62, 12/65, Official Gazette SFRY 23/67, 50/67 – correction in number 25/68, 54/70, 6/73, 4/77.

According to the full text of the **Law on Criminal Procedure** published in Official Gazette SFRY No. 4/77 (came into force on July 1, 1977), the search of a dwelling or person was an investigative action envisaged in Chapter XVIII (Articles 206-210). This investigative action has been undertaken if there existed a possibility that with a search a defendant will be caught or traces of a criminal offence or objects important for criminal proceedings will be found. The search object could be a dwelling, other premises of a defendant or other persons and the persons themselves. The estimation of a need to undertake a search was done by an investigative judge or an internal affairs authority[16] Formal condition for a search was an order against which a complaint could be filed to a president of the court who questioned whether a court decision – order is justified (Article 181 of the Law). The order was given to a person at whose premises or on whom a search will be undertaken, and before the search began, the person in the order was asked to voluntarily surrender the person or requested objects. It was not complied with this procedure only if armed resistance was expected or if it was necessary to undertake this investigative action immediately and suddenly or if object of the search was a public facility (Article 207, Paragraph 2). The search could be conducted in the daytime and at night if it was commenced in the daytime and not completed or there are reasons for search without an order and they were envisaged in the Article 210 of the Law. It was conducted if a holder of a dwelling wanted so, if someone called for help or it was necessary to catch a perpetrator of a criminal offence or he/she was found *in flagranti*, for the safety of persons and property, if in a dwelling or other premises, a person who should be brought in by force or detained on the basis of a decision of a competent authority was (Article 210, Paragraph 1), and also when during the detention or deprivation of liberty a suspicion appeared that the person has a weapon or a tool for attack or that he/she will hide or destroy objects which should be taken from him/her as evidence in the proceedings (Paragraph 4). In the cases of a search without an order, the presence of witnesses was not necessary but the competent official of the internal affairs authority, in these cases, had to file a report to an investigation judge or competent public prosecutor if the proceedings has not yet begun (Article 210 Paragraph 5). In regular conditions of a search, on the basis of an order, it was necessary that this investigative action is attended by a holder of a dwelling, his/her representative or an adult member of his/her household or a neighbor and two citizens of adult age as witnesses. During the search, temporarily were seized only those objects and records which were connected with the purpose of the search in a given case (Article 208, Paragraph 7).

SEARCH OF A DWELLING AND PERSON ACCORDING TO POSITIVE LEGAL SOLUTIONS IN SERBIA

In the Republic of Serbia, there are currently in force two codes on criminal procedure: the Criminal Procedure Code of 2001[17] and the Criminal Procedure Code of 2011[18] which will be implemented as of October 1 2013, except in proceedings for criminal offences belonging to organized crime or war crimes held before the special department of the competent court, in which case its implementation will begin as of January 15, 2012.[19]

In ***the Criminal Procedure Code of 2001*** a search of a dwelling and person is an evidentiary action (Chapter VII – Articles from 77 to 80). Subject-matter of a search can be a dwelling or other premises of a defendant or other persons, lawyer's office or the persons themselves. This evidentiary action is performed when there is a possibility that a defendant will be caught or that there could be found traces of a criminal offence or objects relevant for a criminal proceedings, and certain objects, files or instruments when it is a case regarding a lawyer's office (Article 77 Paragraph 2).

Besides the listed substantive conditions, for performing the search action it is also necessary that formal conditions are fulfilled, which are the existence of a written order with explanation which is before the action of search served to a person to whom the order is related to and he/she is

16 Collection of federal regulations, Law on Criminal Procedure explained by a court practice, VII Revised edition, Official Gazette SFRY, Belgrade, 1997, p. 159.
17 "Official Gazette of the FRY" Nos. 70/2001 and 68/2002, „Official Gazette RS" Nos. 54/2004, 85/2005, 115/2005, 85/2005 – other law, 49/2007, 20/2009 – other law, 72/2009 and 76/2010.
18 „Official Gazette RS" Nos. 72/2011, 101/2011 and 121/2012.
19 Article 608.

asked to voluntarily surrender the objects or person which are being sought. In that situation, there is an obligation for the authority that performs a search to advise a person of his/her right to hire a lawyer, defence counsel who can be present at the search, in which case the search will be postponed until his/her arrival, but maximum three hours (Article 78 Paragraph 1). In the record of the search, it must be written whether the person at whom the search is performed has been informed about the right to a lawyer, or defence counsel who can be present at the search and statement of that person about the use of that right, because in the contrary the judgment based on such a record represents a substantive violation of the provisions of criminal procedure, according to the Article 368, Paragraph 1, line 10 of the Criminal Procedure Code.[20]

It is not necessary that the formal condition for a search is fulfilled so that a search action can be considered legal, if the armed resistance is expected or other form of violence or if it is obvious that there are preparations for or it has commenced the destruction of traces of criminal offence or objects important for the criminal procedure (Paragraph 3). A search without an order is possible also if a holder of a dwelling requests it, if someone calls for help, in the cases of executing a court decision on detention or bringing in the defendant, in order to directly arrest the perpetrator of a criminal offence or for the purpose of eliminating a direct and serious threat to persons or property (Article 81, Paragraph 1).

The holder of a dwelling and other premises will be summoned to attend the search, and if he/she is absent, his representative, an adult member of his household or neighbour will be called to attend the search (Article 79, Paragraph 1). The presence of witnesses at the search of a dwelling and person[21] is a preventive measure and measure for securing the credibility of this evidentiary action, which is prescribed by the Constitution itself (Article 40, Paragraph 2) and has a goal to "prevent the irregular conducting of certain procedural actions and deformation of results by the authorities that undertake them, because it can be expected more from them then from the other procedural actions due to their nature, urgency, lack of public and very often a defense too."[22] The witnesses supervise the conducting of the search action in the sense of its regularity and have the right to put into record potential remarks so that they can later in the criminal proceedings appear as witnesses on disputed circumstances in the case of disputing the regularity of the action.[23] Because of that, they must be present during the entire search action and not only in the part of the action of search of a dwelling or other premises, because on the contrary a record on the search of that part of a dwelling or other premises which was not attended by them, will be separated from the files of the case as an evidence on which a judgment cannot be based.[24] The witnesses sign the record and if a search was attended only by one witness who signed the record, that will not be considered a substantive violation of the provisions of criminal procedure, if the use of this evidence would be without influence on a legal and correct rendering of a judgment.[25]

The authority conducting proceedings which undertakes a search determines the witnesses, taking into account that they cannot be persons who cannot appear as witnesses, persons who would by their statements violate the duty to maintain a state, military or official secret, the defender, person who would by his/her statement violate the duty of maintaining confidentiality of information acquired in a professional capacity (Article 97), or the persons released from the duty to testify (Article 98).[26] In that sense, for example, the wife of a defendant as a person released from the duty to testify could not be a witness of the search actions, because in criminal proceedings he/she can refuse to testify because he/she is in a category of privileged witnesses.[27] The Code envisages certain specific characteristics of witnesses who attend the search (Article 79), so this action is attended by a superior in the cases of facilities of state authorities, enterprises or other legal persons (Paragraph 4), a representative of a competent lawyer's office, or other lawyer (a member of the same bar association) when that is not possible (Paragraph 5), and search in military buildings is possible only after

20 Judgment of the Supreme Court of Serbia, Kž. I 1064/2004 of 30/09/2004.
21 When a search of a person is being conducted, the witnesses must be of the same sex as the person being searched (Article 79, Paragraph 3).
22 M. Grubač, Criminal Procedure Law (Sixth revised edition), Belgrade, 2009, p. 228.
23 Ibid.
24 Ruling of the High Court in Niš, K. 65/2012(2) of 13/07/2012.
25 Judgment of the Supreme Court of Serbia, Kž. I 57/2005(1) of 21/02/2005.
26 M. Grubač, op. cit., p. 228.
27 Ruling of the High Court in Niš, K. 65/2012(1) of 13/07/2012.

previous approval of a competent military officer (Paragraph 6). If a search is conducted without the witnesses and the order in the cases envisaged in the Code and in the issued certificate are not listed the reasons of the search, nor the observations of the holder of a dwelling which did not sign the certificate, and if about that fact the public prosecutor is not informed, nor the investigative judge, a court decision cannot be based on that evidence.[28] Moreover, it is important that a record of the search of a dwelling which is ordered for the possibility that the traces of a criminal offence will be found, would be useful as evidence also in the proceedings for a different criminal offence.[29] It should be noted that a record is also suitable for proving in the case if instead of one authorized police officer a record of search of a dwelling was signed by another authorized police officer which has not participated in the search.[30] A record of the search is a traditional form of the official registration of a procedural action of the search, and a novelty envisaged by the amendments of the Code of 2009[31] is a possibility that a course of search can be audio and visually recorded, and the object found during the search can be separately photographed, and the photos are enclosed as an attachment to the record (Article 79, Paragraph 9).

A search without the witnesses (Article 81) is possible when a holder of a dwelling requests that, if someone calls out for help, for the purpose of executing a competent court decision on bringing in or on the placement of a defendant in detention, in order to directly arrest the perpetrator of a criminal offence or for the purpose of eliminating a direct and serious threat to persons or property. In these cases, it is obligatory to list in the record the reasons why two witnesses were not present, because otherwise that record represents inadmissible evidence.[32] Against this kind of a search, the holder of a dwelling can raise an objection about which he/she is instructed by an authorized official of the internal affairs authority.

A search without an order and witnesses (Paragraph 4) is possible only if during the enforcement of a ruling on the placement of a defendant in detention or his/her arrest there is a suspicion that the person possesses weapon or other tool that may be used for assault, or there is doubt that he/she will discard, conceal or destroy objects which should be seized from him/her as evidence in criminal proceedings. About the fact that a search has been undertaken without a court order, an investigation judge and the public prosecutor must be informed, if criminal proceedings have not yet been initiated (Paragraph 5).

According to ***the Criminal Procedure Code*** of 2011[33], a search represents an evidentiary action (Chapter VII, Articles 152-160). The novelty regarding basis and subject-matter of the search, comparing to the Code of 2001, is about the search of automatic data processing devices and equipment on which electronic records are kept or may be kept, which is undertaken under a court order and, if necessary, with the assistance of an expert (Article 152, Paragraph 3). A search of the automatic data processing devices and equipment on which electronic records are kept or may be kept (Article 157, Paragraph 3), the holder of the object or the person present, besides the defendant, is required to make possible access and provide information needed for their use unless any of the reasons like the exclusion from the duty of testifying (Article 93), exemption from the duty of testifying (Article 94, Paragraph 1) and exemption of a witness to answer certain questions (Article 95, Paragraph 2). The novelty is also that a lawyer's office is not envisaged as a separate object of search with a special purpose.

The formal condition for a search is an order (issued by a court on a reasoned proposal of the public prosecutor) or a legal authority, as it was in the Code of 2001, and the novelty is that in the Code of 2011 in the Article 155, Paragraph 1, explicitly lists the elements of a search order: the title of the court which ordered the search, designation of the subject-matter of the search, the reason for the search, the name of the authority which will perform the search and the other data of importance for the search. Also, in the Paragraph 2 of the same Article, it is envisaged that the search will commence no more than eight days from the date of issuance of the order and if it does not commence in the foresaid time limit, the search cannot be performed and the order will be returned to the court.

28 Judgment of the Supreme Court of Serbia, Kž. 264/2004 of 25/03/2004.
29 Judgment of the Supreme Court of Serbia, Kž. I 2100/2006 of 31/01/.2007.
30 Ruling of the Court of Appeal in Belgrade Kž. 2723/2010 of 08/07/2010.
31 „Official Gazette RS" No. 72/2009.
32 Judgment of the High Court in Valjevo K.46/2011 of 26/01/2012.
33 „Official Gazette RS" Nos. 72/2011, 101/2011 and 121/2012. This code will be implmented as of October 1 2013, except in proceedings for criminal offences belonging to organized crime or war crimes held before the special department of the competent court, in which case its implementation will begin as of January 15, 2012 (Article 608).

Regarding the preconditions for a search (Article 156), it should be mentioned that in this Code it is envisaged that in cases when military facilities, premises or state institutions, enterprises or other legal persons are searched, their managing official or person he/she designates as responsible will be summoned to attend the search and if the person summoned does not appear within three hours of receiving the summons, the search may be performed without his/her presence (Paragraph 5). The time limit of three hours from receiving the summons to attend the search is envisaged also for a lawyer appointed by the president of the competent bar association who has to attend a search of a lawyer's office or an apartment in which a lawyer lives (Paragraph 6). This time limit expresses the urgency of a search action which, as a rule, cannot be delayed, and represents a good legal solution.

It is necessary to mention that a search of a dwelling, other premises and persons found there without a court order and without the presence of witnesses (Article 158) is possible by the public prosecutor or authorized police officers in cases same as the ones in the Code of 2001, but in the draft text of the Law on Amendments and Supplements to the Code of 2011[34], it is predicted one more case when it is possible to perform a search without a court order, and that is for arresting a runaway perpetrator which was caught in committing a criminal offence prosecutable ex officio and with this solution should be solved this disputed issues in practice for which, so far, there was not any legal ground.

According to this Code, regarding the temporary seizure of objects (Article 153), contrary to the Code of 2001, it is explicitly envisaged that documents can also be temporarily seized. Moreover, if the search was not undertaken or attended by the public prosecutor, the authority which performed the search will notify him/her thereof immediately. Regarding the Article 153 of the Code, it should be mentioned that these rules should be applied by analogy on the exempted traces found during the search. The only issue which is disputable is whether the application by analogy of the rules in the cases of returning the temporary seized objects when it is dealt with temporary seized exempted traces, when criminal proceedings are not initiated, especially if they do not belong to a person at whom they were found, is justifiable and acceptable Namely, in this case it is possible to create a solution that in a case that criminal proceedings is not initiated, temporary seized exempted traces are destroyed on the basis of a decision of an authority in the procedure (public prosecutor or court), unless the Code stipulates otherwise.

Finally, a novelty should be noted regarding the registration of the course and content of a procedural action of the search which is completely justifiable, and that is if a search is performed without the presence of witnesses (Article 156, Paragraph 7) or without the presence of the representative of bar association (Article 156, Paragraph 6), taping and photographing is obligatory.

CRIMINALISTIC RULES ON A SEARCH OF A DWELLING AND PERSON (GENERAL RULES RELATED TO PLACE, MANNER AND TIME OF THE SEARCH)

The possibility to catch the defendant, to find the traces of a criminal offence or objects related to the committed criminal offence during the search is subjected to a free judgment of an authority conducting proceedings in every individual case, and that is an obligatory condition for performing the search. On the contrary, a formal condition (a decision of a competent authority) in some cases can be left out. The objects of the search can be persons and their luggage, facilities, means of transport and a free space.[35] The search of a dwelling and other premises, demands a certain preparation which is conditioned by the nature and goal of the search, urgency of the action and available time. The preparation comprises planning which is related to the organizational and tactical-technical issues like the time of beginning of the search, duration, number of persons that will perform the search, necessary technical means, tools, equipment and other. The purpose of the search is not

34 Draft text of The Law on Amendments and Supplements of The Criminal Procedure Code from 2011, 16.11.2012, available at the web site of the Ministry of Justice of the Republic of Serbia, http://www.mpravde.gov.rs/cr/Articles/zakonodavna-aktivnost/

35 A summary overview of crminalistic rules of a search in this paper is given on the basis of Ž. Aleksić, M. Škulić, Criminalistic, Belgrade, 2004., pp. 78-83.

always the same and according to that, for every search there are number of specific characteristics which differentiate them. The search of a free space is performed by dividing the space into sectors and squares (so called netlike division of space), and of special equipment detectors, trained dogs and other are used. The search of transport means is characteristic by the fact that during this search the hideouts have been looked for. Regarding the search of persons, which is specific in a way, it is necessary to indicate general rules like:[36] duty of the search of person in the situation of deprivation of liberty and enforcement of the ruling on detention, the search of a person is always performed by two authorized officials (one of them conducts a search and the other observes the searched person in the sense of his behaviour with an intention to prevent a possible resistance or escape).

In crminalistics, the search can be divided by several criteria: 1. conditions prescribed by law which have to be fulfilled (based on a written and reasoned order or on separate authorization with fulfilment of the conditions prescribed by the Code); 2. object; 3. extent (complete or partial) and 4. time of the search (simultaneous (in a group) – on more locations and individual)).[37]

Location of the search is determined in advance on the basis of collected notifications and operative information which substantiate the possibility as a substantive condition of the search. The location of the search can be a closed space (apartment, house or other premises, restaurants, institutions, military facilities etc.) or open space (courtyard or similar).

Time of the search is related to determining the best moment to perform this action and that is the moment in which a person or an object will be on a presumed place which is determined as a place of the search.[38] Related to this, it is necessary to mention that from the Code on Judicial Procedure in Criminal Offences of April 10, 1865 until the Criminal Procedure Code of 2011, in the procedural legislation it was prescribed that, usually, the search is conducted in the daytime and exceptionally at night:

1) *during the war* (Article 139, Paragraph 4 of the Code of 1929) *or in a case of the search of premises in which a criminal offence is committed, where a defendant hided from a prosecution or was caught, and also in public facilities* (Article 136, Paragraph 2);
2) *if it was commenced in the daytime and was not finished* (Article 140 of the Code of 1929, Article 149, Paragraph 2 of the Code of 1948, Article 201, Paragraph 4 of the Code of 1953, Article 207, Paragraph 4 of the Code of 1977, Article 78, Paragraph 4 of the Code of 2001, Article 157, Paragraph 2 of the Code of 2011 *(between 22 and 6 o'clock))*
3) *in the situation of a search without an order* (Article 79 of the Code of 1865, Article 139, Paragraph 4 of the Codeof 1929, Article 204 of the Code of 1953, Article 210 of the Code of 1977, Article 81, Paragraph 1 of the Code of 2001).
4) *when it is determined by a court order* (Article 78, Paragraph 4 of the Code of 2001, Article 157, Paragraph 2 of the Code of 2011).

Manner of a search is directly conditioned by the type of an object or facility of the search, that means by its special characteristics. However, in the criminal procedural legislation, certain rules of search are comprised, which are related to a manner of the search of a dwelling and person. So, when it is dealt with the search of a dwelling and other facilities, locked facilities and furniture will be opened by force only if their holder does not want to open them voluntarily or he/she is not present (Article 81, Paragraph 3 of the Code of 1865; Article 141, Paragraph 4 of the Code of 1929; Article 150, Paragraph 2 of the Code from 1948; Article 202, Paragraph 2 of the Code of 1953; Article 208, Paragraph 2 of the Code of 1977; Article 79, Paragraph 2 of the Code of 2001; Article 157, Paragraph 2 of the Code of 2011). The search should be performed with the most possible decency, without unnecessary obstruction of the house rules of order (Article 81, Paragraph 1 of the Code of 1865; Article 141, Paragraph 2 of the Code of 1929; Article 202, Paragraph 6 of the Code of 1953; Article 208, Paragraph 6 of the Code of 1977; Article 79, Paragraph 7 of the Code of 2001; Article 157, Paragraph 1 of the Code of 2011). The personal reputation of a given person and the religious customs and personal secrets should be taken into account (Article 141, Paragraph 2 of the Code of 1929). The search of a dwelling and person should be performed carefully, respecting the dignity of a person and right to intimacy (Article 79, Paragraph 7 of the Code of 2001, Article 157, Paragraph

36 Ibid.
37 B. Krivokapić, Criminalistic tactic, Belgrade, 1987, pp. 306-307.
38 Op. cit., p. 308.

1 of the Code of 2011). Regarding the search of a person, the rule is that it should be performed in a way that a woman searches other woman (Article 24 of the Law on Organization of Financial Control of 1922), when a woman is being searched the witnesses can only be other women (Article 141, Paragraph 3 of the Code on Judicial and Criminal Procedure for the Kingdom of Serbs, Croats and Slovenes of 1929). The search of a woman is performed only by another woman and witnesses could only be other women (Article 202, Paragraph 3 of the Code of 1953; Article 208, Paragraph 3 of the Code of 1977). The search of person can be performed only by persons of the same sex (Article 79, Paragraph 3 of the Code of 2001; Article 156 of the Code of 2011).

CONCLUDING REMARKS

Analyzing the positive regulation of the search of a dwelling and person, in this part of the paper it is necessary to say something about the potential disputed issues which can emerge in practice during the implementation of this evidentiary action. Firstly, that is the possibility to perform a search of those objects and facilities which are not explicitly listed in a court order although they are connected with the criminal offence for which the order was issued and there is a possibility that by their search the purpose of this procedural action will be achieved. Although there are opinions that it should be allowed for the purpose achieved, we consider that it would not be a good solution, because by acting in that way, the basic human rights of citizens would be endangered. Namely, according to the Constitution[39] (Article 20, Paragraph 3), in the process of restricting human rights, all state bodies, particularly the courts, are obliged to consider the substance of the restricted right, pertinence of restriction, nature and extent of restriction, relation of restriction and its purpose and possibility to achieve the purpose of the restriction with less restrictive means. In the situation of the search of a person and dwelling, this means that the principles of proportionality and subsidiarity must be respected. Also important is a provision of the Constitution (Article 40, Paragraph 3), which is related to the inviolability of home, that entering a person's home or other premises, and in special cases conducting search without witnesses, shall be allowed without a court order if necessary for the purpose of immediate arrest and detention of a perpetrator of a criminal offence or to eliminate direct and grave danger for people or property in a manner stipulated by the law. According to this, a search outside the subject-matter defined in the order itself would not be in compliance with the Constitution, even if, in a given case, it would be justifiable regarding its purpose. The search of a dwelling and person represents a traditional procedural action which has, for its objective, arresting the perpetrator of a criminal offence, securing the objects related to a criminal offence as well as the traces which emerged after the criminal act has been committed. The search of a dwelling and person is a significant procedural action recognized and acknowledged in the procedural legislation of Serbia from the Code on Judicial Procedure in Criminal Offences of 1865 until today and with some insignificant modifications regarding the conditions, formal and substantive, for its application, subject-matter, time and procedure of the search and the goal which is trying to be achieved. All the modifications were only a result of the existing social conditions and needs of a certain period of time. Historically observed, in our criminal procedural legislation, the search of a dwelling and person has been kept as a traditional evidentiary action, which has never been subjected to a wider revision and it is one of evidentiary actions that is very often used in practice, which undoubtedly represents a confirmation of its quality, which is the result of a good regulation in the Code.

39 „Official Gazette RS" No. 98/2006.

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JUDICIAL INDEPENDENCE RULE OF LAW AND THE CASE OF SERBIA[1]

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Abstract: Principle of judicial independence represents a basic principle of every, including the thinnest concept of the rule of law, its *condition sine qua non*. After the theoretical and normative framing of judicial independence, the authors analyze achievement of *de iure* judicial independence in the Republic of Serbia, applying indicators offered by Melton and Ginsburg. The authors took a position that *de iure* judicial independence in the Republic of Serbia is quite notably realized, although there is a room for corrections and legal framework strengthening. Finally, the authors offer suggestions *de lege ferenda*. All through the paper, the authors assume that *de iure* judicial independence is only the first step toward the thick, *de facto* independence of the judiciary.

Keywords: Judicial Independence; Rule of Law; *De Iure* Judicial Independence; *De Facto* Judicial Independence; *De Iure* Judicial Independence in The Republic of Serbia.

INTRODUCTION

The rule of law represents an open ended, fluid concept, which eludes precise theoretical definitions. It is particularly the case with attempts to define it substantively, as it is shaped so to be able to embrace a different value loading and content. Only if ideological backgrounds are left aside, there is a slight possibility to approach to a kind of consensus regarding formal, procedural elements of the rule of law. Namely, trying to delineate formal aspect of the rule of law, most scholars rely upon Fuller's finding that in order to achieve it, it is necessary that laws shall be general, public, clear, to produce effects *pro futuro* (not to be retroactive), that they are consistent, possible in use, stable (to be rarely revised) and applicable.[2] Their fundamental starting point is basically marked by a positivist concept of law.

In that way, taking Fuller as a model, Randall Peerenboom enumerates following ten issues as key elements of the *thin* rule of law theory: a) there must be procedural rules for law-making and to be valid, laws must be made by an entity with the authority to make laws in accordance with such rules; b) laws must be transparent - made public and readily accessible; c) law must be generally applicable; d) laws must be relatively clear; e) laws must generally be prospective rather than retroactive; f) laws must be consistent on the whole; g) laws must be relatively stable; h) laws must be fairly applied; i) laws must be enforced: the gap between the law in the books and law in practice should be narrow; j) laws must be reasonably acceptable to a majority of the population.[3] In order to complete the procedural conception of the rule of law, Peerenboom asserts that it is also necessary to specify goals and purposes of the system as well as its institutions. It includes stability, and preventing anarchy (Hobbesian war of all against all); securing government in accordance with law (rule of law as opposed to rule of man – by limiting arbitrariness); enhancing predictability of laws (which allows

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2 His famous eight principles defined in a negative form (as „routes of failure") are basic elements of the internal morality of law, L. Fuller, *The Morality of Law* (revised ed.), New Haven 1969, 33-38.

3 R. Peerenboom, *China's Long March Toward Rule of Law*, Cambridge 2002, 65. On Peerenbohm's differences between *thick i thin* theory of rule of law, see more in Serbian D. Avramović, „Jedan novi pogled na vladavinu prava", *Pravni život* 14/2009.

people to plan their affairs and acts); providing a fair mechanism for the resolution of disputes, and, finally, bolstering the legitimacy of the government.[4]

While defining his *thin* theory, Peerenboom is quite strongly attached to the formal concept of the rule of law, as posted by Raz.[5] Although Raz was also following Fuller's thoughts, he modifies a bit governing principles deriving out of the rule of law. So, he demands that: laws must work *pro futuro*, being prospective, open, clear and relatively stable. But, he also adds that the lawmaking process should be guided by open, stable, clear and general rules. However, Raz makes a step further by insisting that the independence of the judiciary must be guaranteed, that the principles of natural justice must be observed, that the courts should have review powers over the implementation of the other principles, that the courts should be easily accessible, and that the discretion of the crime-preventing agencies should not be allowed to pervert the law.[6]

Brian Tamanaha also elaborates chief elements of the rule of law formal component. Along with widely shared orientation within society (among citizens and Government officials) that the *Law does Rule and should Rule*, i.e. devotion to the ideal of the rule of law by ordinary citizens, he adds that key institutional presumtions are also a well developed, „robust legal profession"and legal tradition, as well as independent judiciary.[7]

If it is nearly impossible to define precisely what the rule of law is, it seems easier to answer what the rule of law is not. Namely, the rule of law excludes any kind of arbitrary conduct by the state organs, most of all by the judiciary. This is why already Montesquieu, in his theory of separation of powers, deemed necessary to separate judiciary from the other two branches of government, stressing importance of non unbiased rulings according to the law. This is why he expressly stated that, if a particular ruling should express only individual attitude of the judge, one would live in a society without precisely defined obligations to be performed.[8]

Consequently, there is no doubt in theory that the independent judiciary is a *conditio sine qua non* of the rule of law. However, notion of independent judiciary is quite vague as well as the notion of the rule of law itself. It is quite relative, subject to different interpretations,[9] and therefore it is necessary to perceive at least a certain number of its elements and their possible meanings.

NORMATIVE AND THEORETICAL FRAMEWORK OF INDEPENDENT JUDICIARY PRINCIPLE

Principle of the independent judiciary, as the basic principle which governs even the thinnest version of the rule of law, became a part of international legal order. General Assembly of the United Nations adopted in 1985. Basic Principles on the Independence of the Judiciary.[10] Without thorough elaboration, worth mentioning are only some of the most important standards. The first is obligation of the member states to guarantee the independence of the judiciary, but also to enshrine it in the Constitution or in the law of the country. Also, the duty of all governmental and other institutions is to respect and observe the independence of the judiciary. The document also imposes obligation to the judiciary to decide cases impartially, on the basis of facts and in accordance with the

4 R. Peerenboom, *op. cit.,* 67.

5 "This is the basic intuition from which the doctrine of the rule of law derives: the law must be capable of guiding the behaviour of its subjects. It is evident that this conception of the rule of law is a formal one. It says nothing about how the law is to be made: by tyrants, democratic majorities, or any other way. It says nothing about fundamental rights, about equality, or justice. It may even be thought that this version of the doctrine is formal to the extent that it is almost devoid of content. This is far from the truth. Most of the requirements which were associated with the rule of law before it came to signify all the virtues of the state can be derived from this one basic idea", J. Raz, *The Authority of Law*, Oxford 1979, 213.

6 *Ibid.,* 216–218.

7 B. Tamanaha, „A Concise Guide to the Rule of Law", *Relocating the Rule of Law* (ed. G. Palombella, N. Walker), Oxford–Portland 2009, 10–12.

8 Ch. Louis de Montesquieu, *The Spirit of Laws,* I, 11, 6, London 1777 (The Online Library of Liberty © 2004 Liberty Fund).

9 Melton i Ginsburg are aligned along with a similar reasoning by comparing independent judiciary with freedom: „Judicial independence has become like freedom: everyone wants it but no one knows quite what it looks like or how to get it, and it is easiest to observe in its absence", J. Melton, T. Ginsburg, „Does De Jure Judicial Independence Really Matter?: A Reevaluation of Explanations for Judicial Independence", *The University of Chicago, Institute for Law and Economics*, Working Paper Series Index: *http://www.law.uchicago.edu/Lawecon/index.html*, 1.

10 *U.N. Basic Principles on the Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

law, without any restrictions, improper influences, inducements, pressures, threats or interferences. Any kind of inappropriate or unwarranted interference with the judicial process is forbidden. On the other side, the document guarantees rights and liberties to the members of the judiciary, like freedom of expression, belief, association and assembly. However, only a quite general limitation clause in exercising those rights and duties is provided – to "conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary".

Such a general, not strictly defined limitation opens door for different interpretations. For example, the very wording includes possibility that judges are allowed to be members of the political parties, although it is not clear whether the drafters of the document have really wanted it, as it is disputable to what measure party membership may affect impartiality and independence of the judges. An additional doubt rises out of the ninth principle, allowing judges to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence, which can be interpreted by analogy or *a contrario* in relation to the general freedom of association clause mentioned above. Among other quite flexible principles mentioned in that document are those about the way how to get the position – by appointment or by election, and on the position tenure, until a mandatory retirement age or the expiry of their term of office, where such exists. Particularly characteristic is a formulation on possible suspension or removal of judges, which may occur "only for reasons of incapacity or behavior that renders them unfit to discharge their duties". It is quite comparable to the vast common law legal standard "during good behavior". In a word, although the UN document introduced important general principles of the judicial independence into the international legal order, it did not solve many concrete and delicate issues considering application of the principle in practice.

Instead, there are many different attempts in defining judicial independence in theory. Already Ihering stated that the judiciary means limitation of state power; acknowledgment of independence to the judges and latter infringement of that independence, leads the state power in open contradiction with itself. It violates law in a form of a legal murder. „The State authorities who lay a hand upon that order of justice which they themselves created pronounce their own condemnation."[11] He notes that the basic guarantee of judicial independence from the sole will of the state power is vested in fortification of its position in the law.[12] He adds that independent judiciary depends to a great extent upon personal qualities of the judges. Intellectual presumptions are indispensable knowledge and the requisite readiness in its application, i.e. theoretical and practical mastery of the law. On the other hand, moral presumptions are also necessary - a strong will and moral courage to realize law without any disturbance by any kind of considerations, hatred or friendship, sympathy or fear of the people.[13] According to Ihering's view, what shapes the real judge is "strict obedience to the law, closing one's eyes to all respect of person, equal measure for the vulgar and the respectable, the rascal and the man of honor, the rich usurer and the poor widow; closing the ear to complaints of the poor and miserable, and the lamentations of their dependents, from whom the judge's decision will take away a husband and father".[14] Independent judiciary is also defined as "the extent to which a court may adjudicate free from institutional controls, incentives, and impediments imposed or intimidated by force, money, or other extralegal, corrupt methods by individuals or institutions outside the judiciary, whether within or outside of government".[15]

In analyzing the concept of independent judiciary Pamela Karlan leans upon two concepts of liberty shaped by Isaiah Berlin: negative liberty – freedom *from* and positive liberty – freedom *to*.[16] Based upon that idea she determines reality of two concepts of the judicial independence. The first – negative conception of the independent judiciary (freedom *from*) comprehends absence of different kinds of pressures to a judge: physical compulsion, economic interest,[17] popular pressure, the political branches, the judge's own background.[18] On the other hand, positive conception of independent

11 R. Ihering, *Law as a Means to an End*, Boston 1913, 293.
12 *Ibid.*, 302.
13 *Ibid.*, 297.
14 *Ibid.*, 307-308.
15 R. Howard, H. Carey, „Is an Independant Judiciary Necessary for Democracy", *Judicature*, Vol. 87, 6/2004, 286.
16 P. Karlan, „Two Concepts of Judicial Independence", *Southern California Law Review*, Vol. 72, 1998-1999.
17 „Judges must be free from having their financial wellbeing depend on the outcome of cases before them", *ibid.*, 538. She also points that centers of economic power should have no influence to the election of judges.
18 „Clearly, judges should strive to overcome their irrational and unconscious prejudices against particular types of cases or litigants", *ibid.*, 547.

judiciary comprehends "freedom from review by higher courts, freedom to ignore precedents, and freedom to pursue a conception of the good or the just that contradicts positive law".[19] "In a positive conception, the actor is free to realize a particular internally generated goal".[20] Finally, she concludes that "judicial independence is not a single concept, but a constellation of different freedoms from and freedoms to".[21]

Positive conception of the judicial independence, perceived in that sense, may turn to a very dangerous concept for legal safety and the rule of law. It would comprehend overall release of judges, resolving them from the law and precedents, so that verdicts could become a plant of different value stances created by judges. In that way the judicial discretion may lead to an absurd that the judge replaces the legislator, so that Dworkin's judge with superhuman abilities – "Judge Hercules", steps to the floor.[22] It looks like that a majority of Anglo-American contemporary scholars, following Dworkin, believe in super ability of judges and in their chance to act *sine ira et studio*. A significant example is Cox who, although generally well aware that "idea of judicial independence presupposes decisions 'according to law' and that the judiciary may be put at risk of politicization not only from the outside, but by judges abdicating that responsibility in order to impose their personal values and dreams of a good society", still believes that "great judge", "by careful attention to the discipline of legal reasoning", "can minimize the danger of writing personal values or preferences into decisions".[23]

Principle of independent judiciary presupposes primarily absence of political, economic, social and other pressures, as well as separation of the legislative and executive branches from judiciary. As Serbian law professor Slobodan Perović puts it, "Principle of judicial independence is defined by words that the judge is independent of any kind of power or influence, except of the power of the legitimate law. That principle, therefore, presumes liberty to decide within the framework of the laws and his conscience. In that sense, the judge must not be affected by any kind of influence coming of whomever or from whatever cause: external pressure of personal, material or political background, different kinds of incentives, threats or direct or indirect interventions, fear of revenge or other kinds of unworthy influences".[24] And, of course, beside external pressures and interferences within the judicial process, all kinds of internal pressures coming from fellow colleagues or higher courts mark a kind of danger.

Some authors claim that one should differentiate at least two possible meanings of the independence of the judiciary. On that line John Ferejohn distinguishes personal independence of the judge (independence and freedom of the judge in decision making, without any kind of pressures and influences) and, on the other hand, institutional independence of courts and judges, that is ability of the judges and the courts to act without reliance to other institutions or groups.[25] He believes that in the USA the judges are independent, but that institutional independence of the judiciary is missing, due to constitutional possibility of interference of political power. "The independence of the judiciary, as opposed to that of individual judges, is dependent on the 'willingness' of the popular branches of government to refrain from using their ample constitutional powers to infringe on judicial authority".[26] In any case, it seems that it is not possible to evaluate and analyze principle of the independence of the judiciary as an integral concept, without focusing both possible meanings mentioned above.

There is almost no constitution in the contemporary world, which does not proclaim principle of the independent judiciary and guarantee at least austerely the independence of the judiciary. However, there is a clear distinction in theory between *de iure* and *de facto* independent judiciary.[27]

19 P. Karlan, „When Freedom Isn't Free: The Costs of Judicial Independence in *Bush v. Gore*", *Ohio State Law Journal*, Vol. 64, 2003, 265. See more: P. Karlan, „Two Concepts of Judicial Independence", *op. cit.*

20 P. Karlan, „When Freedom Isn't Free: The Costs of Judicial Independence in *Bush v. Gore*", *op. cit*., 265.

21 P. Karlan, „Two Concepts of Judicial Independence", *op. cit*., 558.

22 More elaboration on that issue, see in Serbian D. Avramović, „Odluka ili norma – slobodno sudijsko uverenje kao pretnja vladavini prava", *Zbornik radova Pravnog fakulteta u Novom Sadu* 2/2012, 311-325.

23 A. Cox, „The Independence of the Judiciary: History and Purposes", *University of Dayton Law Review*, Vol. 21, 1996, 580, 567.

24 S. Perović, *Sudijska nezavisnost*, Beograd, 1998, 62.

25 J. Ferejohn, „Independent Judges, Dependent Judiciary: Explaining Judicial Independence", *Southern California Law Review*, Vol. 72, 1999, 355.

26 *Ibid*., 382.

27 See L. Feld, S. Voigt, „"Economic Growth and Judicial Independence: Cross Country Evidence Using a New Set of Indicators", *European Journal of Political Economy*, vol. 19, 2003, 501-504; J. Melton, T. Ginsburg, *op. cit.*; R. Howard, H.

Almost all countries in the world could assert that they have the independent judiciary *de iure*, as they have established guarantees of the independence of the judiciary by their legal acts, mostly by their constitutions. But, principle of judicial independence presumes *de facto* independence as well, namely application of the proclaimed principles in practice, which is something that many states may not be proud of. Nevertheless, *de iure* judicial independence affects to a great deal establishing of the independent judiciary *de facto*, and therefore it is important by itself.

There are different indicators invented in theory to "measure" the independence of the judiciary. In that way Feld and Voigt suggest twelve parameters of *de iure* independent judiciary, mostly leaned upon Melton's and Ginsburg's criteria.[28] On the other hand, Rios-Figueroa lists only three indicators of the *de iure* judicial independence: the selection procedure, the removal procedure, and the tenure of judges.[29] Therefore, out of many different indicators offered in the literature, it seems that classification proposed by Melton and Ginsburg looks like most acceptable, being focused to six key components.[30]

The first indicator is *statement of judicial independence*. It comprises constitutional declaration of the independence of the judiciary which may enhance independence in practice. The second parameter offered by Melton and Ginsburg is *judicial tenure*, which should be life tenure or at least unlimited in time, in order to enable true independence of the judges. The third is *selection procedure*. They claim that the procedure of the judge's appointment should include a judicial body or at least two or more state bodies, but in any case procedure of the judge's selection performed solely by executive or legislature should be avoided. The fourth indicator is *removal procedure*. Judges should never have a constant fear of loosing the job. Therefore Melton and Ginsburg urge that the very constitution should prescribe removal procedure, as well as that removal requires the proposal of supermajority vote in the legislature or that judicial council can propose removal with approval by another political actor. A *limited removal conditions* is the fifth factor of the judicial independence. According to their opinion, the judiciary would be more independent if the constitution explicitly limits removal to crimes and other issues of misconduct, treason, or violations of the constitution. Judge Kaufman states likewise that chief form to protect the independent judiciary is to provide for the judges secure tenure by the constitution and to allow "removal only for the most serious causes and by the strictest procedures".[31] Finally, as the last attribute of the independence of the judiciary, Melton and Ginsburg propose *salary insulation* - salary of the judges cannot be reduced during their term in office. They add that it should be a constitutional guarantee, in order to prevent "punishment" of the judges by political power.

DE IURE INDEPENDENCE OF THE JUDICIARY IN THE REPUBLIC OF SERBIA

Guided by parameters proposed by Melton and Ginsburg for evaluation of the independence of the judiciary, a case study of the Republic of Serbia is going to be performed by analysis of the elements proposed. In addition some slight corrections of the theoretical framework are going to be introduced in order to make it applicable to more states, particularly to those in transition.

1. *Statement of Judicial Independence*. The *Constitution of the Republic of Serbia* (2006) proclaims the independence of the judiciary in a few articles. Institutional judicial independence is declared allready within the principles of the judiciary in the Art. 142 (2): „Courts shall be separated and

Carey, *op.cit*; J. Rios-Figureoa, J. Staton, „Unpacking the Rule of Law: A Review of Judicial Independence Measures", *CELS 2009 4th Annual Conference on Empirical Legal Studies Paper*, *http://ssrn.com/abstract=1434234,* 13. Figureoa and Staton do not accept conceptual differentiation between *de iure* and *de facto* independent judiciary. However, they suggest distinction between judicial autonomy and judicial power, on the one hand (what would basically correspond to *de facto* independence), while, on the other hand, they keep the usual meaning of *de iure* judicial *independence*...

28 L. Feld, S. Voigt, *op. cit*., 501-503.

29 J. Rios-Figueroa, "Institutions for Constitutional Justice in Latin America", *Courts in Latin America*, (eds. G. Helmke and J. Rios-Figueroa), New York 2011, 27-54, quoted according to J. Melton, T. Ginsburg, *op. cit.* Sam Nasaro, legal advisor at the US Embassy in Belgrade, in his lecture to the students of the University of Belgrade Faculty of Law in 2006, picked up three chief elements for the independence of the judiciary - separate judicial branch, life term for judges during good behavior, salary that cannot be reduced during term in office.

30 J. Melton, T. Ginsburg, *op. cit.*

31 I. Kaufman, „Chilling Judicial Independence", *Yale Law Journal*, Vol. 88, 1979, 716.

independent in their work and they shall perform their duties in accordance with the Constitution, Law and other general acts". Art. 149 is dedicated to personal independence of the judges: „In performing his/her judicial function, a judge shall be independent and responsible only to the Constitution and the Law. Any influence on a judge while performing his/her judicial function shall be prohibited".[32] The Constitution also provides for other guarantees of the independent judiciary: non-transferability of judge (Art. 150),[33] immunity (Art. 151),[34] incompatibility of judiciary function (Art. 152).[35] The Republic of Serbia additionally guarantees and develops the principle of the judicial independence through other sources of law. So, Art. 1 of the *Law on Organization of the Courts* repeats the norm of the Constitution stated in Art. 142 (2).[36] However, Art. 3 regulates the judicial independence with more details: "Judiciary belongs to the courts and it is independent of legislature and executive. Court decisions shall be obligatory for all and may not be a subject of extrajudicial control. A court decision may only be reconsidered by an authorized court in a legal proceedings prescribed by the law. Everyone is obliged to obey final decision of the court".[37] Also, the Law on Organization of the Courts prohibits any kind of influence to the court.[38]

Similarly, the *Law on Judges* stipulates that the judge shall be independent in his work that he has to maintain confidence in his independence and impartiality, and to obey the Code of Ethics enacted by the High Judicial Council.[39] Art. 22 prescribes a specific, mutual independence of the judges, namely freedom of the judge to defend his standing. It releases the judges of the duty to explain their legal considerations to other judges, including the President of the Court, except in the explanation of the ruling.

Finally, the first canon of the *Code of Ethics*,[40] issued by the High Judicial Council, pursuant to the Law on Judges Art. 3 (4), provides for personal independence of the judges.[41] Altogether, it seems evident that there is a firm, in some respect quite specific normative statement of judicial independence in the Republic of Serbia.

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32 Ustav Republike Srbije, „Službeni glasnik Republike Srbije" [Constitution of the Republic of Serbia, „Official Gazette of the Republic of Serbia"], *br. 37/06*.

33 "A judge shall have the right to perform his/her judicial function in the court to which he/she was elected, and may be relocated or transferred to another court only on his/her own consent. In case of revocation of the court or the substantial part of the jurisdiction of the court to which he/she was elected, a judge may exceptionally, without his/her consent, be permanently relocated or transferred to another court, in accordance with the Law". See also Zakon o sudijama, „Službeni glasnik Republike Srbije"*[*Law on Judges, „Official Gazette of the Republic of Serbia"] *br. 116/2008, 58/2009 – odluka US, 104/2009 i 101/2010,* Art 18, 19, 20, 21.

34 „ A judge may not be held responsible for his/her expressed opinion or voting in the process of passing a court decision, except in cases when he/she committed a criminal offence by violating the Law. A judge may not be detained or arrested in the legal proceedings instituted due to a criminal offence committed in performing their judicial function without the approval of the High Judicial Council". See also Zakon o sudijama, „Službeni glasnik Republike Srbije"*br. 116/2008, 58/2009 – odluka US, 104/2009 i 101/2010,* Art. 5.

35 "A judge shall be prohibited to engage in political actions. Other functions, actions or private interests which are incompatible with the judiciary function shall be stipulated by the Law". See also Art. 55 (5) of the Constitution on freedom of association: „Judges of Constitutional Court, judges, public prosecutors, Defender of Citizens, members of police force and military persons may not be members of political parties".

36 Zakon o uređenju sudova, „Službeni glasnik Republike Srbije" [Law on Organisation of the Courts, „Official Gazette of the Republic of Serbia"] *br. 116/2008, 104/2009 i 101/2010*.

37 See also Art. 145 of the Constitution.

38 Zakon o uređenju sudova, „Službeni glasnik Republike Srbije" *br. 116/2008, 104/2009 i 101/2010*, Art. 6, Art. 71.

39 Zakon o sudijama, „Službeni glasnik Republike Srbije" *br. 116/2008, 58/2009 – odluka US, 104/2009 i 101/2010* , Art. 1 and Art. 3.

40 The Code of Ethics consists of seven "canons". The first one has the title "Independence".

41 "In the performance of their duties, judges shall be independent and shall be subordinate only to the Constitution and the law.

Judges shall be free in representation of their beliefs, determination of fact, and implementation of the law in all matters in which they rule.

Judges shall be under no obligation to explain to anyone, including other judges and the Court President, their legal stands and the determined state of the fact, except in the explanation of the ruling, or when a special law specifies otherwise.

Implementation:

1.1. Judges shall perform their judicial duty independently, without any outside influences, limitations, persuasion, pressures, threats, or anyone's interference.

1.2. Judges shall be independent in relation to the legislative and executive powers, the media, and other institutions of the society, political parties, other judges, and in relation to parties in proceedings.

1.3. Judges shall promote the high standards of judicial conduct and comply with them, with aim to maintain and strengthen the confidence of the public in the independence of judges and courts.

2. *Judicial tenure*. The Constitution of the Republic of Serbia guarantees permanent tenure of office to the judges in Art. 146(1). However, already Art. 146(2) introduces an awkward exception considering the judges elected for the first time. Their term is limited to three years only.[42] Constitutionally prescribed "probation period" for the judges, designed to check their skills and capacities, but possibly to test out the degree of their loyalty as well, unquestionably affects harmfully the principle of the judicial independence.

It became a very hot issue and provoked a vivid scholarly discussion, when a general re-election of the judges took place in Serbia in 2009, performed by the High Judicial Council, pursuant to the Law on Judges of 2008.[43] Namely, the Constitution of the Republic of Serbia of 1990 had guaranteed permanent tenure of the judges in Art 101(1), without additional exception introduced in the Art. 146(2) of the new Constitution. However, the process of the judge's re-election was nevertheless performed on that ground, and it encompassed the judges who got their posts before the new Constitution. It affected harsh opposition in the general public, association of judges, among lawyers, professors and at the Constitutional Court. The case was resolved with the dissenting opinion stressing that "permanent tenure is defense of the judicial independence, as the judge, once elected, shall perform his duty continually, without periodical re-elections; only if he does not perform it with due knowledge and full conscience, he is eligible to be dismissed".[44] Truly, political games on account of the independence of the judiciary lead inevitably to dependant position of the judges and their uncertainty considering actual political flows and changes. It took more than three years that the principle of permanent tenure has been reestablished in Serbia, and that the unfavorable consequences of the general re-election of judges have been canceled.

Permanent tenure is also guaranteed in Art. 2 and Art 12 of the Law on Judges. But, there is again a kind of controversy between Art. 12(1) and Art. 12(3). While the former prescribes that "Judicial function lasts continuously since the first election of the judge until his retirement", the latter literally follows the vocabulary of the Constitution Art. 146(2), claiming that: "Exceptionally, a person who is elected a judge for the first time shall be elected for the period of three years".[45] It seems that it has been better from the technical point of view (although not substantially), that the lawgiver remained at the constitutional formulation as a whole, by stating as in the Art. 146(1) of the Constitution concisely: „A judge shall have a permanent tenure". At least, the internal normative contradiction would not be so provoking and absurd. In any case, the example of re-election of judges in Serbia and contentious normative shaping of the permanent tenure testifies about the importance of that principle. It is a good example how strongly the idea of re-election of the judges is in contradiction with the independent judiciary.

3. *Selection Procedure*. How the judges are selected belongs among the most important and pragmatic issues of the independence of the judiciary assurance. In Serbia those conditions are quite clearly posted in the Law on Judges.[46] In order to reduce influence of the politics to the election of the judges, to diminish interference of the legislature, but most of all of to limit the executive power, the Constitution provided that an independent, separate, collective body (High Judicial Council), formed by a majority of representatives from the judiciary, performs election of the judges. Such a form of the judges' selection seems to be quite proper, as the electoral body consists mostly of qualified, basically judicial personnel, which may guarantee judicial autonomy and the independ-

1.4. Judges shall defend the independence of the court from political pressures, interventions, and influences, in every situation. Judges shall not participate in public debates of political nature, except when the debate pertains to issues related to the work of the courts and the independence of the judiciary".

See Etički kodeks, „Službeni glasnik Republike Srbije" [Code of Ethics, „Official Gazette of the Republic of Serbia"], *br. 96/2010*. English translation available at

http://www.seio.gov.rs/upload/documents/ekspertske%20misije/judical%20system/Code%20of%20Ethics.

42 Art. 146: "A judge shall have a permanent tenure. Exceptionally, a person who is elected a judge for the first time shall be elected for the period of three years".

43 See very interesting contributions in Serbian: T. Marinković, „O ustavnosti opšteg reizbora sudija", *Anali Pravnog fakulteta u Beogradu* 1/2009; S. Orlović, „Stalnost sudijske funkcije *vs.* opšti reizbor sudija u Republici Srbiji", *Anali Pravnog fakulteta u Beogradu* 2/2010.

44 Dissenting opinion of the Judge Olivera Vučić, *Rešenje Ustavnog suda Srbije IUz – 43/09*, 9. jul 2009. godine, "Službeni glasnik Republike Srbije" *br. 65/2009*.

45 Comp. Art. 12(3) of the Law on Judges (Zakon o sudijama, „Službeni glasnik Republike Srbije" *br. 116/2008, 58/2009 – odluka US, 104/2009 i 101/2010*) with Art. 146(2) of the 2006 Constitution.

46 Art. 43 regulates that: „As the judge can be elected any citizen of the Republic of Serbia who fulfills general conditions of employment in the state bodies, who graduated from the faculty of law, who passed the bar exam, and who is skilled, qualified and creditable for the judicial position". Art. 44 and Art. 45 elaborate those conditions in details.

ence of the judiciary, as a barrier to possible political influences and abuse. Namely, the High Judicial Council elects the judges to a permanent judicial function [Art. 147(3)] and proposes to the National Assembly election of the judges for the first election to the judicial function (Art. 154).[47] However, one should keep in mind that majority of members in the body perceived to guarantee the judicial independence (High Judicial Council) are elected by the Assembly, which usually decides having in mind their political party interests, as criticized by Prof. Ratko Marković, who framed the previous Constitution of the Republic of Serbia (1990).[48] Still, the National Assembly is limited by the proposal of the High Judicial Council and can not elect other candidates than those proposed. This solution gives at least a slight advantage to professional instead of exclusively political interests. Consequently it is very important not only to shape properly the institutional legal framework, but to enable in practice selection of the best candidates to carry out so responsible judicial functions and to find proper mechanism of balance among different branches in the selection process.

4. *Removal procedure*. Art. 148 of the Constitution of the Republic of Serbia asserts: "A judge's tenure of office shall terminate at his/her own request, upon coming into force of legally prescribed conditions or upon relief of duty for reasons stipulated by the Law, as well as if he/she is not elected to the position of a permanent judge. The High Judicial Council shall pass a decision on termination of a judge's tenure of office. A judge shall have the right to appeal with the Constitutional Court against this decision. The lodged appeal shall not include the right to lodge a Constitutional appeal…" As already mentioned, procedure of removal (by relatively independent judicial body as the High Judicial Council) is a proper and a quite original solution. Theoretically, it protects the judges from political influence and pressures. But, the objection remains that the major part of that body is elected in the last instance by the National Assembly, which always reflects temporary political interests.[49] Also, the Constitutional Court, which may interfere in the removal process, does not guarantee fully the independence of the judiciary, as it is, at least for now, basically a political-judiciary body, not completely resistant to political influences or expectations.

5. *Limited Removal Conditions*. Alike Art. 148(1) of the Serbian Constitution, the Law on Judges also defines conditions for termination of the judges tenure of office, which "shall terminate at his/her own request, if he/she fulfils conditions to be retired, if he/she looses permanently working ability to perform the judge's function, as well as if he/she is not elected to permanent office or if he/she is dismissed".[50] Among the most dangerous threats for the independence of the judiciary is possibility that the judge may be dismissed. Therefore the law defines in details grounds for dismissal of the judges. "A judge is dismissed if convicted for an offence carrying imprisonment sentence of at least six months or for a punishable act that demonstrates that he/she is unfit for the judicial function, in case of incompetence or due to a serious disciplinary offence.[51] The lawgiver was aware how dangerous may be use of legal standards in defining such a delicate issue. Therefore he stipulates a particular provision to define more precisely the notion of "incompetence" in performing the judicial function. With that purpose Art. 63 of the same Law prescribes: "Incompetence shall mean insufficiently successful performance of the judicial function, i.e. if a judge's performance is evaluated as 'dissatisfactory' according to the criteria for the evaluation of the work of judges". However, it seems that such clarification is not quite proper and that reasons for dissolution of the judges are

47 Zakona o sudijama, „Službeni glasnik Republike Srbije" *br. 116/2008, 58/2009 – odluka US, 104/2009 i 101/2010*, Art. 51, Art. 52.

48 R. Marković, „Ustav Republike Srbije iz 2006 – kritički pogled", *Anali Pravnog fakulteta u Beogradu* 2/2006, 23.

49 The Constitution prescribes in Art. 153 how the High Judicial Council is composed:

"The High Judicial Council is an independent and autonomous body which shall provide for and guarantee independence and autonomy of courts and judges.

The High Judicial Council shall have eleven members.

The High Judicial Council shall be constituted of the President of the Supreme Court of Cassation, the Minister responsible for justice and the President of the authorised committee of the National Assembly as members ex officio and eight electoral members elected by the National Assembly, in accordance with the Law.

Electoral members shall include six judges holding the post of permanent judges, of which one shall be from the territory of autonomous provinces, and two respected and prominent lawyers who have at least 15 years of professional experience, of which one shall be a solicitor, and the other a professor at the law faculty."

See also Art. 20(1) Zakon o Visokom Savetu Sudstva [Law on High Judicial Council], „Službeni glasnik Republike Srbije", *br. 116/2008, 101/2010, 88/2011*.

50 Art. 57(1) Zakona o sudijama, „Službeni glasnik Republike Srbije" *br. 116/2008, 58/2009 – odluka US, 104/2009 i 101/2010*.

51 Art. 62 Zakona o sudijama, „Službeni glasnik Republike Srbije" *br. 116/2008, 58/2009 – odluka US, 104/2009 i 101/2010*.

not posted strictly enough. Also, the second quite threatening condition is "a serious disciplinary offence". The Law on Judges also tries to elaborate that concept and sets down that a discipline offence is negligent performance of the judicial function or behavior which is discreditable for the judicial function.[52] Already the next, Art. 90(1) of the Law on Judges enumerates an extremely long list of the discipline offences: a violation of the principle of independence; failure of a judge to request his/her recusal in cases where there are reasons for recusal or exclusion foreseen by law; unjustifiable delays in the drafting of decisions; processing of cases in an order contrary to the order of reception; unjustifiable failure to schedule a hearing; frequent tardiness for hearings; unjustifiable prolonging of proceedings; unjustifiable failure to notify the court president about cases with prolonged proceedings; obviously incorrect treatment of participants in proceedings and the court staff; incompliance with the working hours; acceptance of gifts contrary to the regulations on the conflict of interest; engaging in inappropriate relations with parties in proceedings and their legal representatives; comments about court decisions, activities, or cases, made to the media in a manner contrary to law and the Court Rules of Procedure; engaging in activities that are incompatible with a judge's function under the law; unjustified non-attendance of mandatory training programs; provision of incomplete or incorrect information relevant for the work and decisionmaking of the High Judicial Council; unjustifiable change in the court's annual schedule of judges' activities, and the violation of the principle of natural judge, contrary to the law; serious violation of provisions of the Code of Ethics.

Potentialy, all those cases may be regarded as a severe disciplinary offence (and, consequently, as a ground for dismissal), as the next paragraph of the same Article, 90(2) states that „A severe disciplinary offence exists if the commission of a disciplinary offence referred to in paragraph 1 of this Article caused a serious disruption in the exercise of judicial power or regular duties at the court or a severe damage to the dignity of the court or public trust in the judiciary, and in particular if it results in the statute of limitations causing serious damages to the property of the party in proceedings, as well as in the case of repeated disciplinary offence". Such a long list, full of flexible legal standards, is evidently not a strong recommendation for the independence of the judiciary. Use of so many legal standards opens a wide ground for arbitrary behavior in the dismissal and removal procedure of the judges.

6. *Salary Insulation*. Melton and Ginsburg primarily have in mind the constitutional guarantee of the amount of the judge's earnings, as political power could not make pressure on the judges by threatening them with a possible salary reduction. However, this criterion should be slightly modified in the theoretical framework by its more extensive understanding, in order to adapt it to specific conditions in the Republic of Serbia (and some other countries in transition). In the Serbian Constitution there is no guarantee as for the level of the judge's salary. However, Art. 82 of the Law on Organization of the Courts prescribes that "means for the activities of the Courts are provided from the budget of the Republic of Serbia. Volume and flow of means for the activities of the Courts shall uphold the independence of the judiciary and enable regular activity of the Courts". The very fact that the National Assembly decides every year upon the budget for the Courts, although the High Judicial Council proposes the volume and the structure of the budget necessary for the regular judicial activities, obtaining previously opinion of the Ministry of Justice on that issue,[53] clearly points to conclusion that economic pressure by politics upon judiciary is an open possibility. It is even more probable as "the control over use of the means from the budget performs the High Judicial Council, Ministry in charge of the judiciary and Ministry in charge for finance".[54]

The Law on Judges declares in Art. 4 that the judges shall have a material independence: "A judge is entitled to a salary commensurate with the dignity of judgeship and the burden of responsibility. The salary of a judge shall represent a guarantee of his/her independence and support of his/her family". However, those words of the Law are but a pure declaration, having in mind Art. 37(4) of the same Law, stating that „The base for calculation and payment of salaries of judges shall be established in the Law on Budget", so that the salary of the judges can be theoretically changed every single year. In circumstances of the economic crisis, objective financial limitations could always be used as a good excuse for a possible limitation of the judge's salaries. And those salaries are usually,

52 Art. 89 Zakona o sudijama, „Službeni glasnik Republike Srbije" *br. 116/2008, 58/2009 – odluka US, 104/2009 i 101/2010.*
53 Art. 83 Zakona o uređenju sudova, „Službeni glasnik Republike Srbije" *br. 116/2008, 104/2009 i 101/2010.*
54 Art. 84 Zakona o uređenju sudova, „Službeni glasnik Republike Srbije" *br. 116/2008, 104/2009 i 101/2010.*

in the countries in transition, not very appropriate and in compliance with the responsibility of the profession. Therefore, in such circumstances, the criterion considering salaries of the judges as a guarantee of material independence should be formulated much more modestly in countries like Serbia. It would sound: proper and stable salaries. In that context one should recall statement by a famous Serbian law professor Đorđe Tasić who wrote before the Second World War, explaining why economic independence is a core of the independent judiciary: "Nothing could push a person into temptation as strongly as financial problems. And there are many channels today which, although they do not look like a corruption outside, are indeed corruption in their substance. Material safety enables a person to have a wider optic and to dedicate himself to his profession with more enthusiasm".[55]

INSTEAD OF CONCLUSION

Protection of the independence of the judiciary is a key ingredient of any of the many rules of law concepts – thin or thick, formal or substantive. Firming *de iure* guarantees of the independent judiciary is but a first step towards much more demanding, *de facto* independence. Efforts aiming to achieve those goals are evident in Serbia, most of all on the level of shaping a more stable legal framework. The analysis performed mostly according to Melton and Ginsburg methodology has shown that some further improvements could nevertheless be introduced *de lege ferenda* in the Republic of Serbia. Firstly, in order to enable strict tenure of office by the judges, the probation period of three years should be avoided and, if needed, a kind of supervision period performed by the judge with whom the candidate would work together for a certain period could be established, but without election of the candidates. Hopefully this is one of the reasons why the Judicial Academy has been recently set up in Serbia. Any kind of re-election of the judges is *contradictio in adiecto* with the independence of the judiciary, and it should be omitted from the Constitution. Secondly, one should rethink the way of how the members of the High Judicial Council are elected, in order to eliminate political influences in election and dismissal of the judges. Namely, along with the National Assembly, it could be helpful to introduce an extra state independent body in the procedure of the High Judicial Council member's election, as they could potentially decide on the judges careers, so that they should be themselves independent persons as much as possible. Thirdly, having a recent negative experience, grounds for removal of the judges should be much more restrictively defined. Employing a number of legal standards like "incompetence" or connecting possible removal to the long list of possible "severe disciplinary offences" opens room for misuse and stands in opposition to the principle of the judicial independence. Finally, in order to gain really independent judges, it is essential to obtain their true material independence, maybe by forming a specific kind of fixed budget which should remain out of touch by other branches of government.

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EXECUTION OF PRISON SENTENCES IN SERBIA
REGULATION AND PRACTICE

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Abstract: Given that the courts in Serbia relatively often choose in favour of the imposition of a prison sentence, the author of the paper analyzes the principles of the execution of this sentence. These are the principle of legality, humanity, legitimacy, prohibition of discrimination, keeping record, funds, individualization, imposibility to disciplinary sanction conducts of other offenders, serving the sentence together, releasing on parole and enabling postpenal help. The above principles are, as the author points out, in conformity with the relevant standards established by the execution of sentences in a series of universal and regional documents of binding and recommended character.

On the other hand, the execution is fraught with many problems, one of which is for its destructive effects stand out: overcrowding, inadequate architectural solutions and the institutes being out of date, staff problems, problems with health care, as well as negative trends of the structure of persons deprived of freedom and the structure of committed crimes.

Finally, the author suggests possible directions to overcome these problems, thereby allowing a more efficient exercise purposes of the imprisonment.

Keywords: prison sentences, execution principles, criminal law, Serbia, reforming efforts.

INTRODUCTION

Execution of penal sanctions presents the final phase of an extremely complex process which begins with detection of crime and offenders, continues with initiation of criminal prosecution and pronouncing the sanctions by court. By execution, the general purpose of regulating and pronouncing the penal sanctions should be achieved in a practical way and the appropriateness of the court decision about the types and measures of sanctions in each and every case should be verified. The results achieved by execution plan have a significant influence on the total value of criminal justice policy for repression and prevention of criminality; therefore, a lot of attention has been paid to the execution of penal sanctions.

Despite imposing alternative sanctions as an attempt of the organized society to invent more humane way to control criminality, prison sentence as a penal sanction has still been very often enforced in the world as well as in Serbia. According to the structure of penal sanctions pronounced to the adult offenders in our country from 2006-2010 prison sentences with the share of participation of 24.4% is in the second place, behind the sentence of probation (56%) and in front of the fine as a sentence (17.2%). From the total number of 45,129 prison sentences pronounced during the survey period, up to one-year prison sentence participates with 34,754 or 77%.[1] It is obvious that the alternatives cannot completely replace this sentence and it will remain in penal sanctions registry for a long time. In conclusion, detailed analysis of regulation and practice of prison sentence executions in Serbia, as well as indicating the possible directions to overcome number of problems in this field, have the social and scientific legitimacy.

PRINCIPLES OF EXECUTION OF PRISON SENTENCE

According to the provisions of Article 31 of the Law on the Execution of Penal Sanctions (hereafter: LEPS),[2] the purpose of execution of prison sentence is for a prisoner to adopt socially acceptable values during serving of sentence, through a system of modern correctional measures, aimed at easier reintegration into society after release in order not to commit offences in the future.[3]

1 Punoletni učinioci krivičnih dela u Republici Srbiji 2010. – Prijave, optuženja i osude, Bilten br. 546, Republički zavod za statistiku, Beograd, 2011, str. 55.
2 "Sl. glasnik RS", br. 85/05, 72/09. i 31/11.
3 See: rules 58, 59. and 65. Standard minimum rules for the treatment of prisoners (SMR); rules 6. and 102.1 European prison rules (EPR).

As an organized action, sentence execution is based on 11 principles, 6 of which are of general significance (common for the execution of all penal sanctions), and 5 principles are characteristic only for the execution of prison sentence. These are:

1. Principle of legality – the execution of penal sanctions is founded on the law and requires its full compliance, with no exceptions. Implementation of the principle in the execution phase is logically related to the principle of legality in material criminal law (*nullum crimen*, *nulla poena sine lege*) as a general civilization achievement. The provisions of Article 1 of the LEPS governs, unless otherwise provided by some other law, the execution of penal sanctions in criminal proceedings against the adults, rights and obligations of persons against whom the sanctions are applied, the organization of Directorate for the execution of penal sanctions, supervision over its work, the execution of sanctions pronounced for corporate misdemeanors and offences, seizure of property gain obtained by criminal act, corporate offences and enforcement of the detention measure. Where a law ratifying an international agreement regulates a certain issue, the provisions of such law shall apply. Article 3 prescribes that the provisions of the LEPS shall also apply for execution of sanctions pronounced by foreign courts, where so provided by particular law and international agreements. Speaking of the principle of legality in this field, we do not bear in mind only the law (in a formal sense) as a legal ground for the execution of penal sanctions, but also the by-laws established by the law itself. Therefore, the LEPS regulates the most important issues of the execution of penal sanctions, whereas the by-laws regulations overcome the universality of law provisions, the law is being elaborated, defined and completed as such applied in practice.

In accordance with the principle of legality, execution of sanctions commences after the decision ordering the sanction becomes final and there are no legal obstacles for its execution (Article 1, paragraph 1, the LEPS). Exceptionally, where provided by law, the execution of a sanction may start before the decision ordering the sanction becomes final (Article 4, paragraph 2, the LEPS).

Persons against whom the sanctions are applied are entitled to protection of fundamental rights prescribed by the Constitution, ratified by international agreements, and by generally accepted rules of the international law and the provisions of the LEPS (Article 8, paragraph 1).

The basic sense of the principle of legality is the protection of freedom and rights of the convicts from the arbitrary and irresponsible actions of the authorities, and also from the possible abuse during the execution of penal sanctions. This principle governs in its fundamental sense, the connection by law, so its absolute supremacy over the arbitrary authorities presents the necessary assumption for the constitution of modern and with international standards arranged system for the execution of penal sanctions in Serbia;

2. Principle of humanity – the sanction is executed in a way that ensures respect of dignity of the person against whom the sanction is applied (Article 6, paragraph 1, the LEPS). Human dignity is an absolute inner value that every man possesses in equal way, therefore, the convicts against whom the sanctions are applied.[4] Its significance comes out from a fact that it presents the vital element for defining a human being and the backbone of all human rights and freedoms. It is innate, inalienable and inviolable wherefore as explicitly stated in the international documents and constitutional provisions it must be respected and protected.[5] Respect for human dignity presents the foundation of democratic state of justice and also the essential assumption for fulfilling the purpose of the pronounced penal sanction and more durable criminal and political effects.

Paragraph 2, of the Article 6, in the LEPS prescribes that any form of torture, abuse, degrading and experimental treatment subjected over the persons against whom the sanctions are applied is forbidden and punishable.[6]

4 J. Meyer-Ladewig, Ljudsko dostojanstvo i Evropska konvencija o ljudskim pravima, Pravni život, Beograd, br. 1-2/04, str. 143.

5 See: Article 10, paragraph 1. International Covenant on Civil and Political Rights (ICCPR); Article 2, Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (DPT); Article 2, Code of Conduct for Law Enforcement Officials (CCO); Principle 1, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (BPP); Principle 1, Basic Principles for the Treatment of Prisoners (BPTP); Rules 18.1, 49, 54.3 and 72.1 EPR; Article 23, paragraph 1 and Article 28, paragraph 1, Constitution of the Republic of Serbia ("Sl. glasnik RS", br. 83/06. i 98/06).

6 See: Article 5, Universal Declaration of Human Rights (UDHR); Article 7, ICCPR; Rules 31 and 71, 1) SMR; Articles 1-7 and 10, DPT; Articles 1, 2, 4 and 10 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Article 5, CCO; Principle 6, BPP; Principle 2, Principles of medical ethics relevant to the role of health

Although the principle of humanity as a civilization achievement is beyond any doubts, it objectively has its limits based on the fact that penal sanctions, especially the sentence, are particularly inhumane and consist of certain evil.[7] Inhumane character of the prison sentence cannot be avoided since it has been established in its own retributive nature, as its implementation cannot be avoided, too, because it represents essential means for society protection against criminality. But the necessary inhumanity can be reduced,[8] above all by the total and unconditional respect for dignity of every person against whom the sentence is applied;

3. Principle of legitimacy – convict's fundamental rights may be restricted only to the extent necessary for the execution of penal sanctions and in the procedure defined by the LEPS (Article 8, paragraph 2). The criminal proceedings are limited by this provision in the phase of the execution of penal sanctions which means that the limitations of rights shall be minimum and necessary.[9]

According to paragraph 3, Article 6, of the LEPS, use of disproportionate force against the convict is punishable. The issue is about the agreement that affirms the principle of legitimacy and also reveals the issues of precise legal regulation of the situation when the force may be used, the way of usage of force, and also the responsibility for exceeding the limits. Detailed legal constitution of this matter is necessary for the facts that people who professionally use force, inevitably exposing themselves to danger due to counter force they face, inevitably tend to exceed the limits;[10]

4. Principle of prohibition of discrimination – person against whom the sanctions are applied shall not be discriminated on grounds of race, color, sex, language, religion, political or other convictions, ethnic or social origin, financial status, education, social or other personal features (Article 7, the LEPS). The issue is about an extremely important principle formulated in almost the same ways both internationally and nationally.[11] Practical value of prohibition or elimination of discrimination is the implementation of equality principle referring to legal equality, equal legal protection and equality during the law implementation. The third element of equality principle has a particular significance clearly emphasizing that the sanction must not be applied in discriminating way.

As the negation of equality, discrimination presents forbidden distinction *a propos* distinguishing treatment without objective or reasonable excuse. In accordance with that issue, discrimination during the execution of penal sanctions may be defined as an unfair treatment based on rationally inessential distinctions;

5. Principle of keeping records – appropriate records is kept of every person against whom the sanctions are applied.[12] Precise keepings of records provide supervision over the execution of penal sanctions, over the work of the authorities during the procedure of their execution, as well as a research for evaluation of the system of execution of penal sanctions and detection of problems which disable its adequate functioning;

6. Principle of funds – funds for the execution of sanctions are provided in the budget of the Republic of Serbia. Persons against whom the sanction is applied shall not bear the costs of execu-

personnel, particularly physicians, in the protection of prisoners and detainees against torture and other cruel, inhuman or degrading treatment or punishment (PME); Article 3, European Convention for the Protection of Human Rights and Fundamental Freedoms (ECRF); Article 1, European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT); Rules 48 and 60.3 EPR; 14th General Report on the CPT's activities [CPT/Inf (2004) 28]; Article 25 and Article 28, paragraph 2, Constitution of the Republic of Serbia; Article 137 and Article 252, paragraph 1, Criminal Code – CC ("Sl. glasnik RS", br. 85/05, 88/05, 107/05, 72/09. i 111/09); P. van Dijk, G. J. H. van Hoof, Teorija i praksa Evropske konvencije o ljudskim pravima, Sarajevo, 2001, str. 288-301.; Ž. Ditertr, Izvodi iz najznačajnijih odluka Evropskog suda za ljudska prava, Beograd, 2006, str. 55-81.; V. V. Veković, Zabrana mučenja – instrumenti i mehanizmi Saveta Evrope, Beograd, 2005.

7 Z. Stojanović, Krivično pravo – opšti deo, Beograd, 2009, str. 26.

8 V. Kambovski, Kazneno pravo – opšt del, Skopje, 2006, str. 174.

9 See: principle 5. BPTP; rules 2. and 3. EPR; article 20. paragraphs 1. and 3. Constitution of the Republic of Serbia.

10 R. Lukić, Sistem filozofije prava, Beograd, 1995, str. 499.

11 See: Articles 2 and 7 UDHR; Article 2, paragraph 1, and Article 26, ICCPR; Article 1, paragraph1, and Article 5 (b) International Convention on the Elimination of All Forms of Racial Discrimination; Article 1, Convention on the Elimination of Discrimination Against Women; Rule 6.1) SMR; Principle 5 BPP; Principle 2, BPTP; Article 14 ECRF; Article 1 Protocole No. 12 with ECRF; Rule 13 EPR; paragraph 55 3rd General Report on the CPT's activities [CPT/Inf (93) 12]; paragraph 25, 10th General Report on the CPT's activities [CPT/Inf (2000) 13]; Article 21, paragraphs 1-3, Constitution of the Republic of Serbia; Articles 128, 317 and 387 CC; Article 1, paragraph 1, Article 2, paragraph 1, point 1), Article 3, paragraph 1 and Article 4, Law on Prohibition of discrimination ("Sl. glasnik RS", br. 22/09).

12 See: Rules 7, 66.2) and 66.3) SMR; Rules 15.1, 33.2 and 42.3c EPR; Paragraph 53. 2nd General Report on the CPT's activities [CPT/Inf (92) 3]; paragraphs 39, 44, 60 and 61, 3rd General Report on the CPT's activities [CPT/Inf (93) 12]; paragraphs 39, 40 and 50, 8th General Report on the CPT's activities [CPT/Inf (98) 12].

tion, unless otherwise provided by law (Article 11, the LEPS). The Directorate of execution of penal sanctions in regulations of the budgetary system presents separate entity having at disposal more than 0.7% of the budget;

7. Principle of individualization – the treatment of prisoners should be suited to their character and purpose of correctional program[13] (Article 32, paragraph 1, the LEPS). Therefore, it is necessary to achieve the executive individualization which forms organic and functional unity with legal and juridical individualization so that the pronounced prison sentence has re-socialization and reintegration of the convict as a result.

Necessary assumption of a successful executive individualization is comprehensive study (observation) of the convict's personality. Multidisciplinary examination of personality is performed in order to look into its characteristics significant for choosing the most optimal procedure.

In order to achieve executive individualization in practice, the necessary means are adequate classification of the convicts[14] and categorization of penitentiary institutions.[15] Classification presents sending the offenders to the institutes without doing an observation, according to objective criteria (external or horizontal classification) and then classifying them in the institute into smaller and homogeneous groups according to the similarity of personal characteristics (internal or vertical classification) to use the same treatment for the entire group – so-called group individualization. Categorization of the institutions presents creating branching nets of specialized institutions or general institution departments to achieve special correctional program for separate groups of the offenders formed according to the previous observation and classification;

8. Principle of impossibility to disciplinary sanction the conducts of other offenders – the offender cannot be employed, in the service of the institution, in any disciplinary capacity (Article 33, the LEPS). Penitentiary administration is responsible for offenders not to be in a supreme position regarding the rest of the offenders and dictate the discipline. Mechanisms to establish control, used for various reasons,[16] at first sight seem useful but on long terms their consequences are harmful: offenders are constantly deprived of their rights and the structure of power is inevitably created where the strongest arbitrary dictates the discipline to stay on good terms with the directorate. Informal system becomes stronger limiting the effects of formal system;

9. Principle of serving the sentence together – the convicts serve the sentence together, as a rule (Article 34, paragraph 1, the LEPS), grouping them according to the system of classification in order to use the same treatment. The principles are based on person's social nature as a human being who forms and develops through everyday contacts in primary and secondary groups. Allowing the convicts under the penitentiary conditions living with other people, the cell sentence serving is dismissed leading to alienation and damaging their physical and mental health.

Where necessary due to the health condition of a convict or where provided by the LEPS, it may be provided that a convict is held separately from other convicts (Article 34, paragraph 2).

The convicted men and women who serve their sentence separated[17] (Article 34, paragraph 3, the LEPS);

10. Principle of releasing on parole – in order to encourage convicts in their efforts to reintegrate into the society, a convict who can reasonably be expected to become a law-abiding citizen may be released on parole (Article 35, the LEPS). The court may release on parole a convicted person who has served 2/3 of the prison sentence if in the course of serving the prison sentence he has improved so that it is reasonable to assume that he will behave well while at liberty and particularly that he will refrain from committing a new criminal offence until the end of the imposed prison sentence (Article 46, paragraph 1, CC). Therefore, releasing on parole is possible only in case of cumulative fulfillment of the above mentioned conditions.

The purpose of this legal and penal institute, on the one hand, is to encourage the convict to behave well and take active part in the process of re-socialization and, on the other hand, to adjust

13 See: Rule 69. SMR; Rule 103.2 EPR.
14 See: rule 67, SMR.
15 See: rule 68, SMR.
16 Examples are: insufficient number of employees at the facility or its operation by the authoritarian model and control model of convicts. S. Livingstone, T. Owen, Prison Law, Text & Materials, Oxford, 1995, p. 292.
17 See: Rule 8a) SMR; Rule 18.8b EPR; paragraph 24, 10th General Report on the CPT's activities [CPT/Inf (2000) 13].

effective duration of the sentence and achieve the penal purpose in each and every case eliminating harmful consequences of being in the institute.

Releasing on parole is a possibility, not the right of the person sentenced to prison. The convict having tried to escape or who had escaped during serving of the sentence cannot be released on parole;

11. Principle of post-penal help – prisoners who are released on parole are given necessary assistance in order to facilitate their reintegration into life outside the institute (Article 36, the LEPS). Period after the release is very critical for the convict facing, at the very beginning of the process of social reintegrating, with number of problems of financial, social, psychological nature and cannot, by rule deal with them on his own. Loss of self-confidence and disappointment for negative relations with the environment (prejudice, stigmatization, refection, unprepared to help, etc.) may encourage him to commit crimes again. Preventing this, an organized social help is offered such as: employment, temporary accommodation, creating conditions for specialized training, financial help for necessary expenses, medical treatment, as well as advices for dealing with new problems. In accordance with this, the institute is obliged to inform the custody authorities about the help needed for the convict after the release from the execution of prison sentence.[18]

PROBLEMS WITH THE PROCEDURE OF EXECUTION OF PRISON SENTENCE

The results of empirical researches indicate that the execution of prison sentence in Serbia faces with number of problems, with destructive performance such as:

1. Overcrowded institutes – although the real number of accommodation capacities for people deprived of their freedom in Serbia, according to the criteria of the LEPS and EPR, are about 7,000,[19] due to a constant growth of prison population beginning in 1991, and intensifying since 2003, the number of the people is considerably greater and on 31 December 2007, it was 8,970[20] and on 31 December 2011, it was 11,094.[21] Increasing number of people deprived of freedom is the consequence of the increasing number of the convicts;

2. Inadequate architectural solutions and the institutes being out of date – it is a serious problem of impossibility to accommodate people deprived of freedom in accordance with the international standards. For example, the District Prison in Pančevo was built in the first quarter of the 19th century during the reign of Maria Teresa, while the prison in Subotica was built in 1880. Prison buildings in Pančevo and Vršac, due to their historical and cultural values, are under the auspices of the Institute for the Protection of Cultural Monuments of the Republic of Serbia whose permission is necessary even for the minimal structural intervention;

3. Staff problems – vacant formational workplaces of the security are fulfilled not fast enough having a negative influence on the functioning and safety of the facilities;

4. Problems with health care – only a few facilities have a full time doctor and the satisfactory basic health care of the persons deprived of freedom, while other facilities employ doctors from the community health centre. Special prison hospital, due to the decreasing number of staff, epidemic proportion overcrowding and increasing number of patients with addiction diseases treatments, can hardly take a role of central hospital for the system of execution;

5. Negative trends of the structure of persons deprived of freedom and the structure of committed crimes – along with the increasing number of these persons, other unfavorable occasions are obvious: increasing number of crimes with the elements of violence; organized crime; lower age limit of the convicts; the problem of return; high level of addiction disease (half of them had a drug experience or they are active addicts). Under the conditions of overcrowded facilities, this kind of criminological and psychological structure of persons deprived of freedom has a direct influence

18 See: Rules 64 and 81 SMR; Rules 107.4 and 107.5 EPR.
19 Ljudska prava u Srbiji 2010 – pravo, praksa i medjunarodni standardi ljudskih prava, Beograd, 2011, str. 318.
20 2008 Annual Report on Prison Administration Work, Ministry of Justice of Republic of Serbia, Belgrade, 2009, p. 93.
21 2011 Annual Report on Prison Administration Operations, Ministry of Justice of Republic of Serbia, Belgrade, January 2012, p. 110.

on: the development of informal system; reducing their as well as the staff safety; bringing in the forbidden weapons and substances; breaking the discipline and house rules; organized protests; bad atmosphere in total, and consequently reduced safety level.

REFORMING EFFORTS

Starting from the issues of fundamental significance for democratic development of society, issues related to the system of penal sanctions and their execution, respect for the principle of legality and legitimacy when applying penal sanction and achieving equality before the law, the authorities in Serbia decided to make reforming efforts in this field. The reform has been the condition to create a state with the rule of law. In accordance with this, on 25 May 2006, the National Assembly of the Republic of Serbia determined the National judicial reform strategy,[22] consisting of the reform strategy for institutional sanction execution system based on three goals: protection of the convicts in safe and reliable way under humane conditions in accordance with international standards; promotion of other sanctions besides the instructional; decreasing the rates of return after the release.

Significant role in the reform system of sanction execution has the strategy for reducing the overcrowding of accommodation capacities in the institutes for penal sanctions execution in the Republic of Serbia in the period 2010-2015[23] (the Strategy 2010) developed by the government on 22 July 2010. The main reason for its developing is the fact that in our country since 1991 the number of people deprived of freedom has been constantly growing as the rate of confinement, too, and the consequences are: inadequate functioning of the prison system; impossibility to optimally achieve convict's rights; wait for a long time for pronounced prison sentences execution; pointless police and judiciary efforts to efficiently detect the convicts, as well as a real danger of criminal sentences lapse.

The fundamental goal of the Strategy 2010 is to create and implement the measures and activities to reduce the overcrowding of accommodation capacities in the institutes for penal sanctions execution, where by the protection of freedom and human rights, other basic social values, and general purpose of prescribing, pronouncing and executing penal sanctions must not be compromised in any way. Achieving the goal of the Strategy 2010 shall provide: better position of the persons deprived of freedom and achievement of their rights; humanization of penal sanctions execution and complete implementation of international standards in this field; making back connection to control the success of legislative implementation during the sanctions execution to correct penal court policies and fundamental criminal-political decisions; more effective work of the Directorate for the penal sanction execution; reduction and redistribution of the budget of the Republic of Serbia for the penal sanctions execution; more protection for society members.

Implementation of the Strategy 2010 means performing certain activities under normative and organizational plan, which shall be achieved in short, medium and long term phase. These activates refer to: alternative measures and sanctions; release on parole and temporary release; hiring a judge for the penal sanctions execution; probation service; increasing the number of accommodation capacities and better conditions in the institutes; increasing the number of qualified capacities in the Directorate; amnesty; unique information system.

On 29 September, 2005, the National Assembly of the Republic of Serbia determined the Criminal Code (CC), the Law on Juvenile Criminal Offenders and Criminal Protection of Juveniles[24] and the Law on the Execution of Penal Sanctions (LEPS) enforced on 1 January, 2006. Forming of the legal framework for the reform of the penal sanctions execution system continued when the Law on the Execution of the Prison Sentence for Criminal Offences of Organized Crime in 2009[25] was determined as well as two Laws on Amnesty in 2010[26] and in 2012.[27]

Along with those activities, the following were also performed:

22 Decision of establishing National Judicial Reform Strategy, ("Sl. glasnik RS", br. 44/06).
23 "Sl. glasnik RS", br. 53/10.
24 "Sl. glasnik RS", br. 85/05.
25 "Sl. glasnik RS", br. 72/09. i 101/10.
26 "Sl. glasnik RS", br. 18/10.
27 "Sl. glasnik RS", br. 107/12.

1. Building new, reconstruction and adaptation of the existing accommodation capacities – in accordance with the activities defined by the Strategy 2010 Penal-correctional institute with specialized security was built in Belgrade – Padinska Skela with the capacity of 450 persons and Special department for execution of the prison sentence for criminal offences of organized crime in Penal-correctional institute in Pozarevac – Zabela projected for the accommodation for 120 convicts. Total capacity of the new objects, including the prisons in Pančevo (300 convicts and 200 offenders), Kragujevac and Medvedja where the construction is about to begin, shouldn't be less than 2,000 places. New institutes must be arranged to the European standards in special and security sense providing keeping the persons deprived of freedom under the humane conditions in safe and reliable way;[28]

2. Modification of the rule of employment, increasing the number of employees in some services and the rationalization of workplaces – the priority is to increase the number of employees for security service, which shouldn't be less than 3,000[29] considering the growth of convicted population and new accommodation capacities. Rationalization and new systematization of the workplaces shall create the conditions to involve more employees into the work with the persons deprived of freedom;

3. New categorization of the institutes and the modification of the rationalization concept – beside the optimal categorization of the facilities according to the new characteristics of the convicted population, significant efforts have been made in the field of qualitative modification of rationalization concept. The centre point of the treatment is the individualization of the approach and implementation of the programs which present the convicts' needs (overcoming drug addiction, reducing aggressive behavior, enabling the convicts to live in community, etc.);

4. Continuous training and professional development of the employees in the Directorate – with the efforts of both, the Directorate for the penal sanctions execution and the Organization for Security and Co-operation in Europe (OSCE) Mission to the Republic of Serbia, in 2005 the Center for training and professional development was established in Niš to provide the employees, as the most important resource of the execution system and carriers of the reform, with the training, professional development, knowledge and qualification improvement, and the increase of work motivation, too;

5. Alternative penal sanctions implementation assumptions – after the modern legal framework for the sentence execution in the work of public interest and the probation with surveillance have been formed, the priorities were: commissioner selection; establishing the Commissioner service within the Department for treatment and alternative sanctions; composing the document "The role of Commissioners' Service in the system of penal sanctions execution" that governs the way of work, acting and behavior of the commissioners responsible for the alternative sanctions execution; establishing the by-laws; organizing the seminars for training and professional development of the commissioners led by the experts of the Probation service in the Kingdom of the Netherlands; leading the campaign for presenting these sanctions to the public. First commissioner offices were opened in 2010 in Belgrade, Novi Sad, Subotica, and the next ones in Niš, Valjevo, Sombor and Kragujevac. Gaining positive experience during 2012, four new commissioner offices are planned to be opened.[30] Otherwise, in 2011 the Directorate began with prison sanction execution without leaving the premises where the convict lives[31] (Article 45, paragraph 5, CC). It is about another type of alternative imprisonment the application of which should reduce the problem of overcrowded accommodation capacities in the institute for penal sanction execution;

6. Improvement of the transparency of work of the Directorate and improvement of protection of rights of persons deprived of freedom – according to the new LEPS for the first time the secondary system for the protection of rights of the convicts has been introduced as a part of the Direc-

28 Similar to Serbia, Eastern and Central European counties tried between II and III millennium to solve the problem of great number of prison population by building new accommodation capacities. M. Mac Donald, Prison Health Care in the Czech Republic, Hungary and Poland, HEUNI Paper, no. 16, Helsinki, 2001, p. 6.; R. Walmsley, Prisons in Central and Eastern Europe – Achievements, problems and objectives, HEUNI Paper, no. 41, Helsinki, 2003, p. X-XI, 13 and 15.

29 The goal has not been achieved yet, on 31 December 2011, the number of full time employees as security officers was 2,293; 2011 Annual Report on Prison Administration Operations, op. cit., p. 132-133.

30 Alternativne sankcije, Bilten br. 3, Beograd, 2012, str. 4-5.; 2011 Annual Report on Prison Administration Operations, op. cit., p. 23.

31 *Ibid*., p. 25

torate for the penal sanctions execution, court protection has been provided and also the control by the authorities outside the execution system, and the independent control by various domestic and international organizations and bodies; beside the copies of the LEPS and the most important by-laws, "Manual for Sentenced Persons", "The Code of Ethics for Prison Staff" and "The Guide for Sentenced Persons in the Admission Department" have been published and distributed to the institutes; program for the training of the penitentiary staff includes the presentation and implementation of rules for the protection of human rights; in order to inform the prisoners in the best possible way about their rights and protection, legal libraries are established in prisons. By adequate media news, regular publishing of annual reports about the work of the Directorate, monitoring the rights of the persons deprived of freedom, the improvement of presenting the work of the institute to the public has been made and the transparency has been increased.

Strategic partner of the Directorate in the process of reforming the penal sanctions execution system was the OSCE Mission to the Republic of Serbia. It offered expert and financial help with creation and implementation of the new normative framework of the penal sanctions execution system; establishing and development of the alternative sanctions system; the training and professional development of the employees in the Directorate; increasing the transparency of the work of the Directorate and the improvement of protection of convict's human rights; the improvement of health care in the institutes (staff education in the service of health care, treatment and protection in the field of prison pathology, opening the "Drug-free Unit", etc.); education of the convicts in the Penal-correctional institute in Sremska Mitrovica; composing the draft "Strategy of Social Reintegration and Acceptance of Ex-prisoners 2012-2015", etc.

In reforming the penal sanctions execution system the Directorate cooperates with the Council of Europe Office in Belgrade (the project "Support to the reform of the prison system in the Republic of Serbia"), the European Agency for Reconstruction (EAR), the Canadian International Development Agency (CIDA), etc.

CONCLUSION

The prison sentence execution as the irreplacable link in the chain of social reactions to the criminality in Serbia characterizes the number of problems. Some of them are long term, some short term, but the thing in common is their destructive performance intensified under the conditions of economic crisis.

Legal solutions in this field are compatible with the relevant standards arranged by the series of international documents of universal and regional character, but most of them are hardly applicable in everyday penitentiary practise. In the last few years significant normative, organizational, financial, technical and other efforts have been made, but the results are less than satisfactory. The penal sanctions execution system is a living organism which needs constant improvement with the activities full of content. That is the only way to create the consistent execution system, which means that during the penal sanction execution and the prison sentence execution, methods, means and measures arranged by the positive rules of the highest standards must be applied with no exception. Creating the general climate of respect for human rights, including more humane relation to the convicts and the improvement of their position, contributes to the more efficient achievement of the purpose of prison sentence execution which, despite the implementation of the alternative sanctions, remains the inevitable means in the fight against crime.

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THE EFFCTS OF PRISON SENTENCE IN CRIME PREVENTION

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Abstract: In this paper the effects of deprivation of freedom in prevention of crime has been analysed. Lately, deprivation of freedom is getting more important as a consequence of more rigorous penalty policy against offenders. In the last few decades, crime is getting traits of pandemics and threatens to destroy social values. The effects of crime prevention are weak, although penalty policy is more rigorous and represive conception is applied. Crime rate is constantly high, recidivism is very high, new forms of crime are developing (cyber crime, corporative, organised and etc.), and prison population is increasing until threatening penalty system on a global level. Expirience has shown that the idea of reeducation and rehabilitation of criminals did not give expected results, on a level of both general and special prevention.

Research of freedom deprivation effects shows that in a certain segments this penalty is giving specific results (criminal isolation and reduced risk to society), but also that staying in prison has serious consequences on offender, in physical, social, economical and pshycological sense. That is the reason the concept of punishment on two levels is more present. One level of punishment is designed for the cruelest criminals, wich are sentenced to very long panalties. Second level of punisment is designed for offenders that are less dangerous for society, and have a real base for successful reintegration into community. This category of offenders is sentenced, primarely, to alternative criminal sanction, and in that way eliminate most of deficiencies that come with freedom deprivation.

Keywords: effects of freedom deprivation, crime prevention, recidivism, treatment, social values, alternative criminal sanctions.

INTRODUCTION

Prison sentence has been introduced to criminal legislation under the influence of the so called "Classical School" that insisted on the replacement of capital punishment (as inhumane and not useful) with punishments based upon the deprivation of liberty, either with or without forced labor. Prison sentence holds central position in all contemporary systems of criminal law. It is prescribed for the majority of criminal offences because it facilitates the accomplishment of the purpose of punishment including re – education and resocialization of prisoners and their reintegration in regular social life.[1]

Prison sentence, as an actual criminal sentence, obtained its legal independence at the end of the 18th century, as it was prescribed in 1971 by French *Code Penal* that also limited the application of capital punishment and corporal punishments, eliminated lifetime imprisonment and accepted the system of absolutely determined sentences. The right to punish perpetrators of criminal offences is one of fundamental rights of every state and it determines the purpose and the goal that punishments have in the field of crime prevention. Issues such as criminal policy, the purpose and goals of punishments represent interesting questions for numerous scientific disciplines that study human behavior and social and interpersonal relationships within the community. Actually, punishing represent "imposing certain deprivations and restrictions on the perpetrator or taking away some of his rights, which would in other cases be morally inappropriate and illegitimate"(Dolinko, 1997: 508). Of course, punishing can also be analyzed from ethical perspective, which includes various approaches, treating punishment either as a morally problematic practice or as a morally acceptable act. The purpose of normative theories is to define the practice of punishing, to determine the goals of punishment, to provide guidelines for the creators of penal policy and to give legitimacy to state institutions. The form of crime reaction depends on several factors and it can be changed

1 Jovašević, D. Stevanović, Z. (2011) Punishment as a form of social reaction to crime, the Institute for Criminological and Sociological Research, Belgrade, P.31.

and adjusted to actual social, psychological and other circumstances. It can be noted that significant changes have occurred in the past couple of decades when it comes to forms of crime reaction. The idea of rehabilitation has been rejected; penal policy is becoming more and more severe; the punishment of imprisonment is being reformed; criminality is connected with politics; crime prevention is expanding; civil society is included in crime control; victim's rights are confirmed; the safety of the community is emphasized; an innovative way of managing prisons and situations of crisis has been introduced; the feeling of crisis is permanently present etc.[2]

This raises one fundamental question: *whether and how the punishment that includes the deprivation of liberty can fulfill the general purpose of punishing*. If we observe prison sentence, as the most severe punishment, and measure its efficiency through the percentage of recidivism, we can conclude that the efficiency of prison sentence is doubtful. Namely, the percentage of recidivism in Serbia is around 60%[3], and it is even higher on global level. So, individual prevention shows rather modest results – it has no effect on more than one half of prison population. When aspects of the efficiency of individual prevention are considered, it can be concluded that imprisonment only partially disables the offender from recommitting criminal offences – in the majority of cases, the convict is unable to commit criminal offences while being inside the prison. When it comes to re – socialization, purpose of which is to change convict's habits and values that are considered to have led him to commit crime and to enable the convict to embrace socially acceptable lifestyle, the overall condition can be described as undefined. Namely, contemporary penal policy shows that in the past couple of decades, the resocialization (and rehabilitation) concept has been abandoned, which created a vacuum that moved the entire concept of punishing in the field of retributive approach to punishing. Those who criticize the resocialization concept point out that not only does resocialization represent an unreal and unachievable goal, but it also represents a threat for the principles of prisoners' rights and humane treatment of prisoners, which produces harmful impact on the forming of a prosocial personality.

Crime prevention represents a serious social reaction to criminal activities of delinquents and its purpose is to protect general values. Three main causes can be differentiated in contemporary punishing concepts: protecting society from delinquents, resocialization of delinquents and prevention of criminal behavior. Penological theory defends the approach according to which the most successful way to defend the society from crime is to re – socialize and reintegrate offenders and to re – include them in the society. Punishment represents the consequence of the offence and a way to warn the individual to change his behavior, system of values and attitude toward social values, particularly when it comes to the behavior that is incriminated by legal norms.

THE ROLE OF PRISON SENTENCE IN CRIME PREVENTION

In contemporary society, i.e. the society of risk or postmodern society, as various authors call it, penal policy is focused on pragmatic goals of social control. Numerous authors comment that the changes affecting forms of crime reaction are incoherent, different, contradictory and without clear theoretical conception. A dual approach can be noticed. On one hand, strict punishments are prescribed for those perpetrators that are marked as dangerous for the society, whereas alternative sanctions or processes of restorative justice are applied on the perpetrators of less serious criminal offences, on the other. The approach relying on treatment and rehabilitation has been replaced by the retributive concept of punishing. The co called "new retribution" includes the distribution of justice that is proportional to the seriousness of committed criminal offence, inspired by the principle "punishment in proportion to deserts", which is absolutely acceptable for the citizens craving for justice.[4] Renewed glorification of the punishment of imprisonment i.e. prison sentence is the result of actual policy that promotes penal policy based upon anticipated popularity, according to which prison represents a means to create conditions for safety of the society in general, without taking into consideration any penological consequences. As the result of such concept of punishing, a mas-

2 Stevanović, Z. I Igrački, J.(2011), The effects of prison sentence and institutional tretment in crime prevention, Legal word, Bar Association of the Republic of Serbian. Banja Luka, 405-407.

3 According to the statistical report of the execution of criminal sanctions, the Republic of Serbia in 2009. p.32

4 Vasiljević-Prodanović, D.(2011), Theories of punishment and their implications penology, Special Education and Rehabilitation No. 3 Belgrad , pp. 510-511.

sive number of imposed prison sentences appears, higher than any regular percentage of prison population and opposite to historical and comparative norms for such type of society.[5] Nowadays, "prison crisis" can also be noted. It shows itself through inefficient treatments, strong tension among prisoners, high percentage of ill prisoners, inadequate hygienic, material and other conditions, insufficiently motivated and educated prison staff etc. Fitzgerald and Sim (1982) specify five elements of prison crisis: crisis of conditions, crisis of contents, crisis of authority, crisis of visibility and crisis of legitimacy. In such constellation of relations, the efficiency of prison sentence and penitentiary institutions in which this punishment is executed is becoming more and more questionable. These doubts about the efficiency of prison sentence raise a series of questions. What does the society want from prisons as institutions? Is it possible to change the personality of an offender, who has already formed his attitudes and lifestyle? It is possible that both – general public as well as experts have been expecting too much from prison sentence and from prisons as institutions in which custodial sentences are executed. It is extremely hard to estimate the efficiency of prison sentence, as a way to deter the offender from re – committing a criminal offence. Some researches confirm that there is a high level of skepticism when it comes to the effects of prison sentence, whereas, on the other hand, a number of researches show that this sentence can have a positive impact on the offender and that imprisonment, as a form of coercion, has positive effects on crime prevention. There is a general consensus that the efficiency of prison sentence in the field of crime suppression significantly depends on offender's character as well as on the way he perceives the deprivation of liberty[6].

Three major goals are most frequently emphasized in contemporary concepts of punishing: protecting the society from offenders, re-socialization of offenders and prevention of criminal behavior. Penological theory defends the standpoint according to which the most successful way to defend society from crime is based on resocialization and reintegration of offenders, i.e. re – inclusion of offenders in the society. When prison sentence and the aforementioned model of resocialization are considered, a number of authors underline the unnatural and conflict character of its role that includes punishing and resocialization at the same time. Punishment appears as the consequence of an offence and as a warning for the individual that he needs to change his behavior, system of values and attitude toward social values etc. Resocialization is a concept that finds means and methods to change some of individual's habits, his system of values and attitude toward social values, particularly the behavior that is incriminated by legal provisions. Individualization certainly represents one of the most essential ways to achieve re – socialization. It includes the creation of an individualized program of prison sentence execution which is applied in a professional, lawful and humane manner, including the respect of prisoner's human rights and personal dignity.

In the past couple of decades, the viewpoint, according to which prison sentence and institutionalized resocialization do not have a sufficient influence on the change of offender's pattern of behavior causing their rapid return to criminal pattern of behavior and tendency to commit even more brutal criminal offences, is becoming more and more prevalent. The cause of such condition can be found in unsuccessful re – socialization, predominant impact of negative informal prison structures, as well as in the fact that prisons, as institutions, do not have enough power to change offenders' patterns of behavior. Generally speaking, the conditions in prison systems are extremely complex: prisons are overcrowded to the maximum, the structure of prisoners is becoming more and more complex in both – criminological and psychological sphere, the number of drug – addicts is growing, financial position of prisoners and prison staff is unsatisfactory, professional potential of prison staff is inadequate, the employees are not motivated etc. Already complex conditions are becoming even more complicated due to the fact that "criminal infection" is becoming more and more present in prisons, whereas formal system is becoming weaker and less efficient, which questions the accomplishment of prison's basic functions.[7] Director of International Center for Prison Studies, Rob Allen, comments current conditions in prison systems: "Having taken into consideration high financial, social and ethical expenses of prisons, these data should encourage each country's policies

5 Garland, D. (2001) The culture of controle-crime and social order in contemporary society.Oxford university Press., p.14.
6 Fitzgerald, M., Sim, J. (1982): British prisons. Oxford: Basil Blackwell, 133-154.
7 Stevanović, Z. . i Igrački, J.(2011), The effects of prison sentence and institutional tretment in crime prevention, Legal word, Bar Association of the Republic of Serbian , Banja Luka, 406

to do everything they can in order to limit the size of their prison population. Too frequent use of prison sentence does not contribute to the improvement of public safety"[8].

A large percentage of recidivism and inefficiency of re-socialization, as well as more widespread criminality, of a most diverse form on a global scale, lead to more pronounced differences in attitudes towards offenders and the state reaction method. There is a growing ambivalence, where some believe that "crime is an inevitable phenomenon in modern society- get used to it, be realistic, protect yourself and survive", while others regard crime as "disaster for society, where someone has to be responsible for such a situation, because crime degenerates society and it is a sign that it is high time for a return to traditional values and discipline. " [9]These views are the result of a lack of efficiency of deprivation of liberty and penal institutions in achieving the goals and objectives of punishment, which resulted also in theoretical reflections on the purpose of punishment. Often the question arises: *What is happening with deprivation of liberty?* To be able to understand the current discussion about the purposes of punishment, we should recall the development of different ideas. The main question to be answered is- what do we want to achieve, what is the goal of punishing the offender? The essence of the various theories that explain the purpose of punishment can be reduced to three theoretical concepts, known in the literature as absolute, relative, and mixed theories.

Absolute theories see the purpose of punishment in retaliation for the one who punishes and atonement for one who is punished. Punishment returns evil which is caused by the criminal act. The purpose of punishment is exhausted by focusing on the past (*punitur quia peccatum est*). Punishment is a goal in itself, regardless of whether it is applied on the basis of divine, moral or legal justice[10] .

Relative theories belong to the period of social reflection on criminality reduction so they leave the idea of revenge and punishment is recognized as a method of protecting society from criminality. These theories focus on the future - punish now so as not to sin in the future. It is clear, therefore, that those are theories of prevention – special and general.

Mixed theories try to find a compromise between these two opposing groups of theories, so that the starting point for this group of theories is that punishment, not only can, but must have more goals. For a historical account of the development of the theory of the purpose of punishment we start from the classical school according to which punishment in Europe in the 18th century was very arbitrary and retributive, characterized by severe penalties and corporal punishment. The criminal justice system has allowed for great discretionary power of judges, which made it easier for "perpetrators" to go unpunished, and the innocent to be convicted[11].

The representatives of the classical school evaluate such a system as inhumane and unjust, and as an irrational and inefficient way of controlling criminality. Representatives of this school make an effort to reform the system of punishment and start from the assumptions that crime should be defined by law, punishment must be adequate to criminal offence, a person commits a criminal act freely and penalty provisions should deter, that is, prevent crime. The most important representative of the classical school is Beccaria with his work, "Of Crime and Punishment" (*Dei delitti e delle pene*) from 1764. He states in his work that "the intent of punishments is not to torment a sensible being, nor to undo a crime already committed. The end of punishment, therefore, is no other than to prevent the criminal from doing further injury to society, and to prevent others from committing the like offence. Such punishments, therefore, and such a mode of inflicting them, ought to be chosen, as will make the strongest and most lasting impressions on the minds of others, with the least torment to the body of the criminal" (Beccaria). English utilitarians Bentham emphasized prevention as an important element of punishment and he saw the purpose of punishment in intimidation. Unlike Beccaria, he considered delinquents as limited rational and responsible persons, and imprisonment as an useful method in responding to delinquents. After authors who represent the classical school, there are authors with different views and considerations on tort, the criminal and the purpose of punishment.

8 Allen, R. (2005), Izricanje i izvršenje krivičnih sankcija, Regionalna konferencija, Cetinje, str. 24.

9 Garland, D. (1997): Of crimes and criminals: the development of criminology in Britain.U: Maguire, M., Morgan, R., Reiner, R. (eds.): The Oxford handbook of criminology. Oxford University Press, str. 14.

10 Horvatić, Ž., Novoselec, P. (1999): Kazneno pravo: opći dio. MUP RH, Zagreb.,str. 44-48.

11 Cavadino, M., Dignan, J. (1997): The penal system: an introduction. Sage Publications Ltd, London, str. 36.

Positivists reject the concept of free will, which was advocated by the classical school and put the offender in focus of their interest, whom they believe is not absolutely free from external influences on their behavior. Positivism is particularly important for the development of criminology as a science, because it represents the first effort in scientific explanation of criminality, the development of a "positive" factual knowledge about the criminal offender, based on observation, measurement and the inductive method, rejecting speculative reflection on human nature that was present in previous Criminal Law Practice. The central issue was related to the finding of differences between delinquents and pro-social citizens[12].

The development of different typologies and classifications of perpetrators of criminal offenses led to the development of the principles of individualization in punishment. The purpose of criminal sanctions should be vivified in the elimination of the danger that perpetrators of criminal offenses created by their behavior, and the criminal justice system is, according to supporters of this school, an aparatus for prevention, treatment and elimination of criminality. Positivism, therefore, represents the beginning of the development of the rehabilitation ideal that prevailed in criminological thinking and rhetoric of the mid-twentieth century. The concept of re-socialization started out from the idea of a possible elimination of identified factors of delinquent behavior, using very differentiated individualistic models of institutional treatment. This period is called the period of "*rehabilitative optimism*"[13]. The basis of that idealism was in the idea of "curing" the perpetrator of criminal offense of his delinquent tendencies, and that "treatment" consisted of changing his personality and characteristics, appearance, habits, or ability to carry out the crime. The idea of rehabilitation developed under the banner of "helping" the delinquent assuming that he wants to be helped. Answorth (2000) correctly observed that others benefited more from that help - citizens who thus have a decreased risk of victimization. Rehabilitation as the purpose of punishment has undergone much criticism. Development of rehabilitation models and their way of application has led to the other extreme. As stated by Brody (2000): "Rehabilitation has come not only to the point that it represents an unrealistic and an unattainable goal, but it also threatens the principles of human rights and humane treatment of the convict and may be harmful to the convict's chance to become prosocial".

The efficiency of deprivation of liberty is measured by the rate of recidivism. Martinson (1974) questioned in his research the effectiveness of imprisonment and treatment, as well as the concept of re-socialization, because studies have shown very poor results. After his examination of the effect of treatment, extensive studies on the effects of various treatment models followed. The results generally indicated little effect of treatment and the concept of rehabilitation of offenders. However, a compromise was found which indicates that worse results were achieved in the application of the concept of re-socialization of convicts, but emphasizes the legitimacy of treatment, which with proper application, can achieve much better results than before. In fact, the problem of lack of trained personnel to carry out the sentence of deprivation of liberty and treatment and the inappropriate choice of an adequate model for the treatment of certain categories of convicts are also emphasised. Proponents of the concept of re-socialization (Rex et al.) indicate elements that point to the possible success of the treatment and rehabilitation of delinquents. According to research results of the success of imprisonment and resocialization, positive effects manifest in the reduction of impulsiveness, strengthen connections in the community, model prosocial behavior of delinquents and there is greater chance that the stay in prison accomplished the purpose of punishment.[14]

Since the introduction of deprivation of liberty in the a system of punishment, and some time later institutions for enforcement, nearly two centuries passed. During this period, approach to prison sentences and jail as an institution of enforcement, changed and evolved, depending on the scientific and practical knowledge and the level of social development. Imprisonment consists of the restraint of a criminal offender, in a court ruling, for some time. In all modern systems of criminal punishment deprivation of liberty takes the central place. The highest number of criminal offenses

12 Garland, D. (1997): Of crimes and criminals: the development of criminology in Britain.U: Maguire, M., Morgan, R., Reiner, R. (eds.): The Oxford handbook of criminology. Oxford University Press, str. 14.
13 Cavadino, M., Dignan, J. (1997): The penal system: an introduction. Sage Publications Ltd, London, str. 41.
14 Stevanovic, Z. (2012), Effects of imprisonment in the prevention of crime, tort, punishment and the possibility of social prophylaxis, Institute for Criminological and Sociological Research, Belgrade, pp. 208-210.

is punishable by this penalty, because it provides the most options to achieve the purpose of punishment which consists of rehabilitation and re-socialization of the prisoner and his reintegration into normal social life. From the very introduction of imprisonment into the response measures of society against crime, it has met with a number of opponents that with different arguments challenged its relevance and effectiveness. The most common complaints relate to: the impossibility of achieving general prevention, because it can not intimidate unrecoverables, professional delinquents and returnees not to commit criminal offenses; prison is not a suitable instrument in the resocialization of the prisoner and his adaptation to life outside of prison conditions because in its nature, character and content of what amounts to a negation of social life, prison causes lots of damage in the physical, psychological, medical and social regard of convicts.[15]

In spite of reported complaints that are realistic and that exist the punishment of deprivation of liberty is a basic type of sentence in the system of criminal sanctions. Proponents of imprisonment justify its existence with following reasons: individual prevention can be realized most completely in the process of imprisonment and in prison conditions the offender can be most fully observed and learnt about; imprisonment is suitable for the creation of work habits and acquisition of essentially required knowledge and skills; prison conditions can provide the process of education; imprisonment is the only sanction that can effectively protect society from offenders and the like.

Today, everyone agrees that the sentence of deprivation of liberty and imprisonment are in serious crisis, because there was no success in the fight against criminality and the main objectives of punishment in society have not been achieved. Certainly that there are multi-layered reasons at all levels of society. When in the late eighties of the twentieth century, it was recognized that prison is in serious crisis and that punishment does not achieve the goals, it was traditionally resorted to the repressive concept of punishment. It is even today present in practice in most developed countries, which model and concept accept most of the other countries of the world. Stricter application of the concept of reaction to criminality has not significantly changed the growing trend of criminality, on the other hand, such an approach has increased the number of prisoners to unbearable limits for prison systems, which puts them in serious crisis at all levels. With the advent of globalization and neo-liberal capitalism the problem of punishment of imprisonment is increasing, and imprisonment becomes a "recipe" for a massive crackdown on criminals. Criminal lawyers can rightly ask: *Where is the nub of the problem?*

Starting with the effects generated from imposition of prison sentences, especially long prison sentences, and the consequences that stay in prison produces, all the louder are efforts to limit the imposing of prison sentences and for avoidance of prison, because defects are very serious and reflect on the personality of prisoners as well as the society. Thus, punishment of deprivation of liberty has not fully met expectations and did not substantially achieved its function and philosophy because of which it was introduced into the system of punishment. Another major disappointment is prison as an institution that fails to change the behavior of criminals, so earlier comparison with the school – the more schools the better educated the society is, and the more prisons less crime, has not shown to be justified. A large number of prisons does not point to greater security and a healthier society. Of course, these considerations do not exclude imprisonment as a sanction, but also raise the question of the measures of use of imprisonment, its scope, purpose and search for modern and contemporary conditions of adequate sanctions that give greater effect in the prevention of criminality. Theorists and practitioners are increasingly asking the question how much we really moved away from the former examples from the history of punishment and whether, indeed, we have become more humane in our relationship with prisoners or are we taking a hypocritical stance in the struggle for human rights of the convicted only by words, or when large forces "discipline" small nations and their leaders? Unfortunately, in recent years we have become familiar with such practices. Increasingly, today, there is talking about the so-called "*penal populism*" which describes the tendency of current policies to promote the policy of punishment based on anticipated popularity, regardless of its penological value. Garland (2001), speaking of the "rebirth of prison," states that, "in contrast to the conventional wisdom of the past, the current assumption - prison works not as a mechanism of reform or rehabilitation, but rather as means of confinement and punishment

15 Jovašević, D. & Stevanovic, Z. (2011), Punishment as a form of social reaction to crime, the Institute for Criminological and Sociological Research, pp. 31-32.

that satisfy popular political demands for general security and stricter retribution." The same author discusses the main characteristics of mass imprisonment in America. He provides shocking figures about the number of prisoners in the U.S., because mass imprisonment implies an incarceration rate and the rate of the prison population, which are well above any historical and comparative norm for a society of that type. The American prison system, according to Garland, meets that criteria. Another important characteristic is the social concentration of imprisonment effects, and he states how mass imprisonment implies imprisonment of individual offenders and becomes systematic imprisonment of entire population groups. In the case of America, it is the case of young black men in major urban centers. In this way imprisonment is becoming one of the important social institutions that structure the experience of a group, ie. becomes part of the process of socialization.[16]

The situation is similar in European countries, which Schwind (1995) describes as pessimistic. He states the situation in Germany in the 80s, where, regardless of new prisons built, increased number of treatment staff and the opening of sociotherapeutic institution as a model of rehabilitation approach to delinquents, the effects of imprisonment and detention are very modest, and the rate of recidivism is high. Weak effects of imprisonment and treatment, as well as inadequate behavioral change of prisoners, according to him, are the result of weakening of the idea of rehabilitation, financial problems due to the economic recession and overcrowding as a result of increased criminality rates. Stern (1996) analyzes the consequences of overcrowding in prisons and states that they lead to increased tensions, the objective reduction of quality educational programs for prisoners, reduction of benefits, increasing risk situations that cause incidents, violence and the like. Stern rightly raises the question - whether imprisonment is a response to the growth of social and economic problems? In prisons the largest number of young people who their best years, in which they should acquire knowledge and skills necessary for life, spend in prison.

Emil Vlajki, a contemporary scholar focusing on social pathology within postmodern theoretical perspective approach, defines essence of elite rationality as rigid law and order maitenance as outlined by the legal standards. Individuals of limited capacity in social terms are predominantly unemplyed, and generally insufficiently socially integrated what also streches over law binding behaviour. They ultimately become criminal perpetrators. On the other hand, white-collar crime, in particularly within the business sector, typically is not sanctioned, and, one could even argue, that such law braking is even encouraged. Capitalist elite enables individuals from a higher social circles to make profit and furhter invest it into economy in the most general terms, but predominantly within the financial sector what alowws furhter increase in capital. Capitalism development is firmly marked with plunder, colonial exploitation, wars, globalisation etc.[17] Western rationale adds social value to capital, protecting it at any cost. Such comprehension as expressed by Vlajki points towards conclusion that his theoretic reasoning rests upon idea of sanctioning in society as significantly determined by social context and power of the elites[18].

Contemporary academic discourse on freeedom deprivation and penitentiary system is marked by discussions about various imprisonment issues. By and large, these issues are contested to the highest level so one could speak about crisis od views, methodology, concepts and similar. For exmaple, *the content crisis* refers to what comprises living in a prison, the modes of organisation that dictates lifes of prisoners. This crisis is caused by prison overpopulation and inefficiancy in organising everyday life of prisoners. Additionally, *prison conditions crisis* refers to living disorder along with everything else. Particularly grave is *authority crisis* as a consequence of prison administration status, and especially the status of prison guards and education professionals -pedagogs. The trend to be outlined here is: imposing more limitations to the traditional prerogatives of participants in the treatment with a view of enhancing the rights of prisoners. This trend is percieved by the prison administration as deterioration of their personal and profesional integrity. In such circumstances, these professionals lose motivation, and convey to the "go with the flow" philosophy what ultimately undermines their authority with prisoners. *The crisis of public access to information about funcioning* of *prison system* is referring to the tradional conservativism and its' fundamentaly clondestine fun-

16 Stevanovic, Z. &Igrački, J. (2011), Effects of imprisonment and institutional treatment in the prevention of crime, Pravna riječ, the Association of Lawyers of the Republic of Srpska, Banja Luka, 409-410.

17 Vlajki, E, (2009), " Social pathology in postmodern society", Zagreb: Euroknjiga, , p.215.

18 Stevanović,Z. & Igrački, J.(2011), Efekti kazne zatvora i institucionalnog tretmana u prevenciji kriminaliteta, *Pravna riječ*, Udruženje pravnika Republike Srpske, Banja Luka str.410

stioning, what makes it non-transparent for the general public. In most cases, events in the prisons are a mysterious as prisons themselves create it as such. In the era of modern communication it is not feasible to try to conceive events even if they occur in a prison. Prisoners are capable of communicating with the public in different ways and the state also puts more effort into making this segment of social life more prone to public scrutiny. *The crisis of legitimacy* is probably the most dominant in the British prison system and it is related to debates on abolishing the freedom deprivation punishment. However, this particular crisis is being perceived as morally justifiable.

Papers on freedom deprivation and imprisonment related issues, presented at the first conference organised by the European Criminology Association, highlighted "the crisis of prison" as a question that needs to be carefully addressed. The problems that are frequently occurring are typically related to lack of adequate programme for those in confinement, increasingly deteriorating conditions in prisons, insufficiently developed system for protection of inmates rights, overpopulation of prisons, increasing number of drug addicts that are imprisoned as well as those with psychiatrically problems, strong informal hierarchy and interpersonal relations among the inmates often having features of an organised crime, dissatisfactory status of professionals employed in prisons in economic terms as well as of the institution itself. Such environment does not support achievement of rehabilitation and reintegration of inmates. Hence, the majority of former convicts end up engaging again in criminal actions.

Modest effect of freedom deprivation punsihment in the sense of crime prevention, instigated other modes of sanctioning such as the so called alternative santions, e.g. the community sanctions. These sanctions are mostly defined in reference literature as punishment option falling somewhere between probation and punishment in tradional sense (for more details please see Junger -Tas, 1994). Other term that are often being used to denote the same type of sanctions are as follows: confidement alternative, non-institutional sancions, community programmes, and sometimes, these type of sanction are being related to wider penal strategies such as determent or diversion, de-institutionalisation, incarceration, penal reductionist policy redukcionizam (Nellis, 2001). The European Union in 1992 has published a report that outlines measures that in member-countries are used as an alternative to inprisonment punihsment[19]. There are quite a few options for an alternative punishment. Modified institutional sanctions include half-open regime of confinement, some specificly determined work, weekend confinement, home detention, serving freedom deprivation punishment in an institution such as a hospital or a rehabilitation center. Non-institutional sanctions include fines, certain rights limitations such as suspension of a driving licence, proprerty confiscation, restitution, a ban to act in a certain professional capacity, pedagogical measures, moral sanctions such as special task imposing or court premonition, or a supervision. Separate group of so called alternative sanction is comprised by measures such as probation and community work. Measure related to delaying of criminal sanctions are as follows: delay of enforcement of institutional punishment, delay of sentencing, adjudication without determination of a sanction. In some countries often are being used measures such as mediation between victim and the perpetrator, often coupled with restitution, restitution or compensation via financial payment, restoration of an object that has been destroyed during criminal act, labour for the benefit of a victim. There are other modalities of alternative sancions such as dayly fines, unpayed community work as a type of reparation for the victim or the community calculated in the form of working hours for a certain period of time, order to stay in day centres and supervision increase, electronic monitoring via sofisticated equipment or phone calls, intensive supervision programs, boot camps specially intended for younger perpetrators who became of age (it is a form of schock therapy based on a military training regime[20].

Given that effects of deprivation of freedom, and especially long imprisonment punishment as long term compulsory isolation of the criminal from society, and consequences of this type of punishment, it is noticeable that the number of supporters of limitation to imprisonment punishment among the academic community is continually growing. Their main arguments are focusing on serious shortcomes of these type of sanction reflected in personality of inmate as well as on the community as a whole. Deprivation of freedom is seen as both incapable of fullfilling expectations in terms of criminal sanctioning and impotent to affect criminal behaviour.

19 Recommendation No. R (1992)16th Session of the Committee of Ministers to Member States on the *European Rules on Community Sanctions and Measures*

20 Stevanović,Z. & Igrački, J.(2011), Efekti kazne zatvora i institucionalnog tretmana u prevenciji kriminaliteta, *Pravna riječ*, br. 2. Udruženje pravnika Republike Srpske, Banja Luka, str.412.

CONCLUSION

It is very difficult to find an answer the dilemma on if at all or to what degree freedom deprivation punishment has positive preventive effect on habitual criminals. Imprisonment as a form of punishment has different effects pending on individual specificities, type of committed crime, capacity of perpetrator to accept moral consequences of an act, as well as personal intention to use penal system offered possibilites for a succesful reintegration into the society. Some of these factors it are possbile to be influenced by, for example, providing more humane treatment and variaty as far as education in prison. On some other factors such as personality of an imate or his or her reaction to inprisonment it is practically impossible to influence.

Data on recidivism of convicted offenders make basis for a conclusion that efficency of freedom deprivation punishment comprises ground for a fruitful debate. Namely, recidivism procentage among felons in Serbia is around 60% whereas worldwide it is even over 60%. So-called individual prevention so far has modest performance as it has some effect among less than half of prisoners. In most cases, efficancy of inprisonment as individual prevention measure exists only as long as ofender is confided by simply phisically preventing that he or her make anohter ofense. Re-socialisation as a proces of radically altering an inmate's personality through deliberate manipulation of the environment with a view of his or her inclusion in the socialy acceptable life style, also does not provide sufficient material for a conclusion beyond doubt. Past decades have brought re-socialisation and rehabilitation concept abandonment because it haven't provided expected result, and, further, a vacuum has been created transfering entire concept of punishment into the field of retribution as verifiable by contemporary penal policies. Critism of resocialisation concept point out that it aims towards unrealistic and impossible goal and also stands as a threat to the concept of offender rights and humane treatment and it ultimately can have negative result in formation of an individual personallity that is compatible to social values and behaviour. Deprivation of freedom as punishment has multifaceted consequences such as privacy intrusion, inducement of personality hypersensibility of an offender and other negative psychological phenomena and even mental disorders such as depression or neurosys. Many research studies showed that prisoners who communicate with the outside world in some form, either via work or other activities, have significantly more stable behaviour and emotional balance. It appears that contemporary tendencies in crime prevention focusing on search for new measures, alternative sanctions and non-institutional treatment, pave the way towards more efficient crime control policies and, at the same time, individualisation of criminal punishment to the point of real expectations of better results achievement in overall crime prevention.

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PROBLEMS OF LIABILITY FOR ADMINISTRATIVE VIOLATIONS AND CRIMES IN BELARUS

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Abstract: The problems of civil and criminal penalties for administrative offenses and crimes in the Republic of Belarus. Substantiates the principles of non-compliance, a number of provisions of the law on administrative offenses and criminal law. Proposed to transfer administrative offenses in the category of criminal offenses, to regulate matters of criminal liability for the commission of a criminal, criminal procedure and penal law.

Keywords: administrative offense, offense, criminal offense, the basis of liability, administrative liability, criminal liability, the liability of legal persons.

INTRODUCTION

The close relationship and interaction of legislation on administrative offenses (the Code of Administrative Offences (CAO) and the acts of the President of the Republic of Belarus) and criminal law (Criminal Code of the Republic of Belarus (CC)) is largely due to the similarity or identity of approaches to address the vast majority of issues involved in the legal regulation of these types of legislation. The basis of this similarity is the proximity of the acts which the legislator recognizes administrative offenses or crimes. In this legislative activity in the field of formation and improvement of legislation on administrative offenses and criminal law is in the direction internally inconsistent.

On the one hand, measures are taken to implement a clear boundary between criminal and non-criminal (administrative offense). On the other hand, the principles and practices of administrative and legal restrictions and solving other issues have increasingly borrowed from criminal law. Simultaneously increasing scope legislator gets legalized practice of encouraging individuals and businesses to administrative responsibility for crimes.

Development of Administrative Offences

A year after the demise of the Soviet Union (12/10/1991[1]) [33] Belarusian lawmaker says the concept of judicial and legal reform, guide the development of the judiciary, law enforcement and the law of the country [34], which declared full sovereignty in the Declaration of the Parliament of 27.07. 1990 "On the State Sovereignty of the Republic of Belarus". [3]

Provided for in the first phase of the Concept of the judicial and legal reforms include, in particular, the development and adoption of the Civil Code (CC) and the Criminal Code, the Civil Procedure Code and Criminal Procedure (CCP) codes as well as the Administrative Code and the Code of Administrative Procedure. This decision has not been questioned by any of the Belarusian scientists and practitioners [see, e.g., 42, p. 122, 1, p. 124, 10, p. 193].

However, to implement the provisions of the development and adoption of the two codes of administrative responsibility has failed. As a consequence, the concept of improving the legislation of the Republic of Belarus in 2002 called for the adoption of the Administrative Code and the Procedural-Executive Code of Administrative Offences (PIKoAP). In this document, it was considered appropriate:

1) give the Administrative Code as the only law on administrative responsibility, operating in the country. All newly adopted rules on administrative responsibility should be included in the Administrative Code;
2) to identify new concepts and principles of administrative responsibility, conceptually relevant CC;
3) establish administrative liability of legal entities and individual entrepreneurs;

1 The literature is called and a different date the demise of the Soviet Union, as follows: December 21, 1991 [12, p. 46].

4) decide the question of liability for attempted violation was committed and for complicity in a crime;
5) align the maximum size of fines for administrative offenses by individuals with minimum dimensions of penalties provided for by the General Part of the Criminal Code;
6) agree on the construction and maintenance of the Special Part of the Administrative Code and the Criminal Code [9].

Provided for the establishment of the Administrative Code, the conceptual apparatus which, principles, structure and institutions conceptually is consistent with the criminal law. In fact, it was stated that since the administrative responsibility is so close to the nature and content of criminal responsibility and the Administrative Code of the criminal law must be followed both in content and in construction. PIKoAP planned to take, in which to significantly expand the exclusive jurisdiction of the courts to impose administrative penalties.

Many features of this concept have been implemented in the Code, adopted in 2003 [21] and in PIKoAP adopted in 2006 [22], introduced simultaneously with effect from March 1, 2007. [30]

In many ways similar to the Code of Administrative Offences of the Criminal Code of 1999, and in part PIKoAP principles of administrative process, the process of proof, the rights and obligations of the participants in this process and its procedures - to the CPC in 1999

The adoption of the Administrative Code and PIKoAP led to significant changes in the law. Removed from it rules on the economic (financial) liability. Place this type of responsibility took CAO provided administrative liability of legal entities and individual entrepreneurs. Significantly reduced the number of decrees and orders of the President, which establishes administrative liability. It is recognized that the head of state laws that establish the wrongful act and the liability of legal entities and individual entrepreneurs and individuals in effect until the entry into force of the amendments and (or) amendments to the Administrative Code, and (or) PIKoAP [35, 36].

Many other progressive provisions that made the law on administrative offenses, administrative proceedings and enforcement of decisions on administrative cases more science-based and related to the Criminal Code, the Criminal Procedure Code and Penal Code (UIC) have been implemented. But for all its progressive aforementioned qualities it contains conceptual shortcomings.

COLLISION ADMINISTRATIVE OFFENCES AND THE CRIMINAL LAW

The Criminal Code and Administrative Code are no rules for resolving conflicts between rules of criminal law and the law on administrative offenses. Despite the fact that such conflicts were in the time of the Administrative Code [13, p. 52], and there are at present [17, 43, p. 26 et seq.].

In the absence of the Administrative Code and the criminal law rules governing the procedure for resolution of such conflicts, the issue is solved in the enforcement of different ways, and not necessarily in accordance with the rules under Part 10 of Article. 10 and Part 2 of Art. 71 of the Act of 10.01.2000 "On normative legal acts of the Republic of Belarus", "new legal act has greater legal force to the previously adopted (issued) on the same issue normative legal act of the same public body (official)," and "in the event of a conflict between regulations, have the same legal effect, and if any of them does not conflict with the act of higher legal force, the provisions of the act adopted (issued) later" [20].

To apply these rules, you need to have a sufficiently high professional level, allowing identifying such conflicts. For example, a considerable number of law enforcers do not know anything about the existence of a conflict between Part 1, Art. 12.3 of the Administrative Code (violation of the established order of currency transactions) and Art. 233 of the Criminal Code (Illegal Business), between Art. And 233 of Part 2 of Art. 12.7 of the Administrative Code, which has the same name. Those of enforcers who notice this conflict, decide the question in favor of the criminal liability instead bring those responsible to administrative responsibility. Meanwhile repeated administrative violations under Part 1 of Art. 12.3 and Part 2 of Art. 12.7 of the Administrative Code may not serve as the basis for their evaluation as a crime under Art. 233 of the Criminal Code. By Part 2 of Art. 7.1,

paragraph 2 of Part 1 of Art. 7.3 and Part 5, Art. 7.4 CAO repetition administrative offense - it is only aggravating circumstance administrative liability, recorded in administrative penalties.

There have not yet implemented the commendable de lega ferenda to resolve these conflicts, the presence of which their actions should be recognized administrative violation [17, Sec. 127].

By administrative and criminal liability

Part 6, Article standards. 04.02 of the Administrative Code, taken systemic unity with other rules of its general part, leave no doubt that the basis of administrative liability of the natural persons and legal entities is to commit an administrative offense.

In Part 1, Art. 02.01 of the Administrative Code, under the administrative offense meant wrongful guilty, and characterized by other features provided by this Code, the act (action or inaction), for which administrative responsibility.

By direct indication contained in Art. 10 of the Criminal Code, the basis of criminal responsibility is individual committing the crime. It refers to a perfect guilty socially dangerous act (action or inaction), characterized by features provided by the Criminal Code, and forbidden to them under the threat of punishment (Part 1 of Art. 11 of the CC).

At the heart of both species is responsible for the acts committed by a person, containing all the elements of the corresponding administrative offense or offenses. The act has a different amount of public danger and because of this, provided by different codes in a well defined quality: it is either an administrative violation or crime. Therefore not possible to use the administrative responsibility for the crime, and, conversely, criminal liability for an administrative offense.

However, certain provisions of the Administrative Code and the Criminal Code are in conflict with the above rules, principles.

So, in art. 6.5 and 6.6 of the Administrative Code makes reference to the use of administrative responsibility for the crime in cases under Art. 86 of the Criminal Code. Article 86 of the Criminal Code provides for administrative liability of the person who committed the offense in respect of which a decision on exemption from criminal liability. Here, contrary to the requirements of Part 1 of Art. 1 of the Criminal Code, which determines the subject of regulation of the Code, for an offense set types and amount of administrative penalties (?) That may be imposed on such person. In Art. 30 CCP introduced a rule on dismissal of the criminal case and the release of a person from criminal responsibility in connection with the application of administrative punishment by the court, prosecutor or investigator with the prosecutor's consent. The absence of the CPC rules governing the termination of criminal and administrative penalties, partly offset by the Plenum of the Supreme Court given in the order dated 29.03.2012 № 1 "On the practice of courts of Articles 86, 88 and 89 of the Criminal Code, providing for the possibility release a person from criminal responsibility" [28].

Being introduced in the Soviet criminal law in 1977, the rules for exemption from criminal responsibility for administrative prosecution did not cause initially criticized by criminologists. [38] However, a more careful reading of this novel shows its inconsistency, because the question of whether the person who committed the offense, subject to criminal or civil liability, is delegated to the law enforcement official [7, p. 19], the blurred boundaries of criminal responsibility [29, p. 362], as well as blurred and the grounds of criminal and administrative charges.

The draft Principles of Criminal Legislation of the USSR and union republics it was not possible replacement criminal administrative liability. [2] Similarly, in 1994, did the project developers of the General Part of the Criminal Code of the Russian Federation. [40] Later in 1994, Belarusian law excludes from UK 1960 Article 481, provides for exemption from criminal responsibility to administrative liability. [4] Under the Penal Code did not provide this kind of exemption from criminal liability lawmakers Azerbaijan, Kazakhstan, Russia and some other former Soviet republics. But in the modern Belarusian legislation that rule was restored in the form of art. 86 of the Criminal Code[2]. Moreover, the Act from 15.07.2009 the scope of Art. 86 of the Criminal Code has been expanded exemption from criminal liability in connection with the institution of administrative proceedings

2 Such a rule included in its Criminal Code and the legislation of Moldova (see Art. 55 of the Criminal Code of the Republic of Moldova [39]), who used many of the provisions of the Belarusian Criminal Code [14, p. 14 et seq.].

was made possible also for committing less serious crimes [23], a maximum penalty of imprisonment can be up to 6 years. This reduces the percentage of decisions made by the courts (according to statistics of the Ministry of the Interior in 2012, the share of these solutions was 10, 1%). The practice of termination of criminal cases in connection with bringing to administrative responsibility in the country receives more widespread (in 2010, 121 made the decision, in 2011 - 1308, in 2012 - 2379).

There is no doubt that these rules of the Administrative Code, the Criminal Code and the Criminal Procedure Code conjugate, but with the object of legal regulation of these codes. The uses of administrative responsibility for the crime in that order, and subjected to valid criticism from representatives of the Belarusian Administrative Law [11, p. 30 - 32]. However, the legislation remained deaf to such criticisms and not goes to the withdrawal of the relevant provisions of Art. 6.5 and 6.6 of the Administrative Code, the exclusion of Art. 86 of the Criminal Code and correct art. 30 CPC.

ADMINISTRATIVE RESPONSIBILITY OF LEGAL ENTITIES

In late 2010, legislation is the introduction of the Administrative Code provisions previously known Belarusian law, borrowed them from Part 3. 02.01 of the Administrative Code of the Russian Federation [8].

Act of 30.11.2010 in Part 7 of art. 4.8 CAO introduced addition, according to which an administrative responsibility of a legal entity shall be offenses for which an official of the entity subject to criminal liability [26].

Understandable desire of the legislator to apply punitive sanctions against the legal person due to the fact that the criminal responsibility of those persons in the Belarusian Criminal Code is not provided. Between one and the same acts can be both a crime (for authority) and an administrative offense (for legal entities). Approval of the reverse as contrary to the principles of administrative responsibility, enshrined in particular in Art. 2.1, 3.5, 4.2, 4.8 of the Administrative Code, as well as criminal liability, set out, in particular, in Art. 1 - 3, 10, 11 of the Criminal Code.

It seems that this story is clearly contrary to the principles, and the principles of responsibility [41, Sec. 24].

Unfortunately, this fact did not consider it necessary to draw the attention of the Constitutional Court in its decision of 22.11.2010 № R-515/2010 "On the conformity of the Constitution of the Law" On amendments and additions to the Code of Administrative Offences and Procedural Enforcement Code of Administrative Offences. "In that decision, including novella 7, Art. 08.04 of the Administrative Code, alas, are not even mentioned. [25] Confirmed the view expressed by the author of this work the assumption that the economic courts of the Republic will attract entities to administrative responsibility for the crime of its executive, and not abandon the case in this category, with reference to the above rules, principles [15, p. 130]. Economic courts, ignoring the rules, principles, subject to administrative liability of legal persons, imposing on them the penalties for the crime of their officials, and representatives of the Supreme Economic Court, justifying the practice, justifying the fact that "the prosecution of legal persons and it official for the same offense, regardless of whether it qualifies as an administrative offense or criminal offense (emphasis added. - Ed.), is an extreme measure to be taken strictly in cases established by law"[18, Sec. 118].

A departure from the presumption of innocence

The proximity of criminal and administrative charges prompted the legislator to regulate the administrative process in PIKoAP using principles and rules provided by the CCP. Including PIKoAP appeared not previously known law on administrative offenses the presumption of innocence.

However, in 2010, this principle is subject to revision. In Art. 2.7 PIKoAP introduced a provision stating that the official agency conducting the administrative process is not required to prove the guilt of a person in excess of their current vehicle speed, fixed operating in automatic mode, special technical means. [31]

This provision is taken from PIKoAP paragraphs. 1.3 Section 1 of the Decree of the President dated 03.09.2010 № 454 "On measures to ensure road safety with the use of special technical means" [24], and that in turn is taken from the Code of Administrative Offences of the Russian Federation.

In accordance with Part 3. 1.5 of this Federal Law the person brought to administrative responsibility, is not required to prove his innocence, but this principle does not apply to offenses recorded by the special technical means.

Presumption of innocence, that assumption of innocence of a person that is considered valid until it is disproved in the prescribed manner includes several related and required both components:

– A person cannot be brought to administrative responsibility, while in the manner prescribed PIKoAP, will not be installed guilty of an offense under the Administrative Code;
– The duty to prove the guilt of the person against who is the administrative process, not imposed on it, and an official of leading this process;
– A charge of committing an administrative offense cannot be based on assumptions;
– Doubts about the validity of conclusions about the guilt of the person against who is the administrative process are interpreted in his favor.

Changes in image PIKoAP vehicle that recorded special technical means, given the status of the sole and conclusive evidence against the person. In Part 41 of Art. 3.10 PIKoAP presumption established its uniqueness in comparison with other evidence. At the same time, according to other rules PIKoAP this presumption, like the presumption of innocence, is rebuttable. In presenting the appropriate evidence to refute the presumption of exclusivity of this proof, the image of the vehicle can not be used as the basis for the decision in the case of exceeding the speed limit.

Revision of the presumption of innocence, we believe, is rooted in the conceptual mistake of that rebuttable presumption of exclusivity or other evidence in proving the cases on administrative offenses can not and does not call into question the principle of the presumption of innocence. By orders of Art. 26 of the Constitution of Belarus ("the accused is not required to prove his innocence") [19] This principle is a comprehensive and fundamental not only in the criminal procedure and criminal law, to which attention is drawn in the literature [6, Sec. 19 et seq.], But also in the administrative process, because, as the criminal, administrative responsibility is a public-law character, contains comparable with measures of criminal charge substantial punitive state coercion (penalty) nature.

Unfortunately, the Constitutional Court in its decision of 22.11.2010 № R-515/2010 "On the conformity of the Constitution of the Law" On amendments and additions to the Code of Administrative Offences and Procedural Code of the Republic of Belarus on Administrative Offences " instead point out the error and say that the principle of the presumption of innocence can not be questioned and have started to study the correctness of exceptions to this principle. [25] In our opinion, a more well thought position on this issue has taken the Russian Constitutional Court, pointing to one of his definitions, that the constitutional provisions on the presumption of innocence and the burden of proof rests with the authorities of the State and its officials express general principles of law in the application of state punitive enforcement (penal) nature in the field of public responsibility in criminal and administrative law. [37]

PROSPECTS FOR ADMINISTRATIVE RESPONSIBILITY

The above conceptual shortcomings of the Administrative Code of 2003 and PIKoAP[3], demand appears to be not only to eliminate them, but the solutions of a more global problem of determining the path of the law on administrative responsibility.

Part of the answer to this question is The concept of improving the system of measures of criminal responsibility and the order of their execution, approved by Presidential Decree of 23.12.2010 № 672, in which, inter alia, provides for:

– To expand the practice of release offenders from criminal liability in connection with the institution of administrative proceedings;

3 Limited volume of this work, the author does not name and did not represent a considerable number of other similar conceptual digressions leveling border criminal and administrative offense. In particular, the current practice of setting the Administrative Code with respect to individuals penalties far exceed the penalties of the Criminal Code. The latest example of such a policy - the establishment in July 2012 of the upper limit of the administrative penalty for market manipulation of securities (Article 11.76 of the Administrative Code) at 6, 6 times higher than the lower amount of the fine as a punishment imposed for the crime of market manipulation of securities (Article 2263 CC) [32], which would require its correction by the court in imposing a sentence of a fine for this category [16, paragraph 76].

– Improve the remedial order decision on exemption from criminal liability in connection with the imposition of administrative liability. [27]

In Belarus, the existing state regulation of administrative and criminal liability is not questioned. On the contrary, the order provides for improving the administrative liability of individuals for their crimes and making the practice more widespread.

Meanwhile, all the previous way of development of legislation on administrative offenses, the milestones outlined above indicate that the administrative responsibility, "vyskolznuvshaya" from the womb of criminal responsibility, was constituted as an independent public accountability, which developed on the fundamental principles and provisions of the Criminal Law and therefore acquired the property, bring it closer to criminal responsibility, "grown" to a level that allows it to return to basics. The current state of the legislative material on administrative responsibility does raise the issue of the inclusion of an array of rules on administrative responsibility into the fabric of the criminal law.

Administrative offense should get the status of a criminal offense, but not as the type of crime, but as a form of criminal offenses[4], including the subspecies "criminal offense" and "crime".

Responsible for criminal offenses shall be provided in a separate section of the Criminal Code, which will be based on the norms of the Special Part of the Administrative Code. To criminal offenses should extend the application of the General Part of the Criminal Code with the introduction of its standards, formulating features characteristic of criminal offenses, to be combined in a separate section of the General Part of the Criminal Code. In this connection, some of the general rules of the Code will be in demand, the others will cease to exist.

Introduction of criminal wrongdoing in the criminal law of the conservation of the legal entity responsible for a criminal offense (but it gets the status of criminal liability) would force lawmakers to address the issue of criminal liability of legal persons for offenses.

The inclusion of criminal offenses in criminal law induce lawmakers to draw a line between them and the first category of crimes - crimes, do not pose a danger to society, eliminating the problem of return at the mercy of law-the question of how to punish an offender: Applying criminal sanctions or replacing them with measures of administrative responsibility.

Reform of substantive criminal law will cause the elimination PIKoAP and inclusion of certain of its provisions in the Criminal Procedure Code and the PEC. In the criminal procedure in the case of a criminal offense the person brought to justice, received the status of the accused. Automatically solve the problem of the presumption of innocence, all the above rules, make exceptions to this principle should be excluded, as contrary to the Constitution.

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FEATURES OF FORMATION AND DEVELOPMENT OF AGENCIES OF PUBLIC ORDER AND COMBAT CRIME IN THE MECHANISM OF THE BELARUSIAN STATE (1917-1918)

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Keywords: law enforcement agencies, the police of the Provisional Government, the Soviet police, legal forms of worker-peasant militia, the class principle, permanent centralized state, a public agency of public order.

In modern conditions of the formation of a democratic and social state of law reform agencies and entities of the Ministry of Internal Affairs of the Republic of Belarus, the further development of the Interior, as well as improving their performance and determine the need for in-depth scientific understanding of their historical experience in various stages of the Belarusian statehood. Taking into account that, without knowledge of the past cannot meet today's threats to national security, addressing problems of the formation and development of internal affairs in the mechanism of the Belarusian state is relevant and popular scientific direction of modern jurisprudence. This in our view will highlight general trends reflected in the theory and practice of law enforcement agencies, and other public institutions as well. Moreover, that «ignoring the historical trends and the logic of internal development has led to the fact that in the years of revolution, the new police was forced to go the long way of trial and error to eventually develop the institutions, tools, and methods of dealing with crime, which have already been known to the police and proven effective in practice» [9, p. 83]. Consequently, the study of the experience of formation and development of internal affairs has not only theoretical but also practical importance for the development of management; to improve their performance in today and further improvement of legislation regulating these processes. Critical reassessment of many stereotypes of the duties, tasks, and role of internal affairs in the state requires careful scientific and theoretical study, which will take a fresh look at many problems of the history of our country, including those related to the activities of the Interior, to understand the positive and mostly negative experiences and mistakes of the past in order not to assumption them in future.

Fundamental changes in the state mechanism has led to the abandonment of the old ideological model, the revision of the conceptual approaches, including challenges to the evaluation of the legal framework of organization and functioning of the internal affairs of the state in the mechanism. In this regard, the declassification of archives of the Interior and the opportunity to study first-hand gave new impetus to the development of problems connected with the activities of law enforcement agencies. We believe that in the present conditions without ideological bias to explore different aspects of emergence, formation and functioning of the internal affairs bodies, to give a more complete, scientifically verified assessment and compilation of the various stages of its formation.

After the victory of the February Revolution in Belarus, as well as in the whole of Russia, the people's militia comes to replace the imperial police. Thus, on 4 March 1917 a legal act came by which an employee of All-Russian Zemstvo Union Mikhail Mikhailov (Mikhail Frunze) was named interim chief of police-Russian Zemstvo Union for the Protection of the order in [1, p. 82]. On this day, groups of workers fighting squads and militia disarmed the police, captured its city management, archival and detective department, and took guard over important government institutions, post and telegraph. So, Minsk, became the center of a police station. On March 7, 1917 in the newspaper «Izvestia Minsk Soviet» an appeal to the public was published, that «the protection of public security should be in the hands of the workers». «To the faithful servants of the old regime» could not get the old order, «working class must organize itself in Minsk and to separate from their environment comrades to honor the work ... work - the police» [1, p. 90].

Recognizing the democratic principles as a key to the organization of the state after the victory of the February Revolution, the Provisional Government of March 11, 1917 decree «On the Abolition of the Police Department and the establishment of interim management for community policing» abolished the Police Department [19], and on June 15, 1917 said Authority was renamed into «General Administration of Police and to ensure property security of citizens» [8]. As a result, the police as an organized armed force ceased to exist. In accordance with the decree of 14 March 1917 «On the establishment of the police» Police is the executive organ of State power and was under the rural and urban public administration, and its purpose was «to take measures to stop violations of the order, the law or the By-laws» [20]. A literal interpretation of this provision allows the police to use the Provisional Government, not only for the protection of public order, but also for political reasons, namely, to combat the Bolshevik movement, creating a real threat to the Provisional Government. Thus, although its people's militia was administered zemstvo and town councils, the interim government has sought to centralize it. In turn, workers of Minsk police saw their task «solely in protecting public safety and in the maintenance of revolutionary order, and not a political investigation and control of the political movements» [25]. This fact was the reason for the protest M. Frunze and other police officers to the city council against the transformation of the police to the body of the political struggle and the investigation: «More and more, a tendency to transform the police from an organ subordinate to municipalities, in the administrative and police apparatus of the old police» [25]. A similar protest against the attempts by the provincial police commissioner to turn to the authority of political investigation by the Social-Democratic group in the Minsk City Council happened [26]. Similar problems encountered and the Petrograd militia, when in September 1917 was given the responsibility to take action to find and arrest V. Lenin [16, p. 22].

The legal basis for the organization and activities of the militia were determined in a government decree «On the establishment of the police» and in the «Provisional Regulations on the police». General management of the police as the executive body of state power in the whole country belonged to the interior minister. In the provinces were established positions of government inspector's police who were under the provincial commissioners (officials of the Provisional Government, who replaced the governors). The direct management of the police in the counties and cities were in rural and urban county council.

In Minsk police establishment had its peculiarities as to guide the process of M. Frunze, which primarily sought to turn the police into a highly professional armed formation. At the first meeting of the Board of Minsk, which was influenced by the Bolsheviks, at the suggestion of M. Frunze, who was a member of the executive committee of the Council, was held for the organization and expansion of the police? A resolution was adopted calling on workers to join the ranks of the police [23, p. 122]. To this end, personnel policy M. Frunze when creating Minsk police was limited to the selection of skilled, educated workers, and those who showed loyalty to the Bolsheviks. During the period from March 4 to 12 October 1917, that means on the day of departure from Minsk, Frunze gathered in Minsk police ranks above all the revolutionary workers and soldiers that determined the nature of its activities.

By analyzing the formation of the People's Militia, it is necessary to consider that the headquarters of the Western Front was in Minsk. Guide the process of formation of the most experienced organizer of «political army of the revolution», M. Frunze, attracted to the ranks of the militia of the Provisional Government, particularly the revolutionary workers and soldiers loyal to the Bolsheviks that determined the nature of its activities. At the same time the people's militia of the Provisional Government reserved all rights and obligations of the former tsarist police, concentrating in its ranks the reaction, from the point of view of the class approach element because the police took «worthy, who are former officials of the police and gendarmerie» [17, p. 59]. In this connection, it should agree with the opinion of R. Mulukaeva, that «... the Provisional Government, given the changed historical conditions, reorganized the Ministry of Interior, which, however, did not wear the indigenous nature» [15, p. 539]. However, the people's militia of the Provisional Government did not become so complex branched and deeply penetrating all spheres of life mechanism, which the tsarist police were. This is confirmed by the fact that the 25 October 1917 the people's militia had virtually no assistance to the Provisional Government, but only watched the course of the revolutionary events [24, p. 8].

Fate formed police identified the October Revolution and the subsequent related events. Already at the II All-Russian Congress of Soviets, October 26, 1917 was created by the People s Commissariat of Internal Affairs (hereinafter - the Commissariat), responsible for the organization along with the issues of public order and crime control Commissariat included managing local economic affairs, statistics, medical and many other issues [13, p. 120-123, 398].

Thus, the breadth and importance of ongoing authority of the Commissariat had a special place in the system of Soviet state mechanism. As the bodies of internal affairs in the Soviet period had traditionally played the role of material appendages of the state mechanism, they, along with law enforcement functions, and the functions performed administrative (executive), as well as business, were not directly related to the provision of public order, which predetermines the specifics of their operation.

To analyze further the peculiarities of the individual components of the system of internal affairs, to consider in more details the problem of the formation of the Soviet police, as it was with the creation of a specific police forming, the system of internal affairs began. After the victory of the armed uprising in Petrograd on October 28 (November 10) in 1917 the Commissariat issued a decree «On the workers militia» (hereinafter - the Regulation) [18, p. 8]. In its content was the Decision of politico-legal character as the decisive question of establishing a working police all the tips and Soldiers Deputies, the workers militia was solely and exclusively the responsibility of Workers and Soldiers Deputies, and military and civil authorities were obliged to promote the armed workers militia and supply its technical forces up to supply the State-owned weapons [18]. Thus, based on the content of the test regulation on the Soviets were charged with establishing a working police officers, and establish jurisdiction solely and exclusively the last tip. This fact A. Wisniewski explains that in the widespread establishment and consolidation of Soviet power, legal recognition of common organizational forms police had fundamental importance [3, p. 14]. A feature of this paper is the lack of mention of the mission, structure, competence, order picking station.

Regulation also does not provide for the manner eliminate the militia of the Provisional Government. The fact that it does not contain information on the police of the Provisional Government is not accidental. This fact is due to the content of the party program Bolsheviks came to power, which provides for the elimination of the old state apparatus (bureaucracy, standing army and police). Despite the fact that the royal police changed people's militia, the latter is still seen as «reactionary» part of the bourgeois system and subject to liquidation. In this regard, B. Morozov said that «with the release of the said decision of the interim government militia completely abolished, as it was no different from the tsarist police» [14, p. 135].

Analysis of the contents of this decision suggests that the police are not seen as a full-time public authority and centralize across the state on the basis of common principles of organization. Rather, it was a body that combines both public and social origin. This dual nature of the workers militia is because on one hand it was created by the Soviets, i.e. served as a vehicle of the government; on the other hand it was a form of attracting workers to the protection of public order on a voluntary basis. Thus, the workers militia became the main armed force councils to ensure their sovereignty and adopt revolutionary order.

Thus, the ruling establishment perpetuated the Soviet police, the distinctive feature of which is the need to serve the political goals of the Party came to power. An example is the participation of the police in suppressing anti-Soviet in Gorki, the Township and [22, p. 30].

The distinguishing feature of the Ordinance was to that, their legal nature; it is a legal act of the central state administration body, but having constitutive force. It seems that this was due to the fact that the competence of the individual apparatus of the Soviet state not yet fully defined, and providing a solid revolutionary order is a way of consolidation of Soviet power. The historical situation does not allow for the requirements of the legal technology in the state-legal construction in the making of the Soviet state apparatus. This circumstance VI Lenin explained as follows: «Let the terms of the laws of bourgeois society are affected by formal issues, but because the power in the hands of the Soviets, who can make the necessary adjustments ... publishing laws, going to meet the aspirations and hopes of the masses, the new power sets milestones for the development of new forms of life» [11, p. 56]. Noting the organizational line of workers militia, we note that it was created in the form of armed groups of workers, designed to protect the gains of the revolution from encroachment, «performances of the class enemy, incited them to criminal acts irresponsible underclass elements and other violations of public order» [15, p. 190].

Analyzing the problem of creating a Soviet police in Belarus, it should be noted feature that creates a temporary government of national police is not eliminated, and reorganize. Feature of the reorganization was the fact that the police took control of the Soviet authorities, purged of personnel, adding to its revolution betrayed people [4, p. 29]. For example, the November 16, 1917 order of the Military Revolutionary Committee of the Western Front was reorganized police in Minsk, because it did not fulfill orders. Its ranks were replenished true revolution of the workers and soldiers, and it became a real organ of Soviet power [22, p. 15], and is November 26, 1917 if the national police have a hostile attitude towards the Soviet regime or declared itself neutral, it is subject to liquidation. This is why the elimination of the militia of the interim government in Belarus conducted a slower pace than in the center

Thus, the uncertainty of legal forms and structures of the police caused the diversity of approaches to its organization on the ground. For example, in Belarus, in the first months of Soviet power the people s militia used by the Bolsheviks, but the latter was subsequently replaced by the police, standing on a clear class position.

During 1918-1920 formation of the main links held the worker-peasant militia. For example, October 5, 1918 the Commissariat approved Regulations on formation of the Main Department of the Central Police Criminal Investigation Department, the purpose of which - the protection of the revolutionary order by secretly investigate criminal offenses and combating gang violence [10, p. 255]. This legal instrument was valid and in Belarus, where the Soviet power was established.

Further development of internal affairs is not only open the suppression of anti-Soviet speeches, but with conditions conducive to them. For example, January 28, 1918 Council of Peoples Commissars of the RSFSR adopted a decree «On the revolutionary tribunal press», was established to deter crimes and offenses against the people, and was accomplished through the use of print. It should be noted that the censorship of the Soviet power was established more October 25, 1917, the order № 1 of the Executive Committee of the Minsk Soviet of Workers and Soldiers Deputies, which stated that «... established censorship over all facing in Minsk and newspapers get here to prevent the spread of the rumors population» [6]. In this case, the police was seen as force structure, designed to thwart various attempts to counter installed power by the Bolsheviks with the press. After all, the police (along with other executive bodies of Soviet power) enforce orders of the Commission of Inquiry established by the Revolutionary Tribunal to conduct a preliminary investigation.

Legal registration of a regular staff of the Soviet police ended on October 12, 1918 approval of the instruction «On the organization of the Soviet workers and peasants militia» (hereinafter - Regulations) [7]. It identifies the location and nature of the police in the system of government: the executive body of police workers and peasants in the field, which was in direct control of local councils, and submitted to the general direction of the Commissariat. Thus, it has performed as a member of the state apparatus of the Soviet Republic. The enactment of regulations was due to the start of military intervention, the failure of general police duties, as well as the inability by irregular armed groups of workers to perform tasks to strengthen the power of the soviets and the maintenance of public order. That is why the Soviet government decided to create a full-time police apparatus, thus destroying the thesis of the development of the proletariat of the state without a standing army, the police and the bureaucracy. In this regard, study of the establishment of regular police unit took quite a long time, which is not characteristic of the revolutionary events in which decisions are made in the shortest possible time, without prior discussion. The fact that the task of strengthening the power of the Soviets and the maintenance of public order carried a workers militia and the Red Guards, were a common feature of the absence of permanent staff of professionals and a mix of military functions to the protection of public order, which was not effective, especially in attempts to overthrow the Soviet power. It is no accident in December 1917 at the suggestion of the CPC V. Lenin decided to set up the State Security - All-Russia Extraordinary Commission, giving its functions to combat counterrevolutionary actions, sabotage, espionage, sabotage and other similar crimes [2, p.14-15].

But after the establishment of the regular Red Army in connection with the issuance of the decree Council of People's Commissars «On the organization of the Workers and Peasants Red Army on January 15, 1918 the People s Commissar of Internal Affairs G. Peter in March 1918 initiated the organization of the militia on regular basis [12, p. 31]. In print publications appeared, indicating the need to distinguish the military construction and organization of the police, and the establishment

of regular police authority: «... a Red, a person feels a» war «designed to defend the workers republic of armed political enemies, - pointed out by Ivenin - naturally, is unable to perform the functions policemen, civil essentially» [5, p. 4]. Member of the Board of the Commissariat, V. Tikhomirnov also supported the idea of creating a special police state «... a state of emergency time, requiring hasty establishment of revolutionary order, forced to give up the complete destruction of the militia as a whole staff of hired persons having internal protection of personal and property security of citizens ... Conditions of Russia s international position requires strengthening internal order and this, the last forces to create a special police staff bearers themselves on the basis of Soviet power entirely the case» [27, p. 11]. As a result of the meeting of the CPC, Board of the Commissariat, the First All-Russian Congress of the executive committee chairman of department heads of the provincial councils control the Bolshevik government concluded the need for a full-time police apparatus. As a result, October 12, 1918 the statement has been approved. The importance of this paper is that, first, the legal treatment of the finished creating the regular staff of the Soviet police, secondly, there was a legal basis for the construction of the police, not only in the USSR, but also in other Soviet republics, including Belarus. TRC in its decision stated that the predominant direction of the Soviet police were fighting against criminal elements, borrowing sanitary order and execution requirements of local authorities. The value of this decision was to determine the place in the Soviet police state mechanism, primarily as a body to combat criminality, a body of public order.

Thus, the instruction was the first legal act, to issue the permanent emergence of centralized state government agency of public order, which is characterized by the class principle of organization and activity. Thus, the politicization of the police to the Bolshevik platform and following the principle of the class in the activities of the Soviet police led to the implementation of the dictatorship of the ruling party. A primary purpose of internal affairs was a provision will come to power of the Bolshevik Party, which, in the end, and determine their role in the mechanism of the Soviet state.

Instruction was the first legal act, to issue a permanent emergence of centralized state government agency of public order, which is characterized by the class principle of organization and activity. Since the early years of Bolshevik power Soviet militia in Belarus was politicized, which manifested in the selection and placement of personnel, Communist cells in all organs of the police, as well as in the main direction of their work: the fight against crime and public order were intertwined with the liquidation of the political, economic and spiritual opposition to the ruling regime. Therefore, to retain and strengthen its power, as well as guidance about the revolutionary Bolsheviks began to create a new quality in focus and the social composition of the police. Thus, the politicization of the police to the Bolshevik platform and following the principle of the class in the activities of the Soviet police led to the implementation of the dictatorship of the ruling party. A primary purpose of internal affairs was a provision will come to power of the Bolshevik Party, which, in the end, and determine their role in the mechanism of the Soviet state.

Thus, the study of the genesis of the formation and development of internal affairs gives a visual representation of the fact that in the period under primary influence on the formation and development of internal affairs, their organizational forms, the amount of competence, main activities, their place and role in the mechanism of the state provided first of all, socio-political and economic factors. Analyzed historical and legal material indicates a lack not only of organizational stability, but also the clarity of the presentation on the scope and content of the functions of the Soviet police in Belarus, which occurred simultaneously with the birth of the Soviet state, and is an integral part of its machinery. It is an essential tool for the promotion of public order and the rule of law in Belarus, providing the will of the ruling party.

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INTERNATIONAL LEGAL ISSUES OF THE FIGHT AGAINST TRANSNATIONAL ORGANIZED CRIME IN THE AREAS OF UN PEACEKEEPING OPERATIONS

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Abstract: The paper discusses the main trends of development of transnational organized crime in the areas of international peace-keeping operations. The necessity of making a number of international legal steps to enhance the effectiveness of the fight against this phenomenon is being substantiated.

The transnational organized crime is a phenomenon that inevitably arises in the areas of local armed conflicts. Not only its existence is inadmissible for renewal of the country. It destabilizes surrounding regions, as well as distant countries, that had given refuge for victims of the armed conflict, and many other countries. The forces behind this crime take all steps for escalation of the conflict in order to achieve complete domination of their ethnic or religious party, or keeping the conflict in a smoldering state – for further sucking out of the international community funds. Scrutiny of situations within zones of international peacekeeping operations (IPKO) proves that the triad of the most profitable trends of organized crime: 1) trade in weapons, 2) delivered to the industrial level forced prostitution of the abducted and 3) drug business, – are being very actively exploited in each of IPKO areas. The crime in IPKO areas is growing to transnational level. Criminals are organizing flows of drugs, of illegally transported arms, of stolen and deceived women.

To cope with this, the law enforcement of an IPKO zone need international cooperation with police of the countries, in which criminal activity of emissaries from the IPKO zone has been detected. A number of international measures should be carried out. The idea of this kind of international cooperation should be legalized on the level of UN Security Council. Then a comprehensive model of relevant agreement should be worked out. And it should be started in areas of particular IPKO. The further interaction with United Nations Office on Drugs and Crime (UNODC) should be developed. Particularly, UNODK can collect and render information concerning countries which which have criminal links to particular peacekeeping areas. Also UNODK experience on confronting transnational crime is needed. Also the "ex-combatants' factor" in IPKO areas should be carefully regarded in order to prevent them from being involved with crime.

Keywords: transnational organized crime, international peacekeeping operations (IPKO), the UN Security Council (UNSC), Department of Peacekeeping Operations (DPKO), the UN Civilian Police (uncivpol), United Nations Office on Drugs and Organized Crime (UNODC).

INTRODUCTION.

Enhancement of compact mass destruction weapons, development the means for their delivery and means of information exchange has now led to the fact that even a local armed conflict is a threat to peace all over the globe. The international community, through the UN, responds to these challenges creating a network of international peacekeeping operations. Ukraine is actively involved in this process <?>12 <?>7. During the last two decades, such conflicts more and more acquire features of internal conflicts. Handling such conflicts needs greater and greater involvement of international civilian police force. Thus, since 1994 peacekeeping forces contain law enforcement bodies of Ukraine, which fully share burdens, risks and responsibilities for operations' results.

One of the significant negative phenomena that inevitably arise in the areas of armed conflicts is the transnational organized crime. Not only is its existence inadmissible for renewal of the country. It destabilizes surrounding regions, as well as distant countries, that had given refuge for victims of armed conflict, and many other countries. It is also important, that the forces behind this crime take all steps for escalation of the conflict in order to achieve complete domination of their ethnic

or religious party, or keeping the conflict in a smoldering state – for further sucking out of the international community funds.

In our opinion, to successfully combat the phenomenon it is necessary, as a minimum, to take into account a number of factors: 1) the crime features of IPKO zones, 2) so far unexercised interaction of IPKO civilian police with national police of countries affected by criminal emissaries from IPKO zones and 3) so far unused capacities of international organizations in the suppression of international organized crime in areas IPKO, 4) the dual perspective of the «ex-combatants factor» in IPKO zones.

In 2004 the UN Secretary General of that time Kofi Annan wrote in preface to an issue of "The United Nations Convention against Transnational Organized Crime": "If crime crosses borders, so must law enforcement. If the rule of law is undermined not only in one country, but in many, then those who defend it cannot limit themselves to purely national means. If the enemies of progress and human rights seek to exploit the openness and opportunities of globalization for their purposes, then we must exploit those very same factors to defend human rights and defeat the forces of crime, corruption and trafficking in human beings"<?>11. This slogan should become the key to solving the problems of combating transnational organized crime also within IPKO zones.

During the participation of Ukraine in UN peacekeeping operations, scientists in this country completed a number of dissertation researches in related areas: 1) international humanitarian law in protection of human rights – Mohammad Abdel-Karim Moussa Al Nsour (2002), N.V. Plahotniuc (2002), A.A. Maevska (2002), L.V. Pastukhov (2003), Yu.V. Klimchuk (2003), V.I. Dyachenko (2003), V.Kh. Yarmaki (2003); 2) the development, evolution and prospects of international organizations for peace protection – O.A. Deliysky (2003), V.S. Rzhevska (2003), V.I Motyl (2006); 3) applying the international law in resolution of armed conflicts – O.Є. Bolgov (1999); 4) preparation of national law enforcement agencies staff for participation in IPKO – O.O. Telichkin <?>1[8], V.O. Zarosylo (2009)<?>17.

As we see, the study was carried out on many factors, consideration of which may contribute to the effectiveness of international peacekeeping operations. Though, the factors affecting the effectiveness of the fight against transnational organized crime in the areas of international peace-keeping operations have not been studied. That's why the purpose of this study is to determine the organizational and international legal measures to enhance the efficiency of UN civilian police struggle against transnational organized crime in the areas of international peace-keeping operations.

EXTREME CRIME SITUATION AS THE MAIN FEATURE OF IPKO ZONES

Situations in all the IPKO areas confirmed that the lack of law enforcement, while the population has a great number of weapons in their possession, leads to a total nihilism of law and increase in the level of all types of crime, particularly organized crime, which has a strong tendency to escalate into an transnational crime through the usage of refugees flows to other countries.

Scrutiny of IPKO situations proves that the triad of the most profitable fields of organized crime: 1) trade in weapons, 2) delivered to the industrial level forced prostitution of the abducted and 3) drug business, – are being very actively exploited in each of the areas of armed conflicts, i.e., wherever the law enforcement control is weakened. For comprehension of this practical truth international community took about 20 years.

It is quite clear that the first trend of the listed triad (weapons trade) was monitored by peacekeepers from the beginning of first peacekeeping operations as weapons are a physical propeller of armed conflict. That is why today in the zones of long-term conflicts, the staff of international peace-keeping operations in respect of ex-combatants carries out the triune process: Disarmament – Demobilization – Reintegration into the society (DDR) 16. Awareness of dangers of the second direction of the criminal most profitable triad in the zones of peacekeeping operations, of the fact, that the phenomenon of trafficking in stolen women and forced them into prostitution in zones of armed conflicts is not just an accident, but a system that destroys thousands of human

lives, economically feeds the conflict, and which needs to be intensely struggled, – was coming to the international community for about a decade, from the beginning of mass disclosure of the phenomenon in the early 90-ies of the 20th century, and resulted in establishment of specialized Trafficking and Prostitution Investigation Units within each <?>8. Twice as much time was spent on the awareness of the need of tough and well organized fighting of international peace-keeping operations against third trend of profitable triad – the drug trade. The world community has finally paid attention to the dangerous spread of drug-related crime in the post-conflict areas such as Kosovo, Afghanistan, the West Coast of Africa and Haiti. Signals from IPKO territories indicate unavailability of operations to this situation, for example: «The UN peacekeeping mission in Haiti wasn't designed to be an international anti-drug task force"<?>4.

THE NEED FOR INTERNATIONAL MEASURES TO ENSURE COOPERATION OF IPKO CIVILIAN POLICE WITH NATIONAL POLICE OF COUNTRIES ABROAD

In parallel with the flow of the first refugees from conflict zones to the countries of asylum, the emissaries of the crime from the specified zones began to spread in these countries. Their task is to establish connection with the criminal gangs in those countries. Development of this process is actively supported by the mutual interest. On the one hand, the criminals from the conflict zones find markets for their "product" (eg, European countries are the market for heroin from Afghanistan), and, conversely, the "goods" from other countries - for own market (i.e. stolen or defrauded women from Eastern Europe for "consumers" in Bosnia, Kosovo, the former Yugoslav Republic of Macedonia). On the other hand, criminals from countries not belonging to the conflict zone are willing to use the opportunities offered. In addition, they use the conflict zones (areas with weak or missing system of law and order) to move over-there pre-existing transit routes of criminal business. For example, since the conflict zones arrived in the former Yugoslavia, drugs transit routes shifted over there from Albania. It is important that through the Balkans routs drug moved from Asia to Europe and the payment, luxury SUVs stolen in Europe, used the same routs in opposite direction.

All of this leads to the realization of the need to join efforts of law enforcement agencies of all countries, which lie along the path of criminal business. This implies the need for cooperation of international police, which works in the areas of IPKO, with police of the countries where criminal emissaries from conflict zones proved their activities. Ideally, we need to create a situation that in the IPKO police among others there officers should serve namely form those countries where criminal activity of the emissaries from the IPKO zones has been detected. And that those police officers should work with the IPKO police in the units specialized in the disclosure of namely those crimes in which criminals from IPKO zone are involved. In addition, these officers need to be experts at home against the same crimes.

As a result, the officers in the IPKO area would interact with the same units in their home countries, where they worked before being sent to the mission. The last provides a complete understanding between the IPKO police and the national police, both interested in the fight against international organized crime, which now abounds in post-conflict zones.

But in order to provide such an ideal situation, the UN DPKO with the support of the Security Council should take a number of international legal actions.

1) Using all the possible international informational channels, it is necessary to identify in which countries criminal representatives from the zones of armed conflicts are active. This requires, in particular, to provide the interaction of DPKO Police Division with the network <?>5<?>9<?>1^{0}<?>1^{4}<?>1^{3}.
2) Organizing intakes of international civilian police to the area of a new IPKO, it is necessary to pay special attention to selection of participants from namely those countries where criminal activity of refugees from the area of the future IPKO has been detected. And some of those selected officers should at home belong to the units specialized in confronting transnational crime. Definitely, it can demand some changes in quotas concerning providing police from contributing countries.

3) To ensure the reliability of UN civilian police interaction with the national police of countries interested in fight against international organized crime, it is necessary to ensure the legality of this interaction. To do this, it is necessary to develop a model of an international agreement between the UN civilian police of particular IPKO and on the National police a country to interact. The agreement should also state the purpose, objectives, interacting units, the rules and the way of the exchange of confidential information. Based on this model, agreements between particular IPKOs and national polices of certain countries should be concluded in the future for the purposes to enhance the efficiency of the fight against transnational organized crime.

WAYS OF FURTHER INTERACTION OF IPKO CIVILIAN POLICE WITH UNITED NATIONS OFFICE ON DRUGS AND CRIME

Only in late 2010 – early 2011, an issue was raised concerning the need to unite efforts of the Department of UN Peacekeeping Operations (DPKO) and the UN Office on Drugs and Crime (UNODC) in the fight against transnational organized crime <?>6.

UNODC has positioned itself as a global leader in the fight against drug trafficking and organized crime. Created in 1997 through the merger of the UN Office for Drug Control and the Centre for International Crime Prevention, UNODC operates in all regions of the world through an extensive network of field offices. According to its mandate, UNODC provides assistance to UN member states in the fight against drug trafficking, organized crime and terrorism. The three pillars of the UNODC work programme are:

1) Field-based technical cooperation projects to enhance the capacity of Member States to counteract illicit drugs, crime and terrorism;
2) Research and analytical work to increase knowledge and understanding of drugs and crime issues and expand the evidence base for policy and operational decisions;
3) Normative work to assist States in the ratification and implementation of the relevant international treaties, the development of domestic legislation on drugs, crime and terrorism, and the provision of secretariat and substantive services to the treaty-based and governing bodies <?>1.

While the DPKO on behalf of the world community takes responsibility for the conduct of peacekeeping operations, the UNODC is conducting purely advisory functions concerning the UN Member States. Accordingly, the international civilian police are so far responsible for prevention, detection, investigation of crimes related to drug trafficking in the areas of peacekeeping operations. However, directions and ways of implementation of this interaction have not yet been determined. We do believe that the interaction of IPKOs with UNODC may be useful in the next areas: 1) using its extensive global network, UNODC can provide the international peacekeeping much-needed information about the criminal activity of refugees from the area of conflict in the asylum countries, thus enabling IPKO police to determine: with police of which country to cooperate; 2) expertise and practical experience gained by UNODC can provide a significant contribution to the success of the police in IPKOs in their fight against transnational organized crime.

THE NEED OF RECOGNITION AND APPLICATION OF "EX-COMBATANTS FACTOR" IN AREAS OF IPKO

In IPKOs' areas ex-combatants constitute a noticeable part of the society. After prolonged conflict this category of persons is mostly comprised of young people without a civilian profession, i.e., without means of subsistence. During the war, they controlled the lifestyle of others, but after the war they found themselves on the sidelines of life: they cannot compete with their peers, which in some ways (temporary emigration, etc.) declined participation in the fighting, btained civilian specialties and strong positions in civilian life. The said above pushes a part of ex-combatants to the ranks of organized crime<?>3. In the last decade this problem declared itself loud enough, and the

international community has responded with the development of the mentioned above Program "Disarmament – Demobilization – Reintegration" (DDR)<?>16. In cases of very long-standing conflicts, such as in Liberia (14 years), the program is supplemented by the penultimate stage of the mental, social, etc. rehabilitation. It should be noted that DDR is being theoretically provided and practically implemented by the UN Inter-Agency Working Group on DDR, which is a combination of 16 offices and departments, which also includes the UN DPKO, but does not include the UN Office on Drugs and Crime<?>2.

Thus, the participation of the UN civilian police covers DDR only partially, namely its stage of disarmament. Rehabilitation and reintegration phases, among other kinds of support include providing ex-combatants with civilian specialties of short-term training. Despite this, some of these young people, because of stung ambitions, try to build their future differently: using weapons and their combatant's skills, — and, of course, they fall into the ranks of organized crime, in particular, transnational crime. This is a painful reply to the society's negligence of the psychological factor — the stung ambitions of ex-combatants.

On the contrary, in our opinion, adequate consideration of this factor can not only help to prevent the involvement of ex-combatants into crime, but it can help to form worthy defenders of law and order of them. It is necessary to consider the issue of establishing of unarmed voluntary associations promoting law and order within IPKOs' areas. It's necessary to attract ex-combatants to their ranks appealing to their professional qualities as discipline, persistence, dedication to their country, which is necessary to maintain governing of law. The main tasks of these associations should be prevention of crime and informing the police on criminal trends in the area. No need to prove that this issue is closest to the activities of the police, especially in the view of the progressive philosophy of community-oriented policing.

Consequently, the international civilian police should be involved in all the stages of the DDR process. And as it was during the development and initial implementation of the DDR process, international legal instruments need to be applied for implementing of the said supplement to the DDR process. Thus, the idea of establishing of voluntary civil associations for support of the rule of law and involvement of ex-combatants into their ranks along with other citizens needs to be elaborated in the Police Division of UN DPKO. And in the case of positive findings it needs to be considered by the UN Security Council for the approval by a relevant UN resolution and further implementation in the IPKOs' activities.

In the societies, where police system is on a phase of creation in the conditions of legal nihilism and vacuum of law and order, ignoring this aspect can seriously hinder the transition towards the rule of law. However, careless and unprofessional attitude towards the problem of development and implementation of the idea of voluntary unarmed associations promoting law and order within IPKOs' areas may alienate potential participants. Thus, high level of expertise is needed in many fields, including international law, forensics, criminology, psychology, and professional system of monitoring and control. That's why the said process needs knowledge and experience of UNODC. The said is timely especially now, when DPKO and UNODC have already decided on start interacting<?>15.

CONCLUSION

1. The territory of any international peacekeeping operation has high criminality level due to the weakening or the temporary absence of the rule of law there. The most daring ideas of transnational organized crime are being tested namely over there.

2. Creating a system of interaction of UN civilian police in the zones of international peacekeeping operations with national police forces of countries in which criminal emissaries from these zones develop international criminal connections, is an inevitable demand of our time. The expertise and factual data of the UNODC need to be applied in order to identify external countries (in relation to the areas of international peace-keeping operations) with police of which UN civilian police should liaise. Besides, DPKO should develop a model of an agreement on cooperation (liaison) between IPKO's civilian police and a police of a single hypothetical country in the fight against transnational crime. The mentioned model agreement should be discussed by the Security Council

and approved by the appropriate resolution. After that, this model should be applied in order to draw up relevant treaties between specific IPKOs and interested countries.

3. Necessary measures should be taken in order to bring ex-combatants to support of law and order in the region and to prevent their involvement in criminal structures. For these purposes within any IPKO, efforts of UN components should be united: the UN civilian police, the Office on Drugs and Crime and the UN Development Program. It seems expedient to assign coordination to the UN civilian police, as on the one hand, it should be involved in all the stages of the DDR program, and on the other hand, the core of their job is based on close interaction with local communities.

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COMPENSATION OF DAMAGE CAUSED BY THE CRIME TO THE VICTIMS OF HUMAN TRAFFICKING: RESULTS OF THE RESEARCH IN BELARUS

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Abstract: The article considers legal and practical aspects of compensation of damage caused by the crime to the victims of human trafficking in the Republic of Belarus. Views of professional community (lawyers, psychologists, social workers) on the pondering problem are studied. Recommendations to the specialists working in anti-trafficking domain are provided.

Keywords: trafficking in persons, exploitation, victim of human trafficking, compensation, damage caused by the crime, investigation, reintegration, cooperation.

INTRODUCTION

This article presents the results of the research "Compensation for Trafficked Persons in the Republic of Belarus", which was carried out by International Public Association "Gender Perspectives" (La Strada Belarus Program) in cooperation with the Chair of Criminalistics of the Academy of the Ministry of Interior of Belarus. The research was conducted in 2009-2011 & covered all the regions of Belarus. It based mostly on the empirical data & also law analysis. Using the method of semi-structured interview the authors studied opinion of 50 victims of human trafficking, which have undergone reintegration assistance and participated in criminal process. As well the method of experts' evaluations was used – in this way were interviewed 20 investigative and operative employees of law enforcement bodies, lawyers, judges and social workers. Each interviewed professional had to deal with dozens or even hundreds of trafficked persons. Preparing the results of the research the author used the experiences obtained studying the human trafficking problem since 2002 including participating UNDP, IOM projects as well during missions in Belgium, Czech Republic, Germany, Italy, Moldova, Russia, Sweden, USA & the Ukraine.

MAIN CONCLUSIONS OF THE RESEARCH

The subjects for identifying the persons involved into the sphere of human trafficking are the law enforcement bodies and international and nongovernmental organizations (IOs-NGOs). According to the current Belarusian legislation, recognition of a person to be a victim of human trafficking (VHT) is possible in case of a respective crime committed against this person, that assumes acquisition by him/her of a certain procedural status – of a victim or a witness (depending on the circumstances of the case). The right to compensation of the damage caused by a crime arises only in those VHTs, who were recognized to be victims in the criminal case. Thus, the victims, who address for help to the IOs-NGOs, but appearing outside the field of attention of law enforcement bodies, who did not take part in the criminal process, officially are not VHTs; they are recognized as such only by the respective organizations, and have no right to compensation of damage.

In the opinion of the overwhelming majority of law enforcers (LEs) and judges, the claims of damage compensation are lodged by no more than 10% of the VHTs, participating in the criminal process. The study of the opinions of employees of the IOs-NGOs indicates that out of the total number of the victims, who are taking the course of rehabilitation support in these organization, no more than half take part in the criminal process, while only a quarter of them, about 25%, enforce their right to compensation of damage. When analyzing the above data, one should keep in

mind that not all the VHTs, who cooperated with law enforcement bodies, addressed for help to the IOs-NGOs, but, at the same time, all the VHTs, who lodged their claims, including those who underwent their rehabilitation in the IOs-NGOs, were participants of the criminal process. Thus, the comparison of the above figures allows moving a hypothesis that the VHTs, who took (are taking) their reintegration course, are more willing and active in enforcing their right. In the enforcement process, an important role is played by the qualified legal aim rendered to the VHTs. This argument is confirmed by the fact that practically all the interrogated lawyers noted that civil claims in the criminal process were lodged by all the VHTs, whom they rendered help.

In the opinion of most of the experts, the problem of low activity of VHTs is actual for Belarus and stems from the fact that, on the one hand, VHTs are afraid to lodge claims on damage compensation (especially in small towns), and on the other hand – not all of them understand their right and know about it.

The above experts' opinions are confirmed by the results of polling the VHTs. Only 44% of the total number of the respondents, who took their course of reintegration support at the IOs-NGOs and participated in the criminal process, lodged civil claims on compensation of the damage caused by a crime. Out of 56% of the victims, who did not enforce their right, 26% failed to do it by virtue of unawareness about it, 28% – for the desire to forget as soon as possible what had happened with them, for fear of publicity and vengeance from traffickers, etc.

Practically all the psychologists and social workers stick to the same viewpoint about the need for VHTs to claim compensation of the damage caused to them by a crime. In their opinion, reintegration of VHTs in the society is extremely difficult, entails high expenses on treatment and recovery of both physical and mental health. Besides, although no money can often compensate the caused damage, the very fact of collection of compensation from the criminal is an act of his/her attraction to responsibility, not only before the state (in case of conviction), but also before the persons, against whom the particular crime was committed.

In the opinion of the lawyers, while being an integral right of the victim, lodging a civil claim on compensation of the damage caused by a crime, is, besides, very important for VHTs based on the following provisions:

- It is a stimulus for active participation in the criminal process (giving evidences at the preliminary inquiry and participation in the court proceedings);
- It contributes to understanding by VHTs of the fact that they are defended by the state and that their broken rights are restored;
- It contributes to a more complete perception by the court of the character and volume of the damage caused by a crime;
- It strengthens in the eyes of the convict the principle of imminent punishment; and
- It contributes to the general prevention of crimes.

Explanation of the right to compensation of damage caused by a crime is the duty of the body of criminal prosecution and the court. At the same time, in case of participation in the case of a representative of the victim (a lawyer), this right is also explained to VHTs by this participant of the criminal process. As follows from the poll of the experts, experienced LEs and lawyers, already at the first meeting with VHTs, not only explain the right, but also describe in detail the procedure of filing and lodging a suit. Although the explanation of this right is not the duty of the employees of the IOs-NGOs, the general information about the possibility of obtaining the compensation in case of participation in the criminal process is given by them to VHTs in the course of reintegration support.

It follows from the words of psychologists and social workers that at rendering the reintegration assistance they are explained the right of VHTs to compensation of the damage caused by a crime. Informing VHTs by them about it may be a stimulus for them for their participation in the criminal process and exposing the traffickers. This practice should also contribute to restoration of the moral condition of victims, since, as noted by a number of experts, compensation of damage brings, to a certain extent, into VHTs the feeling of the triumph of justice not only before the face of the state, but also right against their eyes.

The study of the opinions of VHTs indicates that under all the importance of clarification of the right to compensation of damage, the efficiency of this work is not always very high. Thus, only 48% of the victims said that this right and the procedure of lodging claims were explained to them completely and clearly, and 26% of them noted that they were not informed at all about their right to lodge a civil claim in the criminal process.

The necessity of a detailed explanation of the right to compensation of damage and the procedure of lodging a civil claim is dictated by the fact that not always VHTs by virtue of the level of their education, psychological condition and a number of other subjective and objective factors are capable to correctly perceive the respective information.

Based on the analysis and generalization of the opinions of experts, we can state that in general the active behaviour of VHTs in lodging a claim on damage compensation depends from a complex of subjective and objective factors, which form the attitude of the victims to this issue during a certain period of time after the crime committed against him/her, and the post-criminal period.

Among the subjective factors are the following:

- *Fact of awareness about the aim of travel abroad.* Evidently, involvement in the sphere of trafficking in persons through a deceit or kidnapping essentially strengthens the victim's psychological trauma, causing unwillingness to cooperate with law enforcement bodies, take part in the criminal process and lodge a civil claim by virtue of the desire to forget and never get back to these traumatizing memories. At involvement through an open offer, even in case of causing damage by the crime, VHTs may not identify themselves as victims, by accusing themselves of what happened.
- *Sphere of exploitation*. The victims of labour exploitation (as a rule, men) are much more active in enforcing their rights and usually willingly lodge civil claims. The victims of sexual exploitation (as a rule, women) are much less active. An important role in this case belongs to the subjective psychological factor.
- *Peculiarities of exploitation.* The ways of enforcement to prostitution and slavery labour; the term of exploitation; conditions of stay; number of clients; character of work; duration of labour time; presence and volume of payment for the rendered services or fulfilled works, etc. – along with growth of critical threshold of these circumstances and conditions, the implications of the crime become more and more grave for the mental health of VHTs and decrease their activity in aspiration to restore their rights and broken justice.
- *Consequences of exploitation.* Infections of STIs, HIV, viral hepatitis, chronic and other diseases; childlessness; mental disorders, etc. – the presence of these consequences, so grave for VHTs, can still further aggravate the general stress condition of the victims after exploitation. It is obvious that such circumstances are telling negatively on reintegration of VHTs and their persistence in standing for their rights.
- *Subjective attitude to what happened and self-identification*. For the considered range of crimes, specific peculiarities are notable in how VHTs perceive what happened to them. The victims can blame themselves of what happened (in particular, under the influence of surrounding people), feel the fear of responsibility for their committed offences (illegal crossing the border and stay in the destination country, prostitution, etc.), feel positive attitude to traffickers (the so-called "Stockholm syndrome"), acquire a post-traumatic stress disorder, or suffer from "psychological personality deformation". Due to similar circumstances, VHTs are not able sometimes to self-identify them as victims.
- *Perception of completeness of the damage caused by a crime.* In the opinion of experts, it takes place differently in VHTs and depends on the level of education, awareness about the aims of the trip, etc. At the same time, if the property and physical damage is somehow better understood by them, the presence and the volume of moral damage is not completely perceived by VHTs by virtue of their psychological condition.
- The following refers to objective factors:
- *Peculiarities of the reintegration period.* It follows out of the answers of experts that often VHTs try to avoid a repeated reconstruction in their memory of what they had lived through, they fear to disclose the intimate sides of their life, etc. As noted earlier, the rehabilitation course

(obtaining, first of all, of psychological help) is telling positively on overcoming the above barriers and intention of VHTs to contribute to attraction of traffickers to responsibility and to claim compensation of the damage caused by a crime.

- *Presence of risks.* Certain experts have noted that VHTs, already in the post-criminal period may experience pressure caused by traffickers or their relatives or friends. Evidently, on the one hand, the feeling of insecurity and fear of execution are strengthening their reluctance not only to lodge a suit on damage compensation, but generally take part in the criminal process and give accusatory evidences. On the other hand, when such pressure brings no open aggression, but is aimed towards revaluation by VHTs of what had happened and formation of a false presentation about his/her guilt of that, the result here can be the absence of a VHT's self-identification as a victim.
- *Competence and professionalism of employees of law enforcement bodies* and *social services (other specialists).* Evidently, the formal approach of the inspector (operative worker) to contacting VHTs and, in particular, to explaining their rights and duties, with no account of peculiarities of the crimes in the considered sphere, is depressing, in a number of cases, not only the desire of victims to lodge a civil claim, but also, as a matter of principle, the understanding by them of the very essence of the caused damage, as well as of the procedure of its compensation. The aforesaid also completely refers to the workers of social services, who are rendering the reintegration help to VHTs, and to other specialists (including employees of IOs-NGOs, lawyers, etc.).
- *Reality (chances) to get compensation.* This circumstance depends from the fact of establishment by the body of criminal prosecution of any defendant's property and monetary assets and imposition of arrest on them; cost of the arrested property; number of victims and defendants in a particular criminal case. Understanding by VHTs of the fact that the lodged claim can not only be satisfied by the court, but they can indeed get real money as damage compensation, is essentially strengthening the intention of VHTs to enforce their right.
- *Obtaining of highly-qualified legal aid*. Under all the diligence of the inspector and all his/her attention to the problems of VHTs, his/her round of duties does not include rendering legal aid to the victims in compiling their claims (although, as noted earlier, the law obliges the body of criminal prosecution to ensure the victim's access to justice and take measures to ensure payment of the compensation of the caused damage; the character and volume of damage are elements of the fact in proof). In this context, rendering of the respective consulting support by the lawyer is a precondition of active behaviour of VHTs in enforcing of their right.

Most of the experts-lawyers have noted that the claim, as a rule, is lodged by VHTs in the court (at the trial); and it is motivated by the fact that the complaint goes to the court and is considered there. This experts' opinion is confirmed by the poll of the victims. Thus, out of the 44% of them who lodged claims, 38% did it at the trial.

It follows from the study of empirical data that VHTs do not face any real organizational problems related to lodging a statement of claim, since the procedure of lodging a civil claim in the criminal process is clearly regulated by the legislation and is rather simple. As to the psychological problems that exist in this area, they are connected not with lodging a claim as such, but sooner with the victim's participation in the court proceedings in principle. The reasons are, as a rule, of subjective character (they were listed above). Based on the experts' opinions we can conclude that these particular reasons, first of all, cause low activity of VHTs in participating in the criminal process and lodging suits on compensation of the damage caused by a crime. In this context, the opinion expressed by practically all employees of IOs-NGOs about the necessity to support VHTs, including to accompany them when they go to court.

It was noted earlier that for VHTs the moral damage is the most complex for understanding. Along with that the experts have stated that exactly moral damage is most often applied to compensation. This is confirmed by the results of polling the victims themselves: 42% out of the 44% of those who enforced their right, claimed for compensation of moral damage.

It is obvious that this circumstance is characteristic for the cases, when VHTs receive the necessary explanations of the respective notions and procedures, which, as a matter of fact, is one of the

preconditions of the activity in lodging the claim. The lawyers were unanimous in the opinion that this type of damage is claimed, because in practice it is present in the overwhelming number of cases and requires no documentary confirmation (unlike the property and physical damages), which is not always possible to obtain. At the same time, it was noted many times that a problematic issue is definition of the sum of the claim on compensation of the moral damage, since the legislator does not provide any criteria to this end.

Definition of the sum of the claim depends on the sphere of exploitation. Experts note that as to the labour exploitation such calculations are rather simple, just based on the sums, which were promised to the person involved in the sphere of trafficking in persons and were not paid by traffickers for the work, with account of the duration of exploitation (as a rule, the property damage is claimed to compensation in the first place). In case of sexual exploitation, VHTs face difficulties in defining the sum of the claim and do it with the help of lawyers (32% of the respondents), who are guided, as a rule, by judicial precedents (especially, on compensation of moral damage).

Assistance in defining the volume (sum) of the claim, both by employees of law enforcement bodies and by lawyers, mainly implies providing consultations on the basis of judiciary practice and with account of really available funds for compensation (property of the defendant; detection of the property and imposition of arrest thereon).

In the opinion of most of the lawyers, the current legislation, which regulates the procedure of damage compensation, is quite efficient. However, practically all the experts agreed that the problem is to enforce the court decisions in the part of collecting compensations, that is, actual collection from the respondent of payments for compensation of damage. The reason is that if the defendant formally has no money and property, the probability of such collection is minimal. Experts expressed a number of opinions and ways of possible solution of these problems.

RECOMMENDATIONS TO THE SPECIALISTS WORKING IN ANTI-TRAFFICKING DOMAIN

A precondition for a more active behaviour of VHTs in lodging claims on compensation of damage caused by a crime is a more active cooperation of LEs and IOs-NGOs in implementing the mechanism of redirection of VHTs. On the one hand, the VHTs, identified by LEs, should be sent, whenever possible to these organizations for taking the course of reintegration support, which contributes to VHTs' self-affirmation in the society, increase of the level of their self-actualization and understanding of the need to consolidate the efforts, directed towards punishment of traffickers and recovery of their broken rights. On the other hand, IOs-NGOs should work towards explaining to the VHTs, identified by them, the need to cooperate with LEs and participate in the criminal process, which is not only the necessary precondition for punishing criminals, but also for enforcing the victim's rights, including the right to compensation of damage caused by a crime.

Lodging a claim on damage compensation is not only the right of VHTs, but is also one of the conditions for their successful reintegration in the society. This circumstance should be accounted for both by LEs and IOs-NGOs in their work with VHTs when addressing their professional tasks.

The wish of VHTs to cooperate with law enforcement bodies and take part in the criminal process may depend, in a number of cases, from the personal interest of VHTs in obtaining compensation. On the other hand, a precondition of such interest is their understanding of a realistic opportunity to get compensation of damage. In this context, in executing by the body of criminal prosecution of requirements of part 2, Article 102, and part 3, Article 148, of the Code of Criminal Procedure of the Republic of Belarus (CCP) on proving a civil claim, and of Article 156 of the CCP on securing a civil claim, any formal approach should be excluded. Timely measures to establish the character and volume of the damage caused by a crime, detection of the property that can be arrested, and monetary assets of suspects (defendants), already at the initial stage of inquiry, can decrease the probability to hide them, including, by means of legal re-issuance by the trafficker of the ownership rights.

The investigator (detective) should explain to suspects (defendants) that in accordance with point 4, part 1, Article 63, of the CC "voluntary compensation of damage, or elimination of the damage caused by a crime; other actions aimed at smoothing this sort of damage," are the circumstances, mitigating the responsibility.

It is important to exclude formal approach at fulfilling the requirements of Article 150 of the CCP dealing with explanation by the body of criminal prosecution to the person, who suffered from the damage caused by the crime, his/her right to lodge a civil claim. As far as possible, the notion damage and its types, and the procedure of lodging a claim on its compensation should be described in all possible details, since in a number of cases the mental condition, the level of intellectual development and other peculiarities of VHTs, and the volume of information presented to them, do not allow VHTs to completely perceive the explained provisions of the legislation.

It is expedient for IOs-NGOs to hold, in the course of implementing reintegration support in relation to VHTs, consultations on the issues of damage compensation. It is not recommended to hold such consultations at the initial stages of working with VHTs, to avoid any oversaturation with information and difficulties in perceiving it. With the aim to attain better understanding of the essence of the damage caused by a crime, procedure of lodging claims on compensation thereof, help in enforcing this right, as far as possible professional specialists – lawyers – should be attracted, capable of representing the interests of VHTs in the criminal process. Consulting should be held on the bases of respect of the rights of VHTs, unbiased attitude to them and individual approach.

In general, it is important both for the body of criminal prosecution in charge of proceedings on the case and for the lawyer who is consulting VHTs, to keep in mind subjective and objective factors influencing the intention of VHTs to take part in the criminal process and to claim damage compensation (see the conclusions). In particular, the negative subjective factors, causing the stressful and depressive condition of the VHT in the post-criminal period, can be redirected, at a clever individual approach, towards excitation in the consciousness of the victim of a healthy feeling of vengeance, triumph of justice and restoration of broken rights. Here, an important condition is ensuring the VHTs' security in the course of their participation in the criminal process (46% of the respondents indicated that upon their return to homeland they were exposed to threats from traffickers). That is why, the body of criminal prosecution (with possible cooperation with IOs-NGOs) should take the respective and timely security measures[1].

Since participation of VHTs in court proceedings is a stressful situation for them, the right to lodge a civil claim may be enforced at the stage of preliminary inquiry. In any case, it is recommended to prepare a complaint (formulate claims) in the course of the pre-trial proceedings.

When defining the sum of the claim, one should outgo from the data obtained in the course of proving the character and volume of the damage caused by a crime at the preliminary investigation. It is necessary to keep in mind that at proving the moral damage, along with appointment of the psychological-psychiatric examination, one can also make use of evidences of the psychologists (psychotherapeutics) of IOs-NGOs about the consequences of exploitation for the VHTs, with whom they worked in the course of reintegration support. It is better that they are interrogated as witnesses with regard to the criminal case.

When the court passes a decision to satisfy a civil claim, an important role belongs to assessment of the character and volume of the damage caused by a crime[2]. In this context, when proving these circumstances, the body of criminal prosecution should take into account, if the trafficked person is sent to IOs-NGOs for receiving reintegration support, that the need to render certain types of help, first of all, of rehabilitation character (medical or psychological), was caused directly by the committed crime, while rendering them is directed towards elimination of the consequences thereof. In this context, in the opinion of the authors, the expenses suffered by IOs-NGOs on rendering these types of help may be referred to the damage, caused by the crime, and should be reflected in the materials of the criminal case. Such damage cannot be claimed by a VHT to compensation within a civil claim, since the respective expenses are suffered not by the

1 See: Shrub, M.P. Ensuring safety of participants of the criminal process and other persons when investigating crimes of trafficking in persons for sexual exploitation//Herald of the Academy of the MIA of the Republic of Belarus. – 2004. – No. 2. – P. 146-149.

2 See Points 10-11 of Statement of the Plenum of the Supreme Court of the Republic of Belarus of June 24, 2004, No. 8 "On Practice of Considering Civil Claims by Courts in Criminal Process"

VHT, but by a third person (IOs-NGOs). At the same time, based on the principle of omnitude, completeness and objectivity of the investigation of the circumstances of the case, this circumstance should be accounted for by the body in charge of the criminal process.

As a whole, in the opinion of the authors, it is important that the body of criminal prosecution and the court take into account, when assessing the presence, character and volume of the damage caused by a crime, the circumstance that frequently the persons, involved in the sphere of trafficking in persons, and real crime victims, do not identify themselves as victims. The list of reasons of this phenomenon was considered earlier (see the conclusions). However, the body in charge of the criminal process is initially assessing the awareness of the person about the aims of the travel, by means of establishing the method of involvement in the sphere of trafficking in persons: whether recruitment through deceit, or kidnapping, or an proposal (in particular, about going in for prostitution). The practice shows that, as a rule, in the latter case the actions of traffickers are qualified not as «trafficking in persons» under Article 181 of the Criminal Code (CC), but as «benefiting from prostitution or creating conditions for prostitution, connected with taking the person out of the state for prostitution» under Article 171 of the CC. In such case, as a rule, VHTs are not recognized in criminal cases as victims.

Evidently, when a person went abroad voluntarily and knowingly, being notified about the aim of the travel, conditions of stay and the rates of payment for works (services), if later all this complied with reality, there is no point of victimization here. In such cases these persons can be witnesses with regard to a criminal case, and they quite reasonably do not believe themselves to be victims.

However, firstly, one should keep in mind that the very fact of awareness of the character of the forthcoming work in the sphere of sex-industry when going abroad does not at all mean that person subsequently did not suffer any damage. The absence of a person's self-identification as a VHT should not be the only criterion for defining his/her procedural status. Thus, the practice knows a huge number of cases, when, bring aware about the aim of the travel (going in for prostitution), people found themselves in slavery conditions: they were forced to work actually for nothing (or for the salary disproportionate to what had been promised), service up to several dozens of clients per day against one's will, etc.[3]. Such people often do not believe themselves to be victims and accuse themselves of what had happened. However, the fact of causing them in the process of exploitation at least the property damage looks obvious and cannot be disregarded even under the negative attitude of the society to prostitution. In other words, we should not mix up the legal and ethical components of the problem.

The second aspect of the considered problem is that the absence of self-identification of a person as a VHT may have place also in the case of involvement by means of recruiting through deceit or even kidnapping. However, such self-assessment appears not at once, but upon expiry of a certain period – as a rule, at least several months of exploitation; or at a repeated victimization. As a matter of fact, when suffering in the course of exploitation during a certain period of time from a broad range of methods of physical, mental, economic and organizational-legal influence[4] a person may acquire serious, sometimes irreversible mental changes (psychological deformation): life priorities are revaluated, concepts and values are replaced, etc. Thus, the damage, really caused by a crime, becomes latent and hard to reveal and understand by surrounding persons.

In addition to the aforesaid, the authors believe it necessary to note that in case of qualifying the offence committed against a VHT under Article 171 of the CC, it should be kept in mind that the legislator refers this a crime to Chapter 20 "Crimes Against Sexual Immunity or Sexual Freedom" of Section VII "Crimes Against Person". That is, such crimes encroach directly on the person, causing damage not only to the society, but also to a particular person. Besides, the only criterion of defining the procedural status of a person as a victim, according to part 1, Article 49, of the CCP, is the fact of causing him/her any physical, property or moral damage, irrespective of his/her subjective attitude to this fact.

3 See, for example: Court Archives of the Oktiabrskiy District of Grodno. Criminal Case No. 1-391/02; Court Archives of the Tsentralny District of Mogilyov. Criminal Case No. 1-554.

4 See: Shrub, M.P. Criminalistical characteristic of trafficking in persons with the aim of sexual exploitation/M. P. Shrub; edited by I. I. Basetskiy. – Minsk: ALC "Druk-S", 2007. P. 31-35.

By summing up the conclusions and recommendations, formulated on the basis of the analysis and generalization of the current legislation, opinions of practical experts, as well as of trafficked persons, the authors find it reasonable to quote here Points 19 and 4 of the Statement of the Plenum of the Supreme Court of the Republic of Belarus of June 30, 2005, No. 6 "On Application Practices of the Provisions of the Code of Criminal Procedure, Regulating Participation of Victim in Criminal Process":

"The victim is the only participant of the process who has directly suffered from the crime; therefore, ensuring the protection of his/her rights and legitimate interests acquire special value. The decision to recognize an individual to be a victim shall be made immediately upon establishment of the grounds thereto, which is an important guarantee of the victim's timely access to justice and enforcement by him/her of procedural rights and execution of his/her duties."

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QUALIFICATIONS OF CRIMES IN THE LIGHT OF LEGAL AND SPECIAL PRINCIPLES

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Abstract: This paper shows how the principles of criminal law are implemented in the qualification of crimes. The author substantiates the need of extracting special principles of crimes qualification, gives their classification and discloses the content of each of them.

Keywords: qualification of crimes, principles of criminal law and criminal liability, general legal principles, special principles of crimes qualification.

INTRODUCTION

Combating crime is impossible without compliance of fundamental principles of law enforcement activity. In this context, particular importance have the legal principles that officers should follow when conducting the criminal trial and qualifying crimes. In the Article 3 of the Criminal Code of the Republic of Belarus are fixed regulations, which are called the principles of criminal law and criminal liability: rule of law, equality in the law, inevitability of punishment, guilt, justice and humanism. These principles are addressed not only to a law enforcer, but a legislator.

In the provisions contained in Article 3 of the Criminal Code, there is a question if it is right to consolidate the principles in the criminal law, giving them in this way a branch value. On the one hand, the normative expression of the principles in the criminal law gives them an obligatory nature, they guide persons who conduct the criminal process. But on the other hand, it's known that most of the principles mentioned in the Article 3 of the Criminal Code (rule of law, equality in front the law, justice and humanism), by their nature are general, i.e. they are relevant to all areas of the law. And, unfortunately, as it's shown by studies of many legal scholars, there is no harmony between the general legal principles in the process of law-making and law enforcement. The thing which is legal is not always justly, the principle of humanism often comes into formal contradiction with the principle of equality of everyone in front of the law, etc.

Mentioned general legal principles have various contents that appear in all the relevant requirements for the implementation of certain activities: criminalization, codification, state regulation of combat crime, the direct application of the legal norms, etc. In the context of crimes qualification, general law principles, refracting through the prism of law enforcement tasks, acquire their specificity. Let us concentrate this specifics.

PRINCIPLE OF LEGALITY

On the basis of provisions of Part 2 of the Article 3 of the Criminal Code we can underline following requirements, which express the essence of the principle of legality in the process of qualification of crimes:

– criminality of act is determined only by the criminal law;
– application of the criminal law following analogy is not permitted;
– criminal law norms must be strictly interpreted;
– no one can be convicted for a crime commission except by the sentence of the court;
– conviction for a crime shall be in accordance with the law.

The classical formula "nullum crimen sine lege" acquires fundamental importance on the first stage of the criminal law norm application. In the process of crime qualification, this important for law enforcement practice requirement is expressed as follows: the actions can be qualified as a crime only in that case if the committed socially dangerous act is covered by a concrete article of the Criminal Code. If in the committed act at least one feature provided by criminal law is absent that

characterizes this act as a certain type of crime, it cannot be attributed to the actions prohibited by criminal law.

Prohibition of act by the criminal law also means that during a crime qualification it is inadmissibly to apply the criminal law, which came into force after the act, which affects the position of the person who committed the act. This requirement of the principle of legality in the characterization of a crime arising from the provisions laid down in Part 1 of Article 9 of the Criminal Code: "Criminality and penalty of an act are defined by law, which was in force at the time when the act was committed."

The position of the principle of legality is that "no one can be guilty in committing a crime and have criminal liability except as by the sentence of the court" justified by the provisions of Article 11 of the Universal Declaration of Human Rights. This provision is also duplicated in the Article 26 of the Constitution and developed in other provisions of the Constitution. This requirement of the legality has the criminal-procedural character. However, in the aspect of crime qualification, court sentencing means that the final conclusion is determined by qualification only of the court.

The provision that a person is admitted as guilty in crime committing only in accordance with the law in the context of a crime qualification expects: criminal and legal assessment of the offense under the criminal law relationship, the recognition of the crime as the base of criminal responsibility; abidance of crime qualification rules stipulated by the criminal law.

Crime qualification under the criminal law relationship is expressed as follows. The subjects of the criminal law relationship can be only individuals: on the one hand a person who committed a crime, and the other – the authorized representatives of the justice system. In the initial phase the activities of persons engaged in criminal prosecution are determined by a crime qualification. To the power of the persons engaged in criminal prosecutions attributes the right and duty to give correct criminal and legal assessment to the committed act and the basic right of a person who committed a socially dangerous act accordingly is to demand the correct offense qualifications.

The completeness and accuracy of the collected data of committed crime influence certain criminal and legal crime assessment. Establishment of facts is part of the criminal procedural relations. This process must also comply with the requirements of law. When establishing the facts for the tasks of the proper offense qualification, the bodies involved in criminal process must comply with the law themselves. Striving to achieve the task of justice by making a circumvention of the law, under the auspices of the feasibility and achieve the result in the revealing of crime at any cost are serious violations of the principle of legality and lead eventually to outrage. Violation of the principle of legality by the representatives leading criminal process may become, according to the norms of the Criminal Code of Belarus, independent basis for qualifying illegal conduct as a crime against justice (indictment obviously innocent (Article 393 of the Criminal Code), forcing to testify (Article 394 of the Criminal Code) , falsification of evidence in criminal proceedings (Part 2 of Article 395 of the Criminal Code), illegal exemption from criminal responsibility (Article 399 of the Criminal Code), the imposition of obviously illegal sentence or other judicial act (Article 392 of the Criminal Code), or the crime against interests of the service.

Thus, the practical significance of the principle of legality in the first stage of application the criminal law is expressed in proper qualification of criminal offense.

PRINCIPLE OF EQUALITY IN FRONT OF THE LAW

The content of the principle of equality in front of the law in aspect of crime qualification is reflected in the following provisions of the Criminal Code:

- the Article 10 of the Criminal Code stated the same grounds of criminal responsibility for everybody: the basis of criminal responsibility is committing an act prohibited by criminal law act; preparing for committing a crime, attempt to commit a crime: complicity in a crime commission;
- the provision of insignificant act under Part 4 of the Article 11 of the Criminal Code does not contain any exceptions;

– criminal legal assessment of a socially dangerous act of one species should be the same for any person, regardless of gender, race, nationality, language, origin, property and official status, place of residence, attitude to religion, convictions, membership of public associations or of any other circumstances.

Equality in front of the law in the process of crimes qualification is also provided on the implementation of the constitutional provision of justice on the basis of competition (Article 115 of the Constitution). This important provision is developed in the criminal legislation of the Republic of Belarus: everybody has the right without any discrimination to equal protection of the legitimate rights and interests, and no one can use the benefits and privileges that are contrary to the law, everyone has right for legal assistance for the implementation and protection of human rights and freedoms (Article 20 of the Criminal Procedure Code), a suspect and an accused have the right for protection (Article 17 of the CPC).

PRINCIPLE OF JUSTICE

Until the moment of including the principles in criminal law, many authors gave to the principle of justice complex character. It was called the principle that accumulates all the other principles [8, p. 21, 9, p. 17]. This approach is expressed in the present days. So Filimonov V.D. indicates that the principle of justice with its content covers all the other principles. Last ones in fact specify the principle of justice [10, p. 51]. Such approach characterizes the idea of social justice. With reference to the law, justice gives the perfect model, which should be set to the legislator and law enforcement in the performance of their professional duties.

S.G. Gelina and V. Kudryavtsev identified three levels of justice in criminal law: justice of sentencing, justice of sanctions and justice of forming range of criminal acts [2, p. 134-135]. In Part 6 of the Article 3 of the Criminal Code, it is indicated: "Punishment and other criminal sanctions are to be fair, i.e. established and administered by the nature and degree of social danger of the crime, the circumstances of its commission, and personality of a criminal." This definition provides justice in criminal law on two levels: legislation and enforcement. In the process of the recognition of certain acts as unlawful, legislator should take into account how fair criminal legal prohibition will look in the public opinion. Ignoring in the process of criminalization of ordinary sense of justice and moral ideas about this or that man's actions will inevitably produce unjust criminal legal assessment. For example, Article 405 of the Criminal Code provides criminal penalties for harbouring a serious or especially serious crime. The presence of this criminal legal prohibition allows the possibility of criminal prosecution for close relatives or members of the family of the person who has committed a serious or especially serious crime. But from the standpoint of morality, is it right to condemn this behaviour of mother, who is hiding from justice her son-killer? More than ten years ago, the Constitutional Court of the Republic of Belarus has made a conclusion, which permitted the adoption of a legislative decision about exclusion in some cases of criminal responsibility of a close relative or family member of the offender, for the harbouring of the person or his location [1]. But by this time, no legislative action in this area has been done.

In the aspect of the law-making process, a precondition of violation of the principle of justice is the evaluative signs that are used in the designation of the criminal illegality of appropriate behaviour ("indecent form" at insulting, "clear mismatch of protection to character and hazard of encroachments" in the frame of definition of excess of the necessary defence limits, "helpless condition" of victim as a qualifying circumstance of murder, etc. In such cases, during the qualification of crimes, the understanding of evaluation sign depends largely on the subjective perceptions of the person applying the criminal law. In practice, this leads to the fact that in the presence of the same trait, in some cases an act constitutes a criminal offense, but in others not.

The Part 6 of the Article 3 of the Criminal Code contains an important provision: "No person may be held criminally liable twice for the same crime." This applies not only to the field of sentencing, but to the qualification of crimes. Unfortunately, the court practice allows "double qualification" of the same acts. Thus, in accordance with the Paragraph 23 of the Resolution of the Plenum of the Supreme Court of the Republic of Belarus "On judicial practice in cases of murder". murder,

combined with the kidnapping or hostage-taking, rape or violent actions of sexual character, with robbery, extortion or banditry, shall be qualified by items 4, 7 or 12 Paragraph 2 Article 139 of the Criminal Code in conjunction with articles of the Criminal Code providing for responsibility for these crimes [6, p. 17]. This approach in qualification does not consistent with the legal nature of the sporadic and combined crime and contradicts to the principle of justice. According to conventional position in the theory of criminal law, the presence of a single compound offense does not require qualification for multiple offenses.

As the investigative practice shows, in recent years, during the pre-trial it became a widespread phenomenon, which is called "qualification with the stock." It is expressed in the criminal law assessment for multiple offenses, when it should be classified as a single crime or when the act committed knowingly qualifies by the norm of the Criminal Code that provides more strict liability. "Qualification with a stock" indicates uncertainty of a person conducting criminal prosecution, on the application of the relevant criminal norm. The basis of this uncertainty is usually lack of knowledge or poor knowledge of criminal law and the rules of crimes' qualifications.

The principle of justice during the crimes qualification finds its realization in the case of overcoming the competition of criminal law norms. The existing rules of qualification of crimes at competition of norms boil down to the fact that for application should be subject of only one norm. Otherwise, we should bring twice a person to responsibility. Even in Roman law an important position was secured, which became for the contemporaries a legal axiom: non bis in idem. This provision was recognized in international law (for example, Section 7, Article 14 of the International Covenant on Civil and Political Rights).

PRINCIPLE OF HUMANITY

The principle of humanity during qualification of crimes appears to a lesser extent than other common law principles. In the Constitution of the Republic of Belarus, the principle of humanity is manifested in the care of the rights and interests of law-abiding citizens. The Constitution guarantees the socio-economic, political and personal rights and freedoms: a man and his rights, freedoms and guarantees of their implementation are the highest value for the society and the state (Article 2), the rights and freedoms of the citizens of the Republic of Belarus is the ultimate goal of the state (Article 21). Constitutionally guaranteed rights and freedoms of citizens are provided by legal means of state coercion. Constitutional rights and freedoms are subject to the criminal law protection. In relation to the legitimate interests of the persons who have committed a crime, the principle of humanity is manifested in other stages of criminal law application: when sentencing criminal sanctions, exemption from prosecution or punishment, application of compulsory measures of security and treatment. However, in some rules of qualifying crimes, principle of humanity also finds its realization. For example, during the existence of norm competition with aggravating and mitigating responsibility sign, the priority in crime qualification is given to the norm which contains mitigating sign.

PRINCIPLE OF INEVITABILITY OF RESPONSIBILITY

Undoubtedly, principles of the inevitability of responsibility and guilt have important meaning for the process of qualification of crimes. Known requirement expressing the essence of the principle of inevitability of responsibility is that each guilty person must inevitably be punished.

Extremely important to the process of qualification of crimes are provisions of the Article 26 of the Constitution of the Republic of Belarus. These provisions formulate benefit of the doubt, which is a fundamental principle of the criminal process and the pre-trial stage of the criminal proceedings. But for criminal law, this is a principle of guilt (subjective imputation), with which law enforcer must be strictly guided during qualification of crimes. Lack of guilt eliminates subjective basis of criminal liability and the recognition of the act as a crime.

The principles laid down in the Article 3 of the Criminal Code, during qualification of the crime "are presented as a method of detection of the correspondence between the signs of committed act and signs of corpus delicti" [4, p. 397].

Recently, in the theory of crime qualification at the institutional level, they started to call special principles that characterize this stage of enforcement. However, there is uncertainty about the number and content of the relevant principles of the qualification of crimes not observed [7, p. 29-43, 3, p. 14-18, 5, p. 98-133]. The abundance of different positions is explained that the issue of the allocation on institutional level of principles of crimes qualification is relatively new, and has not been fully developed.

Critical interpretation of existing positions on special principles of the offense leads to the conclusion that from a scientific and practical point of view, forming a group of principles can only be based on a number of criteria to determine the appropriate level for a particular principle. It appears that they can be identified by the use of the following criteria: as a basis it should be taken a state, which reflects the nature and essence of a crime qualification, and this provision should be essential for the process of crime qualification, it must be independent of their functional purpose, direct the activities of law enforcer during his/her professional duties on criminal and legal assessment of the crime.

By its nature, the process of crime qualification is very similar to the process of identification. This similarity is particularly visible in the definitions of those authors, who as a predicate of definition "crimes qualification" use the notion "identity". However, the study of the literature shows that the science of criminal law criminalization of scientists tend to be observed in the requirements identification process. Apparently, this is due to the fact that too dissimilar objects are mapped on the one hand – an act committed under certain factual circumstances, and on the other hand – the rate of the Criminal Code. However, it seems that the theory of identity can serve not only the objectives of criminology. In any case, some of its elements can be used in other sciences of penal cycle.

Thus, the principle of special qualifications should recognize positions that have, for the criminal law, independent assessment of committed crime, which characterizes the order of collation and interpretative process implementation of which contributes to the proper setting by enforcer article (s) of the Criminal Code.

From the above criteria, we have a reason to talk about the following specific principles of crime qualification: comparability, science, sufficiency and interpretation of doubt in favour of the accused.

PRINCIPLE OF COMPARABILITY

The principle of comparability should ensure comparability of correlative object of the offense. Objects of qualifications are committed in the concrete situation act and criminal norm, which describes the specific features of the offense.

According to the level of the requirements, the qualification objects can be classified into comparable and non-comparable. The object of the offense can be classified as comparable, if it is consistent with the legal requirements, which provide a benchmark for further individual and comparative analysis. All file evidence enclosed to the case should be valid, reliable, meet the procedural requirements of their completeness. If the collected evidence do not meet these requirements, then they will form a component of that, which is included in the matching process. The construction process of the offense with an object that cannot be the basis for comparison, would indicate a violation of the principle of comparability, which eventually will lead to a false conclusion about the criminal legal assessment of the offense.

In turn, the content of the criminal law must comply with the methods and rules of legislative technique. Unfortunately, some provisions of the Criminal Code of Belarus cannot participate in the matching process of qualification by violations of legislative technique of constructing the appropriate elements of crime. For example, the study of judicial statistics of the ten years of the Criminal Code of the Republic of Belarus in 1999 shows that in the case law, Article 232 of the Criminal Code that provides for liability for interference with legitimate business has never been applied. This composition is designed as a material: any version of obstruction of business to be associated with the onset of the consequences – the damage on a large scale. But in most cases, obstruction of legitimate business is not property damage, and social and psychological in nature: a person may not realize their right to engage in business activities (e.g., wrongful refusal to register a person as an

individual entrepreneur). It should be noted that in some foreign countries, there is a different legal structure of obstructing the lawful business or other activities, such as the Article 169 of the Criminal Code of the Russian Federation, the objective side of the crime formulated by type of formal composition. For the recognition of this crime, offensive impact is not need any.

An important requirement to ensure the principle of comparability is an adequate interpretation of the evidence and the text of the criminal law. The clarification of the circumstances that characterize a real event, involves the interpretation of specific evidence. In the interpretation of the text, law enforcers must be guided by well-known legal methods of interpretation.

SCIENTIFIC PRINCIPLE

Content of the principle of scientific qualifications is expressed in the following crimes. This principle determines that the establishment of the correspondence between the features of the offense with the elements of the crime described in the norm of the CC is done using scientific categorical system, laws and practices that developed logic: logical methods of interpretation of concepts and judgments, the laws of logic, how to build a simple categorical syllogism, relations between the concepts of "true" and "false", etc.

Furthermore, the content of the principle is characterized by the fact that the definition of crimes is characterized by certain rules. These rules should be based on science.

The principle of the offense cannot be equated with its rules. In contrast to the principle of the rule, definition of crimes meant to solve a narrower particular problem of the offense: overcoming competition between standards, the individual rules of qualification of unfinished crime or complicity in the crime, multiple crimes, etc.

The scientific validity of the relevant rules of qualification of crimes should be expressed in mandatory use when creating scientific and practical regulations based on sound theoretical arguments. They must comply with the principle of scientific rules of qualification, which developed from many years of case law and relevant regulations laid down in the highest court. Undoubtedly, these contribute to the uniform application of the rules in the practice of criminal law.

SUFFICIENCY PRINCIPLE

The sufficiency principle must meet qualification requirements, not only in terms of the completeness of the formula of the offense. Undoubtedly, the formula of the offense must include that article or set of articles of the Criminal Code, an indication that is enough to judge its entirety. However, in the process, all the requirements of the offense must be met, which indicate that the evidence collected are enough evidence to establish the appropriate composition of the crime. In this sense, the principle of sufficiency is in contact with the principle of comparability of qualifying crimes.

PRINCIPLE OF INTERPRETATION OF DOUBT IN FAVOUR OF THE DEFENDANT

As the essence of the process is determined by the definition of crimes interpretation, then we should agree with those scholars who, as the principle of self-definition of crimes isolated position on the interpretation of doubt in favour of the defendant [3, p. 19]. This provision was formulated at the level of a legal postulate in Roman law and in the framework of the modern criminal justice system has become the character of the governing requirements, defining the direction of law-making in the decision, in the event of its uncertainty in the interpretation of the relevant evidence of a crime or evidence underlying the charges.

There are doubts that should be repairable, letting them through making the relevant proceedings or existing methods of interpretation rules enforcer is not possible. Doubt is the result of care-

ful, comprehensive (sometimes quite complex and painful) analysis of the actual facts of the case or the study of the text of criminal law.

The requirement for the interpretation of doubt in favour of the accused is not covered by the content of the principle of equity, fixed on the regulatory level in the text of the criminal law. However, the requirement can be analyzed to consider the perspective of the category of "fairness" as moral and ethical ideas of what should be.

This interpretation explains the presumption of doubt in the validity of the charges in the context of establishing the guilt of the person concerned. However, doubts may arise, not only about the guilt or mental attitude of a person in the circumstances or characteristics of legal significance. Difficulties may arise with the clarification of meaning of criminal prohibitions, understanding the content evaluation of the elements of the crime, establishing conflict in other areas of legislation in interpreting blanket evidence of a crime, etc. If the legislator in the design of appropriate criminal law is thinking from the perspective of compliance with the requirements of the unity and interdependence of the rules of legislative technique and qualification of crimes, perhaps in relation, for example, the estimated characteristics of the offense, would be elected by other, more optimal tools and techniques of legislative technique. But, as matters stand upon the principles,they allow law enforcers to avoid ambiguous provisions of the criminal law, which are generated by defects of legislative techniques.

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CYBERCRIME IN POLAND 2011-2012

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Abstract: While accepting the appearance of Information Society (IS), the idea of Global Information Infrastructure (GII) and Global Electronic Commerce (GEC), it is necessary to notice the emergence of Risk Society (RS). The consequence of such a development is adaptation of legal normalization of appearing forms of cybercrime and threats to information security. The task of the state is to ensure that the legislation will protect citizens from cybercrime and minimize the effects of RS.

Keywords: cybercrime, penal law, copyright and related rights, cybercrime statistics.

INTRODUCTION

Several years ago we watched "War Games" and read about Kevin Mitnick with a profound distrust. In 1994, when preparing materials for the first conference in Poland devoted to crime with the use of modern technologies of data processing, we borrowed some pieces of information from Great Britain, France, Germany, having at the same time only two Polish examples available. Now, discussing the problem of cybercrime (or computer crime) we can make use of our own home sources. In Poland, there were many crimes included in Council's of Europe Convention on cybercrime from 2001 (ETS-185).

CYBERCRIME REGULATIONS

Such an alarming phenomenon has been reflected in alternation and establishment of new regulations.

In 1994, the Copyright and Related Rights Act, owing to which within a few years **computer piracy** has become a synonym for computer crime, came into force. There are several reasons of such a situation. The most important are:

– high level of piracy (software producers' loss) – over 90% in 1994 (in 2005 – "only" 59%, in 2011 – still 53%)[1],
– opportunity to make use of act regulations for prosecuting criminals,
– relatively simple in understanding method of committing a crime.

According to the Act, illegal distribution and publication of legally protected computer programs are prosecuted. Prosecution is carried out on private accusation and in cases when a given crime becomes permanent source of income or when a perpetrator organises or runs criminal activity –prosecution is on indictment. Criminal responsibility for violation of the Act is enclosed in the Chapter 14, which says:

– misappropriation of authorship, falsification, labelling with trade mark of one's product are prohibited. Moreover, it is illegal to shorten, adapt and change the code of program against the will of the author (Article 115 – penalty of up to 2 years' imprisonment, restriction of liberty, or pecuniary penalty),
– it is forbidden to make any changes, against the licence, in the way of using software, e.g. one-position installation in the net or on a few workstations. It is forbidden to make protected software for copying in the net or BBS accessible (Article 116 - penalty of up to 2 years' imprisonment, restriction of liberty, or pecuniary penalty),
– making extra illegal copies, pre-installation of protected software on hard disc are prohibited (Article 117 - penalty of up to 2 years' imprisonment, restriction of liberty, or pecuniary penalty),

1 Numbers from Business Software Alliance (BSA) Global Software Piracy Study, www.bsa.org\globalstudy.

– it is forbidden to purchase, accept or help with selling or hiding software carriers in order to gain material profit, called receiving of stolen property (Article 118 - penalty of up to 2 years' imprisonment, restriction of liberty, or pecuniary penalty),
– it is illegal to make exercising the right to control the process of operating a program difficult or impossible (Article 119).

The new Penal Code, which has had a binding effect since 1st September 1998, has introduced new possibilities of fighting computer piracy. Illegal obtainment of computer program (copying, duplication of a carrier, taking a carrier without authorised person's permission) – theft of other person's program aimed at gaining material profit (disposal of a copy on a computer stock market) has been considered a theft of a movable property (Article 278 §2 of the Penal Code). A computer program is not a movable property, however, it may become the subject of copyright property. Article 278 §2 of the Penal Code allows more radical prosecution of computer piracy, since it imposes penalty of imprisonment for 3 months to 5 years. Moreover, classified form of crimes under the Articles 117 and 118 of the Law on Copyright imposes penalty of up to 3 years' imprisonment, if the crime becomes a permanent source of income, or when a perpetrator organises or runs crime activities related to computer piracy. If illegal obtainment of computer programs concerns the property of great value (more than 200 000 denominated in Polish zloty), according to the Article 294 §1 of the Penal Code, a perpetrator commits classified crime and he/she can be sentenced to up to 10 years. A computer program can become an intentional or unintentional receiving of stolen property (Article 291 §1 and 291 §2 of the Penal Code). It is illegal to help with selling, receiving or hiding pirate copy in order to gain material profit. This regulation provides for penalty of imprisonment for 3 months to 5 years. In a less serious case a perpetrator can be fined or he/she is liable to the restriction of liberty up to 1 year. What is meant by a less serious case is that a perpetrator did not want to gain any material profit and installed a program only in his/her own computer or helped with receiving or hiding a program by means of computer network. Unintentional receiving of stolen property – when perpetrator should or may assume that a program either purchased, sold or hidden has been stolen, he/she is liable to the penalty of restriction of liberty, or the penalty of up to 2 years' imprisonment. It is worth noticing, that receiving of stolen property under the Article 293 §1 of the Penal Code is prosecuted on indictment, and under the Article 118 point 1 – on the wronged person's motion.

Owning to various activities, estimated level of computer piracy went down to 53% in 2011. At the same time, the rise both in anti-pirate activities and instituted preparatory proceedings was observed.

It can be said, that computer piracy has become one of a few areas of computer crime where the police are effective. So far, I have not come across any evidence of applying regulations of tax law as far as collected and unrecorded software in the register is concerned.

As far as hacking is concerned, within a few years hackers have **broken into servers** and replaced WWW pages belonging to the Prime Minister and Government. Unfortunately, perpetrators have not been captured. Even if they had been captured, there would have been plenty of problems with qualification of the offence. First time in 1998, people could watch on TV how a burglary to the server of the Central Bureau for Statistics was performed. In a talk-show programme an invited computer scientist broke security measures and gained access to the resources of the Central Bureau for Statistics. Heaving had a binding effect since 1st August 1998, the new Penal Code under XXXIII chapter – crime against the protection of information – penalised such deeds. Unlawful entry to a computer system through violation of security measures and receiving protected information (also obtaining access without authority to all or part of the computer system) is liable to the penalty of fine restriction of liberty, or penalty of up to the 2 years' imprisonment. According to the regulation mentioned above, it is illegal to receive information by an unauthorised person. What is valid, however, is whether it was an electronic, magnetic, or any specific entry. It does not matter what kind of security measure was disabled to break. Attempted hacking – checking the quality of security measures and possibilities of breaking them isn't prosecuted. It is also forbidden to alter, damage, erase any recorded information or in any way hinder an authorised person from accessing it. Also prohibited is the acquisition, sale or sharing with others a hardware or software adapted to commit

these crimes, as well as computer passwords, access codes or other data enabling access to information stored on computer system or communications network (Article269b).

Computer frauds such as interfering with input data, program or output, are often a black number. Afraid of having their reputation undermined, banks, offices and companies often fail to inform the police and the public about them. One of the most frequent computer frauds is tampering with output devices with credit cards. The present Penal Code defines computer fraud as an activity involving the obtaining of material profit or causing other harm by exerting influence on gathering, processing and transmitting information. The criminal activity can take various forms, such as alteration, erasure or input of new data into the computer information carrier (Article 286 §1 of the Penal Code). This regulation refers to a classic fraud where, with the intent of procuring a lawful economic gain, the offender makes other person administer his/her or other person's property by inducing him/her into error or by taking advantage of his /her error or inability to undertake the right action. Thus, Article 287 §1 of the code forbids any computer data interference aiming at causing economic loss of another person property.

Computer fraud is punishable by three months up to five years in prison. In less serious cases (Article287 §2 of the Code) the penalty is a fine, restriction of liberty or prison sentence for up to one year.

Computer forgery - another cybercrime - can be divided into two cases:

- a computer with its programs and input-output devices is a tool used to forge typical documents or legal tenders. It is not difficult to provide evidence of this act having been committed, and this sort of crime is recognised as forgery of documents (Article 270 §1 of the Code) or of money (Articles 310, 313, 314 §1 of the Code).
- documents in the form of electromagnetic record are counterfeited or forged. Under Article 115 §14 of the Penal Code, a document is any object or recording on a computer information carrier bearing a definite title, or which due to its contents is a proof of law, legal relationship or circumstances of legal significance. With this understanding of a document, a person forging a record on a magnetic card or other computer information carrier is also liable to penalty under Article 270 §1 of the Penal Code. In both cases, forgery is liable to a fine, restriction of liberty or prison sentence of three months to five years.

One of few cases of computer blackmail for which documentary evidence has been supplied involves planting a logic bomb in software by a dismissed computer operator. The planting of the bomb was connected with the operator's demand to be paid for programs he was the author of. As a result of undertaken actions, no **computer data or programs were damaged**.

Any tampering with computer entries with the intent to unlawfully alter, erase or suppress important computer data, or to hinder or prevent an authorised person from getting access to the data (Article 268 §2 of the Code) is punishable by prison sentence for up to three years. It does not make any difference how the information was damaged. The damage can be done to database, in the course of information processing, by putting a virus into information, program or computer network, entering a password or changing it, blocking connections in a network, or any other hindrance to accessing data by an authorised person. Alteration of computer data or programs is also punishable. The latter differs from the former in that the perpetrator unlawfully interferes with data, e.g. by entering new data or changing the existing record to break the protection system. Therefore, it is forbidden to enter any changes in important information stored in a computer system, as it breaks the integrity of data and infringes interests of the owner or other authorised person. It is connected with the right for undisturbed possession of data or the right for privacy. If the violator damages information, whereby causing grave pecuniary loss, he is liable to a prison sentence of 3 months to 5 years under Article 268 §3 of the Penal Code. This is a qualified form of damaging information - a crime prosecuted on the wronged person's motion. If the above-mentioned acts cause damage to information of particular importance for the state's defensive system or security, citizens' safety, or local government, then the offender is liable to a prison sentence of 6 months to 8 years. It should be added that besides computer sabotage, the legislator distinguishes activity with the intent to hinder or prevent automatic data acquisition or transmission.

Computer sabotage can also involve damaging or replacing the information carrier, destroying or damaging devices for automatic processing, acquiring or transferring of data (Article 269 §2 of the

Code). Those acts are also liable to a prison sentence for up to 8 years. Since 2004, also unintentional sabotage, e.g. in case of unintentional putting of virus into the computer system or data on the carrier, is liable to a prison sentence to 5 years (Article 269a).

Unauthorised interception of information - computer tapping. This crime involves obtaining information by using a tapping or visual device, or other special device. Thus, it does not matter what kind of device it is, it can also be a telecommunication device plugged into teletransmission network. Neither is it important why the person enters the computer network or system. Penal sanctions for these crimes are the same as for hacking. The main purpose of security measures is to ensure the confidentiality of data transmitted or transferred with the use of technical devices, and to guarantee that every person" privacy is protected against various forms of surveillance in teletransmission networks.

Other forms of computer crime and possibilities of prosecuting them in Poland are as follows:

Telecommunication fraud - phreaking (Article 285 §1 of the Code). It is illegal to get connected to a telecommunication device and obtain phone impulses at somebody else's expense. The offender is liable to a prison sentence for up to 3 years.

Computer espionage or computer intelligence (Article 130 §3 of the Code). This crime consists in entering a computer network with the aim of gaining information which is either a state or official secret, and which - if given to another country's intelligence service - may do harm to the Polish Republic. The statutory penalty for this crime is a prison sentence for the period of 3 years or more. If an offender enters a computer network and gathers or stores the collected information, or intends to gain it for a foreign intelligence service against Poland, but has not yet transferred it, then under Article130 §3 of the Penal Code he/she is liable to a prison sentence of 6 months to 8 years. Computer espionage of that type can also be prosecuted under hacking or computer tapping regulations, or under state or official secret protection ones. Liable to penalty is also an act harmful for an allied state, provided that the state ensures mutuality in this respect (Article 138 §2 of the Code).

Bringing about danger to the lives or health of many people or to property of great value (Article 165 §1 of the Code, Point 4). This crime consists in hampering, preventing or influencing automatic processing, acquisition or transmission of data, and is liable to a prison sentence of six months to eight years. A person can be prosecuted under the same regulation for jeopardizing safety connected with the functioning of an airport, railway station, water, gas or energy supply system, monitoring of data in an intensive medical care ward, guarded bank, military or other facilities, e.g. by putting a virus into a computer program controlling the above mentioned activities. If a person causes somebody's death or grievous bodily harm to many people, he/she can be sentenced to a prison sentence of 2 to 12 years.

Unintentional disturbance of automatic data processing resulting in bringing about public danger (Article 165 §2 of the Code). This crime carries a prison sentence for up to three years. However, if somebody's death or grievous bodily harm done to many people is involved, the penalty is 6 months to 8 years in prison.

Terrorist attempt on a ship or an aeroplane (Article 167 §2 of the Code). If a terrorist destroys, damages or disables navigational equipment used for processing indispensable data, or makes it impossible to operate it, he/she is liable to a prison sentence of 3 months to 5 years.

Cyberstalking (Article 190a §1 of the Code, since 2011). It is prohibited to persistently harass (e.g by Internet, phone) another, which gives rise to the justified sense of danger or significantly affect his/her privacy. The penalty is up to 3 years.

Cyberstalking, phishing (Article 190a §2 of the Code, since 2011). It is prohibited to impersonate another person, the use of his/her image or his/her personal data in order to cause the property or personal damages. The penalty is also up to 3 years.

Offence to somebody's religious beliefs (Article 196 of the Code). This crime consists in insulting an object of religious worship or a place used for public performance of religious rituals, e.g. by disseminating information of this nature in computer networks.

Grooming (Article 200a §1 of the Code, since 2011). If someone contacts via the Internet with a minor under the age of 15 with an intention to meet with him/her, by placing him/her in delusion,

exploiting delusion or inability to properly understand the situation or using unlawful threat, he/she is liable to a prison sentence of 3 years.

Disseminating pornography, pedophilia, sodomy (Article 202 of the Code). Making arrangements for sexual contacts, including pedophiliac ones, distributing pornographic materials. Since May 2004, possessing in the system or on the computer carrier pornographic materials with children under 15 is liable to a prison sentence of 3 months to 5 years.

Praising fascism in public (Article 256 of the Code). Propagating fascism, communism or other totalitarian ideologies, also selling, sharing symbols of them with the use of computer network (up to 2 years).

Insulting, deriding or humiliating people in public (Article 262 of the Code). Publicising or spreading information glorifying violence, racism, Nazism, anti-Semitism, etc.

The above list of computer crimes shows explicitly that these crimes are closely linked with economic activity and pose a serious threat to communication and transportation. They can jeopardize lives, health, property and safety of citizens.

Police statistics of selected cybercrime cases reported in Poland in 2011-2012 is following:

Selected Article numbers of the Polish Penal Code	Police investigations (2011/2012)				
	initiated	completed	offences committed	offences detected	Remarks
267	**1194/1656**	**1154/1636**	**1102/1513**	**679/764**	§1-3 (hacking)
269b	**38/21**	**30/33**	**29/27**	**12/7**	access codes, credit card data sharing
270§ 1-2	**2442/2435**	**2795/2586**	**2805/2670**	**2435/2302**	altered data on the card (forgery of document)
278§5	**8207/7662**	8493/7975	8239/7697	1117/990	credit card theft
287§ 1-2	**998/1279**	**850/1074**	**1361/1341**	**848/626**	computer fraud
310§ 1	**2980/3370**	**3323/3761**	**3279/3696**	**262/384**	forgery other means of payment
310§ 2	**3423/3517**	**3577/3538**	**2859/2775**	**398/367**	bringing into circulation false other means of payment

Source: Polish Police Headquarters, System TEMIDA

CONCLUSIONS

It seems worth noticing that criminals are making the most of the latest developments in information technology. Cybercrime should be treated as a criminological phenomenon (not necessarily regulated in separate chapters of the Code) prosecuted under an adequate Article depending on the act (e.g. appropriation, devastation of, or damage to property, revealing a state or official secret). The existing Polish law regulations allow police effectively to fight cybercrime in a democratic state.

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THE KNOWLEDGE OF RETAIL CRIME AS A FACTOR OF BUSINESS SECURITY OF RETAILERS AT TODAY ECONOMY

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Abstract: The trade as important part of today economy and as part of its circular flow has many socio-economics functions including GDP production, employment, etc. The retail is the endpoint of this distribution process. The attractiveness and the values of retail are grand enticement for many persons and parties, especially crime groups. The retail business claim adequate preserves. The ORC is a synonym for Organized Retail Crime, the sophisticated crime in retail sector in more advanced economics. Examination of crime and related problems is important not only for development of the state and the region itself, but also for the criminalist development and review of its methods. The authors begin from overview on crime and security in global retail sector. The U.S. retail industry is one of the high level developed retail systems in the world. The view of the crime and security of this sector may be inspirational, too. Examination of retail crime activity and its status in Slovakia has some tradition, especially in the economic sphere. There are many changes memorized in the trade of the inner Slovak market, at the last 2 decades. Slovak trade is a part of global economy and new business forms are penetrating on it. The consequences of this crime are not subject thoroughly examined. Thus, the authors opt for a debate on how the concepts Retail Crime examination in Slovakia as a major problem in their study.

Keywords: Today Economy and Retail, Crime, Security, ORC (Organized Retail Crime), US Retail Industry, The knowledge of Retail Crime in Slovak Republic.

INTRODUCTION

Retail is the sale of goods and services from individuals or businesses to the end-user. Retailers are part of an integrated system called the supply chain. A retailer purchases goods or products in large quantities from manufacturers directly or through a wholesaler, and then sells smaller quantities to the consumer for a profit. Retailing includes subordinated services, such as delivery. The term „retailer"is also applied where a service provider services the needs of a large number of individuals. Shops may be on residential streets, streets with few or no houses or in a shopping mall. Online retailing, a type of electronic commerce used for Business-To-Consumer (B2C) transactions and mail order, are forms of non-shop retailing.

Post-modern market evolution phase, characterized by hyper-competition - both online and off - and signals an era defined by very challenging circumstances to understand and master. In short, the retailers and suppliers willing to - up their game will likely remain the most viable in a rapidly changing, shopper-driven retail landscape. This new reality creates several critical implications for retailers and their trading partners. The market forces that are expected to impact the retail industry are significant, but can be leveraged by retail leaders that seek new growth opportunities. Key retail implications and best practice considerations there are in new global economics:

Customers

- Retailing consists of both a fragmented and organized trade.
- Customers shop in both the fragmented and organized trades, often every day.
- Retailers serve customers of all income levels. Lower income customers offer the greatest long term opportunity.

- Lower income shoppers initially venture into the organized market out of curiosity and for entertainment.
- Retailers have the potential to make changes in the lives of their customers because they are the only organized business customers deal with on a regular basis.
- The level of retailer interaction is a factor of company strategy and openness to the particular society.

Dynamics

- The dynamics of markets, economy, politics, and legislation, can be unpredictable and volatile, creating risks for retailers that are mostly beyond their control.
- Successful retailers anticipate these risks when possible and attempt to turn problems into opportunities.

Finance

- Financial institutions have strengthened in markets.

Logistics

- Poor roads and heavy traffic create serious delivery and inventory problems in many markets.
- Some retailers compensate by overstocking stores, but that option reduces inventory turns.

Security

- As in any market, providing a secure store environment is a basic requirement.
- In markets, however, retailers rely less on electronic surveillance and more on an overt presence of security personnel who are well trained to respond with restraint and respect.

Connectivity

- People at all income levels in markets are sophisticated about internet access and the use of mobile phones.
- They are likely to use their mobile phones for activities other than voice communication, such as price comparison while shopping.

Women

- The presence of more women in the workplace is changing where stores are located (along commuting routes) and the products they offer (for example, apparel for work and ready-made meals).
- Many women still occupy traditional roles as mothers and homemakers. Typically, they also are the shoppers and control the household finances.

Credit

- Because lower income customers often are short of cash, selling merchandise to these individuals is difficult without offering credit.
- Retailer credit still provides opportunities for competitive advantage and profit.

Stores

- Stores are not just stores, places to buy merchandise. In markets, successful retailers operate stores as centres of community that play an important role in educating the customer about how to function well in a consumer society.
- Location, location, location remains important. But often poor roads and limited public transportation make the notion of location more complicated.
- Store employees are front-line educators in the process of integrating lower income consumers into the organized market. Consequently, programs to educate and prepare employees with technical and sales knowledge are critical.

- Retailers in the traditional and organized markets increasingly are learning from each other and imitating each other's best practices." Many traditional stores are doing a better job of presenting merchandise, while their counterparts in the organized market are refining their product and assortment - and presentation - to meet the expectations of traditional-trade customers.

Brand

- Much of the market is fragmented and unbranded.
- Communicating a retail brand sometimes can be easier in a market because the message is less likely to be lost amid media clutter. Communicating the retail brand is important in markets.

Technology

- For a long time in markets, it was possible to ignore inefficiency and still be profitable. That's no longer the case. Market retailers are rapidly adopting state-of-the art information technology.
- Many of these retailers have an interesting advantage. Because they have not installed IT incrementally, they can take a big leap, and in one installation of an integrated IT platform, leapfrog retailer leaders in the developed markets.
- Of course there is a downside. The rapid introduction of IT sometimes has resulted in information overload, which leaves retailers with a lot of random facts and figures but little useable intelligence.

Assortment

- Product assortment is expanding in markets. But it's still narrower than in developed markets with emphasis on merchandise at both the lower and higher price extremes and with relatively less middle-range merchandise available.
- As lower income shoppers move into the organized market, they initially purchase from a narrow range of low-price items, creating a challenge for retailers whose profit requires shopper interest in a wider assortment that includes higher margin merchandise.

PROBLEM ANALYSING

In today economics, as we can see above, not only **four Ps**: *price*, *product*, *promotion*, and *place*; or two **four Cs** theories (*consumer*, *cost*, *communication*, *convenience*), resp. (*commodity*, *cost*, *communication*, *channel*), are relevant for today retailing. There are about 12 implications, including Security, for retailers on global markets.

Retail Crime (RC) Field in modern Slovak conditions are as virtually and unknown. At the time before the revolution carried out researches and police and security activities for safeguarding property in socialist ownership (Lison, 2000)[1] is "lost in the course of history". Despite the historical conditioning, many particularly prevention and liability relationships from that time will serve today as a starting field of knowledge. Specifically oriented towards our conditions are presented and corrected with knowledge from the "democratic economies".

The current system of scientific knowledge able to analysing the current Retail Crime in Slovakia overlap - or more accurately in compliance with our pre-research must coincide. Knowledge from:

- securitology (Korzeniowski, 2011)[2] as most general science of safety,
- police sciences (Porada, Stacho, 2000)[3] as a basic source of information on effective practices to protect property (Porada, Holcr, 2011)[4],

1 LISOŇ, M., 2000: *K niektorým aspektom odhaľovania kriminality páchanej v ekonomike.* - In: II. kriminalistické dni na Slovensku. - Bratislava: Akadémia PZ. - s. 218-237

2 KORZENIOWSKI, L., 2011: *Sekuritologie - věda o bezpečnosti člověka a společenských organizací.* - In: Karlovarská právní revue. - ISSN 1801-2193 - Roč. 7, č. 1(2011), - s.29-48

3 PORADA, V., STACHO, P., 2000: Úvod do teórie činnosti policajno-bezpečnostných orgánov. 1. časť. - Bratislava: Akadémia PZ - K policajných vied. - 125 s. ISBN 80-8054-153-1

4 PORADA, V., HOLCR, K., a kol., 2011: Policejní vědy. 1. vyd. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk. - 345 s. ISBN 978-80-7380-314-8

- Criminology (Svatos, 2012)[5] as an analytical and prognostic tool for understanding relatively real, though latent (Stieranka, 2008)[6], corrected the situation in the etiology (Kolektív autorov, 2005)[7] and phenomenology (Svatoš, 2010)[8] RC phenomena, including its prevention (Kloknerova, Meteňko, 2008)[9],
- with the knowledge and the rules of criminal law theory (Ivor, 2010)[10], as a means of crime control in the field of collective and group RC expression.

In relation to the knowledge of the mechanisms and processes of individual knowledge of the summary is also significant evidence

- Criminalistics (Straus, 2008)[11] and (Krajník, 2005)[12] and
- Investigation Theory (Bango, Viktoryová, 2000)[13].

They in fact form the basis for understanding the changes and development, the acceptance of individual and group trends outside the etiology and phenomenology of crime.

Realistic view on the situation and development of crime with a possible attempt to estimate the latent RC gives us Criminology. As the Svatoš (Corruption 2012)[14] for its latency index expresses "*latency .... means that criminal activity is almost notified, but the bodies active in criminal proceedings, particularly the police, have to actively search for criminal activity.* "Prevention is the opinion Meteňko and Kloknerova (Meteňko, Kloknerova, Klement, 2006)[15]. Long-standing problem of crime control in the Slovak Republic. System of preventive programs in the field of economics is virtually or non-existent. The responsible authorities of the state and business interest organizations rely on secondary effects of the repressive pressure. This has been for the RC not very effective. There are several reasons. The most important are associated with different types of RC. For organized (ORC) rule, because a significant latency, but also a significant gain, if any, the perpetrators cannot be deter prevention, but also repressive pressures. For individual RC is true that it is more likely the attend crime or offenses committed in misery, which also significantly reduces the primary preventive effects. Increasingly important especially in terms of the effectiveness of control RC are operative and intelligence measures to control crime (Meteňko, 2002)[16], more for forms of organized crime (Lison, Meteňko, 2007)[17]. Their effect is decrease lower for preference to other areas of crime that for the police management seem to be more important and more effective - especially violent crime.

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5 SVATOŠ,R., 2012, *Kriminologie*, 1. vyd. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2012. - 290 s. ISBN 978-80-7380-389-6

6 STIERANKA, J., 2008 : *Možnosti poznávania latentnej kriminality prostredníctvom spravodajských činností*. - In: Policajné vedy a policajné činnosti : Zborník. - Bratislava: Akadémia PZ - K kriminal. a forenz. disciplín, 2008. - S. 55 - 63

7 Kolektív autorov, 2005: Kriminológia - osobitná časť. I. diel. - 2. preprac. a rozš. vyd. - Bratislava: Akadémia PZ - K kriminológie. - 217 s. ISBN 80-8054-345-3

8 SVATOŠ, R. 2010: Kriminologie ve světle nového trestního zákoníku. České Budějovice: Vysoká škola evropských a regionálních studií, , 174 s. ISBN 978-80-86708-21-8

9 KLOKNEROVÁ, M., METEŇKO, J., 2009: Prevencia v policajných činnostiach. In Meteňko, J., Bačíková, I. Policajné vedy a policajné činnosti 2008, Zborník z medzinárodnej vedeckej konferencie konanej dňa 11. a 12. novembra 2008 na Akadémii Policajného zboru v Bratislave, 1. vyd., Akadémia PZ v Bratislave, Bratislava: 2009, s. 273, ISBN 978-80-8054-470-6 s. 52-66

10 IVOR, J., a kol. 2010: Trestné právo hmotné 2 : Osobitná časť. 2. dopln. a preprac. vyd. - Bratislava: IURA EDITION. - 625 s. ISBN 978-80-8078-308-2

11 STRAUS, J., 2008: *Kriminalistická taktika*. 2. rozš. vyd. - Plzeň: Vydavatelství a nakladatelství Aleš Čeněk. - 291 s. ISBN 978-80-7380-095-6

12 KRAJNÍK, V., a kol., 2005: *Kriminalistika*. 1. vyd. Bratislava: Akadémia PZ. 356 s. ISBN 80-8054-356-9

13 BANGO, D., VIKTORYOVÁ, J., 2000: *Metodika vyšetrovania vybraných druhov trestných činov proti majetku*. - Bratislava: Akadémia PZ - K vyšetrovania. - 94 s., ISBN 80-8054-156-6

14 SVATOŠ, R., 2012: *Korupce v České republice a ve Slovenské republice*. In.: Zborník príspevkov z VI. medzinárodnej vedeckej konferencie „BEZPEČNÉ SLOVENSKO a EURÓPSKA ÚNIA", 14. – 15. november 2012, KOŠICE, Slovenská republika Vysoká škola bezpečnostného manažérstva v Košiciach, Košice: 2012

15 METEŇKO, J., KLOKNEROVÁ, M., KLIMENT, A. 2006: *Prevencia kriminality mládeže v policajných činnostiach 2002-2005: Projekt výskumu a záverečná správa*. 1. vyd. Bratislava: Akadémia PZ v Bratislave. Katedra kriminalistiky a forenzných disciplín. 118 s. VÝSK. 115

16 METEŇKO, J., 2002: *Význam policajných operatívnych činností pre rýchlosť a účinnosť trestného konan*ia In: Primeraná rýchlosť trestného konania - podmienka jeho efektívnosti a ústavnosti : Celoštátny seminár s medzinárodnou účasťou. - Bratislava : Akadémia PZ. - S. 57-71. - ISBN 80-8054-246-5

17 LISOŇ, M., METEŇKO, J., 2007: *Registrované aktivity kriminálnych skupín na území SR*. In: Lupták, Ľ. a kol. Panoráma globálneho bezpečnostného prostredia 2006-2007, Ministerstvo obrany SR, Bratislava, , s. 749- 758, ISBN 978-80-89-89261-11-6

Operative and intelligence activities in the Police and other intelligence structures are facing the most serious economic crime (Stieranka, 2009)[18] and therefore give relatively less attention to the abuse of trade relations and the penetration of organized retail crime (Lison, 2011)[19] to business companies (Svatos, 2011)[20]. Retail Crime investigation in Slovakia does not constitute a specific substrate in the Theory of inquiry (Viktoryová, 2011)[21], or in the control system of economic crime (Augustine, Lison, 2009)[22]. In practical terms, is now just undefined structure or component of (home economy) economic crime? Although as generalize Lisoň and Augustin, is a part of comprehensive economic crime.

RETAIL CRIME IN TODAY ECONOMICS

Global Retail Theft Barometer

The Centre for Retail Research provides authoritative and expert research and analysis of the retail and service sectors in Britain, Europe and globally. For 10 years, the Centre for Retail Research has brought to industry invaluable insight into the state of retail theft. In underwriting this research once again, Checkpoint has been honoured to play a small part in helping that happen, and encourage the entire loss prevention community to continue its healthy and honest discourse on shrink. The retailers, brand-owners and shrink management solutions providers are interested in this problem. Retailers have taken a number of important steps to reduce shrink, such as protecting a record percentage of high-theft items, improving staff training and increasing compliance audits. Many reports published by the Centre for Retail Research under the expert guidance of Professor Joshua Bamfield. The *Global Retail Theft Barometer*[23] reports on key trends in retail shrinkage and crime in countries and regions across the world. „Shrinkage"or „shrink"is inventory loss caused by crime or administrative error. In this paper it is measured as a percentage of retail sales value. The authors of this paper target the results 2010, 2011 years.

After a dip in shrinkage last year (2009-2010), shrinkage has risen in the 12-months ending June 2011 as a result of increased shoplifting, higher employee fraud, and organized retail crime (ORC), see Table 1, Picture 1.

Year 2010: Retailers (1 103) surveyed in the 42 countries are all addressing the problems of the spike in retail shrinkage and crime losses. Total global shrink in 2010 cost retailers almost **107, 3 milliards USD, an average shrinkage rate was of 1, 36% of global retail sales**. Global cost of shrink: 186 USD per family.

Year 2011: 1 187 retailers surveyed in the 43 countries. Shrink total exceeded **119 milliards USD**. Shrink rate grew from 1, 36% (2010) of global sales to **1, 45%**. Global cost of shrink: 200 USD per family.

18 STIERANKA, J., 2009 : *Vzťahy a súvislosti operatívno-pátracej činnosti a spravodajskej činnosti*. - In: Policajné vedy a policajné činnosti: Zborník. Bratislava: Akadémia PZ - K kriminal. a forenz. disciplín, 2009. - S. 233 – 241

19 LISOŇ, M., 2011: *Teória operatívne poznanie v systéme konštituovaných policajných vied*. - In: Policajné vedy a policajné činnosti 2011 EU SEČ II/A : Zborník. - Bratislava: Akadémia Policajného zboru. - S. 21 – 31

20 SVATOŠ, R., 2011: *POTŘEBA SPOLUPRÁCE V OBLASTI BOJE S ORGANIZOVANÝM ZLOČINEM ČESKÁ A SLOVENSKÁ REPUBLIKA,* . In.: Zborník príspevkov z V. medzinárodnej vedeckej konferencie „BEZPEČNÉ SLOVENSKO a EURÓPSKA ÚNIA", 10. – 11. november 2011, KOŠICE, Slovenská republika Vysoká škola bezpečnostného manažérstva v Košiciach, Košice: 2011, S.472 – 480, ISBN : 978-80-89282-65-4

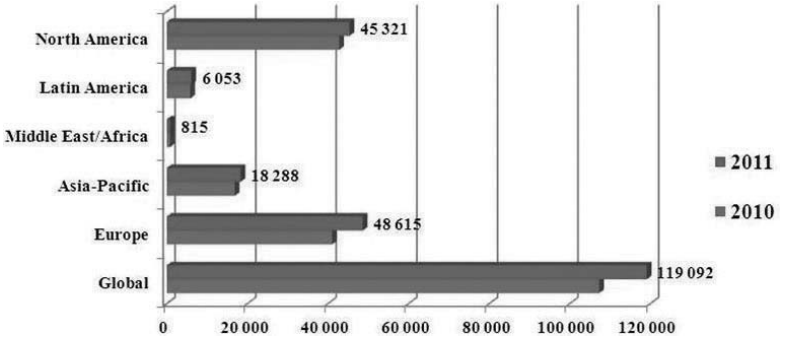
21 VIKTORYOVÁ, J. a kol. 2011 *Vyšetrovanie*. 1. vyd. - Bratislava: Akadémia PZ - K vyšetrovania. - 633 s. ISBN 978-80-8054-505-5

22 AUGUSTÍN, P, LISOŇ, M., 2009: Odhaľovanie trestných činov kriminality páchanej v ekonomike. - In: *Bezpečnostní teorie a praxe*. - č. 3/2009, - s. 29-40

23 BAMFIELD, J., 2010: The Global Retail Theft Barometer 2010, Centre for Retail Research Nottingham (United Kingdom), ISBN 978-84-614-3438-1, www.retailresearch.org

Table 1, Picture 1: Global Retail Shrinkage 2010, 2011 (million USD)

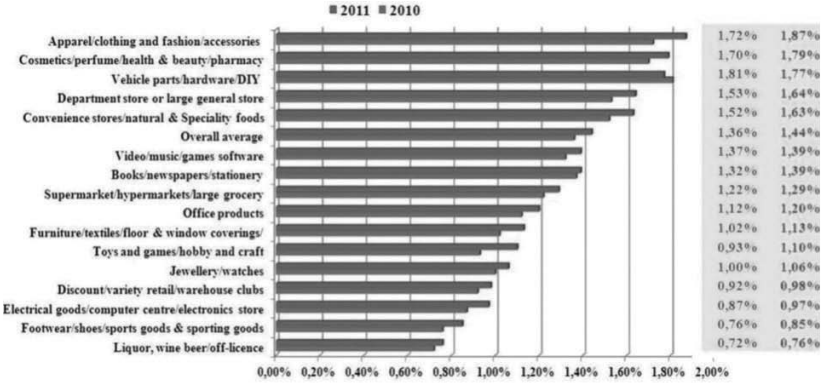
Region	Year 2010		Year 2011	
	Total Shrinkage (million USD)	(%) Proportion of Retail Sales	Total Shrinkage (million USD)	(%) Proportion of Retail Sales
North America	42 790	1,49	45 321	1,58
Latin America	5 826	1,60	6 053	1,67
Middle East/Africa	772	1,62	815	1,71
Asia-Pacific	16 866	1,62	18 288	1,22
Europe	41 030	1,29	48 615	1,39
Global	**107 284**	**1,36**	**119 092**	**1,45**



Source: The Global Retail Theft Barometer Summary 2010, 2011, adapted
Global Shrinkage by Business Sector/Vertical Market 2010 and 2011

Cross-sector view of ORC is very important for more groups of retailers. The analysis of global shrinkage of retail sales, by business sectors, sees following text.

Year 2010 (in blue, Picture 2):



Picture 2: *Global Shrinkage by Business Sector* 2010, 2011

Source: The Global Retail Theft Barometer Summary 2010, 2011, adapted

Retailers in the **Vehicle parts/hardware/DIY** (do-it-yourself) market reported the highest shrink rates: **1, 81 percent** of category sales. This segment supplanted last year's highest-shrink segment, **Apparel/clothing and fashion/accessories**, which was second this year **at 1,72 percent**, followed by **Cosmetics/perfume/health & beauty/pharmacy at 1,70 percent**. But there's a more important story for retailers, embedded under these high-level numbers for each industry. In key markets such as Apparel, Food and Health/beauty/pharmacy, there are a number of high-theft

product lines that experience anywhere from two to four times the shrink rates for their overall markets. For instance, (second place in 2010) take Apparel, where the overall industry shrink rate was 1, 72 percent in this year's GRTB. Other apparel product categories where shrink was much higher than the industry average included children's wear, fashion/tailored clothing, outerwear, and tops/sweaters.

A similar story occurred in the food vertical market, where the category global shrink rate in supermarkets and large grocery stores was 1.22 percent. But in the fresh meat sub-category, shrink was 2.86 percent globally. Also experiencing higher-than-average shrink rates were luxury cooked meat, cheese, alcohol, candy, infant formula and high-quality seafood.

Year 2011 (in red, Picture 2):

Shrink proportion of Retail Sales (%) in all business sectors (except **Vehicle parts/hardware/DIY**) growth. There is a group of three leaders shrink position by business sectors: **Apparel/clothing and fashion/accessories**, which was first this year **at 1, 87 percent**, followed by **Cosmetics/perfume/health & beauty/pharmacy at 1, 79 percent**. Retailers in the **Vehicle parts/hardware/DIY** market reported the shrink rates: **1, 77 percent** of category sales. This segment supplanted last year's highest-shrink segment.

The key shrinkage proportion of retail sales is on theft crime. Thieves stole a very wide range of merchandise, but tended to focus on expensive popular branded items including: razor blades/shaving products; cosmetics/face creams and perfumes; smart phones and electrical gadgets; alcohol; fresh meat/expensive foodstuff; electric toothbrushes, electronic monitoring devices; infant formula and coffee; DVDs and electronic games; fashion (especially branded items, leather, handbags and accessories); sports-branded goods and sports shoes; electronic goods; branded sunglasses and watches.

USA RETAIL INDUSTRY

Finklea, [24] (Finklea, M., K., 2012), specialist in domestic security, the author of Congressional Research Service Report (prepared for Members and Committees of Congress, January 2012) in Summary of Report presents: „*Organized retail crime (ORC) involves the large-scale theft of everyday consumer items and potentially has much broader implications. Organized groups of professional shoplifters, or "boosters," steal or fraudulently obtain merchandise that is then sold, or "fenced," to individuals and retailers through a variety of venues. In an increasingly globalized society, more and more transactions take place online rather than face-to-face. As such, in addition to relying on physical resale markets, organized retail thieves have turned to online marketplaces as means to fence their ill-gotten goods. ORC exposes the United States to costs and harms in the economic, public health, and domestic security arenas. The exact loss from ORC to the retail industry is unknown, but estimates have ranged from $15 billion[25] to $37 billion annually. The economic impact, however, extends beyond the manufacturing and retail industry and includes costs incurred by consumers and taxes lost by the states. The theft and resale of stolen consumable or health and beauty products such as infant formula (that may have been repackaged, relabelled, and subjected to altered expiration dates) poses potential safety concerns for individuals purchasing such goods from ORC fences. In addition, some industry experts and policy makers have expressed concern about the possibility that proceeds from ORC may be used to fund terrorist activities.* "

This author, Finklea, M., K., defined organized groups of professional shoplifters, named as „boosters", (Boosters steal or fraudulently obtain merchandise that is then sold, or „fenced" to individuals and retailers through a variety of venues). A „fence" is someone who knowingly buys illegally obtained goods from a „booster" and then sells the goods for a profit.

In an increasingly globalized society, more and more transactions take place online rather than face-to-face. Such, that goods from ORC are purchasing online.

24 FINKLEA, M., K. 2012: Organized Retail Crime, Congressional Research Service, 7-5700, R41118, [December 2012, http://www.crs.gov].

25 billion in USA=milliards in CE, trillion in USA=billion in CE

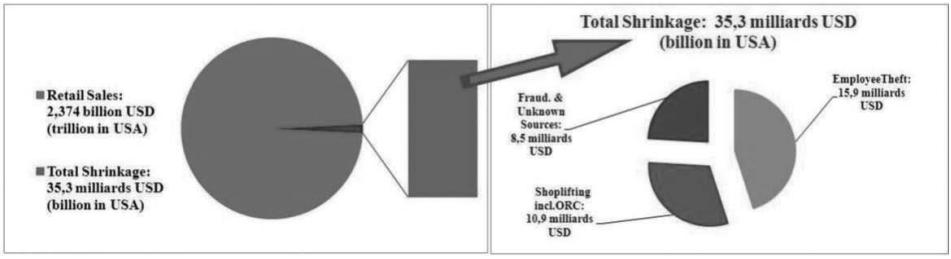
USA RETAIL INDUSTRY AND ORGANIZED RETAIL CRIME

The National Retail Security Survey (NRSS) collects data on the levels and causes of inventory „shrinkage" - the reduction in physical inventory caused by shoplifting, employee and vendor theft, and administrative error as well as data on loss prevention budgets, personnel, and strategies, and responses to shoplifting and employee theft (Table 2 and Picture 3):

Table 2: 2010 Retail Shrinkage Costs to retailers participating in the NRSS

Total Shrinkage:	**35,3 milliards USD**
Total Theft:	**26,8 milliards USD**
Employee Theft:	15,9 milliards USD
Shoplifting incl. ORC:	10,9 milliards USD
Fraud. & Unknown sources:	8,5 milliards USD

Source: Finklea, M., K., (2012, p.10), adapted



Picture 3: 2010 Retail Shrinkage Costs to retailers participating in the NRSS

Source: Finklea, M., K., (2012, p.11), adapted

The acronym CRAVED will help you remember which goods are most stolen. These are Concealable, Removable, Available, Valuable, Enjoyable, and Disposable[26]:

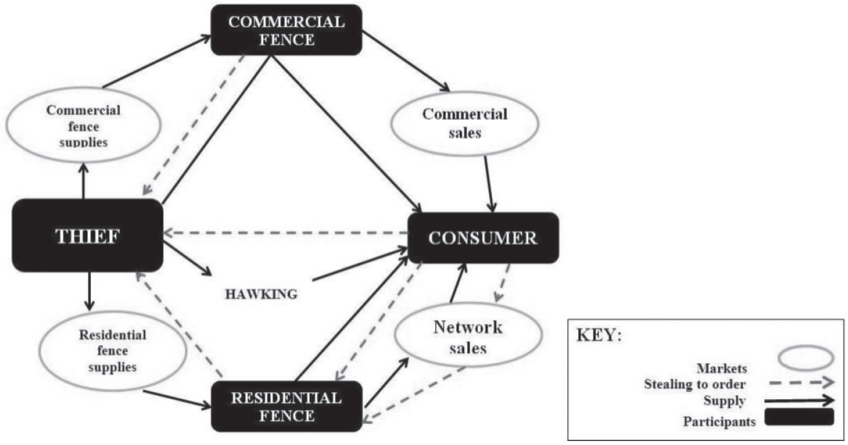
- **Concealable.** Things that can be hidden in pockets or bags are more vulnerable to shoplifters and other sneak thieves. Things that are difficult to identify or can easily be concealed after being stolen are also more at risk. In some cases, thefts may even be concealed from the owners of goods, as when lumber or bricks left lying around on building sites are stolen.
- **Removable.** The fact that cars and bikes are mobile helps explain why they are so often stolen. Nor is it surprising that laptop computers are often stolen since these are not only desirable but also easy to carry. What is easy to carry depends on the kind of theft. Both burglars and shoplifters steal cigarettes, liquor, medicines, and beauty aids from supermarkets, but burglars take them in much larger quantities.
- **Available.** Desirable objects that are widely available and easy to find are at higher risk. This explains why householders try to hide jewellery and cash from burglars. It also helps explain why cars become more at risk of theft as they get older. They become increasingly likely to be owned by people living in poor neighbourhoods with less off-street parking and more offenders living nearby. Finally, theft waves can result from the availability of an attractive new product, such as the cell phone, which quickly establishes its own illegal market (see box).
- **Valuable.** Thieves will generally choose the more expensive goods, particularly when they are stealing to sell. But value is not simply defined in terms of resale value. Thus, when stealing for their own use, juvenile shoplifters may select goods that confer status among their peers. Similarly, joyrides are more interested in a car's performance than its financial value.

26 CLARKE, R., V., ECK, J., E. 2005: Crime Analysis for Problem Solvers In 60 Small Steps. U.S. Department of Justice, Office of Community Oriented Policing Services, ISBN: 1-932582-52-5

- **Enjoyable.** Hot products tend to be enjoyable things to own or consume, such as liquor, tobacco, and DVDs. Thus, residential burglars are more likely to take DVD players and televisions than equally valuable electronic goods, such as microwave ovens. This may reflect the pleasure-loving lifestyle of many thieves (and their customers).
- **Disposable.** Only recently has systematic research begun on the relationship between hot products and theft markets, but it is clear that thieves will tend to select things that are easy to sell. This helps explain why batteries and disposable razors are among the most frequently stolen items from American drug stores.

On the one hand, some desirable products, such as cigarettes and alcohol, may always be popular products for thieves. The desirability of other products may be based on their current popularity (such as new movies, video games, and music titles) or on their use in drug manufacturing activities (such as ephedrine based cold medications and lithium batteries). Desirable items, in no specific order, include[27]:

- tobacco products;
- premium razor blades;
- face creams;
- analgesics;
- smoking cessation products;
- designer, logo, and leather apparel and shoes (particularly athletic);
- name-brand power tools;
- vacuum cleaners;
- printer ink cartridges;
- steaks;
- coffee;
- consumer electronics (such as DVD players and GPS units);
- fragrances;
- infant formula;
- batteries;
- music and game DVDs; and
- over-the-counter (OTC) medications and test kits.



Picture 4: Handling Stolen Goods and Theft in USA

Source: Palmer E. W., et all (2009, p. 12), adapted

27 FINKLEA, M., K. 2012: Organized Retail Crime, Congressional Research Service, 7-5700, R41118, p. 5

UNDERSTANDING THE ORGANIZED RETAIL CRIME SUPPLY CHAIN

The demand for stolen merchandise hinges on the ability to resell it back into the marketplace. Fencing operations and operators sell stolen merchandise to individual consumers at flea markets, pawnshops, swap meets, and increasingly, to store fronts.

Most fences operate legitimate businesses in conjunction with illegitimate enterprises. Fencing operations face the same challenges as businesses in the formal marketplace: supply, pricing, distribution, location, marketing, competition, and cash flow. Fence operations can be categorized as commercial or residential. Commercial fences operate a store front and are able to pass brand new goods on to consumers who may not be aware the merchandise is stolen. Since the items are perceived as legitimate merchandise; the commercial fence can price the items as new and earn a significant profit. Residential fences normally operate out of their own homes. They have a more limited buying market such as friends and relatives.

USA CURRENT DOMESTIC EFFORTS TO COMBAT ORC

There is a growing awareness among retailers about the consequences of organized retail crime. In its 2011 survey of organized retail crime, the National Retail Federation (NRF) reported that about 95% of the retailers surveyed indicated that their companies had been victimized by ORC.

Retailers

Retailers' loss prevention strategies can take various different forms, including pre-employment integrity screening measures, employee awareness programs, asset control policies, and loss prevention systems. Data from the 2010 NRSS indicate that over half of retailers use the following loss prevention systems or personnel[28]:

- burglar alarms;
- digital video recording systems;
- live, visible closed circuit TV (CCTV);
- point of sale (POS) data mining software;
- armoured car deposit pickups;
- check approval database screening systems;
- acoustic-magnetic, electronic security tags;
- live, hidden CCTV;
- uniformed guards;
- cables, locks, and chains;
- web-based case management and reporting;
- drop safes;
- remote CCTV video and audio.

However, data also indicate that less than half of retailers are using other available loss prevention measures, such as secured display fixtures, audible and silent alarms, observation mirrors, and mystery/honesty shopper programs.

Online Marketplaces

With an increase in the e-fencing of stolen merchandise, attention has recently turned to the role of Internet marketplaces such as eBay and Overstock in combating ORC.

28 FINKLEA, M., K. 2012: Organized Retail Crime, Congressional Research Service, 7-5700, R41118, p.14-15

These marketplaces take various measures to combat the sale of stolen and fraudulently obtained goods - not solely by organized retail criminals - on their websites, including educating sellers and consumers, monitoring suspicious activity, and partnering with retailers and law enforcement.

U.S. Federal Law Enforcement

As mentioned, state and local law enforcement have held the primary responsibility for investigating and prosecuting organized retail crime. However, as the scope of the crime has increased, so too has the involvement of federal law enforcement.

Retail criminals are no longer selling goods simply at local flea markets; rather, they are using interstate transportation routes to move stolen goods, as well as the Internet to ship this merchandise across the country and around the world.

FBI (Federal Bureau of Investigation)

In December 2003, the FBI established an Organized Retail Theft (ORT) Initiative aimed at identifying and dismantling multi-jurisdictional retail crime rings. The Initiative focuses on information sharing between law enforcement and the private sector in order to investigate ORC and develop a greater understanding of the nature and extent of ORC around the country. The Initiative relies on federal statutes such as the Money Laundering, Interstate Transportation of Stolen Property, 2 and Racketeer Influenced and Corrupt Organizations (RICO) to investigate and prosecute ORC rings. In addition to the Initiative, the FBI leads seven Major Theft Task Forces around the country that is responsible for investigating a host of major theft areas, including ORC. These task forces are composed of local, state, and federal law enforcement agencies, as well as retail industry loss prevention experts.

LERPNet (Law Enforcement Retail Partnership Network)

The Law Enforcement Retail Partnership Network (LERPnet) is an industry-backed national information-sharing and incident management system that connects loss prevention professionals from the world's top retailers to each other and to local, regional, and national law enforcement agencies. The system offers:

- quick and easy sharing of information about merchandise thefts, organized retail crime, robbery, burglary, pharmacy theft, and more,
- reporting of suspicious locations and sharing of intelligence about known fencing operations,
- features that help users observe, analyze, and even predict crime by individuals or networks,
- link analysis that visually displays relationships among reported cases, allowing retailers and law enforcement to find patterns,
- free access for law enforcement.

LERPnet provides an industry data sharing platform for retailers to report, share and analyze their retail theft and critical incident data. It is designed to be the national standard for sharing retail crime information in a secure and confidential manner. Incident details may be shared with law enforcement while retailers take advantage the many system tools including: automated alerts and recent activity notifications; intelligent link-analysis; investigation collaboration tools; full text search capability; and advanced system reporting.

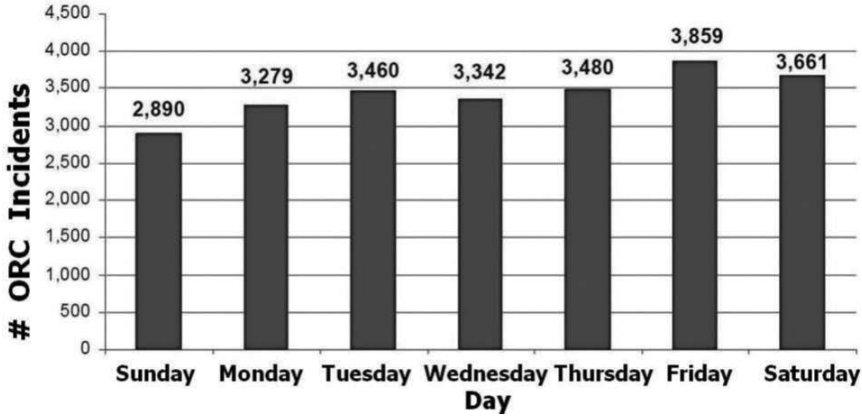
The new LERPnet is a powerful data sharing platform designed specifically for reporting and analyzing retail crime, while facilitating communication with law enforcement. It provides[29]:

- Easy Data Entry and Historical Import.
- Configurable User Dashboard Controls.
- Advanced Data Searching to find the information you are looking for.

29 http://www.lerpnet2.com/LERPnet System Features Launch.pdf

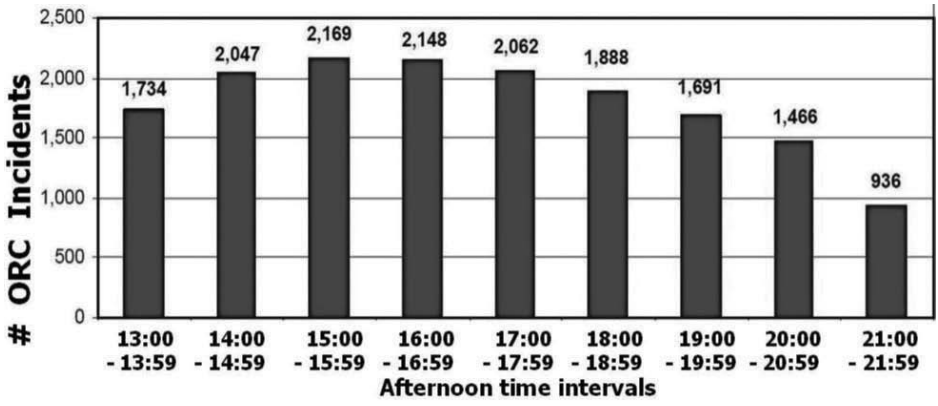
- Link Analysis Tools to help surface patterns and trends.
- Communication and Collaboration to help you connect with other retailers and investigators.
- Dynamic Report Display including geo-spatial mapping and plotting.
- LERPnet Alerts to warn of activity in your area of responsibility or increases in trends that might impact your business or the safety of your associates.
- LERPnet Notifications to let you know when there are updates or new reports related to your investigations.
- Online Training to support your rollout and ongoing use of the system.

Some results of this retail industry data sharing platform for retailers are, as followed next two Pictures. Numbers of ORC Incidents by Day of Week (Retailers in LERPNet) shows Picture 5.



Picture 5: # ORC Incidents by Day of Week, Retailers in LERPNet (USA)
Source: Paving the Future for Retail, (2009, p.6), LERPNet, www.lerpnet.com, adapted

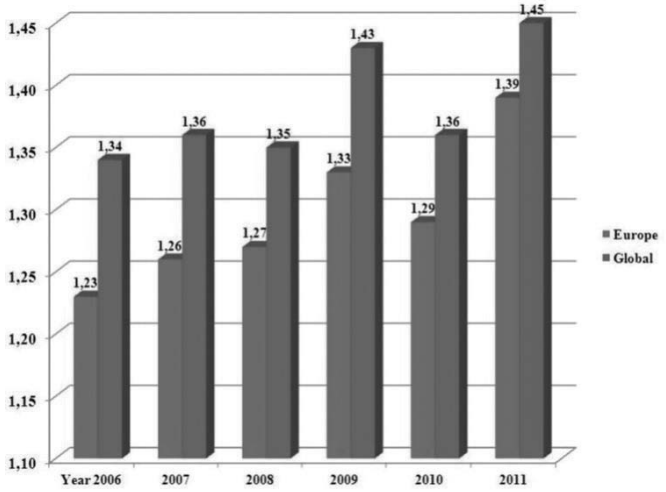
Numbers of ORC Incidents by Hour of Day culminates in afternoon hours intervals (Retailers in LERPNet), see Picture 6.



Picture 6: # ORC Incidents by Afternoon Hours, Retailers in LERPNet (USA)
Source: Paving the Future for Retail, (2009, p.6), LERPNet, www.lerpnet.com, adapted

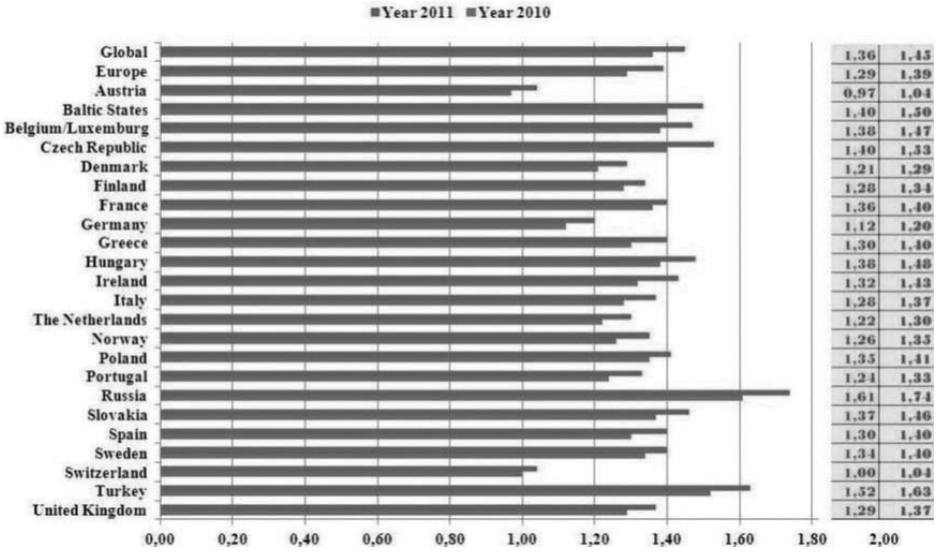
EUROPE RETAIL SHRINKAGE COSTS

The retail sales in Europe is comparable (approximate co-equal) retail industry of North America, USA retail industry has dominant role in this region. The term „Europe"is used to include those countries in and near Europe that are covered by this survey, (includes Russia). „Europe"does not mean the European Union (EU), although a majority of the countries surveyed are EU members.



Picture 7: The Europe and Global shrinkage as percentage of sales 2006-2011
Source: The Global Retail Theft Barometer 2006-2011, adapted

The average rate of shrinkage as a percentage of sales in individual countries can vary significantly. The pattern of shrinkage rates in descending order (by country name) is shown by Picture 8.



Picture 8: The Europe countries - retail shrinkage rate 2010, 2011
Source: The Global Retail Theft Barometer 2010, 2011, adapted

RETAIL CRIME IN SLOVAK REPUBLIC

Data on **criminality** are obtained from the Registration Statistical System of Criminality kept by the Police Force of the Slovak Republic. Data on crime incidents and data on known perpetrators (persons under investigation) are registered in the system. The Table 3 also contains data registered by the Railway Police, the Military Police, the Corps of Prison and Court Guard, and the Customs Directorate. Data about proceedings and court decisions are obtained from the Ministry of Justice of the Slovak Republic.

Notes:

Criminal offence is a wrongful act with characteristics defined in the Penal Code.

Property crimes are mainly thefts (from person, burglary, motor vehicle theft etc.), but also acts of damaging property.

Moral crimes are offences such as rape, sexual abuse, child pornography, and procuring.

Other crimes are for example production of illicit drugs, riot, obstruction of official decisions, etc.

Table 3: Development of criminal offences by basic groups and types

Indicator	2006	2007	2008	2009	2010
Criminal offences in total	**115 152**	**110 802**	**104 860**	**104 905**	**95 252**
of which:					
General crimes	**84 107**	**80 400**	**74 852**	**71 655**	**64 904**
Share in total number	73,0	72,6	74,2	68,3	68,1
of which:					
Property crimes	63 077	60 045	54 754	52 399	47 408
Share in total number	54,8	54,2	53,8	49,9	49,8
Crimes of violence	10 896	9 620	9 030	8 337	7 532
Share in total number	9,5	8,7	9,1	7,9	7,9
Moral crimes	798	805	840	791	678
Share in total number	0,7	0,7	0,8	0,8	0,7
Other crimes	9 336	9 930	10 126	10 128	9 286
Share in total number	8,1	9,0	9,8	9,7	9,7
Economic crimes	**19 168**	**17 895**	**16 974**	**19 518**	**16 781**
Share in total number	16,6	16,2	15,8	18,6	17,6
Remaining crimes	**11 877**	**12 507**	**12 932**	**13 638**	**13 518**
Share in total number	10,3	11,3	11,1	13,0	14,2
Military crimes	•	•	**102**	**94**	**49**
Share in total number	•	•	0,1	0,09	0,05

Source: Statistical Yearbook 2011, Statistical Office of the Slovak republic

The retail sector of the Slovak Republic passed the stormy development especially in the last 20 years. Although the development and status of this important sector of the economy is a relatively frequently discus theme in professional and academic circles, about the state losses due to criminal activity, that is published very little. Is due to the lack of relevant data for the whole sector, respectively under its various headings: territory, products, etc. Some, albeit small substitution in this direction provides particular state agencies (police, prosecutors, and so on). The Statistical Yearbook for 2011 can detect only the cumulative figures for overall crime, including developments and trends. How can we check the Statistical Yearbook for 2011, crime overall development in the Slovak Republic had relatively decreasing trend observed in the years 2006 - 2010. Global Slovak characteristic is not a relevant source of data for the purposes of research prepared by us. Another regulating fact is associated with a system of statistical data and their sources - latent, notificated, clarificated, convicted of crimes (Svatoš, Criminology, 2012)[30]..... Those are the data for which there is a greater or lesser difference in statistical terms.

30 SVATOŠ,R., 2012, *Kriminologie*, 1. vyd. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2012. - 290 s. ISBN 978-80-7380-389-6

In this analyse, however, it is only general overviews of officially reported incidents related to the crime in the retail SR. Less serious incidents at the level of the offense in this area are not included. At the same time we must note that this is only a general overview of the actual situation in Slovakia, no comment RC in Slovakia. Partial imaginings, without the possibilities to combine a relatively comprehensive picture about RC in Slovakia can be recognise by our experience only through police statistics registration systems ESSK, or specific targeting information systems. Even there are data fundamentally broken not in our object of interest, but by the object of attack or of the protected interest. This distribution does not sort out all the items RC carefully.

In this pre-research analyse we tried to use a specific output from the information system selecting some objects related to the RC. Choosing been subjective qualified, discussed by an expert group and then distributed to the survey table. For representative was selected last full year - that is, 2011. Values arranged in columns surveys show some, already at this time manifested problems with respect to the detection rate, clear-up rate and the ratio of the observed and returned values. In Table 5 we analyse the theft in 2011, with the selection delictual structure aimed at pre-formulated RC structure. Please note that none of the all of presented cases may be guided purely by RC. The data presented are only to interpret the expected options.

Table 4: Analysis of recorded thefts and other property crimes in Slovakia in 2011

Type of crime	found	clarified	i.e., %	caused damage - Mio	Secured values - *Mio*
BURGLARY	12 884	3 289	25,53	32 255	33
311 - burglary.- shops and stores	1 365	351	25,71	5 045	7
312 - burglary.- showcases and cabinets Billboard	31	9	29,03	58	
321 - burglary.- restaurants, canteens	832	209	25,12	1 100	
322 - burglary.- accommodation facilities	230	53	23,04	1 790	1
323 - burglary.- stands (§ 212)	419	124	29,59	785	
331 - burglary.- objects with antiques and art values	7	3	42,86	40	
341 - burglary.- cash registers, safes and strong-boxes	20	2	10,00	603	
342 - burglary.- slot machines, ATMs	162	40	24,69	287	
343 - burglary.- other objects for safekeeping	100	16	16,00	469	
390 - burglary.- other objects(§212)	6 399	1 470	22,97	15 712	12
Thefts other	25 199	9 515	37,76	57 397	456
490 – theft without specification (§ 212)	3 965	2 102	53,01	7 952	19
Other property offenses	5 093	1 609	31,59	7 097	9
Indeed some interest:					
526 – damage to - graffity (§ 246)	255	99	38,82	164	
527 – damage to – glas broken (§ 245)	664	176	26,51	703	
Indeed other					
590 - Other property offenses	2 907	467	16,06	5 585	6

Source: ESSK - specific output processed by the authors

Analysis of the presented data it is possible to infer some of the issues that will be addressed in the context of research RC on Slovakia. We can refer mainly to the low clarifying rate and a very low level of secured and thus potentially saved values, compared to the damage suffered (Svatoš, Criminology, 2012)[31]. But in this analysis it is not the restoring (Svatoš, Criminology, 2012) values, in relation to the outcome of the criminal proceedings, but only the saved values, clearly documented directly in the investigation. In a practical discussion we noted, that in addition to the low efficiency, is recognised the relative lack of interest by law enforcement agencies (OČTK) (Tremmel, Fenyvesi,

31 SVATOŠ,R., 2012, *Kriminologie*, 1. vyd. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2012. - 290 s. ISBN 978-80-7380-389-6

2006)[32]. Namely the people from investigation enforcement agencies present disinterest to quantify these values and implement them into statistical reports, the absence of correlation between works "extra" a reward for it. Thus, evaluation of these efforts remains in police investigative activities in moral terms.

Low level clarifying rate (Svatoš, Criminology, 2012)[33] in our clashing areas between 16 to (highly) 53% presented in the output is a significant for majority in the overwhelming number of cases clarifying rate up at 25%. This means that only a quarter of cases were filed for prosecution and therefore known suspect. Overall, it is for property offenses, as typically prevailing in the statistics, the typical low level clarifying rate compared to offense against life and health. Cause damage to property values requires in the future focus and attention in this direction. On the other hand, the maximum of the damage caused by RC in the world has an absolute majority in the offence being prepared and organized at the level of fraud, mainly organized by category of white and blue collar, and a well organized crime, as we have demonstrated the above. In a similar vein, we tried to delictual analysis for cases of robbery in 2011.

Table 5: Analysis of recorded robberies in Slovakia in 2011

	2011			
Type of crime	found	clarified	i.e., %	caused damage - Mio
TSK 861, § S250a, N222 robberies	2 162	1 672	77,34	17 221
- Banks	78	46	58,97	9 346
- savings	39	23	58,97	580
- insurance	1	1	100,00	6
- Financial Exchange				
- 16 = 601 other define places	1 871	1 466	78,35	14 014
- 16 = 602 other				

Source: ESSK - specific output processed by the authors

Table 6: Analysis of robberies recorded in Slovakia in 2010

	2010			
Type of crime	found	clarified	i.e., %	caused damage - Mio
TSK 861, § S250a, N222 robberies	2 152	1 773	82,39	13 935
- Banks	65	54	83,08	1 437
- savings	22	14	63,64	348
- insurance				
- Financial Exchange				
- 16 = 601 other define places	1 872	1 545	82,53	12 986
- 16 = 602 other	1			5

Source: ESSK - specific output processed by the authors

Table 7: Geographical analysis of crime (burglary oriented to) in Slovakia in 2011

32 TREMMMEL F., FENYVESI CS., HERKE CS., 2006: *Kriminalisztika, dialóg Campus Kiadó*, Budapest, 2005.pp.373-377 . In: Csongor-Herke: Evidence and proofs int he Hungarian Criminal Procedure Law, Bizonyítékok, 2006, Pécs, 201.p

33 SVATOŠ,R., 2012, *Kriminologie*, 1. vyd. Plzeň: Vydavatelství a nakladatelství Aleš Čeněk, 2012. - 290 s. ISBN 978-80-7380-389-6

on objects of interest to the RC	number of crimes (**damage in thousands of €**)								
Territory/city	**SR**	**BL**	**TT**	**TN**	**NR**	**ZA**	**BB**	**PO**	**KE**
132- robbery identified	180	39	26	23	20	25	27	6	14
- *clarified*	64	11	11	11	6	6	12	3	4
- **damage**	1 126	472	113	47	188	118	160	5	18
- Results in death									
- Result in serious injury	12	3	1	1	2	3	1	1	
- Committed on the street	14	4	2	1	1	4	1		1
- In observed city	138	36	20	18	17	13	20	4	10
- Organized crime	1				1				
- Committed with a gun	112	25	23	11	11	14	16	3	9
- With a firearm	72	19	18	5	8	8	6		8
- shop	43	9	3	3	6	6	14		2
- *clarified*	16	4	1	2		1	7		1
- **damage**	426	134		2	138	1	133		14
- store gas station	17	3	3	2	1	5	3		
- *clarified*	2		1				1		
- **damage**	16		2	2		5	4		
- bank	27	12	4	5	2	1	2		1
- *clarified*	12	2	3	4	1	1	1		
- **damage**	260	112	83	15	33		15		
- currency exchange	2					2			
- *clarified*									
- **damage**	89					89			
- post office	2	1		1					
- *clarified*									
- **damage**	1			1					
- bookmakers office	5	3	1			1			
- *clarified*	2	1				1			
- **damage**	8	8							
- cash in transit									
- *clarified*									
- **damage**									
- pawnshops	4	2	1					1	
- *clarified*	2		1					1	
- **damage**	1								
- casino and playground	20	3	1	2	3	4	6	1	
- *clarified*	6	1			2	1	1	1	
- **damage**	56	11	15	6	1	11	6	3	
- object money	160	33	26	22	19	23	23	4	10
- mobile phone	2	1				1			
- groceries									
- tobacco products									
- notebook, PC									
- valuables (gold, coins ...)	7	1			2		2	1	1
- The number of offenders	74	13	12	7	10	6	16	4	6
- juvenile									
- adolescents	5					1		2	2
- foreigners	11	6			1	1	3		
- recidivists	21	1	6	1	3	1	8	1	
- unemployed	23	1	2	3	6	1	5	2	3
- The number of individual acts committed	49	9	8	10	4	6	8	2	2
- pair	9	1	2	1			2	1	2
- a group of offenders	6	1	1		2		2		

Source: ESSK - specific output processed by the authors

Compared with 2010, the same data: show the distribution in terms of leisure facilities - banks, savings banks, insurance companies, and interesting for us - otherwise defined space - the area containing other objects just in case RC robberies in their respective years. In addition to this output

is also interesting for the assessment of trends, both short-term for several years, or long term - decades, what we should use in formulating prediction (Holcr, 2008)[34] as one of the research results.

Analysis of robberies in 2011 is also interesting from the most important objects for RC, in terms of localization. The project examining the usability of geographic information systems (Meteňko, 2012)[35], taking off as an international project on the Police Academy in Bratislava, we came to understand and relatively negative response in some areas of economic and business interests. Were they presented fear of negative consequences from this information such as potential "prospective risk locations"(Kříha, 2009)[36]. Concerns about the presentation of information that "could reduce land prices" or otherwise affect the business plan is logically contradict other interests to which such information helps the contrary. Here we present such an information due distribution of robbery according to localisation / "interest" city.

This can be, and will also be more accurate suggestions for possible extended object of our research.

CONCLUSION

Outlined our comments available information and the inability to get specific outcomes in crime statistics to the necessary data clearly indicates **the need to examine** the issue RC Slovakia in detail and systematically. Neither the analysis of existing sources of last 20 years does not show any examination made, and not at all complexity.

In preparing the research project we must focus on:

1) Methods
2) Databases
3) Hypotheses

Methodology:

In the area of research methods, we want to focus on the basic fields of science, which each have their own methods to study our problem. As mentioned above, interdisciplinary RC Slovakia research requires knowledge overlap:

- securitology as most general science of safety,
- police sciences - as a basic source of information on effective practices to protect property,
- criminology as a analytical and prognostic tool for understanding relatively real, though latent situation in the etiology and phenomenology of the RC,
- prevention, although the relative components of criminology, though the specific application and non-criminology knowledge about the prevention and prohibition of * RC in conditions of Slovakia,
- criminal law, including selected questions of criminal procedure,
- theory of operational and intelligence activities in relation to knowledge of economic and property crime, but especially with the knowledge of the forms and methods of organized crime,
- criminalistics - in relation to the knowledge of the mechanisms and processes of the commission and the study of individual and group RC effects and
- investigation and evidence theory, which forms the basis for understanding change and development, the acceptance of individual and group trends in the understanding and application of the above knowledge in practical police activities,
- trade theory, focusing on retailing, and
- theory of advertising.

34 HOLCR, K., 2008: Prognóza kriminality a jej kontroly v Slovenskej republike. 1. vyd. - Bratislava: IURA EDITION. 219 s. ISBN 978-80-8078-240-5

35 METEŇKO, J., 2012 *Projekt: Metódy a technológie Geografických informačných systémov (GIS) pre policajné činnosti – výskum, vývoj, testovanie.* Akadémia PZ v Bratislave, , 12s.

36 KŘÍHA, J. 2009: *Ochrana místních záležitostí veřejného pořádku v intencích strategie „ Community policing" – vybrané interpretační souvislosti.* České Budějovice: Vysoká škola evropských a regionálních studií, o.p.s., , 150 s. ISSN 1214- 4967 s. 131 -132

Available sources of information:

We will try to process specific orders for specific outputs of the registration systems of the police and judiciary, describing the RC area in Slovakia. For this requirement, we will process the content distribution offenses in RC available statistical records, qualifications in the Penal Code or other laws. The species distribution will be verified by data obtained from sources interest trade organizations.

Suitable hypotheses:

At this stage it is not possible or necessary to formulate hypotheses in detail the contents of this research concept. Basic assumptions should be based on inadequate knowledge in Slovakia. It is necessary to formulate delictual RC distribution in Slovakia, mainly due to the fact that they may not exactly replicate the foreign structure. Necessary and also very interesting comparison is surely the real situation in Slovakia and in Europe, possibly the world. Based on the above concept should be the main hypotheses:

- in Slovakia is not a sufficient knowledge base for exploring the RC,
- where criminal distribution of RC in Slovakia, just copy the standard structure of a European RC,
- development of etiology and phenomenology in Slovakia RC replicates the pattern in Europe.

In this area, we can utilize the knowledge of the ending of international research, research project no. 3/2004 - Methods of research and development of the police activities, grant task by the Ministry of Interior (Meteňko, 2006)[37]. This study is in the parts of analysing the police activities those research output.

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37 METEŇKO, J., 2006: *Metódy výskumu a vývoja policajných činností : Zámer integrovanej vedeckovýskumnej úlohy*. / Rieš. výsk. úl. Jozef Meteňko. - 1. vyd. - Bratislava: Akadémia PZ. - 13 s., VÝSK. 130

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ANTI-FRAUD PROBLEMS IN VEHICLES INSURANCE

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Annotation: One of the most important conditions for the establishment of market economy is the development of the insurance market. A number of factors prevent the creation of modern insurance industry, one of which is the criminalization of the insurance market. The increase of financial resources of the insurance business makes the examined segment very attractive for criminal offenses. The conducted research deals withspecifics of identifying and combating crime in the insurance business.

The development of the insurance market is one of the most important conditions for a sustainable market economy. However, a number of factors hinder the creation of a modern insurance industry, among which we can single outthe ones such as the critical state of economy, imperfect tax legislation and several others. One of the most destructive factors is the criminalization of the insurance market. The development of insurance business, its financial resources increasing, makes it a very attractive area forcriminal offense.

Crimes in the insurance area bear a high social risk by their nature, since they complicate or block the realization of the main tasks connected with the formation of insurance trust fund by way of monetary contributions for compensation of possible damage, and loss in family income due to the consequences of occurring insured events covering. Also, the criminalization of the insurance market impedes the implementation of some of important functions of insurance such as the increased stability of economic relations, the restriction of economic risks, and the entrepreneurial initiative encouraging.

Understanding the crime mechanism and identification of the specific features of certain criminal offenses facilitates the identification of crime in the insurance sphere. Crimes in the insurance sphere can be classified on various bases depending:

- on the insurance formandsubject;
- on the persons responsible for the offense;
- on the people, whose rights are being violatedby the offense.

As the international experience shows, vehicle insurance is one of the most vulnerable areas. For example, in Germany, the USA, and France, the most typical examples of vehicle insurance fraud are: burning the car insured on a sum larger than itsprice, provokingcrashing the carinto a dummy car or an already damaged car, and accident simulation with the help of false witnesses. Special Commission of Criminal Police Office in North Rhine - Westphalia has identified about 50 groups thathave professional "emergency" drivers. These groups have underground workshops where they restore cars, some of which get involved in car accidents up to ten times a year. It should be emphasized that the problem of car insurance fraud is relevant for the Republic of Belarus.

Criminal offenses of car policyholders can be divided into three groups:

A. Obtaining insurance reimbursement higher than the sum to which the vehicle is insured;

B. Illegal receipt of insurance reimbursement with the insurance fraud case;

C. Illegal increasing of the insurance reimbursement amount.

Let us look at the most common pattern of committing such crimes.

Insurance reimbursement largerthan the insurance sum obtaining. In accordance with the law, the insurance amount (liability limit) is set by the law, the act of the President of the Republic of Belarus or contract of insurance money, within which, unless otherwise provided by the law, or the act of the President, the insurer is obliged to pay the insurance when the insured eventoccurs. In property insurance, insurance amount cannot exceed the actual value of the property at the moment of the contract signing. Illegal acts can involve overestimation of the insurance amount by way of providing false information about its value.One of the methods is the distortion of information about the car that is supposed to be insured (a change of release year, or upping the class of the vehicle (eg.by changing the model)). This leads to an overestimation of the insurance sum, because in the insurance contract vehicles are estimated according to the catalog, in which the main parameters are: brand, model and year of release. These methods can be used simultaneously.

These actions are performed by means of fictitious documents (vehicle registration, etc.) and are accompanied by other insurance offenses (false car theft, arson, etc.). In identifying such cases of fraud in the insurance field it should be taken into account the possible presence of accomplices representing the insurance company (agents, brokers and evaluators). For a reward from the insured, they do not pay attention to the discrepancy between the car andits presented documentation.

One of the ways of making such an offenseis false car theft. At the preparatory stage theinsurance contract is made. As a rule, an expensive car is insured with various illegal methods to increase the insurancesum.

The next stage is staging the theft. Thefraudsterhides the car first, and reports the hijacking to the police. Then, he or she notifies the insurance company about the theft. The insurance case is usually staged at the beginning of the insurance term or before its completion. The offendersengaging in insurance fraud at the beginning of the insurance termseek to get insurance money and continue their criminal activity. Those criminals, who have criminal intent at the termination of the insurance, choose the second option. The third stage involves illegal receipt of the insurance reimbursement. The fraudsterfills the papers of requirement to get the insurance and provides the necessary documents, and the insurance company analyzes them and makes a decision on the payment. From a legal point of view, from that moment the fraudster actions may qualify as a consummated fraud (Art. 209 of Penal Code of Belarus). The previous steps are considered as a preparation to commit a crime.

The fourth stage is characterized by acts aimed at concealing the traces of the crime. At this stage, the car is sold with forged documents (often in the Russian Federation), or sold for parts. According to the necessity of vehicle re-use for criminal purposes, the fraudster modifies the serial number of engine and body, and gets fake documents. After that, the criminal scheme can be repeated in another insurance company.

In conclusion, it should be stressed that in the first place it is the insurance companies that sustain the losses from fraud in the insurance sphere. Regarding to this, insurance companies should act as the main initiators on counteracting with respect to such kind of crimes. At the same time, the bodies of internal affairs in charge are summoned to protect the interests of the state and citizens in the insurance sphere as well as to assist the security services of insurance companies in bringing fraudsters to justice.

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JOINT INVESTIGATION TEAM (JIT): A MODERN AND USEFUL INSTRUMENT AGAINST CROSS-BORDER ORGANIZED CRIME

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Abstract: Joint investigation team - as a special form of mutual legal assistance - is a desired fundamental instrument for the international cooperation of law enforcement/judicial authorities against cross-border crime. The Framework Decision on JITs adopted by the Council in 2002[1] gives the possibility for the EU member states to facilitate their investigating capacities by creating JITs. The Police Cooperation Convention for Southeast Europe (PCC SEE) – that was signed in Vienna in 2006 by seven countries including Serbia – created the framework for the contracting parties to establish JITs as well. What are the advantages and possible difficulties of using this method? What can be the reason of the experience that JITs are not widely accepted in practice by states? The main goal of this paper is to provide a brief overview of this instrument – that is considered to be a valuable tool in the international police and judicial cooperation network - by focusing on the questions above.

Keywords: joint investigation, cross-border organized crime, mutual trust, law enforcement

INTRODUCTION

The phenomena of globalization and of the "extremely" rapid technical, economical, political and social changes have been followed by some negative trends in criminality and have created some new "products", new forms of crimes in the criminal arena. As a result of "borderless" Europe, the free movement of goods and persons, the endless opportunities given by the internet, etc., the "local" character of crime has turned to be more complex by the appearance of the international serious organized criminal groups having complex hierarchical "architecture" of the different actors and well-structured logistical background. Therefore, law enforcement authorities had to change and improve their attitudes and methods to be able to keep up with the constantly changing challenging criminal environment.

The initial "one crime - one spot - one detective" principle has become outdated - since crimes often involve actors and locations in more states - and the qualitative and quantitative changes of crime called for a wider international professional cooperation between different law enforcement authorities in fighting against cross border crime. As a necessary consequence of this trend investigation processes require more complex, modern and effective innovations and methods in the toolkits of criminalistics, and more flexible and efficient forms (legal and institutional) of international police and judicial cooperation.

Europe has worked out a double sided approach to speed up, simplify and improve legal assistance in tackling organized crime: first, by building up personally bound institutions (such as Europol, Eurojust, SELEC), second, by creating new European Conventions on mutual assistance emphasizing direct contacts, technical developments and modern methods of investigation (such as controlled deliveries, covert investigations and JITs.) The role of international law enforcement organizations (Interpol, Europol, Eurojust, OLAF, SELEC, etc.) has strengthened significantly and the legal bases and institutional structures of these organizations are constantly adjusted to the needs on demand as a reaction on the steadily changing political, social and criminal environment.

It had become obvious that cooperation between national law enforcement authorities had to make a significant step ahead, and had to step out of the initial framework of "information sharing and conference organizing" by building up a wide operational cooperation network - based on

1 Framework Decision on Joint Investigation Teams, 13 June 2002. Framework Decision 2002/465/JHA, OJ L 162 of 20.06.2002. (2002). Retrieved December 2, 2009, from http://eur-lex.europa.eu/LexUriServ/site/en/oj/2002/l_162/l_16220020620en00010003.pdf

proper coordination and mutual trust of the participants – including the use of such new methods of joint operations, like the instrument of joint investigation team, the special subject of this paper.

The aim of this paper is not to show the phenomenon of the JIT in the fullest details – that has already been a subject of some previous papers of mine[2] – but in addition to highlighting upon the advantages and introducing truly the possible difficulties of JITs, I would like to emphasize that this instrument is available for the Southeast countries as well since PCC SEE serves as proper legal framework for operational police cooperation.

PHENOMENA OF JOINT INVESTIGATION TEAM

Legal background of JIT for European countries

The United Nations (UN), the Council of Europe and the European Union (EU) played an outstanding role in establishing the necessary legal framework for European countries to be able to establish JITs.

Globally the UN Convention against Transnational Organized Crime adopted on 12-15 December 2000 (Article 19) can be mentioned as a forerunner to the current framework for JITs, and with regard to the EU, the Naples II Convention of 1997 (Article 24) can be characterized as the first document concerning JITs.

Legal framework for JITs set up between the EU member states

Regarding the current legal framework of JITs within the EU, dual legal bases can be found:

In full accordance with Article 34 of the Treaty on the EU, the EU Convention on Mutual Assistance in Criminal Matters (MLA Convention)[3] was adopted on 29 May 2000, as a basic legal framework. Article 13 of this convention creates conditions for setting up a JIT and sets out rules for methodology.

Due to the slow ratification progress of the MLA Convention, the Council adopted on 13 June 2002, a Framework Decision on Joint Investigation Teams[4] (Framework Decision), which reproduced Articles 13, 15 and 16 of the 2000 MLA Convention explaining all the rules for setting up a JIT.

Besides these two main legal instruments there are some other legal bases – apart from the bilateral agreements - that should be taken into consideration during setting up a JIT. The following instruments should be emphasized among others:

- Council Decision of 6 April 2009, establishing the European Police Office (Europol) (2009/371/JHA) (Article 6)
- Council Recommendation of 28 September 2000, to Member States in respect of requests made by Europol to initiate criminal investigations in specific cases.
- Council Resolution of 26 February, 2010, on a Model Agreement for setting up a Joint Investigation Team (JIT) (OJC 70 of 19 March, 2010)
- Council Recommendation of 30 November, 2000, to Member States in respect of Europol's assistance to joint investigative teams set up by the Member States of 30 November, 2000, to Member States in respect of Europol's assistance to joint investigative teams set up by the Member States.

2 Judit Nagy: About joint investigation teams in a nutshell: Current issues of business and law Research Papers 2009, Chapter 4, International School of Law and Business Vilnius 2009, pp. 141-160.

5. Judit Nagy: About joint investigation teams in a nutshell: Issues of Business and Law 2010 Vol: 2, pp. 105-117. http://cejsh.icm.edu.pl/cejsh/cgi-bin/getdoc.cgi?10LTAAAA08617

Judit Nagy: Questions and answers about the Joint Investigation Teams: Administrativa un Kriminala Justicija 3/2010. Nr. 3 (52) pp. 28-38.

3 Convention on Mutual Assistance in Criminal Matters, 29 May 2000 (MLA Convention, 2000). (2000). Council Act of 29 May 2005, OJ C 197 of 12.07.2005. Retrieved December 2, 2009, from http://eur-lex.europa.eu/LexUriServ/site/en/oj/2000/c_197/c_19720000712en00010023.pdf

4 Framework Decision on Joint Investigation Teams, 13 June 2002. Framework Decision 2002/465/JHA, OJ L 162 of 20.06.2002. (2002). Retrieved December 2, 2009, from http://eur-lex.europa.eu/LexUriServ/site/en/oj/2002/l_162/l_16220020620en00010003.pdf

• Decision of The Management Board of 20 March, 2007, laying down the rules governing the arrangements regulating the administrative implementation of the participation of Europol officials in Joint investigation teams.

• Agreement between Eurojust and Europol (Article 6).

• Council Framework Decision of 18 December, 2006, on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union.

• Council Decision 2002/187/JHA of 28 February, 2002, setting up Eurojust with a view to reinforcing the fight against serious crime (The Eurojust Council Decision of February 2002, was subsequently amended in 2003 (Council Decision 2003/659/JHA of 18 June, 2003, amending Decision 2002/187/JHA) and 2008 (Council Decision 2009/426/JHA of 16 December, 2008, on the strengthening of Eurojust and amending Decision 2002/187/JHA).

Legal bases for JITs between the EU Member States (MS) and Third States

There is a possibility to establish joint investigation teams with and in between countries outside of the EU as well, since there is a legal basis for the creation of such a JIT existing.

The legal basis can take the following forms:

• International legal instrument,

• Bilateral agreement,

• Multilateral agreement,

• National legislation (e.g., article(s) in the code of criminal procedure).

The following international legal instruments have already been adopted and might provide an appropriate legal basis for a JIT established between an EU MS and a third state:

• UN Convention against Transnational Organized Crime, 15 November, 2000 (Article 19)

• The second additional protocol to the Council of Europe Convention on Mutual Assistance in Criminal Matters of 20 April, 1959, 8 November, 2001 (Article 20)

• The Convention on mutual assistance and cooperation between customs administrations (Naples II Convention), 18 December, 1997 (Article 24)

• Agreement on Mutual Legal Assistance between the European Union and the United States of America; (Article 5 and national implementation thereof)

• UN Convention against Corruption 31 October, 2003 (Article 49) (Long, 2009).

• Police Cooperation Convention for South East Europe (PCC SEE), 5 May, 2006 (Article 27)

JIT as a possible tool for countries of the Southeast European countries

a) Police and judicial cooperation in Southeast of Europe

In the Southeast region of Europe the police and judicial cooperation has improved in many areas, such as the information pooling, exchange and collection of cross-border intelligence (ILECU's projects), risk and threats analysis (OCTA-SEE), legislative harmonization (SELEC, PCC-SEE, UN legislative framework), cross-border operations (SECI Centre, PCC-SEE Secretariat, SEEPAG, WB Prosecutors Network) and in policing (SEPCA, OSCE). SECI Center has been recognized by the European Commission "as a facilitator of the exchange of information on trans-border crimes between the law enforcement agencies in the region as well as a coordinator of joint law enforcement regional operations".[5] Nevertheless, the lack of coordination at the level of projects implementation needs to be addressed.[6]

Many regional activities and structures have been developed, these include among others: Southeast European Cooperative Initiative, Regional Centre for Combating Trans-border Crime (SECI Centre)/Southeast European Law Enforcement Centre (SELEC); Police Cooperation Convention for South East Europe (PCC SEE); Southeast Europe Police Chiefs Association (SEPCA); Southeast European Prosecutors' Advisory Group (SEEPAG); Regional Anti-Corruption Initiative (RAI); Migration, Asylum, Refugees Regional Initiative (MARRI); Centre for Security Cooperation (RACVIAC) ; Border Security Programme (DCAF).

5 2010 EU-Western Balkans Ministerial Forum on Justice and Home Affairs

6 Southeast European Cooperation Process (SECP): Regional Strategic Document and its Action Plan endorsed by the SEECP Ministers of Justice and Interior, in March 2011, p. 2.

b) SECI Center - SELEC

More than a decade ago 13 Southeast European countries (including both the EU and non EU MSs) established a special regional organization called SECI Center[7] to be able to reach a more effective tackle against the cross-border criminality in that region by bringing together and supporting custom and police authorities. On 7 October, 2011, the SECI Center became SELEC[8] "inheriting" its successful information sharing channels, joint planning platforms, operational and strategic capabilities, joint investigations and analysis capacity.

The main goal of the Center is to provide support for Member States and enhance coordination in preventing and combating crime, including serious and organized crime with trans-border dimension. SELEC has the tasks to support investigations and crime prevention activity in the Member States and to facilitate the exchange of information and criminal intelligence and requests for operational assistance.[9]

SELEC conducts its operational activities within the framework of eight Task Forces addressing issues of drugs and human beings trafficking, stolen vehicles, terrorism, financial and computer crime, smuggling and customs fraud, container security and environmental and nature related crimes. These Task Forces have the capacity to identify "region-specific" operational, legislative and structural difficulties in cooperation against crime, and by bringing together national experts professional network and trust among investigators can be created, which could be a good starting point for joint investigation teams. "Thus, this regional initiative, including states that are not (yet) members of the EU, could develop into an example of a starting point for JITs across the Eastern and Southern outside borders of the EU."[10]

c) Police Cooperation Convention for Southeast Europe (PCC SEE) - PCC SEE Secretariat

In Vienna on 5 May, 2006, the Ministers of Interior from Albania, Bosnia and Herzegovina, Macedonia, Moldova, Montenegro, Romania and Serbia, signed the Police Cooperation Convention for Southeast Europe. After ratification by all seven signatory states, the Convention entered into force on 10 October, 2007.[11] The PCC SEE Secretariat started its operation in Ljubljana on 1 September, 2008, and provides the institutional framework for bilateral or SEE-wide multilateral cross-border police cooperation, bringing them more in line with European practices (guidelines, manuals, and best practices). The Secretariat is the focal point of all PCC SEE related activities.

The PCC SEE provides the possibility to use modern forms of cooperation for the Contracting Parties, such as joint threat analysis, liaison officers, hot pursuit, witness protection, cross-border surveillance, controlled delivery, undercover investigations, transmission and comparison of DNA profiles and other identification material, technical measures for facilitating trans border cooperation, border search operations, mixed analysis working groups, joint investigation teams, mixed patrols along the state border and cooperation in common centers.[12]

In Article 27 of PCC SEE (Joint investigation teams) the convention repeats almost word-by-word most of the provisions concerning JITs of the EU Framework Decision and MLA Convention.[13]

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7 Southeast European Cooperation Initiative was established in 1999 with the headquarters in Bucharest.

8 Southeast European Law Enforcement Center with 13 member states: the Republic of Albania, Bosnia and Herzegovina, the Republic of Bulgaria, the Republic of Croatia, the Former Yugoslav Republic of Macedonia, the Hellenic Republic, Hungary, the Republic of Moldova, Montenegro, Romania, the Republic of Serbia, the Republic of Slovenia and the Republic of Turkey.

9 Articles 2 and 3 of the Convention of the Southeast European Law Enforcement Center http://www.secicenter.org/p521/Convention+of+the+Southeast+European+Law+Enforcement+Center+(SELEC)

10 Prof. Dr. Edwin Bakker Mr. Joseph Powderly LL.M: .Joint Investigation Teams: Added Value, Opportunities and Obstacles in the Struggle against Terrorism Expert Meeting Paper (Expert Meeting JITs 21 February, 2011) ICCT International Center for Counter – Terrorism, The Hague, p. 5-6 http://www.icct.nl/download/file/ICCT-Bakker-EM-Paper-Joint-Investigation-Teams.pdf

11 In addition, Bulgaria acceded to the Convention in 2008, Austria in 2010 and Hungary in 2012. As of 14 December, 2012, Slovenia officially ratified the PCC SEE Convention and joined the participating countries in the region in order to further strengthen the regional community and cooperation in SEE security.

12 Official website of PCC SEE Secretariat http://www.pccseesecretariat.si/index.php?item=9&page=static

13 In the PCC SEE the question of criminal liability of operating officers is missing, since there is a general clause in Article 23 for civilian liability of operating officers.

It means that the basic requirements and conditions for setting up a JIT, the rights and tasks of different members (team leaders and seconded members, participants), even the used terminology (seconded members), the possibilities of using the gained information and the possible participation of members from third countries or international organizations (which both are very sensitive questions), etc., therefore the most relevant characteristic features of the JIT correspond to the provisions determining the circumstances of establishing JITs between the EU MSs.

In February 2012, the PCC SEE Secretariat made a Roadmap for the implementation of PCC SEE[14] (as one of the PCC SEE implementation tools) by determining some achievements and short term activities that Contracting Parties have to execute in order to be able to reach the Specific Goal No. 22 (Develop JITs) worded by the Roadmap.

In order to support Contracting Parties to establish JITs, the PCC SEE Secretariat published the Police Cooperation Convention Manual in January 2012, which is a set of instructions and guidelines for all law enforcement officers of the authorities, which in accordance with the national law of the Contracting Parties have the necessary competence to apply the provisions of the PCC SEE. This Manual - regarding the provisions of JIT – is a full copy of the Eurojust/Europol document "Joint Investigation Teams Manual", published on 14 October, 2011, The Hague.[15]

Under the aegis of PCC SEE Secretariat there is an ongoing project on JITs[16] with the main strategic goals of establishing and developing JIT activities in Southeast Europe (SEE), and to advance and intensify the cooperation between the EU MSs and the countries in SEE by encouraging practitioners to use this method.

d) Regional Strategic Document (RSD) on Justice and Home Affairs 2011-2013 and Action Plan for the Implementation of the Regional Strategic Document 2011-2013[17]

The RSD, adopted by the Regional Cooperation Council[18] in its Section B (Main regional priorities) under article B.1.7. (Fighting trans-border organized crime) emphasizes the importance of JITs: "Among the tools to address regionally organized crime, terrorism and other forms of serious criminality based on the implementation of the existing legal framework and organizational network are: joint investigation teams, intelligence exchange, information share, bilateral - multilateral meetings, experts meetings, conferences, and workshops."

In its Section C (Harmonizing regional activities, police and law enforcement cooperation) in article C.1.9., the RSD also emphasizes the outstanding role of JITs: "Regional solutions and tools for harmonizing police and law enforcement cooperation are: a) Full implementation of the SEE-PCC of the signed bilateral and multilateral agreements in the field of crime counteraction, and full use of the modern forms and methods of cooperation provided (i.e., cross-border surveillance, hot pursuit, controlled deliveries, joint investigation teams enhanced and regional harmonized cooperation with the ILECU project;…."

14 http://www.pccseesecretariat.si/index.php?page=documentspcc&item=37

15 With the support of the President of EUROJUST and the Director EUROPOL the new Eurojust/Europol document "Joint Investigation Teams Manual", published on 14 October, 2011, The Hague, shall be used by the Contracting Parties. The procedures described below are also applicable for the Contracting Parties to the Police Cooperation Convention for Southeast Europe, being non-EU Members States, and laid down in Article 27 of the said convention. In this regard the term "Member State" is interchangeable with the term "Contracting Party".

16 The project has been awarded to the secretariat with a grant (reference JLS/2009/JPEN/OG/0729) by the European Commission. The project will contribute to a more efficient fight against organised crime and other forms of cross-border crime, and it is supported by Europol and Eurojust.

17 Southeast European Cooperation Process (SECP): Regional Strategic Document and its Action Plan endorsed by the SEECP Ministers of Justice and Interior, in March 2011

18 The Regional Cooperation Council (RCC) was officially launched at the meeting of the Ministers of Foreign Affairs of the South-East European Cooperation Process (SEECP) in Sofia, on 27 February, 2008, as the successor of the Stability Pact for South Eastern Europe. Through a regionally owned and led framework, the RCC focuses on promotion and enhancement of regional cooperation in South East Europe (SEE) and supports European and Euro-Atlantic integration of the aspiring countries.

Advantages and possible difficulties of using JITs

Basic characteristics of JIT in a nutshell

A JIT is an investigation team set up on the basis of an agreement between two or more Member States (MS) and/or other parties, for a specific purpose and limited duration - which may be extended by mutual consent - to carry out criminal investigations in one or more of the MSs setting up the team. The composition of the team shall be set out in the agreement. Exchange of information can be immediate. JIT members can be present at house searches, interviews, etc., in all jurisdictions covered, helping to overcome language barriers.

There are two main requirements of setting up a JIT such as:

- A MS's investigations into criminal offences require difficult and demanding investigations having links with other MSs;
- A number of MSs are conducting investigations into criminal offences in which the circumstances of the case necessitate coordinated, concerted action in the MSs involved.

Advantages of using a JIT

The general benefits of a JIT compared to traditional forms of international law enforcement and judicial co-operation, such as "mirror" or "parallel" investigations and letters of request, are briefly listed below:

- Information can be shared directly between the members of the JIT without official/formal requests; therefore, all members of the JIT have the same newest "actual" information.
- Investigative measures can be requested directly between the members of the JIT, dispensing with the need for rogatory letters (this applies also to requests for coercive measures).
- The appointed team leader - who is responsible for the coordination - means guarantee for minimizing the risk of duplication in the procedure, since she/he has overall knowledge about all the different investigative actions taken in the participating states.
- Although the activity of a JIT produces the results for the judiciary (prosecution and litigation) procedures, its success is based mostly on the level and quality of police cooperation. This brings new "colours" into the traditional police working methods, since besides the real investigative work some other additional activities should be done as well, such as: arranging accommodation for foreigner police officers, conducting working meetings in foreign language (using the official language of the JIT), explaining the rule of law and procedural rules of the hosting country to the seconded members in foreign language, etc. These things would seem to be encumbrance for police staff at the beginning but become very profitable after all.
- JIT members can be present at house searches, interviews, etc., in all jurisdictions covered, helping to overcome language barriers in interviews, etc.
- Within a JIT there is a possibility to co-ordinate efforts on the spot, and for informal exchange of specialised knowledge.
- Since the seconded members of the JIT can be present at collecting evidence as well, this means extra guarantee for meeting all the requirements established by principal international (human rights) standards during gathering information and evidence.
- JIT gives the opportunity to build and promote mutual trust between practitioners from different jurisdictions and work environments.
- A JIT provides the best platform to determine the optimal investigation and prosecution strategies.
- By the involvement of Europol and Eurojust, there is great possibility to get direct professional support and assistance (it means technical and professional background for participating countries).
- In that case, if there is a necessity to request a mutual legal assistance from a third country (which does not participate in the JIT), Eurojust - as a participant of the JIT – can facilitate this procedure.
- Participating countries have the possibility to apply for available EU, Eurojust or Europol funding.

• Participation in a JIT improves and raises awareness of the management and delivery of international investigations.

• Possibility for reducing costs and damages by better coordination.

• All the participating countries have their own special professional networks and know-how that can be used/exploited during the activities of the JIT.

• The execution of the investigation can be faster, cases can be elaborated and closed faster, and there is a better chance to reach judgments at an earlier stage.

• In an early stage of investigations there is a chance to divide the work between the countries and to avoid useless double investigations.

• A JIT can be a base for the future to build up a cross border professional investigational network (including experts, institutions, authorities, etc.)

• All the participating countries have the chance to improve the human qualification (sharing experiences, improving language capabilities, European approach) in the fields of combating crime - better efficiency of manpower.

• By using a JIT there is a chance to give the criminals, criminal groups a more concentrated, coordinated and more powerful (sometimes even more unexpected) blow (which can have a stronger retentive effect).

• As an indirect effect the participating law enforcement authorities – after a successful investigation - can receive better social welcome (good PR!) which can lead to mutual trust with the other actors of the society.

Possible questions and difficulties concerning JITs

It is obvious that the instrument of JIT can be prosperous in case of crimes with powerful cross border international dimension. Apart from the general problems rear their heads during all kinds of international cooperation of law enforcement authorities – such as limited human and financial sources, differences in languages, cultures, investigative strategies and techniques – there are some typical "JIT specific" difficulties that may arise during the establishment and operation of a JIT.

Possible questions during the establishment and operation of a JIT:

• Admissibility of evidence gathered during the JIT activities can also generate some questions in criminal procedure. "When different judicial systems cooperate, advance agreement on requirements for applying specific investigative measures is essential, as is the need to have a clear, mutual understanding of procedural questions. The admissibility of a telephone intercept or material gained as a result of a search warrant, for example, may be subject to different evidential rules in Member States. Eurojust's involvement in providing expert advice on these aspects is crucial, including, on occasion, advice that a JIT is not appropriate. If the national legal requirements for specific types of investigations are not consistent with envisaged JIT activities, the possibility of parallel investigations or traditional MLA procedures needs to be considered".[19]

• The problem of applicable law in the framework of a JIT. Question of the possibilities of using weapons and other coercive tools/measures. Do the certain actors act upon the law of their home country, or for the whole team the same law is applicable depending on the place of the activity of the JIT? The activities of all the actors (members, seconded members and participants)[20] of the JIT are determined always by the law of that country in which the team operates (principle of *locus regit actum*).

• Another "neuralgic" question is the disclosure of sensitive case-related information. "Because prompt sharing of information is a major advantage of a JIT, its members must be aware of the outset about the extent and the timing of disclosure of sensitive material to defence counsel and courts under national legislation in the involved Member States. Expert knowledge of national disclosure

19 Annual Report of Eurojust 2011 p. 39. http://www.eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202011/Annual-Report-2011-EN.pdf

20 Seconded members: members of the joint investigation team from Member States other than the Member State in which the team operates are referred to as being 'seconded' to the team.

To be able to be member of a JIT is a possibility only for competent authorities of states of the European Union. Third parties – from inside the EU or from outside the EU – may participate in the work of the JIT. Participants may come not only from agencies, and organizations of the EU such as Europol, Eurojust and OLAF, but also as representatives of the FBI.

rules is crucial to avoid a situation where authorities of one Member State are obliged to disclose sensitive information that the authorities of another Member State did not intend to disclose until a later stage. This expert knowledge can have an impact on court proceedings, and unexpected disclosure could undermine ongoing wider investigations in one Member State, even exposing sources of information to risk of physical injury or death."[21]

• "Another disclosure consideration is that domestic authorities may hold important information but not be part of the JIT. In these cases, clear agreements must be reached as to the subsequent treatment of any information disclosed in the context of a cross-border JIT investigation. Only when an understanding of differing domestic rules on disclosure is established can national authorities be encouraged to exchange sensitive information. Eurojust has provided a useful service to Member States by raising awareness of the implications of different disclosure rules, by advising on careful drafting of JIT documentation and consequently by helping to avoid unexpected disclosure and the possible endangering of those who have provided information against organised crime groups."[22]

• Problem of the legal control, legal accountability. Which authorities (and how do they) have the right /role to control the legitimacy of the whole procedure?

Possible difficulties during the establishment and operation of a JIT:

• When a case is recognized to be the possible target /subject of a JIT, the competent authorities of the concerned states must agree in all the details of the JIT. Although the Model Agreement adopted by the Council[23] gives support for the states in wording the agreement for a specific JIT, adopting a bilateral (or multilateral) agreement properly and fast still means a problem due to the different political motivations and uncertainty originated from the differences (sometimes incompatibilities) of the rule of laws of different states.

• Modification of the agreement during the operational phase of the JIT – in case if new members (states or individuals) join the JIT or there is a change in the operational territory of the JIT - can also cause some difficulties. Therefore, it is necessary to find the appropriate contact point as soon as possible to make the essential formal steps in order to avoid waste of time.

• Negative attitude of states because of giving up certain elements of state sovereignty.

• The phenomenon of traditional mistrust against new things. JIT is a new working-method which differs from the traditional instruments, therefore repugnance can be experienced in many cases.

• The lack of basic trust in respect of each others' working-methods, legal structures, procedural guarantees and reliabilities.

• Lack of knowledge about the JIT as an instrument and about the legal and institutional structures and possibilities of the partner countries. As a criticism we can speak about the lack of proper information at both national and international level. There is not proper and effective internal and external "PR" of using the instrument of JIT. Where can the experiences (success or failures) of countries which have already used this method be found? Where can the analysis and evaluations of best practices be found? As experiences show in many countries local police forces have not even heard about this possible method of investigation.[24]

• Problems coming from the language barriers. Members of the JIT use a common working language, and in case of not having proper level of language knowledge communication cannot be free enough (misunderstandings should be avoided). We have to emphasize the importance of language training courses both at national and international level.

21 Annual Report of Eurojust 2011, p. 39.

22 Annual Report of Eurojust 2011, p. 40.

23 The Council of the European Union adopted a first Recommendation on a Model Agreement for setting up a Joint Investigation Team on 8 May, 2003, and a second one on 26 February, 2010, which is now being used. Council Recommendation of 8 May, 2003, on a model agreement for setting up a joint investigation team (OJC 121 of 23 May, 2003, p.1). Council Resolution of 26 February, 2010, on a Model Agreement for setting up a Joint Investigation Team (JIT) (OJC 70 of 19 March, 2010).

24 Here we have to emphasize the outstanding role of Eurojust and Europol. Both parties may give the previously gained and worked up experience in JITs over to the MSs, and can provide (especially the Europol through its Analysis Work Files) analytical support. They may provide feed-back from other JITs. In the framework of a common project Europol and Eurojust try to promote the use of JITs with the following instruments: a specific webpage was made to JITs (www.eurojust.europa.eu, www.europol.europa.eu), and a Manual was produced to guide practitioners. Besides this both organizations host and co-organize the meetings of the National Experts on JITs. A Network of National Experts on JITs was established in July 2005. The experts assist practitioners in the MSs with setting up JITs. Europol and Eurojust provide support to the Network and the experts in their work.

• Different rules concerning compensational methods of damages. Problems may arise from the differences in the national ruling of the civil and criminal liability regarding officials.

• Financial problems: lack of the necessary national financial sources (costs of travelling and translation, accommodation, etc.). Though there is a possibility for financing JITs offered by the EU Commission-Eurojust-Europol[25], some state experiences show that the technical execution of the application is not very simple.[26]

• It occurs less and less often, but sometimes the incompatibility of technical devices (used by law enforcement authorities) might be a problem during the joint investigation.

CONCLUSIONS

Experiences show that all the participants of closed JITs are satisfied with the outcome of the operation, and they consider JITs to be considerably beneficial and agree that this tool contributes to an effective tackle against cross-border organized crime at European level.

Though the number of JITs registered by Eurojust has been increasing slowly by years, this instrument is still not accepted, appreciated and exploited as much as it should/could be.

What can be the reason of the experimental fact that JITs are not used very often in Europe?

I have no intention to give detailed answer but just want to focus on a few – out of the many – factors that may contribute to the hesitating (or sometimes negative) attitude of the states.

In this paper above I listed some of the possible difficulties and questions related to JITs that may lead countries turn their backs on this modern tool.

Besides the indispensable political will and crucial financial sources, and the necessity of proper training/education sharing knowledge and best practices (we should not forget about the role of proper assessment and analyzing mechanism), I would highlight the necessity of a clear legal base for setting up JITs.

The existing legal documents in the EU (MLA Convention and the Framework Decision) concerning the instrument of JIT do not include provisions with the fullest detail that would be preferable and acceptable by many states. The form of framework decision means that working out all the details of this rule belongs to the competency and responsibility of the national legislations, and maybe this can lead to differences (even "incompatibilities") in the national "interpretation" of JITs.

Regarding the legislation in SEE, legal base for police cooperation and for JITs with and within the SEE region exists; therefore, it is necessary to enhance operational capabilities and transfer of know-how. "The PCC SEE shall be seen as a window of opportunity."[27] The problems of inefficient operational cooperation can be addressed as follows: unfortunately the awareness in Contracting Parties is still very low, they should invest more efforts to increase their operational and functional capabilities, the discontinuity, overlapping, and inconsistency in programs and projects in Southeastern Europe should be reduced by better coordination.

And last, but not least, I would like to emphasize the importance of mutual trust. Besides the operational cooperation, mutual trust - in each other's legal system and law enforcement capabilities - is another key factor for the successful cooperation.

As Robertson would say: "Where cooperation exists, there is trust and where there is trust, there is cooperation."[28]

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25 Eurojust received EU Commission grant to support Joint Investigation Teams. Based on its successful application under the European Commission's Specific Programme "Prevention of and Fight against Crime 2009", Eurojust was awarded a new grant of € 2 159 160 for an action entitled "Supporting Greater Usage of Joint Investigation Teams". The awarded funds, which represent 95% of the total amount available for this project, will be used to provide financial and logistical support to JITs through the second Eurojust JIT Funding Project. This new project, which is the continuation of the pilot JIT Funding Project, will end in September 2013.

26 Disadvantage of using such financial support originated from the European Union is the limit of its availability, which means that such kind of money can be used only for such aims that have been mentioned concretely before in the application form as application spheres by the candidate member states. But knowing the flexible nature of the JITs, this strict rule might cause problems during the practical execution.

27 Emanuel Banutai: Police Cooperation Convention for Southeast Europe: Lessons learned 2011, p. 80. http://www.academia.edu/1590389/Police_cooperation_convention_for_Southeast_Europe_lessons_learned

28 Robertson, K.G. (1994). Practical Police Cooperation in Europe: The Intelligence Dimension. In M. Anderson, & M. Den Boer (Eds.), Policing Across National Boundaries (pp. 106-117). London: Pinter Publishers, p. 112.

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NEW DRUGS - THREATS FOR EUROPE[1]

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Abstract: This study provides basic analyses in a specific area of personal and social security from aspect of drugs abuses. Problem is widely known and presented as a specific antihuman crime with high profit. Effect of drugs use and abuse, is usually analysed in different terms of solving, especially in criminology, and as the problem of detecting and documenting crime for process of evidence. Study provides orientation on aspect of regional, global and specific European threats for personal health and security. Drugs trouble is known as social problem, with forensic and criminalistics ground for investigation and punishment of this crime. Authors try to characterize the content and scope of evidence in connection with crime committed in new drugs abuses. The development of stream new drugs to Europe, partly as economical crime, is analysed. Any actual pieces of information for the study are based on information from the signalizing drug system and new information from cooperated local experts. Authors analyse the possibilities of evidence this new drugs, as a new part of criminalistics – forensic knowledge, especially for their high danger. There are abnormally dangerous because of their unknown effects on human health. Conventional drugs are less hazardous than the unproven new products, because the actions of the classical ones on human health and effects associated with their use are more or less known. This is typical for crime connected with high commercial winning and interest regardless of the consequences on human health.

Keywords: drugs, social security, health security, evidence, types of new drugs, parameters of new drugs.

INTRODUCTION

There are many different influences on our knowledge of the safety of individuals, groups, companies or communities. The problem of drug use and abuse is relatively well known and described, as well as scientifically examined. It has so multilateral effects. Most often it is associated with the attacks on human body and human health, their mental health, social health, but there are also economic, military, security, and political consequences. In examining the problem we prefer, in particular, because there are more factors of exposure to new trends in the field of trade and drug abuse.

The study concentrates on the analysis of the drug situation, focusing on the "new drugs" within the territory of Europe - especially central Europe. Based on the knowledge of early warning, monitoring system warns of the negative development of new drugs mainly in the Slovak Republic. Although Prague was once the centre of a typical influx of new drug innovation in Central Europe, it is now their sales space and the management of trade in concentrates out from Prague.

Historical - analytical observation can help us to find parallels, concepts and solutions. This study is not and cannot be forecast or direct search for solutions. It is an attempt to analyse the changes in this area that we register in the current criminal and criminalistic/forensic drug control (Metenko, Hejda 2012)[2].

1 This study is the result of the project implementation: Centrum excelentnosti bezpečnostného výskumu kód ITMS: 26240120034 supported by the Research & Development Operational Programme funded by the ERDF.
2 METEŇKO, J., HEJDA, J., New and old drugs - threats for Europe. Kap. 45, In: MAJER, M., ONDREJCSÁK, R., TARASOVIČ, V., at all. Panorama of global security enviroment 2012, Centre for European and North Atlantic Affairs, Bratislava 2012, ISBN 978-80-971124-1-7, p. 617-630

BACKGROUND ANALYSYS

The history of using psychedelic substances for different objectives is as old as mankind itself. The anthropologists, who study various original cultures, describe using the substances for healing, fortune telling, contacting "supernatural beings" in shamanist rituals and the like. In general the substances bring about intensive feelings, they often contain sequences of the death and the rebirth of ego (one's self), and they evoke experiences of the unity with the universe – that is why they entered into contacts with the different inhabitant populations of the world.

Evidence about shamanism, shamanist rituals, ranks among the oldest preserved evidence of using psychedelic substances. In shamanist rituals drugs were used very often, but for evoking changed states of consciousness also preparations not containing drugs were at their disposal. The perception of our world was based on an immediate experience, intuition and symbols, not on a rational and logical basis. According to Hejda (Krajnik, Hejda, 2003, 223)[3], the so-called "sacred plants" provided a quick transfer to the changed state of consciousness and on the basis of an immediate experience they enabled the shaman to understand the states of birth and death, the relation to the universe and to the creation. The shamans called these plants sacred because they enabled them to break through the frontiers of one's self and provided them with the possibility of having a look into cognition extending beyond the framework of a simple sensual perception. At those times it was not possible to use these sacred plants for recreational purposes or abuse them for evoking other states of consciousness, except for shamanist rituals. These were plants "designated" exactly for these purposes, for shamanist healing. However, shamans had to normally "function" in both realities; they continually "made a switch-over" from one reality to the other, from the earthly one to the transcendental. Thus shamans went to the transcendental world to get knowledge which they mediated to their earthly companions. When shamans healed somebody, they took the medicine together with the one who was healed. Thus they got to know the processes that the patient could have experienced and they were able to influence him by visualization. If the drugs were used in spiritual traditions, they were medicine. They were not misused, but used under control for suppressing certain symptoms and if people believed in them, the drugs were really able to heal.

Using psychedelic drugs was described in the history of traditional Chinese medicine as early as 3,500 years ago; and in ancient Indian literature there is a description of a sacred plant by means of which a drink called "soma" was prepared. After the believers had taken this "divine drink", they entered into ecstatic states, when they were in heaven with one leg and on earth with the other. (Krajnik, Hejda, 2003, 122)[4]

Positive aspects of using drugs perceived as an ordinary part of life in a society with adequate natural internal control has its importance even today. Historically inaccurate and inappropriate use of drugs should have their relationship to disruption of natural control of drug use. Drugs have always been regarded principally as a means of treatment as evidenced by standardized definitions.

The term drug originally denominated a substance of plant or animal origin used for the preparation of medicine or the medicine itself. Today this term is thus understood only in certain professional circles (e.g., in pharmacology). According to the definition of the World Health Organization from 1969, a drug is any substance which – when having entered into a living organism – can change one or more of its functions." In expert terminology since 1971, drugs have been denominated as "narcotic and psychotropic (psychoactive) substances (NPS)". The drug – such as imagined by most people – can be defined as any narcotic substance, either natural or synthetic, used for other but medical purposes, and mainly as a substance abused by drug addicts. If we want to make this definition valid, the substance must meet two basic presumptions. It must have a psychotropic effect (i.e., it must have the possibility of having influence on the experiencing of our reality) and it must cause dependence.

In broader context it is, however, possible to denominate a drug any "substance or activity (e.g., gambling, fixation on subjects) which is able to change the experiencing and perceiving of our in-

3 Krajník, V., Hejda, J. [a i.], 2003 *Drogy v živote spoločnosti*. 1. vyd. - Bratislava: Akadémia PZ „. 223 s. ISBN 80-8054-273-2.
4 Krajník, V., Hejda, J. [a i.], 2003 *Drogy v živote spoločnosti*. 1. vyd. - Bratislava: Akadémia PZ „. 223 s. ISBN 80-8054-273-2. S. 122 a nasl.

ner or outer world, causing psychic or physical dependence." (Krajnik, Hejda, 2003) [5]. But this is extremely wide definition.

The drugs themselves do not imply greater risk than other tools or ways of human activity. Wrong and inappropriate use of drugs in history had its source in the disruption of natural social relations. Unlike the modern society, their abuse leads to damage of such relationships. Overall, our connection with problem of interest is drug abuse.

Detrimental usage means mainly a usage damaging somatic or psychic health. According to the international classification of diseases, it is "a pattern of usage that damages health." The damage can be physical, e.g., by transferring jaundice when applying the substance into veins, or psychic, e.g., when suffering from a psychic disorder (persecution mania and the like).

For drugs now clearly labelled and abused medications, alcohol and tobacco. To support our claims about the interrelation of social, political, and economic effects of the drug problem, we can give some historical aspects.

In the years 1839 – 1842 the first opium war broke out in China. The British gained control of the Chinese opium market, the market proclaimed unlawful by the Chinese. In 1856 the second opium war broke out and the British in co-operation with the French expanded their influence on the distribution of opium in China. This situation can be taken as model situation for the documentation of almost all legislative forms of struggle against drugs – from mass media promotion by means of pamphlets to exemplary punishments – executions of the whole families of opium smokers.

One of the prohibitionist attempts in history was the ban on smoking opium in 27 states of the U.S.A. in 1875, but this did not bring the required positive results and opium consumption, however, increased seven times approximately. The U.S.A. did not give up similar prohibitionist attempts and in 1914 the so-called Harrison Narcotic Act was adopted; it should prevent spreading all kinds of narcotic substances apart from medical spheres.

The year 1859 was a turning point as to the relation to the coca plant; at that time pharmacist Albert Nieman succeeded in chemically isolating the alkaloid cocaine. Later on psychotherapist Sigmund Freud experimented with it in a very intensive way. Before that, however, an active part of coca – cocaine – had already been found by the pharmacist F. Gaedcke in 1855. In medicine in the area of the Andes coca was used very often, it was found efficient when treating mountain disease, toothache, diarrhoea, or rheumatism. Till the year 1903 cocaine was added into the famous drink – Coca-Cola. According to scientists from Harvard University, U.S.A., chewing 100 grams of coca leaves covers the organism's daily need of calcium, iron, phosphorus and vitamins of the series A, C, and B.

The period of World War II and the times after the war are marked by a great interest in psychotropic substances. For example, in the concentration camp of Dachau Nazis experimented with the effects of mescaline on prisoners, in the U.S.A. after the war the CIA was trying to find "the drug of truth". CIA agents, for example, studied and tested the effects of LSD (found by Albert Hofman in 1938). The manipulation with human mind, conviction of certain persons and the possibility of having control over them was always an important topic for all secret services worldwide. World War II also brought about an enormous increase in the consumption of amphetamines. British pilots, American soldiers and even Japanese kamikaze were given huge amounts of amphetamines to come to terms with mentally and physically demanding fighting tasks (Metenko, Hejda 2012)[6].

After the war had broken out, almost all important transit drug routes were interrupted, the "drug connection" between Europe and Asia, Europe and Latin America was cut for six years. A strict censorship was imposed, parcels sent by post were thoroughly checked, there was hardly any chance to smuggle even the smallest amount of drug. It was thought to be a neither reliable means of struggle against abusing drugs, because drug addicts had neither access to drugs nor financial means. Drug trafficking was too risky and was not worthwhile, purchasing power was very small. The influx of drugs began to stagnate.

5 Krajník, V., Hejda, J. [a i.], 2003 *Drogy v živote spoločnosti*. 1. vyd. - Bratislava: Akadémia PZ ,. 223 s. ISBN 80-8054-273-2.
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In the 60's and 70's spreading of drugs was accompanied by such phenomena as the rise of organised crime and related things. After the war drugs became an ideal trade commodity and the demand for them continually increased. This was also connected with the rise in prices and the appearance of organised groups specialising in "business" with this commodity. The moving power activating the illegal drug trade as low costs for getting the substances and enormous profits, even though connected with a certain risk. The risk is reflected in the final price of the drug, thus for drug pushers it is balanced by their efforts. Stronger drugs began to be used and the number of intravenous users quickly increased.

The second half of the 20th century is marked by a number of crisis phenomena, such as great social contradictions, individualism, break-up of families, consumer way of life, cold war and the like. The world as a whole, and mainly the young people experienced disillusionment of democracy as well as communism. As a response to this state there appeared the hippy movement or the movement of "flower kids", whose motto was "love, brotherhood, good will". The hippies experimented with drugs and using drugs became stylish. Drugs became a tool of revolt and unification. Famous people used them and these people became a model for the youth.

Approximately in the 70s there appeared other movements, which – in comparison with the hippies – were characterised by greater aggression. One of them was the punk movement, which came into being as a reaction to the feeling of alienation and disappointment by the society. (Hejda 2000, 143)[7]

These historical circumstances led to the drug policy to the implementation of preventive and repressive effects. The concept of prevention, the content of which is the preferred long-term drug policy as the only rational solution has more options.

Prevention - In medical terminology prevention means the measures taken in advance, efficient protection and preserving man's health. Preventive care includes a set of medical and social measures that make it possible to prevent health damage, appearance of infections, diseases, health complications and chronic consequences of diseases (Svatoš, 2010, 174).[8]

Prevention does not mean preventive programmes only (Meteňková, Meteňko, 2011, 151).[9] "Drug prevention is to be understood as a broad complex of various activities the aim of which is to restrict using habitual substances" (Svatoš, 2009, 118).[10]

Anti-drug policy is a complex of anti-drug activities the aim of which is to regulate the consumption of mainly illegal drugs. Its characteristic feature is that it oscillates between two extreme poles, which are the absolute prohibition of drug producers, distributors and consumers, and the absolute legalization of drug production, sales and consumption.

As part of preventive and repressive policies in addition to the drugs played very significant point source and the auxiliary material for the production of drugs, known as Precursor. Precursor means "initial substance out of which the final product arises after a chemical change", e.g. ephedrine is a precursor for the production of methamphetamine.

Typology of drugs is much known; also we recommended classical Criminology knowledge, or health bibliography for recognizing. For criminal, criminalistic and social aspect we prefer the classification of drugs according to the effects on organism - opioids; cannabinoids; sedatives or hypnotics; other stimulants; hallucinogens; organic solvents; classical and other psychoactive substances and their combinations (Černik, Lisoň, 1997)[11], (Horváthová, Ondicová, 2006, 190)[12].

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10 Svatoš, R. 2009 *Základy kriminologie a prevence kriminality*. Vysoká škola Evropskych a regionálních studií, s.r.o., České Budějovice, vysokoškolská učebnice, , 118 stran, ISBN 978-80-86708-81-2

11 Černík, J., Lisoň, M., 1997 *Drogová kriminalita* : (Úvod do štúdia). - Bratislava: Akadémia PZ - K kriminálnej polície,. ISBN 80-8054-031-4

12 Horváthová, A., Ondicová, M., Sabopál, E., Uhrin, S. 2006, *Kriminológia II : 1. diel.* - 1. vyd. - Bratislava: Akadémia PZ - K kriminológie,. - 190 s. ISBN 80-8054-393-3

The results of the historical analysis presented in the first part of the study relate to the real area of Central Europe. In particular, we can talk about identical issues at least in the Czech Republic and Slovakia. Similar problems have been addressed and solved in different time contexts across Europe, especially in Middle Europe (Metenko, Hejda 2012).[13]

SITUATION ANALYSYS

Therefore, the second part of the study is devoted to the analysis and evaluation of the situation, with emphasis on the territory of the Slovak Republic. Identical trends with specific dispersion trends take place across Europe. Over the last decade, the use of cannabis has developed not only at European but also at the national level. Marijuana (cannabis) has maintained its leading position as the most commonly abused drug in our country (EMCDDA 2004-2010).[14]

The latest trend that is strongly reflected in the Slovak Republic was growing marijuana indoor way citizens of Vietnamese ethnicity. As in neighbouring countries, and for us, these criminals have established the marijuana market in a relatively short period of time. These are organized groups of offenders whose control cells probably do not operate on the territory of the Slovak Republic. The organizers and the executive "producers" who are often detained in the facility, there are other brokers charge subtasks.

Growing marijuana in greenhouses and foil tunnels allow offenders like when growing hydroponics growing season shortened grown plants while avoiding damage, respectively. Destruction of crops due to bad weather or accidental disclosure. In Slovakia, the cases were discovered marijuana growing in the wild, while the content of the active ingredient THC was about 5 -8%. Marijuana grown in wild previously reached significantly lower levels of THC, about 2 - 5%. Offenders placed in this area such as the cultivation of marijuana cannabis grown for industrial use, corn or any other agricultural plants to prevent accidental discovery by a characteristic odour and appearance of plants.

In connection with the use of marijuana or other cannabis products was observed also called poly and multidrug trend use, i.e., combining marijuana with heroin, methamphetamine (pervitin) or cocaine.

Methamphetamine (meth-pervitin) production in Europe is concentrated primarily in the area of Central Europe, ie Czech and Slovak Republics. In the last five years, methamphetamine has become the drug of choice for the second in Slovakia. Increasing demand of narcotics is also confirmed by the continual growth of the number of clients seeking treatment. Slovakia reported methamphetamine as the primary drug for the first application of treatment to 26% of users. Its popularity has grown mainly due to:

- easy accessibility,
- stronger incentive effect than cocaine,
- slightly lower price per dose, respectively. gram compared to cocaine.

Methamphetamine is produced in Slovakia:

- In the small, so-called kitchen with simple laboratory equipment. Although the production of such a laboratory is relatively low, there was more to produce. Quality the final product depended on the precursor used, most often obtained from wild medications, compliance and process technology capabilities cooker,
- In special laboratories with high productivity and quality of prepared drugs.

Its production is mainly used as a precursor for pure ephedrine imported some branches of the Balkan route from Turkey or imported from the Netherlands or Hungary in pill form, or in powder form from Poland.

13 METEŇKO, J., HEJDA, J., New and old drugs - threats for Europe. Kap. 45, In: MAJER, M., ONDREJCSÁK, R., TARASOVIČ, V., at all. Panorama of global security enviroment 2012, Centre for European and North Atlantic Affairs, Bratislava 2012, ISBN 978-80-971124-1-7, p. 617-630

14 EMCDDA výročné správy 2004-2010.

Heroin available on the Slovak market the drug in 2009-10 came from two sources:

- from Afghanistan - was made from opium poppies and smuggled to Europe for one of the branches of the Balkan routes. As has been repeatedly diluted during transport, the average concentration of the drugs available on the street was about 3 -12%.
- of medicines containing morphine. Drugs were obtained by theft from pharmacies or pharmaceutical companies.

In the interests of consumers of heroin can be concluded that users are increasingly oriented towards the use of meth.

The price of cocaine has declined slightly, to continue to use the more solvent-oriented users. Monitoring drug scene, it was found that the centre of the cocaine trade was in Bratislava and western Slovakia. Drop in the price of cocaine and increased interest of methamphetamine users was associated with a decrease in the concentration of cocaine dose. To dilute cocaine was used in addition to creatine and also melanin paracetamol or other medicines, veterinary and human use. Whereas in previous years, the streets accessible cocaine concentration 30% and 2008 - 2010 its concentration decreased to 15 - 20%. Meth users to provide better stimulatory effect at a lower price and a more accessible to users than cocaine.

The Slovakian drug scene of a group of synthetic amphetamine-type drugs in 2009-10 most abused ecstasy. The territory of Slovakia was imported from Hungary, Poland, Austria or the Netherlands. Compared to Europe, the vaccine saturation for the Slovak market is smaller.

The year 2009-10 was the Slovakian drug scene recorded the presence of synthetic substances mephedrone (4 - metylmetkatinon). It is mostly sold via the Internet in powder or crystalline form or as capsules filled with powder. In Slovakia, for example, in 2009, except for two cases of seizures of mephedrone in powder form and seized 1,197 pieces of tablets. Mephedrone sold as tablets on the market can be sold as a form of ecstasy (fake). In the diversion of precursors for illicit drug production continues throughout Slovakia trend from previous years - abuse of medicines containing pseudoephedrine in small "factories" of methamphetamine. Pseudoephedrine is a key and essential part of the production of methamphetamines.

The last two years are recorded at different levels
and the desire for a drug scene type of synthetic analogues.

In addition to classical criminology, criminal and forensic assessment of the current status is very important qualitative trend analysis carried out in the field of drug policy different organizations at different levels of complexity. = Warning systems in this area, both managed by the European Agency formally, both components of cooperating national security, health care and economic. Details can study the example in monograph from co-author of the study. (Hejda, Krajnik, Drugs – The Social Phenomenon of Today, s.143)[15]

The motto on the European drug scene is the phrase "synthetic analogue" (Bolf, 2012, p.?)[16] What is actually happening?

Substitutions may be interesting and useful. For example, the generic medicine. Unfortunately, the for drug scene in Europe with substitutions to the effect unclear. In the last 2 years of sales captured "like substances and precursor drugs". Under obscure brand names haunt detectives, forensic experts, their institutions, but also doctors and economists. (Metenko, Hejda 2012)[17].? And what users?

In particular a response to user requirements presented new trends in species composition changes are explored in the third part of the study.

15 HEJDA, J., KRAJNÍK, V. A KOL.: *Drugs – The Social Phenomenon of Today*. Policejní akademie ČR, 1. vydání. Praha 2004. ISBN 80-7251-156-4. str. 225

16 Bolf, 2012, s.6, prednáška na seminári „*Praktická kriminalistika*. Banská Bystrica. 04.2012.

17 METEŇKO, J., HEJDA, J., New and old drugs - threats for Europe. Kap. 45, In: MAJER, M., ONDREJCSÁK, R., TARASOVIČ, V., at all. Panorama of global security enviroment 2012, Centre for European and North Atlantic Affairs, Bratislava 2012, ISBN 978-80-971124-1-7, p. 617-630

FINALLY - SAME EXAMPLES OF RISK SUBSTITUTION

Given the price relations, and other issues of drug availability leads to innovation in the species composition of the investigational drug territory. Examples of hazards present mainly substitution trends. New drugs have no proven health effects and their frequency of innovation achieved in recent times only a few months period.

Fake ecstasy or synthetic piperazine.

The last few years across Europe in tablets presents for ecstatic encounter with the massive presence of synthetic piperazines. These include substances whose structural basis is piperazine, but which itself is not psychoactive. Between piperazine derivatives include, among other things, certain antidepressants, antipsychotics, antihistamines (anti-inflammatory drugs), but sildenafil or Viagra. Below are the most common psychoactive synthetic piperazines, often found in ecstasy tablets:

- *1-Benzylpiperazin* (**BZP**)
- *1-Metyl-4-benzylpiperazin* (**MBZP**)
- *1,4-Dibenzylpiperazin* (**DBZP**)
- *3-Chlorofenylpiperazin* (**mCPP**)
- *3-Trifluorometylfenylpiperazin* (**TFMPP**)
- *3,4-Metylenedioxy-1-benzylpiperazin* (**MDBZP**)
- *4-Bromo-2,5-dimetoxy-1-benzylpiperazin* (**2C-B-BZP**)
- *4-Fluorofenylpiperazin* (**pFPP**)
- *4-Metoxyfenylpiperazin* (**MeOPP**)

Probably the most widespread of them are mCPP, BZP and TFMPP. They are present in the tablets either alone or in various combinations (both among themselves and with other drugs, including MDMA). It is possible to speculate how many tablets on the market these substances contains - sober estimate is at least 50%. Dramatically increased incidence of these substances in the tablets can be observed from about 2008. (ZAOSTŘENO NA DROGY 4/2010, 2)[18]

Mefedron

Mephedrone or 4-metylmetcathinon (4-MMC) during last 4 years, rapidly spread throughout the European drugmarket. The largest expansion is quoted in the UK. streetnames are 4-MMC, MMCAT, M-Cat, meow-meow (mňau-mňau) bubbles, Subcoca I. It is a derivative of cathinone, drugs with stimulant and hallucinogenic effects in plant Catha Edulis (Kata dishes Khat). The use of this plant is widespread especially on the Arabian Peninsula and East Africa. While Khat is a natural drug, mephedrone is purely synthetic substance. Structurally, the effects are very similar to many other psychoactive drugs, especially metcathinonu, metylonu, metedronu and pyrrolidine derivatives and amphetamines. His massive distribution in Europe probably began in 2006. The main source of this drug are online stores that advantage of loopholes in legislation and began to sell this substance mostly as a fertilizer plant (the effects are nothing substantiated) or as a research chemical (substance intended for research) labeled "not for human consumption" (not intended for human consumption). Nowadays, the majority of mephedrone produced in China, where it is in large quantities by post transported to Europe. Making changes to legislation in different EU countries mephedrone gradually coming to lists controlled substances (controlled in Denmark, Germany, Estonia, Romania and Sweden, Great Britain from April 2010 in the Czech Republic is not yet controlled, it should be based on an evaluation Risk and Decision of the EU Council inspected since 2011.). (ZAOSTŘENO NA DROGY 4/2010, 6)[19]

18 *ZAOSTŘENO NA DROGY* 4/2010 (ročník osmý) Vydává Úřad vlády ČR Národní monitorovací středisko pro drogy a drogové závislosti, Nábřeží E. Beneše 4 118 01 Praha 1 tel. 296 153 222 www.drogy-info.cz. ISSN 1214 -1089

19 *ZAOSTŘENO NA DROGY* 4/2010 (ročník osmý) Vydává Úřad vlády ČR Národní monitorovací středisko pro drogy a drogové závislosti, Nábřeží E. Beneše 4 118 01 Praha 1 tel. 296 153 222 www.drogy-info.cz. ISSN 1214 -1089, p.6

"SPICE" Or we experienced in the Slovakia HOW TO REPLACE HEMP synthetic cannabinoids

In the last few years on the scene appeared large number of species of so-called herbal highs (herbal boosters mood) with a generic name Spice. In Slovakia as known products from Crazy shops or from Internet shops. Their composition is not yet uniquely determined, it may be in addition to the various Spice product lines. These products have various psychotropic effects, often very similar to hemp drugs. Spice is vegetable product consisting of a mixture of various dried herbs, such as: Indian Warrior (Pedicularis densiflora, type lousewort) Lion'sTail (Leonotis Leonurus) Baybean (Canavalia rosea), Blue Lotus (Nymphaea caerulea), Vanilla (Vanilla) Maconha Brava (Zornia latifolia), Siberian Srdečník (Leonurus sibiricus). Comparatively recently been found, however, that most of these products contain synthetic cannabinoids. These substances, which act similarly as THC, so they are agonists kanabinoidiních CB1 and CB2 receptors. On the European market in 2010 has emerged following synthetic cannabinoids: JWH-015, JWH-018, JWH-073, JWH-081, JWH-122, JWH-200, JWH-250, JWH-398, HU-210, CP-47, 497 and homologues, AM-694, oleamide. They are fat-soluble substances and many of them are much more potent than THC alone. Are chemically very different, do not properly the studied pharmacology and toxicology in animals, let alone on humans. The data available are from a single experiment technical experts from the EMCDDA "Spice Diamond". Although HU-210 and its analogues and JWH-018 have started being in some EU countries and in the Americas checked (Eg Germany, Sweden, Austria, Great Britain, the Netherlands, Switzerland, Canada), most other synthetic cannabinoids not yet checked. Some countries have acceded to control products "Spice". Difficulties in monitoring and control of these substances resulting from the problematic detection of cannabinoids, because most toxicological laboratories to not properly equipped (lack of spectral information in the databases of these substances and their standards). (ZAOSTŘENO NA DROGY 4/2010, 13)[20].

CONCLUSION AND EXPECTATION

The study concentrates on the analysis of the drug situation, focusing on the "new drugs" within the territory of Europe - especially central Europe. Based on the knowledge of early warning monitoring system warns of the negative development of new drugs mainly in the Slovak Republic. Although Prague was once the centre of a typical influx of new drug and drug innovation in Central Europe. Now it is the sales space and the management of trade in concentrates out from Prague.

Historical - analytical observation can help to find parallels, perspective concepts and solutions. This study is an attempt to analyse the changes in this area that in the current criminal and criminalistic/forensic drug control we registers. The second part of the study devoted to the analysis and evaluation of the situation, with emphasis on the territory of the Slovak Republic. Identical trends with specific dispersion trends taking place across Europe.

In particular a response to user requirements presented new trends in species composition changes are explored in the third part of the study. Analyse given the price relations, and other issues of drug availability leads to innovation in the species composition of the investigational drug territory. Examples of hazards present mainly substitution trends. New drugs have no proven health effects and their frequency of innovation achieved in recent times only a few months period. Thus, the analysis results show a very dangerous trend caused by the high frequency of new drug innovation - inexperienced, but also for the original "experienced" drug user population in Slovakia, the Czech Republic, but practically the whole of Europe.[21]

20 *ZAOSTŘENO NA DROGY* 4/2010 (ročník osmý) Vydává Úřad vlády ČR Národní monitorovací středisko pro drogy a drogové závislosti, Nábřeží E. Beneše 4 118 01 Praha 1 tel. 296 153 222 www.drogy-info.cz. ISSN 1214 -1089, p.13

21 This study is the result of the project implementation: Centrum excelentnosti bezpečnostného výskumu kód ITMS: 26240120034 supported by the Research & Development Operational Programme funded by the ERDF.

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EFFICIENT RESTORATIVE JUSTICE DISFAVORING CRIME CALCULATIONS

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Abstract: The response of the traditional state law to crime is generally slow, submitted to intense external pressures and influences as well as diminished due to the loss of judges' integrity. In other words, contemporary penal policy is not compatible with the requirements for an efficient prevention of crimes. The consequences of the inefficient recognition of the hindering and repressive penalty function are more than evident: increased and more channeled crime forms.

Is this a sign that contemporary penalty law systems have not found efficient penalty mechanisms?! Is restorative justice able to stand against criminal flows and to what extent?

The author of this work starts from the hypothesis that restorative justice is not yet developed and operating as an instrument of penal policy. Based on this hypothesis, the author analyzes and offers solutions that will make criminal acts appear high-risk and low-profitable deeds. Therefore, criminal calculations would result in identifying crimes as unproductive behavior. This particularly applies on the cases of property crimes, economic-financial crimes and organized crime.

Keywords: restorative justice, crime, penal policy, efficiency

THE CONCEPT AND IMPORTANCE OF RESTORATIVE JUSTICE

The penal policy in which foundations lays the abstract sentencing of the perpetrators of crimes, particularly those whose motive is gaining unlawful gains, seems to be sufficiently effective in the prevention and repression of crime. The conclusion derives from the fact that everywhere in the world there is an observable increase in complex and more severe criminal forms, an increase in the intensity of the crime recidivism, as well as the internationalization of organized crime. Indeed, the acts of organized crime are increasingly shaping into the form of complex criminal operations of a transnational nature, in a way that the criminal action begins in the territory of a state, transits through several others, whereas the consequences are felt in yet other countries. The same happens with the money that feed crime, often in large amounts. Money is "circulating" from a briefcase to a briefcase, from an account to an account, finding the path to legal financial systems and real economies. This expansion of crime threatens national legal and economic systems and international order in general. Hence, the determinination of the penalty that is in fact reduced to an abstract juridical equalization of the harm caused by the crime on one, and the duration of the imprisonment on the other hand, are inadequate for the purposes of prevention of crime, deterrence of recidivism, and protection of social interest. Namely, the victim of the crime is left alone, in most cases forwarded to other adhesion procedure before the civil court to request reparation for the harm. Thus, restorative justice presents a balance among the interests of the victim, the perpetrator of the criminal act, and the community/society. It starts from the idea that the impaired party should be compensated for the damage caused by the criminal act, the perpetrator should be deprived of illegally acquired property and later re-socialized, while the society should fulfill its responsibility towards the victim, perpetrator and the system, or in other words, it should enable the enforcement of justice and fairness. According to one definition, restorative justice is:

"…a process where all stakeholders affected by an injustice have an opportunity to discuss how they have been affected by the injustice and to decide what should be done to repair the harm. With crime, restorative justice is about the idea that because crime hurts, justice should heal. It follows that conversations with those who have been hurt and with those who have afflicted the harm must be central to the process. The process of restorative justice necessitates a shift in responsibility for addressing crime. In a restorative justice process, the citizens who have been affected by a crime must take an active role in addressing that crime. Although law professionals may have secondary roles in facilitating the restorative justice process, it is the citizens who must take up the majority of the responsibility in healing the pains caused by crime.[1]

1 Braithwaite, John (2004). "Restorative Justice and De-Professionalization" *The Good Society* **13** (1): 28–31

Restorative justice has its origins in the oldest legislations dating from the BC era: The Ur-Namu Law, Hammurabi Criminal Justice System, Roman Twelve Tables etc. Several aspects of restorative justice are also contained in some important regulations in Germany, Ireland, and England of the AD era.[2] In the modern legal systems, restorative justice enters as a social movement and as possibility of an agreement between the stakeholders out-of-court proceedings, usually through mediation and procedures for intercession and alignment. It is indisputable that in this way, a balance between the parties in a reasonably shorter time is established, costs of running proceedings are reduced, and by agreement between the parties the justice is satisfied. In case of a juvenile perpetrator of a criminal act, the process of mediation and conciliation within the framework of the organ of social work has also associated objectives: assistance to and care of juveniles in conflict with the Law, which means correction of socialization breaches without stigmatizing the juvenile. Leaving aside the benefits of restorative justice for the judicial system and for the victims, in this paper I elaborate the effectiveness of restorative justice in the elimination of the motive for executing crimes – the cupidity.

THE CUPIDITY AS A MOTIVE OF THE CRIMINAL ACT

The motive is a psychological process of great importance among perpetrators for the incriminalization of the criminal behavior, qualified-privileged types of crimes and issuance of penal sanction within the penal law framework. Its proper assessment is also important for the judicial practice. We find the criminal significance of the motive in criminal etiology as endogenous (psychological) component of criminality. Not less important is the motive for criminalistics, whence it is often concluded that determining the true motive easily sheds light on and records the commission of the crime as well as discovers its perpetrator(s). Namely, it is indisputable that the motive is an important clue that leads to detection of the true perpetrator and the traces of the criminal act. The cupidity is the most common and unique motive in property offenses, economic offenses and offenses related to organized crime. In penal law terms, the cupidity is defined as obtaining for oneself or for the other(s) unlawful gains. In other words, the cupidity is a driving force and internal-psychological boost that directs the mind of the offender to take away someone else's goods and use them for personal goals. Hence, the cupidity is a negative psychological human characteristic that received illegal dimension by taking the criminal activities of acquiring something foreign. Among the perpetrators of the crimes of organized crime, especially those from the top of the criminal hierarchy, the self interest has already turned into greed. Such an extremely negative and unhealthy psychological human feature is engrained into the definition of organized crime. The most generalized one appears as a fairly explicit definition of organized crime as a form of professional criminality by embedding the greed as extreme human vice, is determined in the FBI's strategy and in the Council of Europe's acts, where organized crime is defined as the "illegal transfer of prohibited goods and services, motivated by greed and fed by corruption[3]". We may notice insolent, unscrupulous and inexorable greed the consequences of which are countless destroyed young lives and unforeseeable implications for the society. Hence, the efforts of modern legal systems and social movements in general should be directed to "neutralize" the motive of greed in any form, especially greed as an extreme form of cupidity.

LEVELS OF MANIFESTATION OF CUPIDITY AND CRIMINAL CALCULATIONS

Generally, cupidity as a motive of executing crimes by offenders and recidivist offenders is a psychological propulsion in individual cases of criminal behavior among offenders who are part of organized criminal groups. Distinguishing between two levels of existence of the motive of greed is necessary for setting up the hypotheses of criminal calculations through which the cupidity becomes effectuated. Thus, in individual cases of criminal behavior, the individual offender or a small homogeneous group sums up criminal calculations and criminal profits in order to satisfy some

2 www.restorativejustuce/homepage
3 A strategy against organized crime in USA

personal and/or family needs whether it be legitimate (an increase of the family budget, etc.), or other illegitimate needs: (gambling, supplying drugs (narcotics), concealing the offense from earlier crimes, etc.). They usually tend to hide the criminal profit and the origin of the funds. The second category of offenders that are members of organized criminal organizations have significantly more extensive criminal calculations. They adapt them to the enormous, even perverse need for luxury, recognizable personal status, investing in legitimate businesses using the criminal mechanisms of "money laundering" and so on. These perpetrators quite deliberately overlook the risk of their criminal activity, considering the protection of a corrupt state apparatus, law enforcement authorities and personal security guards. On the other hand, perpetrators who are official authorities can be categorized in the first or in the second group of offenders depending on the purpose for taking criminal actions and how the illegally acquired proceeds are manifested.

HOW CAN RESTORATIVE JUSTICE DEAL WITH CRIME CALCULATIONS?

a) in cases of individual criminal behavior

The starting assumption in which foundations have been entailed the moral, conceptual and legal postulates of justice, is that no one should profit by committing crimes. That means that the perpetrators must be deprived of their criminal profits, and the victims must be compensated for it. Among the first group of perpetrators of individual criminal behavior, it appears that the revival of mediation as a legally regulated[4] possibility able to solve crimes may be sufficient in most cases, mostly minor property offenses in order for justice to be served without running long law suits. According to Art. 491 of the new Criminal Procedure Act (CPA), in cases where the offense is prosecuted upon private complaint, the judge in charge of the reconciliation hearing due to reasons of expedience can make a proposal to the parties to agree on mediation. Hence, the mediation procedure can be managed for property offenses only where the inflicted damage is below the amount of one-half of the average monthly salary in the Republic of Macedonia at the time of the crime, as well as in cases of crimes committed by juveniles for which an anticipated imprisonment of up to five years is projected, according to the article 72 of the Juvenile Justice Law[5]. An additional opportunity for restorative justice enforcement among juvenile offenders is the intercession and reconciliation procedure (art.68 LJJ) that is under the jurisdiction of the Social Welfare Authority and applies to committed crimes for which an anticipated imprisonment of up to three years is projected. However, the consent of both parties included in the above procedures is required, namely the consents of the victim and his attorney on one, and of the perpetrator and his defending counsel on the other hand. The effects of the conveyance of these proceedings cannot be measured. The first reason is because of the recent introduction of the aforementioned Law, whereas the second reason lies in its seldom practice upon the legal establishment. Because of this, the courts bear an enormous tension that often leads to obsolescence of the cases where the victim is not recompensed, while the perpetrator materializes the criminal calculation into a criminal profit. Of course, the perpetrators, more than certainly rely on the inefficiency of the judicial system and on the ability to avoid criminal sanction and compensation for the damage they caused and are expected to be charged with according to the criminal act. Therefore, the proposal of the experts and scientific community in the Republic of Macedonia seems reasonable[6], i.e. that all criminal charges expected to be run in extrajudicial proceedings should be subject to mediation procedures, or more specifically, to the procedure for intercession and reconciliation, without requiring the consent of the offender and the victim. Thus, the Public Prosecutor does not need to require the consent of the perpetrator(s) and the victim(s) for conducting the intercession and reconciliation procedure for mediation; in fact, this procedure would be a mandatory one and, at the same time, the initial filter of court cases. The benefits of this legal solution are considered to be multifaceted: alleviating the court and prosecu-

4 In Republic of Macedonia, Law of Criminal Procedure, Official Gazette of RM no. 150 /2010 on 18.11.2010 and Law of Mediation, Official Gazette of RM no.138/2009

5 Official Gazette of RM no. 87/07 on 12.07.2007

6 Chamber of Mediators of RM (Комора на медијатори на РМ)- Mediation is mandatory in all legal spheres and the agreement reached by parties involved is an executive document

tors offices and preventing obsolescence of the criminal cases, reimbursing compensation claims to victims with their consent, etc. At this point, the following possible benefits can be underlined in terms of the offender's re-socialization:

– Annulling the criminal calculation due to imposed duties for damage reparation;
– Opportunities for the penalty sanction to be avoided, for example the prison sentence, which gives the offender an additional possibility to understand the senselessness of the criminal behavior;
– Avoiding the post-penalty consequences of the conviction; and
– Creating and triggering responsibility among offenders to their victims and the community as a whole.

All the above-mentioned assumptions are supposed to affect the offenders' consciousness and should lead to moral perception and attitude changes in his future behavior. Namely, under psychological pressure, above all fear of criminal sanction followed by the measure of confiscation of objects acquired with by committing a crime, as well as other forms of compensation to the victim, it is most probable that the offender would accept a more convenient option for him. What if the offender does not own the seized objects or owns no financial resources to compensate for the damage? Again, restorative justice should be equipped with mechanisms to negotiate and control the realization of the agreement for compensation by confiscation of other belongings of the offender. If the offender nevertheless has no property in his possession, he should be obliged to work to replace the damage done by him, which actually does not coincide with some new regulations for voluntary work obligation during the working treatment in penitentiary institutions. A well-justified note of these proposals is that the mediators in the mediation process are indirectly given a strict jurisdiction authority and a possibility to decide about the consequences of the criminal conduct that has not been established by the court and has no final judgment for such behavior. However, after the procedure of mandatory mediation an opportunity is provided for the offender to voluntarily express a willingness to correct the behavior and to repent of having wronged, initiating and prepared to compensate. If such an opportunity is missed, and there is an irrefutable and obvious evidence that the suspect has committed a crime, then the Art.491 subclause 5 of the CPA clearly stipulates that the suspect will undergo a summary trial so that a possibility of evading justice will be eliminated. The author of the text is convinced that in case of individual criminal behavior, especially in those where the illegally acquired proceeds have not yet been destroyed, the mediation procedure would be more effective for the purposes of re-socialization of the offender. In the procedure for mediation and alignment, particular attention is paid to parents in terms of increasing the care and control of their children, as well as to the creation and strengthening of the youth responsibility. In cases of juveniles from well-off families, the restorative justice should be complemented and aided by parents who by means of cutting down the allowances of deviant children as a compensation of their behavior, the first will demand accountability and return to the righteous path of the latter. Both procedures are still very rare and not truly a regular practice in the country, although the Law of Juvenile Justice of 2007, and which was to take effect from September 2008, after several delays began to be applied from June 2010 onwards.

In a broader social context, restorative justice suggests that only the work can produce the necessary goods, not the criminal behavior. Namely, if the offender agrees to compensate - repair the damage, to return the seized goods, and if it is not possible to undertake additional responsibilities in favor of the impaired party, he has been influenced to create a positive social attitude towards labor. Why would he then commit criminal acts?!

b) in cases of offenders involved in organized criminal associations

It is more than certain that relying solely on restorative justice in the attempts of eliminating cupidity as a motive of professional undertake of criminal activities within the framework of organized criminal associations would be ineffective or inappropriate means for its prevention and repression. It would be even less effective in the pursuit to compensate for the damage caused to public funds, victims, and society in general. This is because organized criminal associations accumulate enormous financial power. They get the character of illegal businesses and become increasingly in-

filtrated, more specifically they metastasize in all spheres of economic and social life. Therefore, the need to develop new strategies to combat organized crime and systems to detect suspicious transactions swiftly arises, and many affected states have already passed laws to trace, freeze, and seize criminal assets. These efforts were intensified in the last two decades of the last century, when with the adoption of a number of international conventions, an extensive international legal framework for the fight against organized crime was created. These include the following, but are not limited to:

1) Vienna Convention (on illegal trade in narcotics - 1988)
2) Strasbourg Convention (on money laundering, search, freezing and confiscation of proceeds of crime -1990)
3) Anti-Corruption Criminal Convention adopted by the Council of Europe in 1999
4) Convention on cybercrime adopted by the Council of Europe in 2001 (in force since 2004)
5) UN Convention on Transnational Organized Crime (Palermo Convention) (adopted in 2000/ in force since 2003)
6) UN Convention for the Prevention of Corruption Act adopted in 2003, with additional protocols on trafficking in persons, people smuggling and trade in weapons.

These international documents relied on (or were expanded with) the conclusions of the Tampere Summit in 1999, on which a strategy was adopted for the prevention of organized crime on the threshold of the new millennium, with 39 specific measures to prevent organized crime. Among the new measures envisaged in the Strategy such as secret operations and controlled deliveries, the usage of infiltrated agents, wiretapping communications, the use of protected witnesses, the measure of a temporary freezing and confiscation of objects and property owned by criminal organizations and offenders, the convention established the international basis for immediate disabling and alienation of the illegally acquired property until the completion of the criminal proceedings and the final decision on the confiscation of property. The provision has been incorporated into the modern national law, but it still does not give the expected results. This also happens with execution judgments when the sanction imposed seizure of assets derived from crime. As an example, in the Netherlands only 9 million were confiscated of the declared sentences for seizure of assets worth 129 million euros in the period 1995-2001.[7] Indicators in other countries do not seem promising as well: "studies show the difficulties that arise in the processes of depriving criminals of their assets. In general, the approach that revolves around profits of criminal activities in any country of the world has not been successful."[8] Perhaps, the strongest argument in favor of the (in)efficiency of application of the new legal measures in contrast to the confiscation of criminal profits is evident in the UN report on fight against terrorism, which states that soon after 11 September 2001, 112 million dollars were frozen of which only ten million were seized in the coming months worldwide.[9] Thus, the strategy based on the motto "criminals should be hit where it hurts the most" proved to be ineffective in the actual implementation to break financial power of the criminal underground and the holders of the criminal activity. Here, the involvement of the public prosecutor in restorative justice along with agreement with the suspect, according to art.483 of Law of Criminal Procedure, by entering the type and amount of the indemnification claim in the agreement a verdict will be reached, is expected to be applicable towards the end of 2013. Considering the situation with the effects of the imposition of sanctions for expropriating criminal profits globally, and the delay in application of the legislation of this kind domestically, justifiably makes us wonder: Have we as the system and civilization come to the level of tacit "coexistence" with crimes of the most serious kind?! Do we accept and conformably comply with Durkheim theory of crime as a normal phenomenon in society?! Have the funds from criminal proceeds that cannot find a way to public funds led the global economic flows to a standstill, giving this way a significant contribution to the global economic crisis?! I am

7 Hans Nellen. "The Quicksand: Access to Money from Crime". in: *Global Organized Crime: Trends and Developments,* edited by: Dina Siegel, Hank van de Bunt, and Damian Zaith. Kluwer Academic Publishers. 2003

8 Levi, M, Osofski, L, Investigating seizing and confiscating the prceeds of crime, London, Home Office Police Department, 1995., I Gradowski, M, J.Zigler, excerpt from: Глобален организиран криминал Трендови и случувања (мак). МАГОР, Скопје. 2009, p. 149

9 UN Report on the Results of fight against terrorism (30 August 2002), cited in Nellen Hans (2003): Жив песок: Пристап - пари од криминал- Глобален организиран криминал Трендови и случувања (мак). МАГОР, Скопје. 2009, p. 149

of the opinion that it is this apathy caused by the inefficiency of the institutions and mechanisms of justice that strikes and further reinforces criminal calculations in the direction of further criminal operations. Restorative justice is powerless, because in general, justice does not work. This is because very often the common social reaction to crime is reduced to an avalanche of publicly displayed passions whose outcome is "every nine days' wonder". In addition, the wealth of criminals that no one can take away, becomes a challenge to recruit new "echelons" of especially young people who are considering or about to start their criminal careers in the pursuit of a fast and easy enrichment. The system of values is inverted and as such is trampled under foot and unfortunately very common comment among the young is: "I would play too!".

ARE THE STATE AUTHORITIES AND MEDIA GETTING INVOLVED IN THE ADVERTISEMENT OF HIGH-PROFITABLE ORGANIZED CRIME?

Almost without exception in the Republic of Macedonia and the states of coterie the reports on criminal earnings seem so illogical in order to be more bearable for the public! Namely, when informing they use digits and property worth fortunes, negligently representing criminal activities as an exclusivity that only "the most prestigious and untouchables" can afford. Thus, almost every day we hear statements by the spokespersons or newspaper articles in which e.g. "black market value of the seized drugs is 1.5 million", "profits from human trafficking has increased by three million", etc.., as if the crime was planned and calculated jointly, between the state and the media on the one hand, and the perpetrators on the other. According to the author of this work, such information constitutes deep social oversight and engraining in the mind of the public primarily the tangible benefits from crime, then its consequences and casualties. In context with the inevitable video footage and emphasized need for media sensationalism, such notification resembles an ad of the high-profitable organized crime. Hence, the methods of reporting cases of organized crime must be seriously reviewed. Thus, instead of highlighting the criminal calculation, a must be put on the consequences for the victims, for the community and the legal punishment for perpetrators. With respect to the observation, the first information would be: "The quantity of drugs seized contained 1.500 lethal doses of toxic substances from the opioid type. With the seizure of drugs the captured offenders were prevented to gain 1.5 million "... etc. ... The second information would be: "This year, victims of human trafficking, as modern-type slavery, were bought and sold for 3 million seized by the authorities. The offenders will be sentenced to 10-15 years of imprisonment", etc. In other words, the information must include qualitative dimension of the harmful consequence, the legal and moral condemnation of the criminal action, not the criminal calculation that motivated offenders in the destruction of universal human rights to life, health, and property.

POLICE ACTIONS AND SECURING OBJECTS AND PROCEEDS OF CRIMINAL OFFENCES

During my extensive experience as an authorized officer in the public security organs within the Ministry of Internal Affairs in Macedonia, I have come to the conclusion that the police are increasingly interested in securing criminal assets confiscated in individual cases of criminal activity. This is most probably because by securing the proceeds of crime, a tangible evidence and documentation of the crime would be collected too. In the case of solution and proper documentation of the economic or organized crime, it seems the police is conformed with a mare insight into the documentation and the provision of the same, as well as with the seizure of the suspects and the collected evidence for further investigation. The care of the illegally acquired assets are usually left to be taken by another body or institution, losing this way valuable time as well as leaving an open space for the alienation of assets and its concealment immediately upon the confiscation. Offenders indeed gain from this insufficient care and interest in the seized proceedings as this adds towards a better realization of their criminal calculations. All this is due to the lack of police training on how to

safeguard criminal profits and poor coordination with other financial institutions and judicial bodies. Moreover, these police activities are conducted in highly accentuated conditions and processes of selectiveness in the prosecution, which can be most vividly illustrated in the phrase "politicization of crime and criminalization of politics".

Therefore, the police must meet the basic prerequisites of efficient performance and professional work to combat crime. These prerequisites include the following, but are not limited to:

– Legal, professional, competent, timely, and ethical work conduct of the members of the institutions responsible for preventing and suppressing organized crime;
– Cooperation and coordination between the competent authorities and institutions at national and international level (networking);
– A strong political will incorporated in the national legislation for the prevention and suppression of the organized crime without the pressure of competent institutions for a selective prosecution and sanctioning;
– Material-technical and financial support activities.

The first assumption underlines the shift in attention and training/instruction on securing criminal profits, whether acting independently or in an investigation that would fall within the jurisdiction of the public prosecutor. This way it seems that the underlying assumption of securing due to depriving the perpetrators of criminal proceeds for the effective implementation of restorative justice in eliminating criminal calculations would be fullfiled.

CONCLUSION

Restorative justice is still not a sufficiently effective mechanism in modern legal systems. In Macedonia, the implementation of this system is still in its infancy despite the relatively solid legal frameworks. Thus, the efficiency of the system on the elimination of the motive of cupidity among offenders, protection of victims and society of property crime has yet to be tested and reviewed. Until then, the criminal calculations especially those projected by perpetrators of any kind of organized crime will be realized smoothly, on a public display, and under the scrutiny of the inert, politicized, and corrupt state apparatus. To the extent that the financial power of the criminal associations reaches amounts of "high-profitable businesses" and "economy" comparable with the legal ones. In the context of recklessness and overlook of the authorities and the media in the informing process and the lack of training and competency of the police, instead of the restorative justice, negligently advertised is the "high-profitable crimes". By drawing attention to important flaws in the operation of restorative justice and their removal, the first serious results could finally come into place.

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CHILD-SOLDIERS - NORMATIVE FRAMEWORK AND JURISPRUDENCE OF INTERNATIONAL CRIMINAL COURTS-[1]

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Abstract: Legal status of children in armed conflicts has been developed primarily within the *corpus* of international humanitarian law, especially in the IV Geneva Convention from 1949. *Ratio* of mentioned Convention, though, it was focused on the protection of civilians in general it also granted several special rights to children, according to their specific nature. Today, the Convention and Additional Protocol I from 1977 present the main corpus of norms governing legal status of children in armed conflicts. Yet, the development of international law brought new normative tendencies. The participation of children in armed conflicts has been recognised and stipulated within the *corpus* of international human rights and international criminal law. Normative framework, thus, is consisted within three international law branches. The latest development of a child soldiers issue has been focused on proceedings and judgements delivered in the International Criminal Courts and the Special Court for Sierra Leone. Within this paper, the author`s intention is to analyse the mentioned normative framework and main points of the child soldiers status as the war crimes account, as implemented in recent judgements of international criminal courts.

Keywords: international humanitarian law, international human rights law, international criminal law, international criminal courts, child soldiers, war crimes, armed conflict

INTRODUCTION

The legal status of children has been in the focus of the international community for the last 50-60 years. During that period, it has changed gradually, both quantitatively and qualitatively. Today, it is developed as a coherent body of norms, incorporated within the system of the International Public Law.

Yet, it can be intriguing how and why children raised attention of the legal discipline that governs the relations between states – primarily, and defines their mutual rights and obligations. The interest of the international community for children issues came as a part of a wider ideological-theoretical-political movement – focus on an individual rather than on a state. It can also be phrased in terms of core international community values – the wellbeing of the international community rests on the wellbeing of individuals; or, international peace and security cannot be achieved unless people are free. Incorporated in various parts of international law, it has been governed by their dominant principles, such as, for example, the principle of humanity in international humanitarian law.

The legal status of individuals has been primarily regulated by the corpus of the International Law of Armed Conflicts and developed in the International Humanitarian Law. Children figured as a part of wider terms – civilians or prisoners of war. Civilians as a legal notion were divided in civilians in general, women, children and old people. Women were subdivided in women in general and pregnant women. Children were subdivided in children up to 7, 15 or 18 years of age. In common sense Geneva Conventions from 1949 are marked as the corner stone for the legal status and protection of children in armed conflicts, especially IV Geneva Convention. On the other hand, Geneva Conventions did not prohibit enlistment of children into armed forces or groups and did not develop the notion of a child soldier (Rosen, 2012:9). Obviously, the period of Geneva Conventions occurrence was not marked with the prohibition of children recruitment. Quite contrary, history shows us a number of examples of children volunteers during various wars.[2]

1 This paper is the result of the research on the project "Status and Role of the Police in a Democratic State", which is financed by the Academy of Criminalistic and Police Studies.

2 For example some of well known individuals such as Joan of Arc, Yasser Arafat, but also armed conflicts such as American Civil War, Grand War, World War II. During the World War II child soldiers were mostly enlisted in armed groups

The term child soldiers is considered to be in use since the 1970s, created in the regime of the Additional Protocol I from 1977 (Happold, 2005:4).The term, in general, covers a child too young to be lawfully recruited into the armed forces or armed groups (Rosen, 2012:XIV-XV).[3] Since the 1970s regulations up to the present days, child soldiers have been in the focus of international law in its various parts and from different points of view. The participation of children in armed conflicts in the most general sense is divided into two main corps – (i) the protection of children by the prohibition of enlistment and participation in hostilities, and (ii) the accountability of children for international crimes (Happold, 2012:8)..

However, the legal regime of child soldiers is under the influence of yet another unresolved issue that is in the very notion of a child soldier -the age limit. Do we consider as a child person up to 15 or up to 18 years of age?

Human rights, as part of international public law, developed its corpus of norms concerning the child soldier issues. Thus, it participates in the normative framework of the definition, legal status and protection. Yet, emerging of children as a separate legal institute cannot be overviewed in omission of at least mentioning first international treaties on various forms of slavery, such as International Convention for the Suppression of the Traffic in Women and Children from 1921.

The third part of the international legal framework is built in the International Criminal Law, precisely in the definition of war crimes (Bothe, 2002). Although war crimes are the oldest international crime, with the most developed substantive legal basis, the recruitment and inducement of children in armed conflicts, has become *actus reus* of war crimes in recent history.

As a separate issue of compliance and enforceability it is useful to add a fact that it is estimated that as recently as 2008, military recruitment of children and their use in hostilities "still takes place in one form or another in at least 86 countries and territories worldwide" (Drumble, 2012:5).[4]

Thus, the normative framework that is to be examined within this paper will constitute the first part of a child soldier's legal status issue. The second part of the paper will be focused on the international criminal approach, taking into account recent judgments delivered by international criminal courts.

Normative framework

Customary international law provides basic rules on the legal status and protection of children in armed conflicts (Fonseka, 2001; Doek, 2011). Rule 136, according to the study of customary international humanitarian law, stipulates that children must not be recruited into armed forces or armed groups (Henckaerts, 2007:482). Rule 137 stipulates that children must not be allowed to take part in hostilities (Henckaerts, 2007:485). The cited rules are formulated as principles, in general terms, allowing further development in details. It is as well the outgrowth of fundamental humanitarian values which further on direct the development of specific rules (Bugnion, 2000). As such it is on the top of the hierarchy of norms governing the child soldier issues (Plattner, 1984).

Treaty law, as mentioned in the introduction, is built within three international public law branches. International humanitarian law rules governing the child soldier issues are incorporated in the Geneva Law (Happold, 2005). IV Geneva Convention, in Article 50, paragraph 2 regulates legal status of children on the occupied territory, providing that the occupying power may not enlist children "in formations or organizations subordinate to it". This rule is not of significant importance for a child soldier status, since it refers only to children in terms of their protection from serving in the occupying powers armed formations (Bugnion, 2000; Doek, 2011). Thus, it does not reach the level of general protection of children from their participation in an armed conflict.

Additional Protocol I from 1977 in Article 77 stipulates the protection of children in general (Happold, 2005). Paragraphs 2 and 3 regulate the participation of children in hostilities, as it follows:

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that fought against occupation, partisan units.

3 The term child soldiers is in general use at present, although it has been deemed as inappropriate in several occasions. The term child in armed conflict is suggested as a wider but more precise term since it covers a variety of roles that children can find themselves in during armed conflict. Another argument against the term child soldiers is due to the fact that children cannot legally be soldiers and thus, it is misguiding the understanding – Whitman S. (2012), The Responsibility to Protect and Child Soldiers, in: Knight A.W., Egerton F. (eds.), The Routledge Handbook of the Responsibility to Protect, Routledge.

4 Reference from the: Coalition to Stop the Use of Child Soldiers, Child Soldiers Global Report 2008, http://www.childsoldiersglobalreport.org/content/2008.

2. The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years the Parties to the conflict shall endeavour to give priority to those who are oldest.

3. If, in exceptional cases, despite the provisions of paragraph 2, children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.

Although Additional Protocol I did not built in a general definition of a child, the limitation in years must have been introduced for the purpose of a child soldier definition. The age limit was set to 15 years.. The article provides only prohibition for states parties to engage children in direct hostilities and obliges the states parties to refrain from recruiting children into their armed forces. In the manner of the whole Protocol, this article as well applies only to regular armies and not to non-state armed groups.

Bearing in mind that this is the first provision on child soldiers ever, the norm is generally welcomed, although it is not compatible with the contemporary human rights law approaches. This rule still provides a substantive law basis for international crimes definitions; it directs national regulations and is considered to have reached customary law status. Thus, its significance is immense (Doebbler, 2005:54).

Wording of the Additional Protocol II from 1977 shows more determination. While in Protocol I the states parties agree to take all reasonable measures, Article 4 of Protocol II in paragraph 3(c) provides:

Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities.

The stipulation of Article 4 contains several important elements. Besides a 15 year old age limit, it addresses both to the state parties, armed groups and potential child soldiers. It provides the prohibition for the state parties to recruit children and to use them in hostilities, but it also lays down the prohibition of voluntary enlistment. Protocol II formulated the prohibition on the use of children in hostilities differently, depending on the nature of the conflict. For this reason Protocol II addresses to a potential participation of child soldiers in armed forces, as state army and groups, as non-stated armed groups.

Both provisions of the Protocol rest on the same fundamental principle – protection of children. Their main purpose is to keep children outside armed conflicts and the interpretation of these norms should always be formulated governed by the main principle.

Emergence of children as a separate notion within the corpus of Human Rights Law produced the Convention on the Rights of the Child in 1989 and for the first time a legal definition of a child was adopted. Pursuant to Article 1 of the Convention "*a child means every human being below the age of 18 years, unless under the law applicable on the child, majority is attained earlier*."

On the other hand, it did not make a direct impact on the definition of a child soldier, since Convention on the Rights of the Child did not enter the subject matter of a child soldier issue (Kupper, 1997). It rather incorporated regime stipulated in international humanitarian law, as defined in Article 38.[5]

The regulation, incorporated in the Convention on the Rights of the Child, has been imported from the Additional Protocol I, both in substance and in the legal approach (Helle, 2000:798). The

5 1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.
2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.
4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

age limit was on 15 years and the state parties were obliged only to take all feasible measures to prevent a direct participation in hostilities.

The first document concerning the participation of children in armed conflicts negotiated in terms of the human rights philosophy and principles was the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict from 2000.[6] This is the first international public law instrument, treaty by its legal nature that comprehensively regulates the legal status of children in armed conflicts from the aspect of their participation (Happold, 2005; Popovski, 2008). The first modification that has been induced, compared to Convention on the Rights of the Child, concerns the age limit. Article 1 sets a new age limit as a general rule and prohibits the participation in direct hostilities in general:

State Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.

The approach to the child soldier issue in the Optional Protocol qualitatively differs from previous regulations. One element of the new approach concerns the age limit, but it is drawn in terms of compulsory and voluntarily recruitment and it differs national armed forces and non-state armed groups.

An 18 year old age limit follows the general definition of a child, adopted in the Convention on the Rights of the Child, but it is also the age limit for the majority status in most states. According to these reasons, it is a quite logical age frame for the participation in armed forces. On the other hand, the period of life from 14 to 18 years of age is usually a period of secondary education, when children may choose a secondary school in a system of the national armed forces. For this reason a distinction has been made between the participation of a child in direct hostilities and it is prohibited for a person less than 18 years of age. The prohibition concerns the age limit, type of activity and prohibits the state's compulsory recruitment.

As for voluntary recruitment Article 3 provides:

1) States Parties shall raise the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in article 38, paragraph 3, of the Convention on the Rights of the Child, taking account of the principles contained in that article and recognizing that under the Convention persons under the age of 18 years are entitled to special protection.

2) Each State Party shall deposit a binding declaration upon ratification of or accession to the present Protocol that sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards it has adopted to ensure that such recruitment is not forced or coerced.

3) States Parties that permit voluntary recruitment into their national armed forces under the age of 18 years shall maintain safeguards to ensure, as a minimum, that:

(a) Such recruitment is genuinely voluntary;

(b) Such recruitment is carried out with the informed consent of the person's parents or legal guardians;

(c) Such persons are fully informed of the duties involved in such military service;

(d) Such persons provide reliable proof of age prior to acceptance into national military service.

4) Each State Party may strengthen its declaration at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall inform all States Parties. Such notification shall take effect on the date on which it is received by the Secretary-General.

5) The requirement to raise the age in paragraph 1 of the present article does not apply to schools operated by or under the control of the armed forces of the States Parties, in keeping with articles 28 and 29 of the Convention on the Rights of the Child.

6 The Protocol entered into force in 2002, with 150 parties at present, Serbia as from 31 January 2003, http://treaties.un.org/Pages/ViewDetailes.aspx?src

Voluntary recruitment implies certain safeguards for such recruitment. *Ratio* of safeguards refers only to the recruitment, since the participation in direct hostilities is generally prohibited for persons younger than 18 years.

The participation of children in armed groups other than national armed forces is prohibited under any circumstances, either as a participation in hostilities or recruitment (Article 4, paragraph 1). States parties are obliged to take *"all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices"* (Article 4, paragraph 2).

The implementation of the Optional Protocol is the obligation of each state party in terms of providing national legal, administrative and other measures. Specific progress of this Protocol, when speaking of the implementation, is the duty of a state to take measures to ensure the demobilization of child soldiers and their reintegration into society (Article 6, paragraph 3) (Topa, 2007:110).

As for regional international law, there is only one regional treaty that directly addresses the child soldier's issue – African Charter on the Rights and Welfare of the Child (adopted in 1990, entered into force in 1999). African Charter covers whole spectrum of human rights, among them a definition of a child soldier (Doek, 2011). A child is defined as "*every human being below the age of 18 years*" (Article 1). Child soldiers are not defined separately, which means that the age limit of 18 years is without exceptions. Article 22 is under the title – armed conflict. States undertook their duty "*to respect and ensure respect for international humanitarian law applicable in armed conflicts which affect the child*" (Article 22, paragraph 1).

As for the participation of children in armed conflicts Article 22, paragraph 2 provides:

States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities and refrain in particular, from recruiting any child.

Unlike the Optional Protocol to the Convention on the Right of the Child provision in African Charter is comprehensive and thus should be interpreted as to cover both the compulsory and voluntarily recruitment and both the participation in national armed forces and non-state armed groups.

A qualitatively different approach toward the child soldier issue has been taken on *ad hoc* conferences and expressed in the outcome instruments (Bakker, 2010). Treaty regime created a child soldier notion exclusively on the modes of the participation in armed conflicts and issues of recruitment. A wider approach to the term *child soldier* also considers the use of children as messengers, spies, for domestic purposes, for sexual abuses.

The first conference was on the prevention of the recruitment of children into the armed forces and on the demobilization and social reintegration of child soldiers in Africa, held in Cape Town in 1997. It was conducted by the United Nations Children's Fund (UNICEF) and NGO Working Group on the Convention on the Rights of the Child. The result of the conference, principles and actions to be taken by governments of states are formulated in the Cape Town Principles and Best Practices.[7]

Second, under the auspices of United Nations Children`s Fund (UNICEF), Special Representative of the Secretary-General for Children and Armed Conflict and French government was held in Paris in 2007. Paris conference was universally oriented, on a larger scale of issues and participants.[8]

For the purpose of analyses of the legal status of child soldiers both conferences are significant; both participate in the structure of the child soldier definition, although they created only legally non binding instruments. Cape Town Principles and Paris Principles share the same values and are directed towards the same goal. The most important contribution of these instruments is in the very child soldier definition. The age limit is 18 years. A child soldier is a child enlisted into the army or armed group, who carries weapons, who is engaged in combat and takes direct part in hostilities. Furthermore, as a child soldier is to be considered a child used for auxiliary activities, such as spying, cooking or sexual servitude. It would be useful to quote Paris Principles:

7 http://www.unicef.org/emerg/files/Cape_Town_Principles(1).pdf

8 As of 3 December 2012, 105 states have endorsed Paris Commitments and Paris Principles on Children Associated with Armed Forces and Armed Groups, Serbia among them,
http://www.child-soldiers.org/news_reader.php?id=610

Principle 2.1.

Any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities.[9]

The most important elements of the child soldier definition, that both Cape Town and Paris Principles cherish, are the age limit, no distinction between girls and boys, no distinction between regular state army and non-state armed groups, no distinction on whether a child is voluntarily enlisted or through coercion, no dictions on whether a child is engaged in combat or serves in other activities connected to an armed conflict (Grover, 2010:416; Drumble, 2012: 4).

Thus, the approach taken on the conferences and the expansion of the child soldier definition is valuable and welcomed, although it does not create binding legal regime.

The Organisation of United Nations has been very active and interested in the legal status and protection of child soldiers. Activities on behalf of the UN have been undertaken by General Assembly,[10] Security Council,[11] Secretary General,[12] in creation of new bodies,[13] organisation on several conferences on children.[14]

Of the utmost importance among the Security Council's resolutions are the Resolution on establishing monitoring, reporting mechanism on use of child soldiers[15] and the Resolution stating readiness to impose sanctions on armed groups persistently violating rights of children.[16] Up to now, the Security Council has taken measures in connection to the recruitment and use of children in two cases – the Democratic Republic of Congo and Cote d`Ivoire. Although sanctions were already imposed on states, the Security Council imposed sanctions on individuals, as well. The Security Council Sanctions Committee concerning Côte d'Ivoire subjected Martin Koukakou Fofie to a travel ban because of his recruitment and use of child soldiers.[17] The Security Council Sanctions Committee concerning the Democratic Republic of Congo subjected commanders of the Forces Démocratiques de Libération du Rwanda (FDLR) to existing asset freezes and travel bans citing the abduction and sexual abuse of girls and the recruitment and use of boys as young as 10 years old as soldiers.[18]

The focus of international community is shifted from armed forces to the use of children by armed groups. The legal framework governing states and national armed forces on the child soldiers issue is completed and duties of states are legally defined. On the other hand, a specific legal position of armed groups in the system of international law, issues on whether they are or are not subjects of international law, whether they can be considered as duty-bearers or not, complicate their compliance and accountability for norms on the child soldiers status and protection. Thus, this set of issues will be of the international community`s utmost interest to be defined.

Impunity issues were raised concerning criminal accountability for the recruitment and use of children in armed conflicts. According to the majority of instruments governing the status of child soldiers, states are obliged to enact their national legislation i.e. criminal legislation to punish individuals responsible for the violation of their provisions (Withman, 2012).

9 The Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups, February 2007, www.child-soldiers.org/childsoliders/Paris_Principles_March_2007.pdf

10 UN General Assembly, United Nations Millennium Declaration, 8th plenary meeting, A/55/2, 8 September 2000

11 UN Security Council Resolution 1612 from 26 July 2005, Res. 1261 from 25 august 1999, Res. 1314 from 11 August 2000, Res. 1379 from 20 November 2001, Res. 1460 from 30 January 2003, Res. 1539 from 22 April 2004, Res. 1612 26 July 2005, Res. 1882 from 4 August 2009, Res. 1998 from 12 July 2011

12 Promotion and Protection of the Rights of Children – Impact of armed conflict on children, Note by Secretary General, A/51/306, 26 august 1996.

13 Creation of Special Representative of the UN Secretary General for children and armed conflicts, UN General Assembly Resolution A/RES/51/77(1996).

14 2005 World Summit Outcome, UN General Assembly Resolution A/RES/60/1 from 24 October 2005

15 UN Security Council Resolution 1612 from 26 July 2005; for more see: UN Security Council Resolution 1612 and Beyond: Strengthening the Protection for Children in Armed Conflicts, Watchlist on Children and Armed Conflicts, May 2009, http://www.watchlist.org/reports/pdf/PolicyPaper_09.pdf

16 UN Security Council Resolution 2068 from 19 September 2012

17 UN Security Council Resolutions 1572, 1584, 1643, 1727, 1782 and 1842 from 2006

18 UN Security Council Resolutions 1596 and 9608 from 2009

International criminal law, as the part of international public law normative framework of the child soldier's legal status, contributes to the struggle against impunity. The incrimination of the recruitment and use of children in armed conflicts is defined under war crimes. The Statute of the International Criminal Court was the first international treaty where the recruitment and use of children in armed conflicts were recognised as war crimes.[19]

Child soldier`s oriented crimes are defined under paragraph 2(b) as "other serious violations of the laws and customs applicable in international armed conflict, with the established framework of international law" as "conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities" (Article 8, paragraph 2(b(xxvi). Paragraph 2(e) defines "other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law" and one of them is "conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities" (Article 8, paragraph 2(e (vii)). Both *actus reus* are defined under the general regulation concerning the definition of a war crime and thus they cannot be interpreted separately (Sivakumaran, 2010).

The Stipulation of Article 8 in the Rome Statute rests most directly on the wording of the Additional Protocol I from 1977.[20] It is self-understanding since war crimes generally are the incrimination of the violation of the laws of armed conflicts.[21] At the time when the Rome Statute was created, there were no other norms creating a different age limit and states could not decide at that stage whether customary law raised the age limit up to 18 years.[22] Thus, the age limit in the Rome Statute has been created on the ground of the age limit created in Additional Protocol I.

On the other hand, there are different views and different understanding on the specific *actus reus* prescription (Topa, 2007:115-116). The prohibition of the recruitment is general and it is basically the same provision as the one in the Additional Protocol I from 1977. The selection of verbs, though, should be carefully studied. The verb "recruiting" is wider and it is supposed to cover both the voluntarily and compulsory recruitment. The verbs "conscripting" and "enlisting" were rather new in the context, attracting thus various interpretations. For example, there is understanding that these terms suggest a more passive attitude, thus it should be understood only as the compulsory recruitment (Schabas, 2001:50; Hebel and others, 1999:117). The other part of the sentence creates the prohibition against using children to participate actively, while Article 77 of the Additional Protocol I prohibits a direct use in hostilities. Both versions are vague and should be interpreted. In general, the version of the Rome Statute is understood as broader, since it covers a direct participation in hostilities, but also other activities such as spying, sabotage or other auxiliary activities (Grover, 2010:580).

The child soldier's oriented crimes are also defined within the Statute of the Special Court for Sierra Leone under the crime *Other serious violations of international humanitarian law* in Article 4 (Sivakumaran, 2010). The composition of crimes in this Statute differs from the classical catalogue of crimes (Schabas, 2006:46). Thus, war crimes as classical international public law crime is divided in the violations of Article 3 common to the Geneva conventions and of Additional Protocol II in Article 3 and other serious violations of international humanitarian law in Article 4. The definitions are due to the circumstances of Sierra Leone conflict. Article 4 does not provide the *chapeau* definition, thus *acuts reus* is to be interpreted solely. Under (c.) *actus reus* reads identically to the one in the Rome Statute (Article 8, par.2(e(vii) - conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities. It is worth mentioning that in the UN Secretary General Report on Establishing the Special Court original proposal for child oriented crimes were defined as "abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in

19 Schabas refers to it as "a new law" together with sexual offences (Scahabas, 2001:49)

20 Schabas points that wording of this paragraph is drawn from the 1989 Convention on the Rights of the Child as well as Additional Protocol I (Scahabas, 2001:50); Cryer and others defines it as a norm of both international humanitarian and international human rights law (Cryer nad others, 2008:260).

21 "War crimes law is, in effect, a set of secondary rules that criminalize a subset of the primary rules found in International Humanitarian Law" (Cryer and others, 2008:225)

22 For detailed overview on drafting process see: Hebel von H., Robinson D. (1999), Crimes within the Jurisdiction of the Court, p.117-118, in: Roy S. Lee (ed.) (1999), The International Criminal Court – The Making of the Rome Statute: Issues, Negotiations, Results, Kluwer Law International.

hostilities."[23] The definition that was accepted at the end, is the one already accepted in the international community, thus it was more secure wording for the Special Court as well.[24]

Whether the child oriented crimes emerged in customary law prior to treaty law is under debate. Drafting the Rome Statute was the first official occasion for such a discussion. The United States strongly held that recruiting of children is not established in customary law and thus drafting for purpose of the Rome Statute is creation of a new law. Majority of states' representatives held that no matter whether it is or it is not customary law, it should be provided within the treaty, justified with a strong and almost universal acceptance of children protection in the substantive law, both international humanitarian law and human rights law (Hebel and others. 1999:117).

There are views that conscripting and enlisting of children into armed forces or armed groups, as well as using them in conflicts is a crime under customary law. In the Special Court for Sierra Leone Appeals Chamber held, with only one dissenting voice, that as early as 30 November 1996 (date for commencement of temporal jurisdiction of the Court) the child recruitment was criminalised under customary law and before its prohibition in treaty law.[25] Contrary to this statement, justice Robertson in his Dissenting Opinion, thoroughly examined legal framework for the children's legal status in an armed conflict and concluded that since the Rome Statute adopted in 1998 there were "*only general obligation on states and belligerent parties to avoid the enlistment of parties, but if they did enlist children they were enjoined to keep them out of firing line*"[26] He further points that *"in customary international law, by the end of 1996 was a humanitarian rule that obliged states, and armed factions within states, to avoid enlisting under fifteens or involving them in hostilities, whether arising from international or internal conflict*"[27]

Recent armed conflicts in Africa are marked with widespread involvement of children, in various roles. There is one standing: "In the civil war in Sierra Leone (1991-2002) virtually all the parties to the conflict recruited child soldiers" (Rosen 2012"39). The same can be confirmed for other conflicts. Thus, international criminal courts prosecuted (some of these) crimes for the recruitment and use of children in armed conflicts and delivered their judgements.

Jurisprudence of international criminal courts

The first judgement ever delivered by the International Criminal Court was the judgement in the case of Thomas Lubango Dyilo, in March 2012, on its 10th anniversary. Lubanga was convicted on only one count - war crime of conscripting and enlisting children under the age of 15 and using them to participate actively in hostilities.

For the first time in the entire international criminal law jurisprudence a court was examining the concept of a child soldier. The Trial Chamber found that *"the three relevant acts, namely conscripting, enlisting children under the age of 15 or using them to participate actively in hostilities, in each instance the conduct is not defined in the Statute, the Rules or the Elements of Crimes".*[28] Accordingly, their scope and meaning are to be found in the Article 21 and 22 of the Statute *(*applicable law*)* and interpreted it in the manner defined in the Vienna Convention on the Law of Treaties.[29]

The Trial Chamber found that enlisting and conscripting are both forms of recruitment and that they apply equally to boys and girls under the age of 15, either to armed forces or armed groups. The distinction between them is that conscription should be understood as coercively, while enlisting as a voluntarily form of recruitment.[30]

23 Report of the Secretary General on the Establishment of a Special Court for Sierra Leone, S/2000/915, 4 October 2000, par. 17-18
24 Special Court for Sierra Leone, Appeals Chamber, Prosecutor against Sam Hinga Norman, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), 31 may 2004, par.8.
25 *Ibid*, par.53.
26 *Ibid*, par.24.
27 *Ibid*, par.33.
28 International Criminal Court, Prosecutor v. Thomas Lubanga Dyilo, Judgement, 14 March 2012, par.600
29 *Ibid*., par.600 - 601.
30 *Ibid*., par.607.

The Trial Chamber found that the conscription, enlistment and use of children are separate, independent offences.[31]This statement came as a clarification to the request of the defence that act of enlistment should be understood as *"integration of a person as a soldier, within the context of an armed conflict, for the purposes of participating actively in hostilities on behalf of the group"*[32]

Further clarification considered the relation among the voluntarily and compulsory engagement of a child. A stand that was taken by the Court was that there is no difference between the voluntarily and compulsory engagement of a child, in terms of accusation. Further on, the Trial Chamber endorsed the conclusion of the expert witness who explained that "boys and girls under the age of 15 will be unable to give a genuine and informed consent when enlisting in an armed group or force".[33] The consent of a child neither provides ground for defence of the accused nor ground for exclusion of criminal responsibility.[34] Yet, the interplay between the voluntarily and compulsory engagement should be applied only for the purpose of enlistment and conscription as war crimes *actus reus*. It can be confused, and thus it should be carefully analysed, with other forms of child "engagement" in armed conflicts that are also connected with the issue of will, such as for example sexual offences, or deprivation of liberty etc. (Ambos, 2012:134-136).

Free will, thus, became the essence of the crime. The Trial Chamber applied a test of free will rigidly, restrictively, relying on the stand that a child less than fifteen years cannot make right decisions because he/she cannot foresee the consequences.

The comments on the judgement, though, did pose a question on correctness and accuracy of such a stand. Namely, Kai Ambos poses a question – "Is it really impossible to think of a situation where a child "voluntarily" joins an armed group?" (Ambos, 2012:136). As for illustration, he suggests an example of a child that desperately needs the pay he may receive for the military service for the treatment some health problems of a family member (Ambos, 2012:136).

The posed dilemma has no intention of provoking a philosophical debate on the limits of a free will, but rather is a form of a critique. Free will should provide ground for differencing enlistment and conscription, while its annulment reveals that recruitment as a single term serves better the purpose.

The third part of *actus reus* is defined as using children to participate actively in hostilities. Neither the Statute nor Elements of Crimes provide the interpretation of the expression. Thus, the stand of the Court is of the utmost importance, both for the present case and for all further cases.

The very nature of such prohibition is understood under the general intention to protect children from the risks associated with the armed conflicts.[35]

What should be understood under the term active participation, though, came as very challenging task for the Court. Majority of the chamber opined that *"given the different types of roles that may be performed by children used by armed groups, the Chamber's determination of whether a particular activity constitutes "active participation" can only be made on a case-by-case basis*[36]*. Contrary,* Judge Odio-Benito in her separate and dissenting opinion disagreed with this case-by-case determination, stressing risks of divergent assessments of the respective harms suffered by different children, in particular by the girl victims of sexual violence.[37]

While deliberating on the proper understanding of the expression active participation, the Trial Chamber invoked several reasoning. The Preparatory Committee drafting the Rome Statute did come out with a broad interpretation of the expression:

"*The words "using" and "participate" have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer's married accommodation. However, use of children in a direct support function such as*

31 *Ibid*, par.609.
32 ICC-01/04-01/06-2773-Red-tENG, para. 34.
33 International Criminal Court, Prosecutor v. Thomas Lubanga Dyilo, Judgement, 14 March 2012, par.613
34 *Ibid*, par.616-617
35 *Ibid,* par.619.
36 *Ibid, p*ar.628.
37 International Criminal Court, Prosecutor v. Thomas Lubanga Dyilo, Judgement, Separate and Dissenting opinion judge Odio Benito, par.13.

acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology."[38]

The Pre-Trial Chamber decided "*that a child does not actively participate in hostilities if the activity in question was "clearly unrelated to hostilities"*[39] Active participation was described not only as direct participation in hostilities, but also as active participation in combat-related activities such as scouting, spying, sabotage and the use of children as decoys, couriers or at military check-points, guarding military objectives or acting as a bodyguard.[40] Activities unrelated to active participation the Pre Trial Chamber described as "*food deliveries to an airbase or the use of domestic staff in married officer's quarters"*[41]

The relation that should be cleared is wording of the Article 77 of the Additional Protocol I – direct participation, and wording used in the Article 8 of the Rome Statute – active participation. The Trial Chamber decided:

The use of the expression "to participate actively in hostilities", as opposed to the expression "direct participation" (as found in Additional Protocol I to the Geneva Conventions) was clearly intended to import a wide interpretation to the activities and roles that are covered by the offence of using children under the age of 15 actively to participate in hostilities. It is noted in this regard that Article 4(3) (c) of Additional Protocol II does not include the word "direct".[42]

And as for a conclusion the Trial Chamber underlines the common feature:

The extent of the potential danger faced by a child soldier will often be unrelated to the precise nature of the role he or she is given. Those who participate actively in hostilities include a wide range of

individuals, from those on the front line (who participate directly) to the boys or girls who are involved in a myriad of roles that support the combatants. All of these activities, which cover either direct or indirect participation, have an underlying common feature: the child concerned is, at the very least, a potential target. The decisive factor, therefore, in deciding if an "indirect" role is to be treated as active participation in hostilities is whether the support provided by the child to the combatants exposed him or her to real danger as a potential target. In the judgment of the Chamber these combined factors – the child's support and this level of consequential risk – mean that although absent from the immediate scene of the hostilities, the individual was nonetheless actively involved in them."[43]

Tightly connected, yet separated was the issue of sexual violence. Prosecutor did not add sexual crimes to the list of charges and thus they were left out of deliberation. On the other hand, they were a contentious issue throughout the procedure, since the witnesses and their legal representatives insisted on adding them. Nevertheless, the Trial Chamber was firm on decision not to enter new charges during the trial (par.630). In the final outcome, the judgement did not take the official stand on whether sexual violence can be understood as active participation in armed conflicts. Finally, there is no jurisprudence on this count.

The qualification of sexual violence in terms of active participation in armed conflict, though, has been thoroughly analysed in Separate and Dissenting Opinion of Judge Odio-Benito. She asserts:

"Although the Majority of the Chamber recognises that sexual violence has been referred to in this case, it seems to confuse the factual allegations with the legal concept of the crime, which are independent. By failing to deliberately include within the legal concept of "use to actively participate in hostilities" the sexual violence and other ill treatment suffered by girls and boys, the Majority of the Chamber is making this critical aspect of a crime invisible. Invisibility of sexual violence in the legal concept leads to discrimination against the victims of enlistment, conscription and use who systematically suffer from this crime as an intrinsic part of the involvement with the armed group."[44]

38 International Criminal Court, Prosecutor v. Thomas Lubanga Dyilo, Judgement, 14 March 2012, par.621
39 *Ibid*, par. 622.
40 *Ibid*.
41 *Ibid*, par.623.
42 *Ibid*, par.627.
43 *Ibid*, par.628.
44 International Criminal Court, Prosecutor v. Thomas Lubanga Dyilo, Judgement, Separate and Dissenting Opinion of Judge Odio-Benito, par.16.

Judge Odio-Benito did not separate her opinion only on the ground of procedural terms. Her opinion dissented from the point of *ratio* of prohibition and *telos* of the child protection. While Majority of the Chamber agreed on common feature for protection that is defined as the risk for a child of being a potential target, Judge Odio-Benito underlined that such reasoning is reasonable only as protection of children from the enemy. Contrary to such deliberation, Judge Odio-Benito underlines that a child can suffer harm inflicted by the armed group that recruited the child. She points:

"Children are protected from child recruitment not only because they can be at risk for being a potential target to the "enemy" but also because they will be at risk from their "own" armed group who has recruited them and will subject these children to brutal trainings, torture and ill-treatment, sexual violence and other activities and living conditions that are incompatible and in violation to these children's fundamental rights. The risk for children who are enlisted, conscripted or used by an armed group inevitably also comes from within the same armed group."[45]

Although reasoning by Judge Odio-Benito fulfils usual logical standards and also fulfils reasoning of the Chamber when broadening the term of active participation, her reasoning was not mostly welcomed. For example, Kai Ambos in his detailed commentary on the Judgement suggests that such reasoning is in confrontation with *nullum crimen sine lege* principle (Ambos, 2012:137). Yet, he does not explain how broadening in sexual violence is different from other broadenings. His ultimate explanation consists that in fact sexual violence presents separate *actus reus*, which further on means that no crime will go unpunished.

It should be concluded that since the Judgement does not provide the official statement on whether sexual violence can or cannot be understood as active participation in an armed conflict, there is still enough room for deliberation in potential future cases. The principle that was underlined by the Chamber – that criminal incrimination is governed with the risk for children's lives when exposing them to real danger should be the governing principle for sexual violence as well.

Broadening the protection of children is welcomed since there are no other *actus reus* designed to protect children. Besides, the above mentioned conferences, one held in Cape Town and the other in Paris adopted the use of a child by an armed group for sexual purposes within the definition of a child soldier. This should suggest that a wider composition of a child soldier definition should be followed by broader interpretation of incriminating norms.

The Special Court for Sierra Leone delivered the Judgement in the case against Charles Taylor (just two months after the International Criminal Court rendered its first verdict), on 18th May 2012. One of eleven counts was for conscription, enlistment and the use of children under 15 years to participate actively in hostilities. It is worth underlying that the Judgement is not the first decision of the Special Court for Sierra Leone on child oriented crimes. The first decision where Special Court for Sierra Leone deliberated on child soldiers was the Norman Child Recruitment Decision (Sivakumaran, 2010: 1013). Focus of the Norman Decision was rather on *nullum crimen* principle, then on specific elements and interpretation.

The judgment in the case of Charles Taylor did not bring a different reasoning from the Judgement delivered by the International Criminal Court (Leiflander, 2012).

Conscription is understood as an act which "encompasses any acts of coercion, such as abductions and forced recruitment of children by an armed group with the purpose of using them to participate actively in hostilities"[46]

On the other hand, enlistment "entails accepting and enrolling individuals when they volunteer to join an armed force or group. Enlistment need not be a formal process, and may include "any conduct accepting the child as part of the [armed group]. Such conduct would include making him participate in combat operations"[47].

As for the intriguing relation with the more familiar term "recruitment" the Court finds that both conscription and enlistment are forms of recruitment.[48]

As for the interpretation of the expression "use of children to actively participate in hostilities" the Special Court for Sierra Leone completely rest on the ICC`s findings:

" '*Using' children to participate actively in the hostilities encompasses putting their lives directly at risk in combat, but may also include participation in activities linked to combat such carrying loads*

45 *Ibid*, par.19
46 Special Court for Sierra Leone, The Prosecutor vs. Charles Ghankay Taylor, Judgement, 18 May 2012, par.441
47 *Ibid*, par.442
48 *Ibid.*

for the fighting faction, finding and/or acquiring food, ammunition or equipment, acting as decoys, carrying messages, making trails or finding routes, manning checkpoints or acting as human shields. Whether a child is actively participating in hostilities in such situations will be assessed on a case-by-case basis."

Sexual violence on girls and boys was not considered as a manifestation of active participation in the armed conflict. Sexual violence, under counts 4, 5 and 6, on the other hand, covered girls as well (with no definition of a "girl", or age limit).[49] Thus, it would be possible to conclude that justice is reached, though there is still an issue on whether it would be better to differentiate sexual violence as such from sexual violence that is in the function of hostilities i.e. soldiers. The facts finding on sexual violence showed that women and girls were abducted in order to serve to soldiers. They were also used as a reward to soldiers or to motivate unpaid soldiers.[50] In the version of sexual slavery, function of either women or girls can be described as active participation in armed conflict. Their position was to serve soldiers in order to maintain hostilities. They were used, as well, as a reward to soldiers, etc. Yet, marking the distinction of such kind was not undertaken either in crime definition, or *actus reus*, or indictment (Tanjevic, 2012).

The Judgement on Taylor adds to the growing jurisprudence on child soldiers. Nevertheless, it is followed, as well, with regrets and critics that a valuable opportunity to charge and convict for sexual crimes over children in terms of child soldiers was missed (Aptel, 2012; Leiflander, 2012; O`Regan, 2012; Torrens, 2012; Drumbl, 2012:145).

CONCLUSION

The protection of children during armed conflicts was stipulated both in the corpus of international humanitarian law and human rights law. Those two parts of international public law are coherent in general. The main difference concerns the age limit for a person to be regarded as a child. The incrimination of the violation of the child's rights during an armed conflict is created within the International Criminal Law. When reading definitions it comes necessary to gain their interpretation. Thus, recent verdicts of international criminal courts are of immense value, for better understanding of wording as well as for the detection on shortcomings of the definition and court's reasoning. The main achievement of judgements (analysed in the paper) is the conclusion that there is no difference on the ground of the free will for a child participating in an armed conflict and the spectrum of activities and roles that can be understood as active participation in armed activities. Broadening of a scope of participation, from direct (humanitarian law approach) to active (in international criminal law) comes as a direct influence of human rights orientation. Thus, the stipulation of a criminal act is defined under both humanitarian law and human rights law influence. The age limit is imported directly from humanitarian law and it does not follow contemporary prescriptions. Thus, it is disappointing that there is a certain gap in ages for complete and comprehensive protection.

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MISTAKE OF FACT IN GERMAN LAW[1]

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Abstract: The subject of the paper is mistake of fact in the Criminal Law of Germany, but it is not limited to the description of this provision in the legislation of this country. In the introduction, we shall review the term and effect of mistake of fact. We shall study the importance of the wrong impression of the offender, in respect of the qualification and beneficial characteristics of the offense. We shall also point out the similarities and differences between mistake of fact and mistake of law and establish criteria for their distinction. We have particularly highlighted the conditions for the application of mistake of fact. Part of article is related to the offender's misconception about the object of criminal offense and causality. In order to properly understand the topics of the paper, we shall consider the opinion of court practice about a numerous concerns related to the mistake of fact.

Keywords: mistake, misconception, specific elements of crime, prohibition, guilt.

THE TERM MISTAKE OF FACT

Mistake of fact is prescribed by Paragraph 16 of the German Criminal Law: "1) Do not act with intent to the one who while committing the offense did not know of any circumstances which belong to the legal nature of criminal offense. Punishment for negligent execution remains intact. 2) The one while committing offense mistakenly believes that there are circumstances achieving specific elements of the offense by a more lenient law, may be punished for committing an intended offense only based on that more lenient law."[2]

Mistake of fact in the German Law implies the mistake about the circumstances related to the specific elements of the offense. At first glance, this institute has a wider meaning in our legislation, as it refers to an actual circumstance that would, if it really existed, make an offense allowed (Article 28 Premise 2 Criminal Code of Serbia). However, according to the interpretation of German theory and court practice, the circumstances that are the subject of mistake of the offender are not only the actual specific elements of an offense, but also in case of mistake on basis of unlawfullness exclusion (e.g. self-defense and necessity), Paragraph 16 Criminal Code of Germany is applied.[3] There is no unique opinion about this issue in doctrine, which will be pointed out in the following paragraphs.

We begin the analysis of the mistake of fact in German Law, by considering the circumstances in respect of which the offender is mistaken. This is a very important question, because the type of mistake and its effect depends on the answer (mistake of fact or mistake of law). Paragraph 16 of the Criminal Law of Germany implies that the offender's mistake referes to specific elements of an offense (action, consequence, causal relation, place, time, means, etc.). Related to the above mentioned, in theory dominates the view that misconception may refer only to the objective specific elements of an offense.[4] There is no doubt that this view can be accepted, i.e. that compering to specific elements of an offense which are subjective, mistake is irrelevant (intent, negligence and incentive). Of course, assumption for the acceptance of this concept of mistake is previously accepting the objective-subjective understanding of specific elements of an offense, which includes subjective ones as well.[5]

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2 Krivični zakonik Savezne Republike Nemačke sa Uvodnim zakonom za krivični zakonik i Vojno krivičnim zakonom, Prevod sa nemačkog: Pavlović, D., Beograd 1998, 19.

3 Walther, S., *Strafrecht – Anmerkung*, *JZ*, 1/2003, 53; Jescheck, H.H., Weigend, T., *Lehrbuch des Strafrechts - Allgemeiner Teil*, Berlin 2003, 308.

4 Kindhäuser, U., Neumann,U., Paeffgen, H.U., *Strafgesetzbuch*, Baden-Baden 2005, 521.

5 Стојановић, З., *Кривично право-општи део*, Београд 2011, 106-107.

In German theory, specific elements of an offense are not considered to be apstract concepts from legal description of the offense, but the specific elements of the criminal matter that fit the legal description of the offense.[6] Specific elements of the offense in respect of which the offender may be mistaken, in terms of Paragraph 16 CCG, are both descriptive and normative elements, it is unique theory of criminal law.[7] For descriptive specific elements of an offense (e.g. thing), "mere knowledge of the facts" excludes mistake.[8] If the person who commits theft whose object of action was a dog, mistakenly believes that a dog is not a thing (the so-called mistake of subsumption), he is not mistaken about the fact on a descriptive specific elements of the offense.[9] On the other hand, the normative elements are the legal terms in the legal description of the offense (e.g. property, marriage, documents), and other elements (e.g. sexual intercourse, dignity, secret).[10]

Perception is not enough for intent reagarding the normative specific elements of the offense, but mental understanding by the offender, the so-called "parallel evaluation of the laic sphere."[11] If the offender has not properly understood the meaning of these elements, even as a laic, Paragraph 16 CCG may be applied, which regulates the mistake of fact.[12] This means that the offender may act intentionally, though he does not possess legal knowledge.[13] For example, the knowledge of the civil law concept of ownership is irrelevant, if the offender knows that the thing belongs to another person.[14] Accordingly, a person A who had let the air out of the tires on the car, cannot rely on that in his opinion, the term "damage" means a material breach of things, because the vehicle due to the actions taken cannot be used safely, and the offender must have known that. Our theory accepts that the laic understanding of the meaning of these terms is sufficient to exclude references to mistake of facts.[15] This cannot be denied, because the accepting of the opposite solution would mean that only lawyers can commit certain offenses with intent, i.e. the application field of mistake of fact would be too broad. Thus, the normative specific elements of an offense are crucial for intent, being that the offender sensually perceived facts subsumed under the abstract legal concepts, which meaning he probably did not know.

In German law and theory, mistake of the qualification and beneficial specific elements of an offense is in focus. The Paragraph 16 Criminal Code of Germany follows that mistake of the offender about beneficial circumstances of act is criminally relevant. If the offender has the wrong idea that there are beneficial circumstances of act i.e. he mistakenly believed that he committed beneficial form of offense, may be punished for intent to commit the minor offense only. For example, a person who is mistaken about serious requests for a murder may be punished for beneficial murder regarding Paragraph 216 Criminal Code of Germany.[16] For example, the offender deprives another person of life, because he takes into account his alleged desire to be killed, even though the victim just wants attention.

If the mistake refers to qualifying circumstances, there is no doubt that Paragraph 16 of the Criminal Code of Germany which regulates mistake of fact, may be applied, because the qualifying circumstances of the offense are specific elements. Therefore, applying the mistake of fact excludes intent in relation to more serious offense, but it will have no impact on the existence of intent in relation to the basic form of the offense.[17] For example, the offender who is involved in the theft with more than one person did not know that these persons possessed firearms or dangerous tools that could be used for an attack or defend. This view of German theory can be accepted, even though the provisions of the Code relating to the mistake of fact do not specifically regulate the offender's misconceptions regarding qualifying circumstances.

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6 Schönke, A., Schröder, H., *Strafgesetzbuch-Kommentar*, München 2001, 326.
7 Poppe, I., *Tatirrtum, Rechtirrtum, Subsumtionsirrtum,* GA, 4/1990, 145.
8 Joecks., W., *Münchener Kommentar zum Strafgesetzbuch*, München 2003, 661.
9 Haft, F., *Strafrecht Allgemeiner Teil*, München 1990, 247.
10 H. H. Jescheck, H.H., Weigend, T., *Lehrbuch des Strafrechts - Allgemeiner Teil*, Berlin 2003, 308.
11 Haft, F., 247.
12 Jescheck, H.H., Weigend, T., 308.
13 Poppe, I., 151.
14 Haft, F., 247.
15 Стојановић, З., 147.
16 Pragraph 16 of Criminal Code of Germany provides manslaughter on request ("Whoever takes live of another person on his explicit and serious request.").
17 Kindhäuser, U., Neumann,U., Paeffgen, H.U., 522.

Generally speaking, mistake of fact exists in case of the offender's misconception about specific elements of the offense and in case of conception absence of same as well.[18] It is necessary to highlight that this rule applies only to Paragraph 16, Premise 1, Criminal Code of Germany, because, as noted above, Premise 2 regulates the situation in which the offender mistakenly believes that there are beneficial circumstances of the offense. In this regard, the uncertainty (doubt) about the existence of specific elements of the offense does not mean that there is a mistake of fact yet.[19] This means that Paragraph 16 of Criminal Code of Germany may be applied, only if the offender has no idea or has misconception about specific elements of the offense.

There is an issue whether mistake of fact has importance, if the offender has misconception that there are not beneficial circumstances of the offense. The theory argues that the solution to this problem depends on whether the subject of mistake is the conditions which reduce the unlawfullness or his guilt.[20] If the unlawfullness of the undertaken actions is reduced because of the state of mistake in which the offender is found, the provision on mistake of fact should be applied. For example, a thief thinks that worthless imitation is a precious jewelery. If the subject of mistake is the conditions that diminish the guilt of the offender, misconception is irrelevant to the existence and degree of guilt in this case (e.g. mother mistakenly believes that her illegitimate child was born in marriage).[21] To put it simply, what is not known to the offender, cannot affect his guilt. In contrast, some authors believe that if in any particular case mistake is determined regarding the realization of specific elements of a more serious offense, that act, should be qualifyed as an ideal concurrence of attempting a more serious offence and less serious criminal offense which is finished.[22]

In criminal legal literature there is a unique opinion, that the actual circumstances regarding which the offender may be mistaken result primarily from the legal description of criminal acts in Criminal Code of Germany and the subordinate Criminal Law. However, it should be taken into account, that due to the combined application of general and specific provisions of the criminal legislation on individual criminal cases, new objective circumstances may be created in regarding which there may be mistake of fact, or the current will be changed.[23] For example, we can use rules of complicity. An indirect offender must know that the offender is tools in his hands, while the one who induces other has to know that he creates or strengthens offender's decision to realize a criminal offense. It is our opinion that the above mentioned circumstances are relevant, but not for the mistake of fact application, but for the application of indirect execution and encouragement institute.

It has already been said several times that Paragraph 16 of the Criminal Code of Germany relates primarily, to the specific elements of an offense arising from the legal description. Accordingly, the objective condition of punishment is not the circumstance regarding which the offender's misconception is relevant, although it is an integral part of the legal description of certain criminal offenses.[24] The reason is simple; the objective condition of punishability is not specific elements of the offense. It is outside of the specific elements of offense and therefore there is no need to be included in the offender's guilt. It is therefore logical that the offender's mistake regarding the objective condition of punishability is irrelevant to the guilt. However, the doctrine considers that the offender's mistake regarding circumstances which are criminally relevant is not irrelevant, and cannot be classified as specific elements of an offense. Accordingly, a legal document which regulates the mistake of fact should be applied analogously in terms of the circumstances that are relevant to sentencing, and that must be included in the offender's intent.[25]

18 Joecks., W., 652.
19 Schönke, A., Schröder, H., 326.
20 Jescheck, H.H., Weigend, T., 310.
21 Paragraph 217 of Criminal Code of Germany provides privileged murder of a child born illegitimate, while the killing of a child born llegitimate is treated like ordinary murder from Pragraph 212, Premise 1.
22 Schönke, A., Schröder, H., 326.
23 Kindhäuser, U., Neumann,U., Paeffgen, H.U., 522.
24 Joecks., W., 653.
25 Jescheck, H.H., Weigend, T., 306.

EFFECT OF MISTAKE OF FACT

Mistake of fact may affect the offender's guilt in different ways. Depending on the circumstances of the case, mistake may exclude guilt (intent and negligence), exclude only intent or be irrelevant for the existence of guilt. Therefore, Paragraph 16, Premise 1 in Criminal Code of Germany provides that mistake of fact is the basis which excludes the offender's intent. Although Premise 1 of this Paragraph provides, that "the punishment for negligently commission of an offense remains intact," it does not mean that the exclusion of intent means that in this case the form of guilt is negligence. Similarly to the solution which is accepted in our criminal law, the existence of negligence depends on whether mistake is removable or not, whilst the intent is excluded in case of irremovable and removable mistake as well.[26]

Interestingly, the Criminal Code of Germany does not proscribe intent and negligence as a form of guilt; it is left to court case and legal theory.[27] Therefore, some authors believe that the legal provisions of mistake indirectly regulate forms of guilt. Accordingly, if mistake excludes intent and the subject of mistake is a specific element of an offense, it follows that intent exists only if the offender is aware of those specific elements.[28] Therefore, the awareness of specific elements of an offense is a constitutive element of intent. On the other hand, according to Roxin the view that indirectly regulates intent in Paragraph 16 of the Criminal Code of Germany is wrong, because this provision provides only that mistake about specific elements of an offense excludes intent.[29] The content of intent is not specific.

In case of negligent acts a question of time that is relevant for the determination of this form of guilt may be asked. Whether this is the time when the offense has been committed, or the time prior to taking actions? The offender in the time proceding the commission of the offense, often contributes to the state of mistake, in which he later gets (do not gather the relevant information, do not read the instructions, etc.). Should the preceding guilt be taken into account? According to theory understanding, the offender's guilt is determining considering the time of the offense execution,[30] while the previous guilt is significant in accordance with the principles *actiones liberae in causa*.[31] This means that the previous guilt is irrelevant, only under the condition that negligence included possibility of putting in mistake in which the offense will be committed.

There is an issue how to qualify mistake in terms of incomplete criminal-law norms (which refers to other norm), which we can find primarily in the secondary criminal legislation. It should be also noted that in our secondary criminal legislation offenses are often defined by incomplete norms.[32] It is important to emphasize that the offender may be mistaken to the existence of norm which completes the incomplete norm, as well as to its contents.[33] According to one view, the content of the norm, which completes another blanket norm is an integral part of specific elements of the offense, and accordingly, should be included in the offender intent.[34] In other words, the specific elements of an offense included in the norm, which completes the incomplete norm, are not less important comparing to specific elements in the incomplete norm, if they exist at all. In this regard, the court practice is criticized, according to which, in this case there is mistake of law. The incomplete norm is unclear and does not justify the punishment, unless the intent of the offender is not related to the specific elements of the offense included in the supplemental norm.[35] According to the prevailing opinion, if misconception is related to the supplemental norm content, there is mistake of fact, while in the case of misconception about the existence of the supplemental norm provision

26 Haft, F., 247.
27 The perpetrator's guilt and its forms are provided by Paragraph 15 of Criminal Code of Germany: "Only intentional acts are punishable, unless the law provides punishment for negligent acts as well."
28 Schönke, A., Schröder, H., 326.
29 Roxin, C., *Strafrecht – Allgemeiner Teil*, München 2006, 630.
30 Jescheck, H.H., Weigend, T., 310.
31 Schönke, A., Schröder, H., 328.
32 Стојановић, З., 7.
33 Additional norms that complement blanket norm do not need to be by its nature criminal-law, but it often comes to regulations that fall under the administrative, commercial and tax law. Blanket norm often provides just punishment, while the prohibited or ordered behavior is prescribed specifically by other laws or by-laws.
34 Joecks., W., 662.
35 Jescheck, H.H., Weigend, T., 309.

on mistake of law should be applied.[36] For example, an incomplete norm prescribes punishment of persons participating in the hunt, contrary to the rules regulating the time when hunting is permitted. Mistake about duration of the prohibition of hunting is mistake of fact, while mistake about ban on hunting during this period is mistake of law. On the contrary, part of the theory thinks that the the intellectual element of intent should include the existence of a supplemental norm, because of the specificity of the secondary legislation providing that only positive awareness of prohibition justifies punishment for intentional execution of the offense.[37]

We believe that the opinion according to which the intent of the offender should include the specific elements of the offense should be accepted, regardless of the blanket nature of the norm. In addition, Article 13 of Criminal Code of Serbia prescribes that provisions of general part of Code should apply to all offenses, regardless whether they are prescribed in the primary or secondary legislation.

It is disputable how to qualify an act, if the offender is mistaken about the existence of circumstances of an act that in reality does not exist, while circumstances that exist are not included in his intent. It happens when, for example, a person B while committing theft uses weapons for which he mistakenly believes that it is not loaded with ammunition. In spite of it, it is considered that the offender's act in this case should be qualified in accordance with Paragraph 244 Criminal Code of Germany, which prescribes an offense that fits the robbery in our legislation. This is explained by the fact that the offender was carrying firearms in order to use it while committing the offense. The fact that it was loaded with ammunition is irrelevant to the fact that the purpose of carrying firearms in any case (even if it is not loaded), is overcoming resistance of damaged.[38]

MISTAKE OF FACT AND MISTAKE OF LAW DIFFERENTIATION

There is no doubt that the mistake of fact and mistake of law are interconnected institutes, which are sometimes difficult to distinguish. Therefore, the German theory pays attention to the analyses of similarities and differences between the mistake of fact and mistake of law. It should be mantioned that the starting point in any discussion is the view in which the object of mistake of fact is a specific element of an offense (*error facti*), while in case of mistake of law an offender mistakenly believes that his act is not prohibited (*error juris*). For example, a foreigner who resides in Germany does not know that in this country the obligation of the person who has caused the car accident, is to wait for the police at the scene of the offense, no matter whether only material damage has been caused (e.g. damage of a parked car). In this example it is clear that it was mistake of law, but the question whether to apply the provision of mistake of fact or mistake of law remains, if the offender leaves the scene of the offense, convinced that it is in accordance with the law, given that he repaired the damage on the car. According to the position represented by court practice, the provision on mistake of law should be applied.[39] Therefore, in theory and practice there are many doubts about the relationship between two forms of relevant mistake, which is not easy to solve.

If the offender was mistaken so that it is not possible to bring his act under the specific elements of the offense, it would be mistake of subsumption which represents mistake of law.[40] There are clear limits between mistake of subsumption and mistake of fact, as long as there is clearly defined legal description of the offense in which there are certain specific elements.[41] *Poppe* tries to answer the question how the judge will determine whether a defendant who claims to have been mistaken was really mistaken or have maqde mistake of subsumption. Solving this problem is of great importance; because the defendants often defend themselves by saying that they did not know their act was criminalized ("I did not know that I committed an offense of forgery of documents").

The judge may ask two kinds of questions in order to achieve this goal: first, he can ask him about the content of his conception about event if he did not already know he had made an of-

36 Poppe, I., 166.
37 Jescheck, H.H., Weigend, T., 309.
38 Joecks., W., 669.
39 OLG v. 10.12.1985-5 Ss 360/85-295/85 I. (*JZ* 7/1986, 356).
40 Kindhäuser, U., Neumann,U., Paeffgen, H.U., 534.
41 Poppe, I., 151.

fense. Second, he may bring out his own view of the offender's conception, expecting the confirmation or denial of the defendant, in which case he should take into account that the offered conception represents the description of the event in accordance with the legal description of the offense. If the offender has indeed made mistake of fact, he will not agree with the proposed conception, unless while agreeing he has made mistake of subsumption.[42]

MISTAKE OF GROUNDS WHICH EXCLUDES UNLAWFULLNESS

In German criminal-law literature there is no a unique opinion on how to qualify an offender's misconception regarding the circumstances, which if it really existed, would enable application of grounds for excluding unlawfullness. In our legislation, under Article 28 of Criminal Code of Serbia, it is mistake of fact whose effect depends on whether it is irremovable or removable.

There are arguments for the above mentioned problem solution, applying the provisions on mistake of fact, and the application of Paragraph 17 Criminal Code of Germany as well, which regulates mistake of law. It is about borderline cases mistake of fact and mistake of law, because on the one hand the offender mistakenly believes that his act is in accordance with the legal system, which is an argument in favor of the existence of mistake of law. On the other hand, at the same time the offender mistakenly believes in existence of circumstances, which if they really existed, would make act permitted. The legislator in Germany consciously refrained from regulating this problem, which has sharply criticized the theory of criminal law.

According to an opinion that derives from the so called rigorous theory of guilt, mistake on exclusion grounds of unlawfullness cannot be classified as mistake of fact.[43] The starting point of this view is that the circumstances, regarding which the offender was mistaken, are not specific elements of an offense therefore Paragraph 16 of Criminal Code of Germany cannot be applied. The main argument in favor of this is that the offender despite the misconception on exclusion grounds of unlawfulness knows that he has realized specific elements of the offense, suggesting he is acting with intent.[44] Analogous application of Paragraph 16 of Criminal Code of Germany allegedly not possible, because there is no legal emptiness, considering that mistake on exclusion grounds of unlawfullness is mistake of law. This might be acceptable under the condition that the offender's mistake referes only to prohibition of his own act. As noted above, mistake on exclusion grounds of unlawfullness refers to the circumstances which would, if they really existed, make an act permitted, so there is no identification with mistake of law, i.e. the position that this thype of mistake is not regulated in Criminal Code of Germany may be defended.

According to the opposite view, which starting point is restricted theory of guilt, in case of mistake on exclusion grounds of unlawfullness Paragraph 16 of Criminal Code of Germany which regulates mistake of fact[45] may be applied, It is emphasized that the application of the provisions on mistake of fact is theoretically permited interpretation of Paragraph 16 of Criminal Code of Germany.[46] We believe that this view can be accepted, although the legislator explicitly prescribed in Paragraph 16 that mistake of fact exists, if an offender during the commission of the offense was not aware of any circumstances which belong to the legal specific elements of the offense. In applying Paragraph 16, we see no reasons to take into account mistake on the specific elements of an offense that are defined in the legal description of the acts, that indicate the unlawfullness of the offender's action of particular delict, while on the other hand, the analogly with this does not take into account mistake on actual circumstances which excludes unlawfullness of each act. In both cases it is mistake of actual circumstances, which is why the provisions of the Code which regulates mistake of fact should be applied in both types of mistake. We believe that in the theory of criminal law, the criticism of the legislature is justified, as Paragraph 16 does not explicitly prescribe that mistake of fact exists in the case of the misconception on exclusion grounds of unlawfullness.

42 *Ibid.*
43 Kindhäuser, U., Neumann,U., Paeffgen, H.U., 559.
44 Schönke, A., Schröder, H., 329.
45 Walther, S., *Strafrecht – Anmerkung*, *JZ*, 1/2003, 53.
46 Roxin, C., 630.

Therefore, the reference to the provision of self-defnse in Paragraph 32 of Criminal Code of Germany is possible only if the attack is real, serious.[47] This means that it is not a justified application of this institute in the case when, for example, one person wants to greet another person who imagines that he wants to attack him. Legal consequences of putative self-defense depend on the degree of the offender's mistake. An irremovable mistake excludes both intent and negligence, which means that the punishment is excluded as well, because Paragraph 15 of the Criminal Code prescribes punishment only for intentional acts, unless there is specifically prescribed punishment for negligent acts in the Code.[48]

The court should be particularly cautious about determining whether the mistake is irremovable taking into account all the objective circumstances of the case.[49] In contrast, in our legislation the objectively-subjective concept of establishing irremovable and removable mistake of fact is accepted. Therefore, it is necessary to emphasize that this problem in Paragraph 16 of Criminal Code of Germany is not regulated, which means that the legislator leaves to court practice and legal theory to determine criteria for the existence of irremovable and removable mistake. In our opinion, it is too restrictive reasoning that existing of removable or irremovable mistakes of the offender, is not to be judged by taking into account his ability to predict, but only by analyzing the predictability of the average man in given circumstances. We believe that only through the assessment of subjective and objective circumstances of the case, i.e. taking into account the predictability of the offender, but the average man's as well in particular criminal matters, we can determine whether the misconception about the attack is irremovable, removable or we cannot talk about mistake at all.[50]

A stranger (person A) who happens to be at the celebration of the holidays in Germany pushes some of the attendants (person B), for which he apologizes, although does not know to speak German. As the police already have warned participants of a pickpocket, person B checks if her wallet is still in purse, and realizes this is not the case. The wallet has been stolen earlier, but person B, who is convinced she is facing an offender, started briskly to discuss with a stranger, asking in German language, which confuses the foreigner who does not understand, to return her belongings. After that, the person A moves quickly away from the scene, but the person B follows him, catches up and strikes a blow, resulting in the fall on the ground and bodily injury of person A. The court has found that the accused was in irremovable mistake.[51]

It is important to say that the court in verdict explanation pointed out that the action of the person acting in irremovable mistake is not unlawfull. In contrast, in the German literature prevails the view that the attack was unlawfull regardless the offender's guilt, i.e. regardless mistake: *Every attack which is objectively contrary to the legal order is unlawfull.*[52] In this way, the attacked (the alleged attacker) is to be able to refer to self-defense, but at the same time this right is limited, because the attack rejection by committing an offense is allowed only if the offender is otherwise unable to avoid the attack.[53] On the other hand, the authors argue, that in this example the action of the person acting in irremovable mistake is not unlawfull, which leads to the conclusion that the attacked (the alleged attacker) is not entitled to self-defense.[54] Of course, this may happen only under condition that he is aware of misconception of the attacker (the alleged attacked person), otherwise he is entitled to unlimited self-defense.[55]

According to this view, only provisions of necessity should be taken into account, because the existence of the person who takes defense in irremovable mistake of fact is not unlawfull.[56] We believe that the alleged attack in putative self-defense acts unlawfully, because in this case there is actu-

47 Renzikowski, J., *Notstand und Notwehr*, Berlin 1994, 102.
48 BGH , Urt. v. 10. 5. 1968 – 4 StR 16/68. (*NJW*, 40/1968, 1885).
49 Roxin, C., *Sozialrecht. Strafrecht – Anmerkung*, *JZ*, 2/2000, 99.
50 Bloy, R., *Die Bedeutung des Irrtums über die Täterrolle*, *ZStW*, 1/2005, 5.
51 BSG, Urteil v. 25. 3. 1999 – B 9 VG 1/98 R. (*JZ*, 2/2000, 96).
52 Schönke, A., Schröder, H., 610.
53 Jescheck, H. H., Weigend, T., 341.
54 Roxin, C., 99. (According to Roxin, interests of the alleged attacker are protected, because he is entitled to self-defense, but only under condition he previously explains the real situation to the alleged attacked, and only if it is not possible, he may reject the attack. It is the so called social-ethical limitation of self-defense).
55 Krause, F. W., *Zur Einschänkung der Notwehrbefugnis*, *GA*, 9/1979, 333.
56 Hornle, T., *Die Rolle Opfers in der Straftheorie und im materiellen Strafrecht*, *JZ*, 19/2006, 958.

ally no self-defense. This means that his behavior could be considered as an unlawfull attack, which entitles the alleged attacker to defend himself.

Removable mistake of the allegedly attacked person on the existence of an attack, does not exclude his punishment for the negligent act.[57] For example, if a hunter because of poor visibility believes that a man is an animal and kills him, he can be punished for manslaughter. Misconception of offender regarding the condition of self-defense is relevant if it relates to the defense necessity, i.e. intensity of the attack[58] or mistaken belief that it is not possible to reject the attack by less dangerous tool.[59]

For example, if a person A wants to attack a person B, using the gun which is not loaded, the mistake of the person undertaking the defense cannot refer to the state of self-defense, but its necessity (due to physical superiority he could reject the attack using physical force, but he uses a firearm, because he does not know that the attacker's weapon is not loaded).[60] Furthermore, the mistake can be related to the simultaneity of an attack or the existence of socio-ethical limits of self-defense (not known that attacker is mentally ill).[61] In connection with the problem of determining the mistake court practice has taken the position that misconception about the existence or intensity of attack which is the result of an offender's drunkenness, excludes the application of mistake of fact provisions.[62]

MISTAKE OF SUBJECT, PERSON AND CAUSALITY

In German criminal-law literature there is a discussion about the significance of an offender's mistake of the object of action (*error in objecto*) and mistake of the person (*error in persona*), as well as mistake of the importance of causality (*aberratio ictus*). In terms of mistake of object of the action (mistake of the identity of the object's actions), it is considered that the offender's misconception is irrelevant to determine guilt, if the object or person are of the same quality (same value).[63] For example, this type of mistake exists if the offender wants to commit an offense in relation to one person, but as a result of mistake another person is damaged. In the famous case of the 19th century, serf Rose instigated by the landowner Rosal, killed an innocent person, thinking that the he was the Rosal's creditor. In this case mistake is irrelevant for the offender's guilt, because caused consequences (killing) were included in the offender's intent. However, if two objects of action are not of the same value, we can talk about the application of Paragraph 16, which regulates the mistake of fact. For example, a person A wants to damage the car of person B, located in the garage, but in the darkness mistakenly causes damage to his own vehicle. The provision on mistake of fact can be applied, because the misconception refers to the specific elements of the offense (other people's stuff), which excludes intentional realization of the offense.[64] The offender may be prosecuted for the attempted offense.

Causality is the specific elements of an offense regarding those offenses in which there may be a mistake of fact, in terms of Paragraph 16 of Criminal Code of Germany (except offenses that have no consequence). Considering that the causal link is the relation between the act and the consequences, which can never be completely predicted, the question is to what extent there should be a deviation from the causal flow, in order to be relevant in terms of the mistake of fact. Before answering this question, it should be noted that the mistake of causality (*aberratio ictus*), exists if the offender wants to cause consequence to one object of action, but the act is realized in relation to another object of action. According to the opinion which prevails, it is considered that a slight deviation from the causal flow is not relevant, does not exclude guilt by the application of the provisions on mistake of fact. This is explained by the fact that a dangerous act should be incriminated, which is

57 Schönke, A., Schröder, H., 328.
58 Leckner, K., Kühl, K., *Strafgesetzbuch mit Erlauterungen*, München 2001, 205; Urteil. vom. 21. 6. 1968 – 4 StR 157/68. (*GA*, 1/1969, 24).
59 Krümpelmann, J., *Strufen der Schuld beim Verbotsirrtum*, *GA*, 5/1968, 137; OLG CELLE, Urt. v. 6. 3. 1969 – 1 Ss 514/68. (*NJW*, 40/1969, 1775).
60 Joecks., W., 671.
61 Schönke, A., Schröder, H., 630.
62 OLG CELLE, Urt. v. 6. 3. 1969 – 1 Ss 514/68. (*NJW*, 40/1969, 1775).
63 Haft, F., 248.
64 Joecks., W., 667.

the typical way to break or endanger any legal property (object of action).[65] For example, the offender has thrown the victim from the bridge into the water, trying to kill him by drowning, but it strikes the pillar of the bridge and thus gains the fatal injury. However, if the court finds that in particular case there is significant causal flow deviation, provision on mistake of fact should be applied which excludes intent, because as we have said before, causality is a specific element of an offense. For example, a person A fires a gun at a dog, but hits person B. The act which is directed against the dog is an attempt, while on the other hand, the offense of manslaughter is. Therefore, there will always be the attempt in ideal concurrence regarding the object of action that was included in the offender's intent, and negligence regarding another object which caused the consequence.[66] The act is attempted, because the mistake does not refere to the undertaken actions.

A minor part of the theory states that the qualifications of mistake of the causal flow depend on the quality (value) of the object of action. If both objects are of the same value, mistake of causality is irrelevant. There is only one realized offense. For example, the offender fires on a group of people, and it is all the same to him whom he will hit. No doubt he will commit a murder with intent (the general intent). However, it would be wrong to apply this rule if the intent is individualized, which is the most often case. For example, a person A shoots a person B, but hits a person C, who has been in the path of the bullet. We should take into account that there has been an attempted murder of the person B, in ideally concurrence with manslaughter of the person C.[67] Of course, if the court determines in the specific criminal case and accepts the the murder of the person C, in that case there would be ideal concurrence of an attempted murder and a murder with intent (oblique intent).

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65 Jescheck, H. H., Weigend, T., 312.
66 Haft, F., 249.
67 *Ibid.*

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THE ROLE OF THE NEW HUNGARIAN CRIMINAL CODE IN FIGHTING CRIME

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Abstract: Crime is a compound, constantly changeable phenomenon without boundaries which has to be curbed. The wide field of international, European and national public laws handles this harmful social problem by regulating the institutions, materials, procedures and authorities of the intervention against.

The article aims to examine only one part of the legal materials used in the fight against crime, namely substantive criminal law as the cornerstone of jurisdiction. The collection of the Hungarian criminal substantive law in force is Act IV of 1978 on the Criminal Code. The new Criminal Code (Act C of 2012[1]) will come into force on 1th July, 2013. The present scholarly article wishes to present the most challenging, sweeping changes in Hungarian legislation. The paper also tries to present the Hungarian tendencies of criminal policy on the one hand, and the special research area of the author, i.e. the ultima ratio role of criminal law on the other.

Keywords: Hungarian Criminal Code, substantive criminal law, codification, criminal policy, ultima ratio

INTRODUCTION

It can be considered as a fact that criminal law is the branch of law in which the expectations of society come forward in the most direct way. These expectations appear for all in the form of the danger posed by violent crimes, in improving the position of victims and in the field of protecting children, the elderly and the disabled. Living up to these expectations through a **reform in criminal law is a difficult issue** for the government. How can the state meet the expectations of society and international commitments through effective law enforcement? This is, beyond doubt, a very complex question, involving difficult factors, which, I am afraid, cannot be either discussed in full or solved completely in a paper or during conferences. Even so, in the hope of making a useful effort, we must try to look into this issue as often as possible and strengthen international co-operation in order to exchange information and experience. In this respect, this paper aims to contribute to the issue by introducing the cornerstones of the latest result of criminal legislation in Hungary, hoping to call for the exchange of views on the matter.

The legal material of substantive criminal law now in force is Act IV of 1978 on the Criminal Code.[2] In the past fifteen years, the national criminal policy has tried to react to the challenges of crime in several ways. There have been more than 10 decisions of the Constitutional Court that modified the Code and there have been more than 1500 other modifications in the regulations. Since the change of the political regime we have seen a fluctuation of criminal policy in Hungary. The initial decriminalisation was a result of the different ideological-political directions of alternating governing parties. In the mid-1990s this was followed by a criminal policy based on stricter punishments, although such a harsh policy was not able to fulfil the former expectations.

1 The text of the new Code is available on the page http://ujbtk.hu/category/ujbtk/ (download: 30. 01. 2013)
2 The text of the former Code is available on the page http://jogszabalykereso.mhk.hu/cgi_bin/njt_doc.cgi?docid=3352.595616 (download: 26. 01. 2013)

The extensive reform of Hungarian criminal law has been a subject of discussions for years now. The attempt to create a new Criminal Code began in 2001. A framework for a new code was constructed, supervised by the Ministerial Commissioner between 2001 and 2006,[3] but there was no uniform concept. The motions of the codification committees, mainly made up of theoretical experts were turned down. The new codification process was governed by unified criminal policy principles, during which priority was given to the opinion of law enforcement practitioners. The results of the former attempts to create the new Code were also taken into consideration.

PUBLIC POLICY BACKGROUND

The Declaration of the Hungarian National Assembly on National Cooperation is an official statement of the Hungarian Parliament, which was adopted after the elections of April 2010. The Declaration summarizes the **main political ambitions** of the governing party. It renews, among other things, the social contract between the state and its citizens and allocates the main directions of policy according to the following: *"we shall elevate the new political and economic system emerging on the basis of the democratic will of the people to the pillars that are indispensable for welfare, living a decent life, and that connect the members of our diverse Hungarian society.* ***Work, home, family, health and order*** *- these will be the pillars of our common future."*[4] Accordingly, one of the basic factors of the new Hungarian society is law enforcement, the body trusted with maintaining order.

The Hungarian National Cooperation Program (hereinafter referred to as: NCP), based on the document above, unfolds the public political ambitions of the Government. The **main steps of criminal policy,** according this paper are:

1) Restoration of order;
2) Accountability;
3) Equality before the law;
4) Strong and respected legislation;
5) The exclusive right and obligation of the state to restore order;
6) Strong police force that serves and does not rule;
7) More police officers with a higher salary and more tools;
8) A permanent and strong police presence in all the Hungarian settlements;
9) The right to protection for everyone;
10) The law should protect the victims, not the offenders; and last but not least,
11) Faster court procedures.

The NCP declares the following **criminal policy concerning the new Criminal Code**. *"The severity of the legislation, an increase in the amount of punishment, the more frequent application of life imprisonment, the protection of witnesses will curb the offenders and will make it clear for every member of society that Hungary is no paradise for offenders. A strong Hungary can only be born if law guarantees safety for law-abiding citizens."*[5]

The legislator makes a reference to these ideas in the preamble of the new Criminal Code. *"One of the major tasks of the Government is to restore order in Hungary and to im-*

3 The material of the codification ambitions is available in the scientific Hungarian journal *Büntetőjogi Kodifikáció on criminal law codification.*

4 The Declaration of Hungarian National Assembly on National Cooperation, p. 1
http://www.kormany.hu/download/d/56/00000/politikai_nyilatkozat.pdf, 16. 06. 2010, (download: 03. 01. 2013)

5 National Cooperation Program, p. 47
http://www.kormany.hu/download/c/27/10000/a%20nemzeti%20egy%C3%BCttm%C5%B1k%C3%B6d%C3%A9s%20programja.pdf, (download: 03. 01. 2013)

prove citizens' sense of safety. One means for this is to create strict legislation to guarantee protection for citizens who comply with the rules but to warn offenders by efficient punishment that will deter them. Thus, one of the main expectations set for the new Criminal Code is severity, which does not necessarily mean increased sentences, but rather a more emphasized presence of the approach to criminal law acording to which punishment should be proportionate to the criminal act. The aggravation concerns, first of all, reoffenders, while the government's proposal considers the importance of prevention for first-time offenders. ***The ultimate aim of the reform*** *is to create a uniform, up-to-date, coherent and efficient Criminal Code so that criminal law will regain its "keystone" role in the legal system."*[6]

THE MAIN DIRECTIONS OF RECODIFICATION

The Hungarian Criminal Code now in force is divided into two main sections. The General Part defines the scope of the Code, the essential categories of criminal responsibility, the conditions and preclusions of culpability as well as the punishments, criminal measures and interpretative provisions, the rules that are applicable to all crimes. The Special Part defines the acts that are labelled as crimes. The code-structure is influenced by continental law, corresponds to the traditions of criminal legislation and serves the requirement of legal certainty properly, therefore, according to the legislator, it is not necessary to fundamentally modify this typical structure of codes.

Also, there is Decree Law 5 of 1979[7] on the entry into force of the present Criminal Code, which encompasses interpretative rules as well. The **structure** of the new Code will be somewhat modified. The interpretative provisions will be placed at the end of the Code in the Final Part, which will also involve the interpretative rules of the former Decree. I agree with the decision, although, because of the frequently changed rules this part might have to be modified quite often. At the same time, the new Code will not embody rules connected to criminal procedure or to legislation on enforcing sentences.

The main changes in the Code will be represented in a mixed and often implicit way. The lecture tries to represent the criminal policy concepts and interests of the legislator as well as to show their appearance in the structure of the new Code, although it is not always possible to find the consistent correlations in the chapters.

A. CHANGES IN THE GENERAL PART OF THE CRIMINAL CODE

The **changes** concerning the General Part of the Code **expansively,** are introduction of normative principles, broadening the scopes of the Code, change in the system of punishability objections, cutting back the minimum age of punishability, expansion of self defence cases, new elements in the sanctions system, modification of the conditions of release on probation, more stringent norms against recidivists, and the legthening of limitation periods.

According to the legislator the General Part of the Code **does not need conceptual innovation;**[8] its dogmatism is properly elaborated and has an established practice. However, in order to create a clear, substantive criminal legislation, rules are needed

6 Argument to the Act C of 2012 on the Criminal Code, p. 1 http://konyvtar.bpugyvedikamara.hu/wp-content/uploads/2012/02/BTKeloterjesztes-tervezet.pdf (download: 12. 01. 2013)

7 The decree is, in effect, a statutory law have been made by the Presidential Council between 1949 and 1959, until the time of the former Hungarian political system, the People's Republic. The decrees which have not been repealed, however, are still in force and applicable. The hierarchy of these laws is the same as that of the Act.

8 Preamble to the Act C of 2012 on the Criminal Code, pp. 4-12 http://konyvtar.bpugyvedikamara.hu/wp-content/uploads/2012/02/BTKeloterjesztes-tervezet.pdf (download: 12. 01. 2013)

concerning the detailed questions of the enforcement of sentences. These norms will be integrated into the new law on the enforcement of sentences, whose legal material also needs to be reconsidered.

The **main principles** of the criminal law – the *nullum crimen sine lege* and the *nulla poena sine lege* principles - will be **explicitly represented** in the new Code. This way the expression of these basic values of modern, civil criminal law will be able to strengthen the legality and legal certainty of criminal law.

The now effective Code's scope is based on four traditional principles, like the domicile/active personal principle, the territorial principle, the principle of the state's self-protection and the principle of universality. The **scope** of the Hungarian criminal jurisdiction will be widened by introducing the **passive personal principle**. The Code punishes crimes committed abroad by a foreign perpetrator against a Hungarian citizen or another Hungarian legal entity, therefore the examination of double incrimination will not be necessary in the future.

The new Code **maintains the current general definitions and institutions of criminal law responsibility**. The elements of crime – indictable, posing a threat to society and guilty – will remain unchanged, but the Code modernizes the definition of threat to society. The updated text of the statute gives priority to the protection of citizens' rights over the protection of the state's rights. Other vital institutions of criminal liability will not be modified.[9]

The Code defines the grounds for the **preclusion of punishability** in a chiselled way; namely it differentiates the grounds for the preclusion or restriction of the perpetrator's punishability and the grounds for the exclusion or restriction of the culpability of the act. In this way, it consistently underlines the missing element of the crime, which seems to make the system of obstacles dogmatically cleaner and more understandable for citizens.

Minority, as a ground for the preclusion of the perpetrator's punishability will be significantly modified. The **minimum age of punishability will be reduced from 14 years to 12 years.**[10] The cutback will not be general; the law makes it possible only in the case of itemized, enumerated serious, violent crimes[11] if the offender has the ability to recognize the consequences of the criminal act. The verification of this ability will be the task of judicial experts. It should be noted that the number of crimes committed by juveniles is not high enough to justify the change. Perpetrators of the age between 12 and 14 years at the time of the commission of violent crimes can be punished only by Education in a Reformatory Institution. Imprisonment will not be allowed against them, which reflects the spirit of child-friendly justice.

The legislator's interest seems to **strengthen the protection provided by criminal law in cases of legitimate self-defence** and in distress situations. The main point of modifying legitimate self-defence is introducing a new lawful presumption that predicates that the offence shall be considered as an attack against life if it: (a) is against the person or at night, armed, with a deadly weapon or in group; (b) involves breaking into a dwelling at night, armed, with a deadly weapon or in group, or (c) breaking into other housing enclosed

9 The types of guilt – specific intent, foreseeable intent, gross negligence, negligence – and the categories of crime – felony, misdemeanor – will stay invariable in the new Code. The ruling likewise conserves the effective provisions about the normative stages of crimes, namely the preparation and the attempt. The traditional categories and types of perpetrators (offenders: separate offender, indirect offender, coprincipal; accomplices: abettor, accessory) will hence be threatened with the same sentences, based on the parification principle. These are future proof institutions of criminal law, which are effective components of the fight against crime, also in the new Millennium.

10 There are some extreme examples for the minimum age of punishability from 7 years of age – like in Ireland - to 18 years – like in Malta and Turkey - Swiss criminal law punishes children over 10 years. The limit at the age of 15 is the most common in the European Union.

11 According to Section 16 these crimes are homicide, homicide committed with diminished responsibility, battery if it endangers life or causes death, robbery and the qualified cases of robbery through inebriation or intimidation.

space with a deadly weapon. The proportionality of averting won't matter in these cases. This ruling may include in its scope the matters which are not necessarily protectable and may lead to abuse.

The **sanctioning system**[12] will also be somewhat reformed in the new Code. It introduces some new types of punishment like confinement and prohibition of attending sport events. Expulsion as a former supplementary punishment will appear as a punishment. There will be new types of measures, such as reparation work and rendering electric data inaccessible. The sanctions of legal persons will be listed in a separate act about the responsibility of legal entities. In connection with the rules concerning legal consequences we can see the government's intention to renew the sanctions system through incorporating new sentences, but, at the same time, there are some unanswered questions in connection with the practical application of the new forms of sanctions. Although introducing alternative sanctions is a welcome step, because they are conventional and desirable also in Western Europe, confinement as a short-term imprisonment, I am afraid, is in contrast with the requirement of *ultima ratio*, and, according to several international opinions, the prejudice caused by it to perpetrators is greater than the interest in instituting criminal proceedings.

Recidivist perpetrators of violent crimes can expect **stricter sentences**. The general maximum of imprisonment sentences will be increased from 15 to 20 years, in the case of commission by a special recidivist or a multiple recidivist from 20 to 25 years to take more determined action against criminals. At the same time the Code allows the consideration of prevention aspects in the case of first-time offenders. The main changes in the rules of sentencing are that the partial suspension of an imprisonment sentence, which was part of the sanctions system only for a short time but it did not fit in with the Hungarian sentencing traditions, will not be retained in the new Code. The adaptability of release on probation will depend on the past history of the perpetrators and no more on the execution degree of imprisonment.

The new code maintains a few former modifications that came into force in 2010. Namely, the **three strikes rule**, which takes more severe action against perpetrators. It makes it possible to punish multiple, violent repeat offenders with a life sentence. In the case of multiple counts, e.g. three violent crimes against the person the rule doubles the upper limit of the sentence. It restores "median term punishment". In short: *"Offenders can be distinguished more in the new Code, so, while it embodies a more stringent penalty system against massive criminals, at the same time there is more chance given to first-time offenders."*[13]

There has been an **attempt to renew the definition of military personnel** by sorting law enforcement activities into two groups, the ones with an independent decision-making power of the employees and those carried out in an operational unit. The activities with independent competence would have been excluded from the scope of the military criminal procedure, but the legislator reverted to the traditional accomplishment[14] after an extensive professional discussion.

12 The types of punishment now in force according to Section 38 are on the one hand punishments like imprisonment, community work, fine, prohibition from profession, prohibition from driving vehicles and banishment, on the other hand supplementary punishments like prohibition from public affairs and expulsion.
The types of measures now in force according to Section 70 are reprimand, probation, forced medical treatment, confiscation, forfeiture of assets, supervision by a probation officer and sanctions in connection with the criminal liability of legal persons.

13 Opinion of Péter, Polt the Hungarian Chief Prosecutor about the new Code, p.1 http://www.orientpress.hu/105334 (download: 30. 01. 2013)

14 Act CCXXIII of 2012 on the transitional provisions and the modification of certain acts related to Act C of 2012 on the Criminal Code coming into force, www.magyarkozlony.hu (download: 30. 01. 2013), p. 112. The act contains several additional technical and some substantive modifications to the new Code.

B. CHANGES IN THE SPECIFIC PART OF THE CRIMINAL CODE

This part of the lecture focuses on the **main changes** in the Special Part like modification within the system of crimes against the person, the aggravation concerning the punishment for drug crimes, the change in the structure of sexual crimes, the stronger protection of children, more effective action against hate crimes, strictness with traffic offenders, the unified concept of environment protection, taking stronger action against corruption and economic crime related to it, stronger protection against modern-day slavery and the rationalisation of the system of crimes against property.

As opposed to the structure of the Specific Part of the Code now in force, which is divided into 11 chapters,[15] each containing several titles, the Specific Part of the new Code will be **rearranged into 33 chapters**[16] without titles, as can be seen in the footnotes. This structure is more transparent than the previous one, although the legislator does not seem to be always consistent in arranging the order of crimes within the chapters. It is sometimes ambiguous, whether he classifies the chapters and crimes according to gravity, importance or the similarity of legal matters.

The most controversial change in the field of **crimes against life** is punishing a special case of instigation to suicide within the fact of homicide, even though the Code also knows the fact of complicity in suicide.

The legislator will **strengthen the reaction of criminal justice to drug crimes** and makes the fact of drug crimes more transparent, by sorting the behaviour types within the scope of drug abuse into several individual facts.

There are several conceptual modifications in the field of **crimes against the freedom of sexual life and sexual morals**. In the wake of international trends, the legislator will solve certain cumulative problems by summarizing two, formerly separated crimes, namely rape and sexual assault within the fact of sexual violence. These crimes may also be committed in the future by bending the victim to the perpetrator's will. Above the general fact of force, there will be a specialised fact of sexual force that will punish the non-violent type of sexual harassment.

More effective **protection of children** is presented by the appearance of some new crimes, such as exploitation of child prostitution. Protection will be strengthened by one of the new measures, namely rendering electric data inaccessible. In this way in a criminal

15 Chapter X Crimes against the State; Chapter XI Crimes against Humanity; Chapter XII Crimes against the Person; Chapter XIII Traffic Crimes; Chapter XIV Crimes against Marriage, Family, Youth and Sexual Morals; Chapter XV Crimes against the Purity of State Administration, the Administration of Justice and Public Life; Chapter XVI Crimes against Law and Order; Chapter XVII Economic Crimes; Chapter XVIII Crimes against Property, Chapter XIX Crimes against Military Defence Obligation; Chapter XX Military Crimes

16 Chapter XIII Crimes against Humanity; Chapter XIV War Crimes; Chapter XV Crimes against Life, Limb and Health; Chapter XVI Crimes against the Order of Medical Procedures and Medical Researches; Chapter XVII Endangerment of Health; Chapter XVIII Crimes against Human Freedom; Chapter XIX Crimes against the Freedom of Sex and Sexual Morals; Chapter XX Crimes against Children and Family; Chapter XXI Crimes against Human Dignity and Fundamental Rights; Chapter XXII Traffic Crimes; Chapter XXIII Crimes against Environment and Nature; Chapter XXIV Crimes against the State; Chapter XXV Crimes against Certified and National Data; Chapter XXVI Crimes against the Administration of Justice; Chapter XXVII Corruption Crimes; Chapter XXVIII Crimes Related to Office; Chapter XXIX Crimes against Official Person; Chapter XXX Crimes against Public Security; Chapter XXXI Crimes against International Economical Requirements in Connection with Public Security; Chapter XXXII Crimes against Public Peace; Chapter XXXIII Crimes against Public Confidence; Chapter XXXIV Crimes against the Order of Public Administration; Chapter XXXV Violent Crimes against Property; Chapter XXXVI Crimes against Property; Chapter XXXVII Crimes against Intellectual Property; Chapter XXXVIII Crimes against the Traffic Safety of Money and Stamp; Chapter XXXIX Crimes against the Budget; Chapter XL Money Laundering; Chapter XLI Crimes against the Management System; Chapter XLII Crimes against the Consumer's Interest and the clearness of Economical Competition; Chapter XLIII Prohibited Access to Information and Crimes against Information System; Chapter XLVI Crimes against Military Defence Obligation; Chapter XLV Military Crimes

procedure it will be possible to remove criminal data from the internet permanently. By introducing the punishment *prohibition from profession* the law will allow the sentencing of perpetrators of crimes against minors to banning them from professions and jobs related to children. Another tool against child abusers is criminalising the endangering of children's emotional development within the fact of the abuse of minors. This will, hopefully, ensure the children's right to become emotionally balanced adults. The former *seduction of children* will be renamed *sexual abuse*. The fact of child pornography does not punish pornographic acts if the victim only looks like a minor, although the risk this poses to society is also high. The criminalisation of child labour will be highlighted in a separate fact.

The protected legal properties in the former Chapter **Crimes against Public Order** will be replaced and separated in the new code. There are only a few vital changes represented here. The new Code sentences more severely violent offences against teachers. At the same time, the responsibility of a person performing public duties will be higher through the introduction of a new crime, the fact of abuse of authority. Crimes against the environment will be highlighted in a separate chapter. The code maintains some former modifications, such as criminalization of the denial of the crimes of the Nazi and communist regimes and of the uniformed crime, which punishes violence against a member of an identifiable community and the organisation of illegal activities that pose a threat to public safety.

In the sphere of **traffic crimes,** there was an attempt to criminalise driving without a valid driving licence. Thanks to the wide ranging social checks the fact has not entered into force, therefore, this act will still give rise to infringement proceedings.

According to the government, the reason why the new Code's attitude is so severe towards **corruption and economic crime** is that these organized activities have not been punished in the past 20 years, which led to the current economic and financial circumstances in Hungary and to the waste of ethics and trustfulness. Fortunately, the government is under the obligation to increase trust in the state and to guarantee responsible management of national wealth and public money. The new Code contributes to the clearance of these areas by simplifying the facts of corruption and filling in legal loopholes. Also, it comprises new roles to ensure the transparency of the economy, in order to promote the purity of public life. The Code was updated on the basis of everyday experience of the facts of economic crimes and other, not closely linked crimes were removed from the chapter. Crimes against the budget and against consumers' interest will get highlighted attention by being placed into other, separated chapters in the Code.

The content of the former chapter of **Crimes against Property** will appear in the new Code in three different chapters. The code separates the group of more serious violent crimes against property from the less serious, non-violent crimes against property and not least from crimes against intellectual property.

One characteristic modification in the field of **crimes against intellectual property** concerns the fact of Infringement of Copyright and Certain Rights Related to Copyright. Breaching copyright will be punished only if it causes more than HUF 100,000 damage in property, smaller offences will be judged as a minor offence. At the same time, sentences will be increased. With a new ground for the preclusion of punishability, which decriminalises the opportunistic user habit, illegal downloads and file swapping up to the damage rate of HUF 500 without the aim of making a profit. It does not mean the legalising of running file swapping websites, it only aims to avoid criminalisation of young people and other opportunistic users and sets reasonable limits so that the phenomenon would not be a subject to law enforcement measures.

CRIMINAL LAW AS *ULTIMA RATIO*

The expression **"keystone role of criminal law"** has been added to the dictionary of Hungarian legal language by the Constitutional Court decision 30 of 1992.[17] The Court proclaimed the desirable and proper way of criminalisation in an abstract form. The legislator has to examine types of harmful behaviour as a social phenomenon and has to learn about its historical forms. He also has to submit to careful examination the fundamental right that will be restricted by the criminalization, analyse the necessity of the restriction of fundamental rights, keep in mind the requirement of *ultima ratio* and the suitability of the legislation.

According to the Court's interpretataion, the **requirement of *ultima ratio*** means the following. *"Criminal law is the ultima ratio in the system of legal responsibility. Its social role is to be the „sanctions keystone" of the whole legal system. The role of criminal sanctioning and punishment is to maintain the soundness of legal and moral norms when the sanctions of other branches of law do not help. It is a substantive requirement rooted in constitutional criminal law that the legislator must not act in an arbitrary way when* ***defining the scope of punishable behaviour****. The need for the criminalization of any behaviour must be judged by* ***strict standards****; the resource system of criminal law, which necessarily restricts human rights and freedoms can only be applied if it is absolutely necessary and can be done proportionally, to protect certain conditions of life, moral and legal norm and, only if it is not possible to protect constitutional, state, social or economic values and aims by any other means."*[18]

Subsequently, *ultima ratio* seems to be a **contra-criminalisation principle**, it can be used to summarize the desired requirements of legislation below:

1) Harmful behaviour type as a social phenomenon;
2) Historical forms;
3) Fundamental rights;
4) Necessity of restriction, and
5) Requirement of *ultima ratio* and suitability.

Consequently, the legislator sees that the Hungarian criminal law has lost its *ultima ratio* nature and the keystone role of the sanctions in the legal system and he tries to restore them with the help of the new Criminal Code. The question may be first of all whether the strictness – as the main direction of the new Code – can suit the *ultima ratio* role.

The **modifications of the new Code can be categorized on the basis of ultima ratio**. There are several possibilities through which criminal law expresses its *ultima ratio* role by its approach to a harmful social phenomenon. One of these categories is **decriminalisation**, which indicates beyond doubt that criminal law is not the way chosen by the legislator to solve a social phenomenon and that the act is not subject to punishment to such an extent that it would need the interference of criminal law. The decriminalisation applies to the facts of gross indecency, vandalising landmarks, damaging of land survey marks, false

17 The Constitutional Court decision 30 of 1992, (26. V) examines in a posterior law-control procedure the unconstitutionality of law, namely in the fact of Incitement against a Community (legislation: Act IV of 1978 on the Criminal Code, Section 269). The fact is punished in Paragraph (1) the incitement to hatred and in Paragraph (2) the use of an insulting or degrading phrase or committing other similar acts – called invective – against communities before great publicity. According to the proposer the fact has harmed the fundamental right of the freedom of speech, therefore, he requested the destruction of the fact. Marking out the boundaries between incitement, hate speech and the freedom of speech, is well known to be a topic of significant disputes also at international forums. The Hungarian Constitutional Court deemed only Paragraph (2) – the punishment of invective - as unconstitutional and, not least, it made the above significant findings in connection with the scope and role of criminal law in its detailed argument.

18 The Constitutional Court decision 30 of 1992. (26. V.),
http://public.mkab.hu/dev/dontesek.nsf/0/BCB8FB0571816B6AC1257ADA0052AEC7?OpenDocument, (download: 05. 01. 2013) p. 10

disclosure of statistic data, abuse of head of economic organisation, consumer fraud and profiteering. Some punishments and measures seem to aim **softening the sanctioning system**. The new institution of confinement is a good example, it can also be considered as the projection of *ultima ratio* because it is introduced to be the most serious punishment for several minor offences[19] instead of a longer imprisonment. Apart from the fact that it seems to be one of the strongest penalties and it is a type of custodial sentence, this Janus-faced sanction can however mitigate the sentence for certain crimes and reduce the scope of imprisonment. The **obstacles of punishability** related to certain crimes in the Specific Part can equally be categorized as a manifestation of ultima ratio. The common feature of the legal institutions mentioned above is that they are adaptable only in the case of certain itemized crimes. **The problem derives from the lack of a regulation of general scope that highlights the *ultima ratio* role of criminal law in the legal system**.[20]

SUMMARY

In my view, there is no one particular good choice among criminal policies. None of the criminal policies is able to live up to the expectations of society, to combat crime on its own. Instead of a criminal policy emphasizing the power of punishments, retaliation, or another criminal policy focusing only on the restoration type of criminal justice and on the partnership between the state and community, a **holistic criminal policy** is needed, which incorporates the results of the various criminal policy models. The present concept seems to lean mostly on the elements of offensive criminal policy.

The various expectations of society regarding the state's activities against crime may only be satisfied by applying the mixed elements of criminal policy trends. Society expects the offender to be punished but also compensation for the damages caused. Society requires the state to improve public security, law and order, as well as to provide free legal counselling and legal representation for the participants of criminal procedures. Thus, in the course of remodelling the Hungarian criminal justice system, we must strive to establish a legal background in which these goals may be achieved simultaneously[21] - it should be stressed at this stage that using criminal law "as *prima ratio*" to solve harmful social phenomenon is not a desirable way. The large number of modifications made to the former Code and to the new Code before it comes into force, unfortunately, displays the fight against the formal and informal representatives of different interests. Building a modern criminal judicial system is achievable only through wide-ranging social consultation and strong cooperation between the actors of the justice system.

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19 With confinement threatened soft crimes in the new Code are for example the Violation of Privacy, Violation of the Secrecy of Correspondence or Forgery of Official Documents by negligence, etc.

20 The present study does not examine the projections of *ultima ratio* in criminal procedure law or in correctional law, but, unfortunately, they do not have an *ultima ratio* clause of general scope, either.

21 Ferenc, Kondorosi, Under-Secretary of State to the Hungarian Ministry of Justice: The codification of criminal law and current questions of prison matters, pp. 33-34 http://www.internationalpenalandpenitentiaryfoundation.org/Site/documents/popowo/Budapest/07.%20Budapest%20-%20Kondorosi%20Ferenc.pdf (download: 12. 12. 2012)

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CRIMINAL JUSTICE REACTION TO THE SERIOUS FORMS OF CRIME, WITH SPECIAL REFERENCE TO THE REPUBLIC OF SRPSKA

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Abstract*:* "Fight" (combat) against crime, especially its severe forms, has become a kind of resource. It is widely used by the public authorities as one of their own priorities, other political subjects (especially the opposition) as something that is missing or is deficient, the scientific community, NGOs and others, as well. Of course, the media's exploitation of this resource is inevitable, which, on the one hand, leads to overemphasizing of this issue, and on the other hand, contributes to neglecting of the real criminal justice reactions to the serious forms of crime. In addition, there are not enough discussions on contemporary trends in crime combating policy (crime policy), criminal-justice mechanisms of prevention and repression of crime, especially its severe forms, the application of modern methods of combating crime, the institutional framework for combating crime and similar. Furthermore, we should add the absence of criminology debates on the structure, statics and dynamics of today's crime (phenomenological dimension), its severe forms (organized crime, terrorism, violent crime, severe corruption offenses, and similar), but also on the forms of crime that are difficult to evidence and prove (e.g. other corruption-related offenses, some of the property crime offence, etc.). That is why this paper gives an overview of these topics in the Republic of Srpska in order to show the true scope of the criminal justice response to serious forms of crime, including criminal justice and institutional solutions to serious forms of crime.

Keywords*:* criminal justice response, combating crime policy (crime policy), prevention, repression, crime, severe forms of crime.

INTRODUCTION AND EXPLANATION OF TERMS

Criminal justice response to serious forms of crime has undergone a sort of transformation in the past ten years. Thus, the international legal acts, criminal laws in general (comparative and domestic procedural law), as well as criminal justice theories, recognizes the need to apply special methods of detection and investigation of serious crimes, which differ from traditional methods of investigative actions.[1] The starting assumption of this kind of criminal justice law reactions lies in the belief that classical methods of detecting and proving criminal offenses through the basic criminal procedure are inadequate and inefficient when it comes to serious forms of crime. In fact, this approach to combating serious crime stems from the criminal-political affiliation and represents its essential component. This approach undoubtedly increases the efficiency of law enforcement agencies in combating serious forms of crimes; on the other hand, it temporarily restricts the constitutional rights and freedoms of the individuals against whom these measures and actions are applied. That is why some parallel efforts were made to strengthen the criminal law response to serious forms of crime in frames of the rule of law. Therefore, the aforementioned measures of combating serious crime represent just a temporary restriction of fundamental human rights and freedoms in the process of gathering information and evidence necessary for criminal procedures (Comments, 2005: 349). This is because the protection of fundamental rights of citizens in criminal proceedings is higher in favour of demands

1 Those special rules, methods and means of detection and investigation of criminal offenses of organized crime have different names (special, hidden, secret, etc.), but at its core are special investigative techniques (by the United Nations Convention against Transnational Organized Crime and Recommendation of the Committee of Ministers to member states on special investigative techniques - Rec (2005) 10), which are characterized by secrecy, undercover, or conspiracy (Šikman, 2011). Covert research in recent years is provided for in the majority of European legislation, under very similar process conditions (incriminations, subsidiarity, necessity, judicial supervision, specific actions, time limit, etc.). In this sense, special procedural rules and special investigative techniques are governed by the general procedural law (*lex generalis*) or specific procedural law (*lex specialis*), taking into account the known relation between the norms of this type (Škulić, 2003:189).

for efficiency in detecting and proving crimes, especially when it comes to organized crime offenses (Bejatović, 2005:68).

However, following the internationally accepted standards and precisely defining the legal procedures of application of special investigative measures, it is ensured their successful use in combating serious forms of crime. In any case, it is essential to establish the proportionality between the gravity of the offense and the human rights that are temporarily restricted by the use of special investigative techniques.

Criminal-justice response to serious forms of crime generally implies the inspection of the elements of the policy of fighting against crime (crime policy), including criminal justice prevention and repression, as the policy's essential elements, and criminal law (substantive and procedural) that covers serious forms of crime and the punitive policy of combating severe crime. Crime policy or crime suppression policy is a planned activity of the society aimed at prevention of and combating crime. It is a specific theoretical and practical discipline that deals with the prevention of crime as an individual and mass phenomenon (Aleksić, Škulić, Žarković, 2000). The function of the crime combating policy would be the protection of the most important social goods and values that are violated and jeopardized by committing crimes, that is, the preservation of existing relationships, as well as constant monitoring of the dynamics of the development of social relationships and participation in their changing and improving. Since severe forms of crime especially put in danger the protected values, the crime policy should put a special emphasis on precisely these forms of criminal phenomena. Also, the criminal activities which are expressed through their severe forms are more difficult to prevent and detect, although this also emphasizes the need for effective preventive and repressive action of the bodies of the criminal justice system.

Reaction of the criminal justice system on serious forms of crime imply all criminal law provisions contained in the criminal statutes, as well as other crime provisions contained in a special or non-criminal legislation. Norms of criminal law referred to serious forms of crime are under special sensibility, both due to the severity of such crimes, and (abovementioned) need to protect guaranteed human rights and freedoms. The provisions of criminal legislation, which refer to serious forms of crime, can be observed primarily through material and procedural norms. These material and procedural norms of severe crime offences are reflected in the study of severe forms of crime from the perspective of criminal law as a system of legal regulations which define offenses and penalties for the perpetrators of these acts.[2] Severe criminal offences are those for whom serious criminal sanctions (imprisonment) are implied, as an appropriate social response to the offense. Specifically, in the system of penalties and criminal sanctions, prison sentence occupies the most important place, especially when it comes to serious offenses, offenses involving violence, terrorism, and organized crime offenses (Babić, 2008). Regarding that, the Republic of Srpska criminal legislation, where there is a system of relatively defined penalties (defining the lower and upper limit of the punishment), defines as severe forms of crime those ones with minimum imprisonment of three years.[3] All these crimes can be said to represent more serious crime offenses, that is, those which are manifested through violence and assault against core values of man and society. In addition, for the most serious offenses committed with intent, imprisonment for of twenty to forty-five years, or as long law defined the long-term imprisonment, may be prescribed (Penal Code, 2003).[4]

2 The criminal offense is the primary and fundamental condition and the basis for the measure of criminal repression, and for the application of criminal sanctions in each case, together with the guilt that is a measure of fairness, expressed through the principle of proportionality between crime and punishment and the principle of individualization of criminal sanctions (Comments, 2005:120).

3 Determining the lower minimum of the prison sentence of a minimum of three years as a reference point for the definition of severe forms of crime is quite debatable because it widens the number of offenses that could be considered serious crimes. In support of this thesis is the fact that the Palermo Convention of 2000, for a serious offense provided below the minimum punishment of four years.

4 It is an appointment of the gravity of the offense and there are some limitations. This criterion is the most accurate and provokes discussions, the question arises as to whether the sentence may be prescribed for the basic offenses or only qualified for his severe forms. Although it is in most cases provided for qualified criminal cases, there are a number of crimes for which they do not, because they do not occur in severe cases. From the legal formulation, according to which the sentence can be prescribed only for the most serious crimes, which come to the conclusion that the long-term imprisonment cannot be prescribed for the basic forms of crime, and immediately raises the question of its justification for prescribing some basic shapes. However, it seems that the legislator with this formulation did not include only aggravated forms of offenses, but

Procedural provisions related to the combating severe forms of crime represent the manner in which the legal system responds to the need for effective discovery and proof of crimes that fall into this type of crime. This refers to the reaction of the competent authorities, law enforcement agencies to serious forms of crime and the ways in which the legal system responds to the need to provide efficient detection and evidencing of criminal acts that fall under this criminal phenomenon (severe crime forms).[5] Criminal-procedural fight against organized crime, in fact, implies special procedural rules, and thus a specific method of detection and investigation of criminal cases of serious crime, in order to effectively obtain evidence, to reach the disclosure and verdict in specific criminal cases of organized crime. In fact, those special procedural rules and methods are characterized by giving specific, broad powers to the police and the judicial authorities for pursuing offenses of organized crime, which, among other things, represents stronger limitation of freedoms and human rights than the case of regular, general criminal procedure. This is because the protection of fundamental rights of citizens in criminal proceedings is higher in favour of demands for efficiency in detecting and proving crimes, especially when it comes to organized crime offenses (Bejatović, 2005:68).

CRIME CONTROL POLICY
A REVIEW OF THE REPUBLIC OF SRPSKA

Starting from the above specified definition of the crime control policy (crime policy), it is common to make a difference between crime policy as a science and as a skill: a) as a skill it is a practical, planning activity that organizes the activities of social subjects aimed at suppressing crime and offences b) as a scientific discipline it provides a critical overview in order to optimize the control of these phenomena (Ignjatović, 1999). Thus, the policy of combating crime is an organized activity and scientific discipline that deals with the study, evaluation and improvement of the criminal law and all other resources for crime prevention (Stojanović, 1991). In this sense, crime policy is a discipline that represents the unity of theoretical and general political, constitutional, legal and regulatory orientations towards criminal activities, as well as the sum of practical measures for its control and prevention. Adequate fight against crime, as the main objective of crime policy, necessarily implies putting additional efforts to get a better knowledge of the conditions of the criminalization of the society and to, according to the results of the analysis, apply the new and improve the existing measures that should contribute to the achievement of the set goals. Each national community, considering crime as a negative and dangerous social phenomenon, is taking measures for its control and prevention, which are integrated into the crime policy as part of the overall policy. It cannot be said that any country managed to eradicate the crime so far, but it does not mean that the measures to fight it are in vain, since the success in these terms can be considered, on the basis of the long experience, keeping the crime under the control (Kokolj, 2009). Modern criminal policy tends to give more significant and important place in the prevention and combating crime to the remedies and sanctions that does not mean the retribution or atonement, but to the measures that enable reaching envisaged targets in a different, more humane, more effective and more socially acceptable manner. These measures and sanctions offer many new opportunities, but we should not forget the previously imposed sanctions, which adapted to the modern needs, can continue to contribute to the mentioned objectives. This primarily refers to the warning measures that have a status of an independent criminal sanction in the modern system of the criminal sanctions (Kokolj, 2010).

primarily serious crimes and the most serious cases of such offenses. In this way, the legislator is choosing cases where the punishment may be imposed (Comment, 2005: 250).

5 Procedural confronting serious forms of crime, especially organized crime, involves international cooperation in the fight against crime. In this context, the key thing is the exchange of information between the enterprise against crime at the international level, the development and exchange of evidence, and conduct of joint investigations, law enforcement agencies of different countries (Šikman, 2011). Moreover, international experience in combating organized crime, based on research and analysis investigation of criminal offenses of organized crime at the international level, indicate that criminal proceedings should be directed n order to precisely determine: a) the structure, organization and major criminal activities of criminal networks, b) the modus operandi of criminal organizations (including production, marketing and financial support), c) contact with the range of activities and d) a clear description of preventive strategies (Buscaglia, Dijk, 2003: 23).

The main component of the crime policy lies in its protective function, i.e. crime prevention, by providing the security function to the legal goods and thus acting on human behaviour.[6] It is the dominant notion that the action of the criminal law and criminal justice mechanisms represents a fundamental aspect of crime reduction, and within it, the important place is given to passing and implementing criminal law. Traditionally, it is considered that these mechanisms make two types of impact on crime and criminality: direct and indirect. The indirect effects are reflected in the adoption of criminal laws that have preventive function, apart from their implementation. Therefore, the opponents of the decriminalizing behaviour whose social danger is controversial (drug use, prostitution or homosexuality) in states where they are punishable, consider that by not including them in the criminal law represents the act of their explicit or implicit legitimization.[7] The immediate effect of the mechanisms of the criminal law primarily refers to the effect of its norms and that is what many agree upon - utilitarian, and retributivist oriented philosophers of punishment. For them, the general prevention is taken as deterrence, as a primary purpose and justification for the existence of the criminal justice system in each state. It is believed that the latter can be achieved by applying re-social programs tailored to the specific characteristics of certain categories of perpetrators in order to prevent recidivism and to support their re-integration into the society. Although in the meantime the methodology of criminology research has been highly developed, primarily by profiling research funding that enable the measurement of the effects of the punishment, the conclusions remained the same (Horvatić, Cvitanović, 1999).

Understanding the crime control policy in this way, we can say that in the Republic of Srpska it is applied solely as a skill. The political and criminal determination to fight crime is undisputed, including its severe forms, which is manifested by creating a legal and institutional framework to fight crime. New charges have been introduced (e.g. organized crime, terrorist financing, etc.), but also special categories of evidence (e.g. special investigations), special laws have been passed (Law on the Suppression of Organized and Serious Economic Crime, Law on Confiscation of Illegally Acquired Property, etc.). In addition, the Republic of Srpska authorities have carried out the specialization within the judicial, prosecutorial and police structures in order to provide more adequate response to serious forms of crime. Particularly important is the establishment of the Special Prosecutor's Office (Special Department of the District Prosecutor's Office for Organized and Serious Economic Crime - Special Prosecutor's Office) and separate organizational units of the Ministry of Internal Affairs of the Republic of Srpska (e.g. the Special Investigations Unit, the Financial Investigation Unit, etc.). However, without diminishing the significance of this approach of crime control policy in the Republic of Srpska, the absence of the systematic, objective and scientific approach to this issue is evident. No analysis of the structures of crime, including its aetiology and phenomenological dimension has been made, followed by a critical analysis of the success of previous mechanisms for combating crime, as well as the prognostics of the new forms and ways of reacting to them.

MECHANISMS OF THE CRIMINAL JUSTICE PREVENTION AND REPRESSION OF CRIME

Crime prevention is a system of measures and activities aimed at the detection of all, direct, objective and subjective conditions and circumstances, which are favourable for the emergence and perpetration of crime (Aleksić, Škulić, Žarković, 2004). Prevention requires a new perception of the whole issue of crime prevention, the one that implies an effective preventive activities and overcoming narrow knowledge of different experts for crime control. It involves the participation of all social and state institutions, starting from the family, schools, NGOs and others (the so-called general prevention) up to state organs whose main function is fighting crime (the so-called special prevention). When defining new preventive approaches it is important to have in mind the achievements

6 Universals protective function of criminal law is deterrence of the individual behaviors that are harmful to people's legal property, and directing them to the behaviors that are in accordance with legal norms. In addition to these functions, there are those that justify criminal repression that sees a punishment for justice and the return evil for evil done. (Stojanović, 2010).

7 These authors have expressed concern that the decriminalization has an effect through reduction of such undesirable behavior while guided by social and psychological agreement to avoid its implementation, which would lead to an increase in their number.

of other countries, so that researchers in this field are expected to apply the comparative approach (Milutinović, 1984). In addition, there is a trend of preventive targeting of anti-criminal activities. Thus, among the current prevention strategies we can distinguish: criminal law mechanisms by which the socially dangerous behaviour and their perpetrators are influenced directly and indirectly; the developing preventive strategy implies those interventions that aim to prevent the development of an individual's criminal proclivities; prevention in the community refers to interventions to change social factors that affect delinquency at the local community; and situational prevention is the name for all those measures which are designed to prevent the occurrence of certain types of crimes, especially by reducing opportunities for their performance and by increasing the risk (Tonry, Norval, 1992).

In addition, it is certain that the purpose of punishment fulfils the preventive function of criminal law (a general and special prevention). In fact, the applications of criminal law is primarily in a function of general prevention, since the criminal-political decision on whether to declare certain conduct criminal, as well as determining the range of criminal, are mainly considered a general prevention. This is also one of the most complex issues of crime policy, which concerns the justification and effectiveness of the criminal law and its protective function. It is also related to the general question of how many legal norms, as well as other means of social control, can influence the behaviour of individuals. In fact, the specificity of the general prevention within the criminal law is reflected in the fact that it primarily, if not exclusively, seeks to achieve a fine (punishment intimidation), so-called negative general prevention. In addition, new trends of general prevention insist upon its effect on the strengthening of moral norms, that is, its moral effect of upbringing, so-called positive general prevention. In order for the punishment to have a preventive effect, three conditions are set: that it is certain, that is sufficiently stringent, and that is fast. As one of the problems of determining punishment effect, the content of general prevention appears, as well as determination of whether and to what extent the general prevention is effective. However, the issue of the preventive effect of the criminal law is pretty much disputable, and in particular the role of the special prevention in accomplishing the legal protection (the ratio of general and special deterrence) (Stojanović, 2011).[8] Equally important for achieving the preventive role of the criminal law is setting up its limits, so that the issues of criminalization and decriminalization are inevitable. Such complex issues (criminalization and decriminalization of criminal law) in terms of preventive functions of criminal law raise many doubts and uncertainties if the retribution will be put to use in the function of prevention and how big its significance will be. In fact, making criminal law to more closely achieves the preventive role also requires that the criminal law is used to achieve various goals that are sometimes mutually incompatible[9] (Stojanović, 2011). Furthermore, the successful prevention, in terms of criminology, has three dimensions - the analysis, prediction and intervention. Thus, in modern and technologically advanced countries, the proactive strategies to counteract crime have begun to develop which includes crime systematic and comprehensive analysis, forecasting and control. Proactive policing concept is based on three pillars, which together build the modern concept of community policing. These are 1) strategic planning and strategic-oriented policing, which aims to have a strategic and comprehensive analysis and establishment of concepts to identify and combat the causes and conditions that are suitable for crime in general or its specific types, 2) community policing aimed at identifying issues in a community that lead to crime and solving those problems with the help of the community, and 3) community policing which aims to establish a partnership, the broadest forms of cooperation and good relations with the community. Modern concepts of community policing are not only "soft" policing approach, but they also imply both classic and contemporary repressive strategies (different patrol tactics and techniques, use of undercover investigators, simulated operations to detect and arrest organized criminals, such as

8 Undoubted specially-preventive effect in terms of legal protection can only be stated in terms of preventing the convicted person to perform new crimes while serving a sentence of imprisonment or as long as certain security measures. And such, the effects of special prevention have more general significance.

9 The transformation of crime policy in the security policy is more inefficient in the criminal law, which is also hostile not only to the offender, but also the entire society creates such a climate in which every citizen sees a potential enemy, or someone who may violate security. Combating terrorism, organized crime, corruption, and other behaviors carries more risks that can be compared with the dangers of these types of crime (Stojanović, 2011).

drug dealers, surveillance in the neighbourhood, arrest), and implementing the strategy of zero tolerance (Simonović, 2006).[10]

When it comes to contemporary trends of criminal-law repression as a crime suppression instrument, a prominent Belgrade professor Zoran Stojanović identifies five different conceptual approaches to the use of criminal repression in the substantive criminal law. These are: the traditional model, the strategy of the criminal justice minimalism (decriminalization), criminal justice strategy of expansion, the introduction of alternative criminal sanctions and *abolitionism* as a radical negation of exercising protective functions within the criminal law (Stojanović, 2010). The first of the six options would be strictly sticking to the standard principles and belief that for each criminal offense it is necessary to apply a fine or other criminal sanction in criminal procedure that provides all the guarantees for the defendant (the model of liberal criminal law). The criminal justice expansionism places the emphasis on rigorous and proportionate punishment (*just deserts*), which implies a significant increase in the degree of the repressiveness of the criminal law and criminal justice in general. In contrast, we have the criminal justice minimalism (decriminalization), which involves not only decriminalization, but also refining the criminal zones at existing incrimination. In addition to the above, the ability of the criminal justice response strategy is the introduction of alternative criminal sanctions, especially alternative prison sentences to be served in the penalty facilities. Finally, we have the elimination of criminal law and criminal justice and the search for alternative responses to organized crime (as the least likely option). Not going further into a detailed analysis, we completely accept the view that the criminal repression should have two clearly differentiated approach to fighting crime: *the first*, vigorous combat against the worst forms of crime (respecting all the principles of the rule of law) and *the second*, the use of alternative criminal sanctions (but also of innovated traditional punishments, such as daily fines) for light (and somewhat moderately severe) forms of crime (Stojanović, 2010). The second question is a clear differentiation between mild and serious forms of crime, their classification and criminal charges, so that the science of criminal law (and criminal law) should also offer appropriate solutions to these issues.

CRIMINAL LAW REACTION TO SERIOUS FORMS OF CRIME IN THE REPUBLIC OF SRPSKA

Proceeding from the above-mentioned definitions, we can talk about the criminal law response to serious forms of crime in the Republic of Srpska. The basic component of the criminal law response to severe forms of crime is actually a definition of serious crime in the criminal law. However, this is one of the most complex issues for several reasons. The notion of serious crime is quite debatable and subject to discussions of various types (scientific, practical, etc.), and therefore it implies the difficulty in defining the notion of serious crime. For these reasons, it is common that the offenses of serious crime are considered those for which a lower minimum of a punishment of a fixed duration is prescribed, or to specify a list of those crimes, or by a combination of these two criteria. Accordingly, and based on the provisions of the Criminal Procedure Code, which prescribes the use of special investigative actions, the offences of serious crime in the Republic of Srpska can be considered crimes against the Republic of Srpska, crimes against humanity and international law, criminal offences of terrorism and criminal offenses for which the imprisonment of three years or more is prescribed (Criminal Procedure Code, 2012). This list of the offenses for which special investigation actions can be prescribed has been obtained by a combination of the two criteria. First, we have crimes against the Republic of Srpska, which are defined as criminal offense against the

10 Increased repressive policing within the community policing - and it is based on a targeted policing. In theory, the new concept of community policing retains the old institutes of classical concept of policing (arrest, criminal offense, patrolling, etc.), and some of them provide new content and orientation (strategic planning, community participation in decision-making, placing crime prevention to the forefront, the new police management, a new system of values and the evaluation of policing, proactive operational techniques). A new concept of community policing introduces some new concepts, activities that are unknown or are neglected in the classical concept of police work: a partnership between the police and community, safety needs of citizens, the fear of crime, police work in community-oriented problems, police legitimacy, theory of broken windows, policing aimed at strengthening the informal control in the community, surveys and other forms of testing the attitudes and needs of citizens, etc. (Simonović, 2006).

constitutional order of the Republic of Srpska in Chapter XXV in the Criminal Code of the Republic of Srpska. They are followed by crimes against humanity and international law. Given that these crimes are within the jurisdiction of the B&H Court, that is, they are defined in the B&H Criminal Code, special investigative actions can be appointed according to the Criminal Procedure Code if there was a transfer of the proceedings from the B&H Court at the court in whose territory the offense was committed or attempted. Third, special investigations may be imposed for the crime of terrorism and other crimes related to terrorism. And fourth, these actions may be ordered for criminal offenses that, under the criminal law, are punishable by imprisonment of three years or more. The Criminal Code of the Republic of Srpska defines list of them as follows: murder, aggravated murder, preventing the return of refugees and displaced persons, rape, sexual intercourse with a helpless person, sexual violence against children, violence in the family or domestic unit, illicit production and trafficking of drugs, aggravated theft, larceny, robbery, extortion, blackmail, unlawful dealing with banking activities, evasion of taxes and incomes, creating a danger by improper construction works, and the offense of organized crime, including money laundering offenses, offenses against official duty, etc. (The Criminal Code, 2003).

As you can see, the definition of serious crime in such a manner would be quite extensive, vague and imprecise. They are more precisely defined in the Law on Suppression of Organized and Serious Economic Crimes: a) organized crime under the Article 383a of the Criminal Code of the Republic of Srpska and criminal acts with elements of organization, as well as offences related to the previously mentioned or to their perpetrators, in cases where the B&H Prosecutor's Office and Court are not competent for, b) the most serious forms of crimes against the economy and payment transactions, or official duty when the circumstances of the crime or its consequences are of special importance for the Republic of Srpska, as well as offences related to the previously mentioned or to their perpetrators; c) other crimes provided for in criminal legislation of the Republic of Srpska, with minimum prison sentence of five years, and when the circumstances of the crime or its consequences are of special importance for the Republic of Srpska, as well as offences related to the previously mentioned or to their perpetrators (the Act on Combating Organized and Serious Economic Crime, 2007). Similar to the abovementioned, the Law on Confiscation of Property Gained by Perpetration of Crime prescribes that the provisions of this Law shall apply to the offenses prescribed by the Penal Code of the Republic of Srpska, namely: a) offences against sexual integrity: human trafficking for prostitution, abuse of children and minors for pornography, production and distribution of child pornography, b) crimes against health: illicit production and trafficking of drugs, c) crimes against the economy and payment transactions: forgery and the use of securities, forgery of credit cards and cash payment cards, forging the instruments of value, money laundering, trafficking, tax and income evasion, d) crimes against official duty: abuse of power or authority, embezzlement, fraud in duty, receiving or offering bribe, illegal mediation, e) organized crime, f) crimes against public order: making the purchase of weapons and equipment dedicated to the crimes, illegal production and trade of weapons or explosives and g) crimes against humanity and values protected by international law (Law on Confiscation of Property Gained by Perpetration of Crime, 2010). It is evident that there is no single definition of serious crimes in the Republic of Srpska. We therefore consider reasonable to define such crimes by accepting some of the known methods such as combining the list of criminal offenses (offence catalogue) of serious crime and the minimum threshold of imprisonment of at least five years.[11] This would provide a more accurate and clearer definition of serious crime, would narrow the circle of those crimes, and harmonize our legislation with the standards of international legal instruments.

When it comes to the special part of criminal law, the fundamental questions refer to: whether the descriptions of the existing offenses include all forms of crime; whether prescribed sanctions are appropriate for combating this form of crime and whether the criminal law, incriminating certain forms of organized crime, came into conflict with the fundamental principles of criminal law. In ad-

11 For example, in England and Wales serious crime (serious offense) "is one of those offenses listed in Schedule 1, or offense for which the court considered sufficiently serious to be treated as a serious criminal offense". List 1, Schedule 1 includes the following offenses: drug trafficking, human trafficking, arms trafficking, prostitution and child prostitution, armed robbery, money laundering, fraud, tax evasion, corruption, bribery, extortion, criminal offenses against intellectual property, environmental crimes as well as conspiracy and attempted conspiracy or aiding and encouraging the conspiracy. By: Serious Crime Act 2007 (Commencement No.1) Order 2008.

dition, all of the modern constitutional states want to harmonize their systems, avoiding, however, the complete unification, in order to preserve the specificity of each national law conditioned by the special circumstances of each country. The harmonization is necessary for the effectiveness of the international assistance, which is aggravated if there are too large divergences between some national systems. To meet these requirements, modern criminal laws have substantially transformed their criminal justice institutes and descriptions of certain crimes. In this context, it is suggested that in the area of the substantive criminal law, more precisely defined are the offenses related to organized crime, in order to intensify the repression against the perpetrators. Some of those options would also have the effect on crime procedures (Simović, 2005).

When it comes to observing serious crime from the point of view of the criminal procedure law and procedural aspects of countering serious crime, some authors insist on the attitudes that establishment of high-quality procedural mechanisms, but also provisions of other law branches can achieve very significant results in combating serious forms of crime. However, the characteristics of serious crime, especially organized crime, its etiological roots and phenomenological features, but also some characteristics of modern society and dominant legal systems, enable that organized crime is to a certain extent controlled and eventually reduced to a minimum, but in any case, it cannot be completely eliminated (Škulić, 2003:192). Thus, the mechanisms of criminal procedure intended for serious forms of crime can make a decisive move in countering serious crime, while further opposition to this phenomenon should be continued at the international level, by joint activities of several states, but also by the wider social reaction. Regarding that, the bases of this approach lies in the inclusion of serious crime within the procedural mechanisms of Criminal Procedure Code or any other law related to combating serious crime, or in prescribing actions and conditions of their application that are specific for serious crime suppression.[12] Procedural treatment of serious crime in the Republic of Srpska is not precisely determined, given that the Criminal Procedure Codes (CPC B&H and CPC RS) do not pay particular attention to serious forms of crime, in a way to provide for special processing mechanisms of combating serious crime, but instead the existing procedural tools are applied to cases of serious crime (e.g. special investigations). However, the Criminal Procedure Code of the Republic of Srpska, as part of the criminal-procedural legislation of Bosnia and Herzegovina, and as a form of criminal justice reaction to serious forms of crime, can be considered as a foundation for prescribing special investigation actions, which foresee that the evidence that cannot be provided otherwise, are obtained in lawful and conditioned manner. Specific criminal procedural legislation further enhances combat against organized crime and other forms of serious crime. So, the Law on suppressing organized and the most severe economy crime forms, as *lex specialis*, was adopted to effectively fight the worst forms of organized and economic crime. It regulates the establishment, organization, jurisdiction and powers of special units of prosecution and court and other state agencies in the Republic of Srpska, and regulates other conditions for the effective detection and prosecution of criminal offenders specified in this law. In addition, the Law on Confiscation of Property Gained by Perpetration of Crime in the Republic of Srpska governs the conditions, procedures and authorities responsible for the detection, seizure and management of assets from a criminal offense. A financial investigation is initiated against the owner of the property where there are reasonable grounds to believe that there are proceeds of crime. Here, evidence on assets and lawful income which were acquired or generated by the owner before the criminal proceedings for alleged crimes was initiated are collected, as well as evidence of assets inherited by the successor and evidence of assets and charges for which the asset is transferred to a third party. Financial investigation is initiated by the prosecutor's order and he/she is the one who carries it out.

12 This approach is best manifested in combating organized crime. In fact, we can see that the fight against organized crime with criminal law instruments can be implemented through law on criminal procedure as *lex generalis*, or special laws on combating organized crime as *lex specialis*. In these cases, organized crime would be treated in favor of the *lex specialis* provisions. However, the legislator may prescribe application of *lex generalis* provisions for the offenses of organized crime, if not provided otherwise in the provisions of the *lex specialis*. Also, it is possible to prescribe special rules for criminal offenses of organized crime within the Code of Criminal Procedure, and these specific provisions would be *lex specialis* in comparison to other provisions of the Code of Criminal Procedure as *lex generalis*. However, these, as well as other modalities of criminal procedural treatment of organized crime, depend on the criminal justice system of a particular country, and therefore it is not possible to generally discuss these issues (Škulić, 2003).

SUBJECTS OF SERIOUS CRIME COMBAT IN THE REPUBLIC OF SRPSKA

Subjects of serious crime combat in the Republic of Srpska can be viewed through the prism of subjects organized crime combat.[13] Criminal-procedural subjects of organized crime combat represent, in general, the state law enforcement agencies, which, among other things, are responsible for combating organized crime or are specialized in fighting organized crime.[14] In fighting organized crime, specialized law enforcement agencies differ from traditional law enforcement agencies (local law enforcement agencies) in terms of their jurisdiction and methods of investigation. Specialized law enforcement agencies, in general, use a long-term approach to organized crime, the investigations of organized crime are more proactive, and are based on intelligence and analysis of criminal activities carried out by members of criminal organizations (Newbold, 1997). As such, specialized law enforcement agencies detect and prosecute organized crime cases that are technologically and organizationally complex and have the human, material and other resources necessary for that. Also, specialized law enforcement agencies in fighting organized crime are carriers of international cooperation in combating transnational organized crime. Namely, the basis for counteracting transnational organized crime is the inter-agency approach in the fight against organized crime, where specialized law enforcement agencies of more countries are involved.[15]

In order to efficiently combat the worst forms of organized and economic crime in the Republic of Srpska, the Law on the Suppression of Organized and Serious Economic Crime defines the establishment, organization, jurisdiction and powers of special units of prosecutor's offices and court and other state agencies in the Republic of Srpska, and regulates other conditions for the effective detection and prosecution of criminal offenders of the most serious forms of organized and economic crime. Thus, within the District Court of Banja Luka, a Special Prosecutor's Office for Combating Organized and Serious Economic Crime called the Special Prosecutor's Office is established. Special Prosecutor's Office has jurisdiction over the entire territory of the Republic of Srpska, and is independent in its work. Special Prosecutor's Office is made of: chief special prosecutor, deputy chief special prosecutor and as many as special prosecutors as it is determined by the High Judicial and Prosecutorial Council of Bosnia and Herzegovina upon the recommendation of the chief special prosecutor and chief republic prosecutor. The Special Prosecutor's Office is headed and managed by chief special prosecutor appointed to the office by the High Judicial and Prosecutorial Council of Bosnia and Herzegovina for a period of 5 (five) years, with the possibility of re-appointment. In addition to the chief special prosecutor, the High Judicial and Prosecutorial Council of Bosnia and Herzegovina also appoint the deputy chief special prosecutor and other special prosecutors. The Special Prosecutor's Office is also appointed to a number of associates, prosecutor's investigators, and other support staff. In addition to the Special Prosecutor's Office, within the District Court of Banja Luka, a special department for organized and most serious forms of economic crime is

13 This is because the Republic of Srpska under severe crime predominantly perceives organized crime and serious forms of economic crime.

14 Models to combat organized crime are different, but the most common models are establishment of specialized law enforcement agencies, to control, investigate and detect offenses of organized crime. These specialized agencies (judicial, prosecutorial and police) apply specific methods and tools, in separate criminal proceedings, for the effective investigation and proving of organized crime. Specialization of law enforcement agencies to combat organized crime is analogous to the insistence on the use of special investigative techniques in the detection and investigation of criminal offenses of organized crime, and for this reason, there are recommendation in this direction. See: United Nations Convention Against Transnational Organized Crime, Palermo, Italy, 2000.

15 Some authors argue that the very essence of transnational organized crime requires an international response of law enforcement agencies in combating organized crime, because single law enforcement agencies may not have the capacity to achieve this goal (Schegel, 2000: 365-385). Generally, the inter-agency approach in the fight against organized crime has two forms: first, ad hoc collaboration and other, cooperation through working groups. Ad hoc cooperation involves cooperation of law enforcement agencies in each case. Agencies initiate cooperation in each case, with the implementation of joint activities carried out by mutual coordination. Cooperation ends when the case is resolved. Working groups are formal and permanent body for interagency cooperation. Working groups are formed for a longer period of time, and members of the working group (members of various law enforcement agencies) are working together on a number of cases of organized crime. Apart from international cooperation, based on the foregoing grounds in combating organized crime highly significant are international organizations such as the International Criminal Police Organization - Interpol, Europol, and then the United Nations Office on Drugs and Crime Prevention. (Newbold, 1997).

formed. This special department is responsible for the entire territory of the Republic of Srpska to act in the abovementioned cases, regardless of the prescribed punishment for a particular crime, or in any case where the chief special prosecutor decided to take over the case. The work of the Special Department is headed by the President of the Special Department for organized and worst forms of economic crime. The president and judges of the Special Department are appointed by the president of Banja Luka District Court, from among the judges of this court. In case of need, the High Judicial and Prosecutorial Council of Bosnia and Herzegovina may appoint judges of other courts in Bosnia and Herzegovina to this Department. In urgent cases, the High Judicial and Prosecutorial Council of Bosnia and Herzegovina can temporarily appoint judges from other courts in the Department, in accordance with its competences. The judges of the Special Department have an unlimited mandate; they have a certain number of qualified staff and support staff. Provisions of the Law on Confiscation of Property Gained by Perpetration of Crime prescribe the authorities responsible for the detection, seizure and management of assets from a criminal offense: the Prosecutor's Office, the court, the Ministry of Internal Affairs of the Republic of Srpska and Agency for Management of Seized Assets. The Ministry of Interior established a separate organizational unit[16] responsible for the detection of proceeds of crime and other activities in accordance with this law. The management of seized assets stipulated by this Law is performed by the Agency for management of seized assets as an administrative organization within the Ministry of Justice of the Republic of Srpska.

Besides the abovementioned, the unavoidable subject in combating organized crime in the Republic of Srpska is the Ministry of Internal Affairs of Republic of Srpska, or the police, which makes a separate organizational entity whose scope and jurisdiction covers the territory of the Republic of Srpska (See: Law on Internal Affairs, 2012). Functionally, the Ministry of Internal Affairs of the Republic of Srpska consists of six departments, one of which is the Criminal Police, organized through its internal organizational units. The work of the Criminal Police is directed, among other things, to the fight against organized crime, whereas this activity is centralized through the Special Investigation Unit. Thus, the Crime Police processes the most complex organized crime and serious economic crime, performs control, supervision and instructional guidance of all organizational units and support units in the area of economic crime, organized and serious crime, general crime, illicit manufacturing of and trafficking in narcotic drugs, with the support of criminal-intelligence analysis, crime-technical methods and tools, specific operational activities and searches, and supervise the legality of the organizational units and support units in the area of suppressing and detecting crimes, finding and capturing the perpetrators and providing the necessary evidence for the successful conduct of criminal proceedings, and other measures envisaged by law. Also, within the Crime Police, specialized units are formed, whose competences are related solely to the fight against economic crime, such as the Department of Financial Investigations.

CONCLUSION

Criminal-procedure reaction to severe forms of crime is a complex social activity. This complexity is not only caused by the diversity of activities, but by involvement of more social actors, and not just criminal law ones (as described above). Therefore, in order to have and effective suppression of serious forms of crime, besides the relevant institutions, direct and responsible engagement of other social factors, such as educational and scientific institutions, social organizations, the means of mass communication and others is also required. Also, in order to organize social action and successfully prevent and combat serious crime, it is important not only to understand deeply the phenomenological, but also etiological and other features of serious forms of crime, especially objective and subjective causes and conditions of its occurrence in time and space. Such knowledge is necessary to achieve not only at the level of the global society, but also at the level of basic socio-political, as well as local communities. Only in this way, one can provide a qualified and complex involvement in programming of an appropriate system of measures and actions to deal with serious crime problems, that is, to create adequate policies to combat serious crime.

16 The exact name of the unit at the current job classification in the Ministry of Internal Affairs of the Republic of Srpska is the Financial Investigation Unit of property acquired through criminal offense, which is located in the Special Investigations Unit, the Criminal Police of the Republic of Srpska.

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SYSTEM OF COMBATTING CRIMES AGAINST EUROPEAN UNION BUDGET WITHIN THE FRAMEWORK OF POLISH POLICE – THREAT CHARACTERISTICS

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Abstract: Crime against European Union budget is one of the most serious threats for the finances of the EU. Organs involved in counteracting this kind of activities are OLAF, Europol and law enforcement agencies of member states, as well as European Commission which creates the prosecution policy by promulgating legal acts of European community law. The threat of this kind of crime became particularly important at the time of introducing open borders within EU and different liberties, especially concerning the flow of funds and people. When we take into account development of economic crime and Poland's membership in European Union, it is important that we build a system that allows successful combating this phenomenon. In Poland, such activities were undertaken as early as in 2004 with intention to recognize the new threat, and as a result, the new system was developed and implemented. The analysis of its efficiency during the last eight years indicates that it was created in a well-thought manner, which results in high effectiveness of detection and allows monitoring the threat.

Keywords: crime against EU budget, fraud, document forgery, soft project, hard project, cooperation in detecting crimes against EU budget, OLAF.

INTRODUCTION

Crimes against European Union budget, interpreted also as crimes with the use of the Union's funds, are included in the area of crimes described as economic crime, or as it is referred to according to the Central Bureau of Investigation at National Police Headquarters' directions of recognition, commercial crime. Identification and combating crimes against EU in Poland were initially related with pre-access funds of PHARE and SAPARD, which had already appeared in Poland before joining the European Union. The first indications of possible crimes with the use of aforementioned funds appeared in Poland as early as 2004. Originally, systemic solutions were not introduced and departments that were responsible for identification of threats were Fraud Squads at Regional Police Headquarters and departments of the Central Bureau of Investigation. In 2004, for the purpose of law enforcement agencies, the Central Bureau of Investigation at National Police Headquarters in cooperation with the Police Academy in Szczytno developed a strategic analysis for the needs of the Republic of Poland's accession to the European Union, including predicted crime threat concerning frauds of EU funds. The analysis described briefly the financial support system within the framework of the Structural Funds and the Cohesion Fund, the control system, and characterized the possible *modi operandi* expecting the biggest threats from the organized crime.

GENERAL ISSUES AND THE RANGE OF CRIMES AGAINST EU BUDGETW

In 2004, as an author's initiative, the Police Academy in Szczytno took actions aimed at organizing specialized trainings on detecting and combatting crimes against European Union budget. The trainings were addressed to police officers employed at fraud squads and Central Bureau of Investigation. The trainings were conducted by police officers, representatives of the supervision system, as well as governing and implementing institutions and representatives of European Commission and German Police. As a result of the comprehensive approach towards recognition and detection

of this type of threats, law enforcement agencies established close cooperation with supervision organs, which significantly contributed to preventing and detecting cases of misuse at the early stage of crime activities. In spite of prognosis indicating the biggest threat coming from the organized economic crime, there were no cases of these characteristics between years 2004-2006.

Another step on the way to building the system were rank-and-file initiatives that resulted from the trainings organized at the Police Academy in Szczytno which were based on creating regional interdisciplinary task teams. Those teams included representatives of supervision and implementing institutions, fiscal control, the Police, and accredited paying agencies. Initially, two teams were created in Kielce and Katowice. Another step was undertaken at National Police Headquarters' Criminal Bureau in Fraud Squad, where a new concept was created and it concerned establishing Police Commandant in Chief's Team for Task Coordination on crimes against European Union budget in the Republic of Poland. The team included representatives of the indicated department and Anti-Corruption Department of Central Bureau of Investigation and the Police Academy in Szczytno. The first step taken by the team was appointing coordinators in Fraud Squads at each Regional Police Headquarter and creating a system of reporting within the field units, which serves the supervision of threat monitoring, and in case of emergence of criminal act, supporting detecting activities.

Undertaking such activities allowed a systemic approach to the threat of crimes against EU budget. Since 2005, information about all cases qualified as crimes against EU budget come to National Police Headquarters, which allows monitoring and forecasting threats.

Especially in case of such necessity, the substantial assistance is provided, including mediation in governing institutions in situations when inspection is necessary or assistance in securing appropriate documents. Establishing guidelines and creating the system gave the opportunity to continue trainings, which included case studies and exchange of experiences, not only between officers, but also between representatives of supervision system and judicature.

Another step that indicated efficiency of the undertaken activities was organizing two international conferences at the Police Academy in Szczytno in 2010 and 2011 with participation of OLAF representatives. Both conferences were dedicated to the issues of crimes against EU budget.

To sum up, the inclusion of crimes against EU budget in the area of economic crime results from legal characterization that describes activities in preparatory proceedings conducted in the Republic of Poland which qualify them within the reporting system. In order to justify the presented thesis, the National Police Headquarters prepared a system of Economic Crime Key Areas Monitoring. According to its division, crimes against EU budget include the following categories of prohibited acts, both in Penal Code and Penal Fiscal Code.

Penal Code regulations:

1) **Art. 228 § 1-4, Art. 229 § 1-4, Art. 229 § 5, Art. 230, Art. 230a** – crimes against activities of national institutions and local self-governments
2) **Art. 270 § 1-3, Art. 271 § 1-3, Art. 272, Art. 273** – crimes against credibility of documents,
3) **Art. 284 § 1-3, Art. 286 § 1 and 3, Art. 287 § 1-2** – crimes against property,
4) **Art. 296 § 1-4, Art. 296a, Art. 297 § 1 and 2, Art. 299 § 1-6, Art. 305 § 1 and 2** – crimes against economic circulation,

Penal Fiscal Code regulations:

1) **Art. 54-56** – crimes related to evading taxes
2) **Art. 76** – crimes related to liability of persons required to follow the specific tax regulations,
3) **Art. 82** – crimes related to grants and subsidies,
4) **Art. 86 and 92 –** smuggling and wangling[1].

1 Economic Crime Key Areas Monitoring, Criminal Bureau at National Police Headquarters, Warsaw 2012r., p. 97.

The analysis of preparatory proceedings that qualify as cases related to crimes against EU budget indicates that perpetrators commit prohibited acts especially in the area of credibility of documents and frauds qualified on the basis of the Article 286 in relation with the Article 297 of the Polish Penal Code. In some proceedings, there are also crimes classified in the Penal Fiscal Code, nevertheless the statistics of the National Police Headquarters clearly indicate that these are isolated cases. Over the past three years, we have also found some cases of corruption, in which benefits gained by perpetrators allowed them to receive EU grants. The statistics published in Monitoring includes also legal qualification from the Article 299 of PPC, however there has not been a case so far that indicated laundering of the money received in relation with swindling funds from EU budget. It must be emphasized that it is a very surprising situation with regard to the character of criminal activity qualified as crimes against EU.

THREAT CHARACTERISTICS ON THE BASIS OF POLISH POLICE DATA

Modus operandi in crimes related to obtaining undue means from the EU budget is not entirely new and unknown in crime detection tactics and among law enforcers. It must be indicated that for the needs of obtaining EU means, perpetrators adopted the already existing activities related to forging documents, organization and using "ghost companies", frauds committed in, for example, banking or insurance sector. Basic differences concern especially:

1) harmed person
2) sources of obtaining means
3) legal regulations in the field of implementation and using aid from the EU budget
4) profile of a perpetrator
5) tactics of crime detection activities.

Nevertheless, we must acknowledge that these ten years of history of this type of crime was not a rich and long period, which is why it is still treated as a new and not fully examined phenomenon. New and unknown things often awaken curiosity, but they also often provoke resistance, lack of understanding or doubts about choosing the appropriate penal qualification describing perpetrator's actions.

The threat scale in crimes against EU budget, including the number of preparatory proceedings initiated and completed over the years 2009-2011, is as follows:

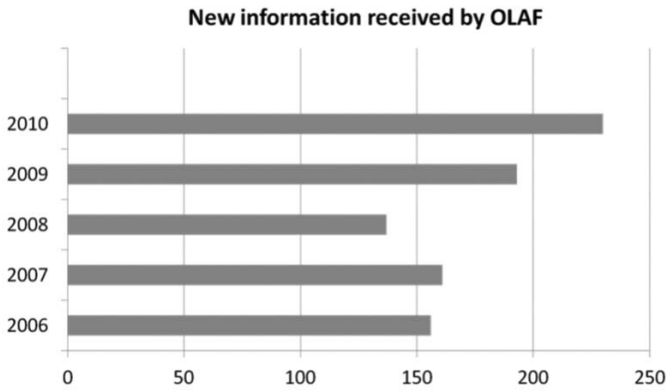
Crimes detrimental to European Union's financial interests						
Year	Initiated altogether	Initiated on operational materials	Completed altogether	With positive result	Perpetrator not detected	Lack of features of criminal offence
2009	643	193	658	329	11	318
2010	435	115	467	246	9	212
2011	388	168	382	215	17	150

Table 1. Number of initiated and completed proceedings altogether on the basis of Economic Crime Key Areas Monitoring

The data presented above indicate a significant decrease in the number of initiated preparatory proceedings. When we compare years 2010 and 2011 it must be pointed out that this decrease amounts to 68%. These data might be indicating a decline in threat related to swindling EU funds, nevertheless the reasons of this state of affairs might be completely different, in particular when the number of irregularities requiring a report from the Republic of Poland is constantly growing each year. In case of MRD[2], the total number of irregularities disclosed in 2010 amounted to 236 cases,

2 MRD – Ministry of Regional Development, data presented during the conference "Supervision activities and irregularities (…)", organized in Szczytno on 14/05/2012.

and 474 cases in 2011. A similar tendency in the scale of the increase in recorded cases of infringements of EU law has also been observed by the European Anti-Fraud Office – OLAF.



Graph 1: Number of new information about irregularities disclosed by OLAF

The number of reported irregularities is a significant variable which must be analysed with regard to the basis of initiation of preparatory proceedings in the form of informing the supervision institutions. The data above indicate, that only 43% in 2011, and in 2009 only 30% of initiated proceedings were conducted on the basis of police operational materials. Thus, it must be assumed that in all the other cases informing the supervision institutions was the source of information allowing initiating the proceedings. According to the Police statistics, the threat in the field of crimes against EU budget is not homogeneous. The number of newly initiated preparatory proceedings varies from 4 in Świetokrzyskie Voivodeship to 64 in Silesian Voivodeship.

The number of newly initiated preparatory proceedings in particular voivodeships is graphically depicted below:

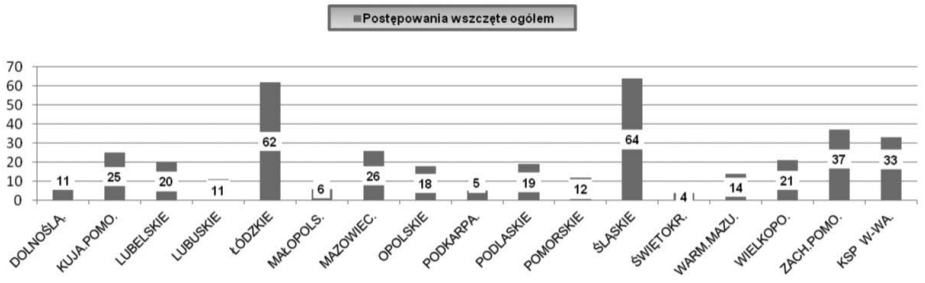


Table 2: Number of initiated and completed proceedings with regard to voivodeships on the basis of Economic Crime Key Areas Monitoring

In order to complete the full picture of the threat, we must specify the scale of losses and participation of organized crime groups in swindling EU funds. Determining of this variable is only possible with the assumption that lower level police units, e.g. County Police Headquarters and City Police Headquarters, investigate cases considered as the ones that generate lower losses and those without participation of organized crime groups. Whenever one or both of these conditions appear, it should result in taking over the case by a superior unit, Regional Police Department or Central Bureau of Investigation at National Police Headquarters.

Initiating proceedings with regard to investigating units throughout the country in 2011 is depicted below:

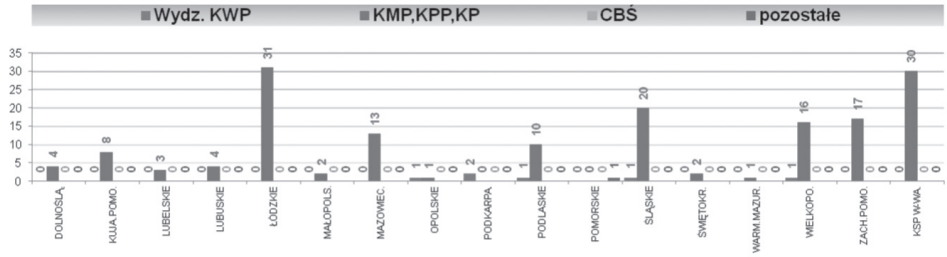


Table 3: Number of initiated and completed proceedings in particular voivodeships on the basis of Economic Crime Key Areas Monitoring

The presented above configuration indicates that in 388 proceedings initiated by police units in 2011 most of them were conducted by Police Stations, County Police Headquarters or City Police Headquarters. Only a few of the proceedings, i.e. one in Opole Voivodeship, two in Podkarpackie Voivodeship, one in Podlaskie, one in Silesian and one in Greater Poland (Wielkopolskie) Voivodeship, were conducted by superior level units – Regional Police Headquarters. The presented results show that in 2011 there were not any preparatory proceedings initiated by units included within Central Bureau of Investigation at National Police Headquarters. In accordance with the assumption above, it must be recognised that in majority of the reported cases, law enforcement agencies dealt with the ones whose gravity was insignificant.

Specifying the threat scale requires presentation of losses caused by perpetrator's activities in crimes against EU budget and determining the actions of law enforcement agencies against this background.

Providing that in the current programming period 2007-2013 Poland has used a few times more financial means from the EU budget and implemented more projects, even the individual cases of regulation breaching may cause serious financial losses. From the data gathered in Monitoring, one can conclude that losses generated by criminal activity are not significant. Recapitulation of losses from the conducted preparatory proceedings in years 2009-2013 is presented below.

Year	Ascertained crimes	Detected crimes	Disclosed losses	Recovered assets	Secured assets
2009	551	540	2 098 255	11 373	1 044 902
2010	560	415	1 122 207	27 301	725 010
2011	593	377	2 440 083	29 251	236 932

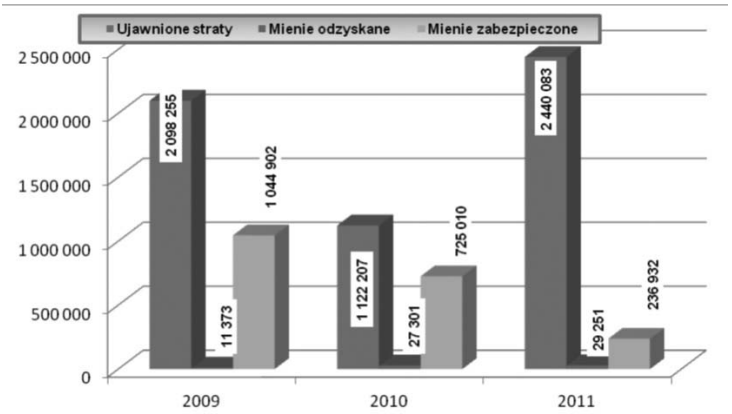
Table 3: Amount of losses, recovered assets, and secured assets in total with the number of proceedings according to Economic Crime Key Areas Monitoring

The presented amount of losses confirms the assumption put forward above, i.e. the amount of losses in preparatory proceedings conducted in 2011 is inconsiderable and came to PLN 2,440,083, while in 2009 the amount had been slightly smaller, PLN 2,098255. We must also recognize that so far there have not been any disclosed cases of criminal activity related to swindling property of great value, according to Article 115 § 5 more than PLN 2,000,000, or they have been committed by an organized crime group[3]. Nevertheless, such situation resulting from the data in police statistics does not mean that such activities do not exist. However, detecting and proving is much more difficult, especially when so many proceedings are terminated currently. Such sate of affairs may raise doubts about the quality of actions in connection with criminal proceedings. Cases presented during the

3 § 5. Property of great value means the property whose value at the time of commission of a prohibited act exceeds PLN 200,000. Act of 6 June 1997, The Penal Code.

II Conference on detecting and combatting crimes against EU budget, which took place between 14-16 May 2012, indicate that criminal activities of organized crime groups do appear.

A comment is also required when it comes to the amount of assets secured in comparison with the scale of losses. In this case, decrease in the amount of recovered assets, depicted in the chart below, might raise a concern.



Graph 2: Disclosed losses, recovered and secured assets

The results presented in the graph indicate a dangerous tendency for efficiency of combatting this type of crime, i.e. a significant decrease in the amount of recovered and secured assets. The system of detection and prevention of irregularities in using EU funds is closely connected with the expanded supervision system. Another form of securing assets is reimbursement of the financial means related to qualified expenses, however in case when these activities fail and improper funds spending occur, which might result from criminal activities, the main objective of supervision organs activities will be recovering the assets. Nevertheless, after the analysis of the data presented above, it must be stated that system in this field is not effective.

INFORMATION SOURCES AND RANGE OF COOPERATION

When it comes to crimes against EU budget, the source of information that initiated preparatory proceedings in 70% of cases is information given to the supervision institutions. Such state of affairs should not cause concern, because the Police deal with all different categories of crimes, nevertheless, such situation is disturbing, as the main disadvantage of the information delivered by supervision institutions is the fact that this information comes after the implementation phase of the project. Therefore, it is difficult to collect the evidence that prove the committed crime, and even more difficult to recover the embezzled financial means. The Police and police officers, apart from the other supervision services, deal with combatting and detecting this type of crime and recognize the potential threats. Unfortunately, as it might be concluded from the presented data, identification might be conducted in non-effective manner, and there are many reasons for this state of affairs. Nevertheless, the most important of these reasons seems to be ignorance of mechanisms accompanying this type of crime, as well as the low level of knowledge about sources of information which might improve the identification phase.

Among the sources of information, apart from the supervision institutions, depending on the character of the prohibited act, we can also include:

– mediating, implementing and governing institutions,
– beneficiaries,
– co-operators,
– executors and subcontractors,

– entities participating in the public tenders procedure,
– third parties,
– "information policy" resulting from responsibilities imposed on a beneficiary,
– analysis of statistical and information data in the field of irregularities disclosed so far,
– media, especially the Internet.

The sources of information enlisted above are of different character and some of them should be treated solely in an auxiliary manner. None the less, with regard to the presented division, it is crucial who gives the information, who publishes it or how it was obtained. The essence of the source of information is inseparably related with the tactics of conducted proceedings and it has important influence on the way of verifying information, but also on the quality of the evidence collected, and paradoxically on the lack of such possibility.

Monitoring of the threat in crimes against EU in the particular field should be associated with designating areas that include funding and that are particularly vulnerable, but at the same time with projects that were implemented within the framework of particular operational programmes in which irregularities occurred most often. The previous experiences and information data indicate that for the purpose of the presented choosing, the following criteria might be assumed:

– a beneficiary (the highest number of irregularities in the past programming period were found within projects dedicated to farming industry in the framework of the Integrated Regional Development Programme),
– type of projects – soft projects, e.g. trainings, counselling,
– size of hard projects with regard to the amount of funds, as well as the scope of scheduled works.

To sum up, the source of information, time of its obtaining and its value need to be identified as the most important premises that might significantly limit the detecting abilities of law enforcement agencies.

The effective detection and combatting crimes against EU budget requires undertaking a well-considered and constant cooperation with institutions responsible for controlling beneficiaries. Lack of such cooperation or its low quality might hamper the activities of the Police, but also supervision institutions. In case of the Police, lack of assistance from civil servants may cause that implementation of the criminal procedure's objectives will be very difficult.

The areas of cooperation will be, most of all: common objectives resulting from protection of national and EU means, especially crime prevention, exchange of information with regard to verifying suspicions about committed crime, assistance in conducting control activities in case when they have been hampered by a beneficiary, occurrence of an implementing institution in the role of a harmed party during the preparatory proceedings, assistance in legal assessment of beneficiaries' actions, trainings, exchange of experiences concerning modus operandi of perpetrators, implementation of the objectives of the proceedings to secure claims by law enforcement agencies.

CONCLUSIONS

In conclusion, detection of crimes qualified as activities against EU budget and conducting preparatory proceedings often require engaging considerable means and efforts, as well as constant improvement of the investigators. The examples from the other member states, as well as those presented by OLAF, indicate that the most serious frauds aimed at EU budget result from activities of organised crime groups and they also pose a threat to life and health of EU citizens, therefore, there is no doubt that recognising a threat on the basis of examples of cases recorded by OLAF, as well as all the other member states should be conducted up to date and modified when it is necessary to include the national characteristics. An example which proves the assumed thesis might be the case discussed during the trainings which concerned importing garlic from China. When a couple of years ago (2004/2005) such case had been discussed by OLAF officers during the training workshops, it caused disbelief among the participants, however in 2010/2011 such cases were disclosed in Poland.

In the end, it must be emphasised, that work meetings and common trainings for representatives of law enforcement agencies and supervision organs are a key element in the process of building the system of detecting and preventing crimes against EU budget. In consequence of such activities, it is possible to conduct an effective exchange of experiences and better understanding of undertaken initiatives and expectations.

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FUNCTIONING OF EDUCATIONAL SYSTEM DURING AN OUTBREAK OF ACUTE INFECTIOUS DISEASES[1]

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Abstract: All school staff and complete educational system should be alerted to dangers of infections if that has happened. It is important to remember that any person could potentially have disease-carrying organisms, even if they have no signs or symptoms of illness. Full responsibility for developing recommendations to assist school policymakers to establish reasonable and practical guidelines for school personnel, when working with children who have infectious diseases is on local community, educational system and whole country. The most important tool that school management should use is a comprehensive plan before an outbreak of disease. In some instances, school staff should be informed of the enrollment of a student who is known to have a chronic infectious disease. There remains a risk that some students who are or will be enrolled in school are unknown carriers of infectious diseases. It is strongly recommended that school authorities establish policies and procedures to reduce the risk of spreading disease, regardless of the presence or absence of a student known to have an infectious disease.

Keywords: educational system, infectious disease, student, effectiveness, risk.

INTRODUCTION

Education is a major engine and vehicle of economic and social development. Education is universal and inalienable human right. The expansion and development of educational systems became a high priority for many governments and issue of national security in the decades following the Second World War, as evidence accumulated that investment in human capital, particularly health and education, had important economic benefits for the whole society.[2] It is especially important in enabling people to reach their full potential and exercise other rights. When education is interrupted or limited, students drop out, with negative and permanent economic and social impacts for students, their families, and their communities.

Without an adequate knowledge base, Ministries of Education cannot develop well-conceived strategic responses to the epidemic, which will make a real difference in schools and other educational institutions. Natural hazards, like epidemics, are part of the context for educational planning. Country impact assessments have relied heavily on demographic models to make projections of student enrolments and teacher requirements. While a number of more qualitative factors can be identified which are likely to affect the supply and demand for schooling, and it is not analyzed in detail with adequate supporting evidence. In particular, little or no research has been undertaken in schools themselves. The lack of hard evidence about what is actually happening in schools could resulted in broad generalizations about the impact of the epidemic on the education sector, which although largely unsubstantiated, have already been widely accepted as received wisdom.[3]

Most individuals who are infected have a definite period of time in which they are considered to be contagious. When they have fully recovered from the communicable disease, they are no longer able to transmit the infection to others. In other instances, some individuals may remain capable of transmitting disease for long periods of time after they have recovered from the acute phase of an illness. These individuals are said to have chronic infectious diseases (Hepatitis B, Hepatitis C, Herpes Simplex, etc.). Often school personnel and parents have questions regarding the risks of

1 Paper is result of research within the project No. 47017 *Security and protection of organization and functioning of the educational system in the Republic of Serbia (basic precepts, principles, protocols, procedures and means)* realized on the Faculty of Security Studies in Belgrade and financed by Ministry of Education and Science of the Republic of Serbia.
2 *The Impact of AIDS* United Nations Department of Economic and Social Affairs/Population Division, ce, p. 69.
3 Paul Bennell, Karin Hyde, Nicola Swainson, *The impact of the HIV/AIDS epidemic on the education sector in Sub-Saharan Africa*, University of Sussex Institute of Education, 2002, p. 1.

exposure to diseases within the school setting and the appropriate management of students with chronic infectious diseases.

Therefore, schools must be prepared to develop operational procedures and plans for emergency situations, which would include the issue of infectious diseases epidemics. Hence, school disaster management involves the familiar cycle of steps found in all project (disaster) management: *assess* hazards, vulnerabilities, capacities and resources; *plan and implement* for physical risk reduction, maintenance of safe facilities, standard operating procedures and training for disaster response; *test* mitigation and preparedness plans and skills regularly, with realistic simulation drills; and *revise* your plan based on your experience.[4] School safety and educational continuity require a dynamic, continuous process initiated by management and involving workers, students, parents, and, if is possible – local community.

EPIDEMICS IN SCHOOLS – CRISES SITUATION OR SOMETHING ELSE

The impact of epidemics of acute contagious disease on the individuals, families, and communities at, for example, the micro-level of society, can be immense. People fall ill, cannot work, and lose income. Their families spend money on care and treatment and lose further income in taking time to care for them. People leastways die; specialized workers, skilled artisans, and educated officials disappear and replacements are difficult to find; businesses close and farms lie fallow; current earnings are lost and future earnings, foregone; and time and money are spent on funerals and mourning.[5]

At the school and community level, in the case of as extended families grow larger, less income is earned, and ever fewer resources must be spent to support more people and to pay for expenses related to illness and death, less money will be contributed by the community to the school. At the system level, less money may be available to the education system both absolutely (due to a shrinkage of the national product and government budget) and relatively (due to stronger claims made on the budget from other sectors).[6]

Many schools were faced or are facing problems caused by contagious diseases. Educators who are at a serious health stage of the epidemic are often away from school through sick leave, and as a result thereof, their work deteriorates as their attention is not at all times given to their learners and syllabi are left incomplete.[7] Many school management teams, that is, principals, deputy principals and heads of departments are facing major managerial and administrative problems of handling and dealing with the emergency situation.

In a case of huge epidemics children may not be able to attend school because of consequences or demands at home, at least not until they are older. The needs of students of different ages, and the needs of girls and boys, may differ widely and require gender-differentiated responses. A traditional educational system centered on a physical structure and conceived in a relatively rigid and hierarchical way, with one teacher in charge of a class of forty or more students may have difficulty creating and maintaining appropriately flexible delivery systems. Among the alternative educational delivery systems currently being explored is the use of interactive radio. The appointment of itinerant teachers, based at central schools, who oversee tutors engaged by community groups, is another.[8]

Recognizing that the standard formal school system is not adequately equipped to meet the needs of all children, some communities have established their own schools, with their own teachers, curricula and management structures. A community-based school may be able to respond very rapidly to community and learner needs and may benefit from the commitment fostered by local

4 *Disaster and Emergency Preparedness: Guidance for Schools*, International Finance Corporation (Word Bank Group), Washington, 2010, p. 3.
5 Sheldon Shaeffer, *The Impact of HIV/AIDS on Education (a review of literature and experience)*, UNESCO, 1994, p. 4.
6 Ibidem.
7 Fourie, P. & Schonteich, M,"Africa's new Security Threat: HIV/AIDS and Human Security in Southern Africa", African Security Review, 10(4), 2001, p. 29-42.
8 Hargreaves J. R, Glynn J, *Educational attainment and HIV infection in developing countries: a review o f the published literature*, London, Infectious Disease Epidemiology Unit, Department of Infectious and Tropical Diseases, London School of Hygiene and Tropical Medicine, 2000, p. 11-2.

ownership and control.[9] But community based schools run the risk of becoming second-rate educational institutions serving only the poorest students. There is the especially troubling possibility that governmental education authorities may view the establishment of such schools as absolving them of responsibility for the education of the communities they serve-and thus for some of those most in need of public assistance.

The main problem in Serbian educational system is that schools are predominantly controlled by the political party in power, which appoints the higher level administrators as well as the headmasters of individual schools. While school boards are made up of a certain number of teachers, parents, and the representatives of the local community, it is the mayor of each municipality who appoints the board, and again, (s) he is likely to be a member of the ruling party. This situation is best illustrated by the fact that after each parliamentary election, as a rule, the headmasters of the primary and secondary schools are replaced. The regime exerts control over schools, not taking into account the competence of the headmasters in terms of their teaching, organizational, problem-solving and leadership skills. In practical terms, this means that a headmaster may find himself out of a job, while an individual with no connection to the community takes over his position. In addition, the uncertainty about a school's leadership leads to lower levels of commitment, continuity, and cohesiveness among the staff, qualities that are essential for creating a stable, safe, well-organized learning environment.

The educational system of Serbia is one of the most important systems in the state, but the state administration has not invested enough money into education. In a situation where an epidemic sweeping the state must reduce the autonomy of the university or school, because necessary, the government can order the temporary closure of all educational institutions and seek to meeting people is reduced to a minimum. In purpose of school safety many of experts must be on duty to ensure the system from among the teaching staff with the participation of firms hired for security. It is important that students and teachers bring to the proper understanding of safety culture and respect the orders of the Government and the Parliament.[10]

In 2009 Health Minister announced that a swine flu epidemic had been declared in Serbia. The decision came at the recommendation of the government working group set up to monitor the spread of the AH1N1 virus. A ban on public gatherings, including in schools and preschools in the whole country or some areas were imposed, but that this happened according to the appraisal of the health institutions with jurisdiction in the matter. The pandemic influenza outbreak in the province started in October 2009 (week 44) among the students who had returned from a school-organized trip to Prague, Bratislava, and Vienna. The most affected age groups were the children from 5to 14 years old.[11] Because of that, Serbian authorities decided to extend the autumn school holidays to stop an outbreak of the swine flu epidemic.

It's necessary that final response of the Serbian Ministry of Education concerns its relationship with other sectors and ministries, at different levels of the system. For this purpose, Serbian government established a Working Group to monitor the pandemic, which included experts from many different ministries. This was intention for making interoperability between different ministries and also for coordinating activities. Within the framework of the Working Group, a Commission was formed to monitor the education sector, because as a particularly vulnerable group, within the general population, the school population is placed.

One issue was particularly important, at both the macro and micro-levels: the need for greater collaboration among different sectors, especially with health, labor, and social welfare. The expertise of the Ministry of Health may be needed, in the design and delivery of educational materials about the disease, its transmission, and its treatment. Closer links is usually needed with the Ministry of Labor in gathering and analyzing data related to human resource needs and development. So, collaboration with ministries concerned with social welfare programs of various types may be thrust upon the Ministry of Education if its schools need to take on a larger role as a community

9 See: Carol Coombe & Michael J. Kelly, *Education as a Vehicle for Combating HIV/AIDS*, Prospects, vol. XXXI, no. 3, September 2001.

10 Dalibor Kekić, Security management system during an outbreak of acute infectious diseases, [dissertation, Serbian], Faculty of Security Studies, Belgrade, 2010.

11 Vladimir Petrović, et. al., Overview of the winter wave of 2009 pandemic influenza A(H1N1) in Vojvodina, Serbia, Croat Med J. ; 52(2), April, 2011, pp. 141–150.

development agency. At the macro-level, another issue concerns the likely arguments among ministries over budget allocations and the need for the Minister of Education to be able to convince cabinet colleagues, faced with immediate problems such as skyrocketing health care costs.

SCHOOL MANAGEMENT SYSTEM IN EPIDEMICS

School safety and security is the job and issue of the entire school community and educational system. This effort requires leadership and coordination by school administration, and involvement and participation from all sectors of the school community (staff). Each school should establish and maintain an ongoing School Disaster Management Committee (also called a School Safety Committee, or School Disaster and Emergency Management Committee) to oversee disaster risk reduction and preparedness.[12] This may be the issue of a pre-existing committee, sub-committee with a similar mission, or one newly established for this purpose. This committee develops implements, adapts, and updates the school disaster management plan. It will typically meet intensively at the beginning of each school year and monthly during the school year. It will encourage personal and organizational preparedness, guide mitigation work, assure two fire and building evacuation drills annually, lead one full simulation drill annually, evaluate the results, and adjust the plan accordingly. In some ideal conditions, the committee is empowered by and maintains formal links between school and disaster management authorities. School Disaster Management is the process of assessment and planning, physical protection and response capacity development designed to:

a) Protect students and the school staff from physical harm;
b) Minimize disruption and ensure the continuity of education for all children;
c) Develop and maintain safety and security culture.

The full scope of activities of School Management Plan is included as follows:

a) Assessment and planning – establishing or empowering your school disaster management committee; assessing your risks, hazards, vulnerabilities and capacities; making contingency plans for educational continuity; communicating your plan;
b) Physical and environmental protection – structural safety maintenance, nonstructural mitigation; local infrastructure and environmental mitigation; fire safety; and
c) Response capacity development – standard operating procedures; response skills and organization; response provisions.[13]

Particularly, an infectious disease program should have following elements:

1) Policies and procedures related to identification, placement, and school management of students with infectious diseases;
2) An infectious disease review team consisting of the school medical advisor, the school nurse, and the school administrator that is responsible for planning and managing the educational program for the individual student with an infectious disease;
3) Maintenance of routine hygienic procedures to assure a clean, safe, healthful school environment;
4) Health education/health counseling programs to educate school staff, students, and parents.[14]

The first step in establishing an infectious disease program is the development of appropriate policies and procedures. The school board is legally responsible for the formulation and adoption of all school policies. The school board should make public its policies on management of students who have chronic infectious diseases. After the infectious disease program and policies have been developed, the school administrator should delegate to the appropriate school staff the responsibility for implementing and maintaining the program. In delegating the specific tasks, the school ad-

12 *Disaster and Emergency Preparedness: Guidance for Schools*, p. 5.
13 Ibidem.
14 *Management of Chronic Infectious Diseases in Schoolchildren*, Illinois State Board of Education, Illinois, Revised Edition, 2003, p. 1.

ministrator must be sure that each staff person fully understands his or her responsibility in implementing the program.

An understanding of the different types of infectious diseases is essential in planning and implementing an effective infectious disease management program. Decisions regarding the educational and care setting for an infected student should be based on the behavioral, neurological, and physical condition of the particular student and the expected type of interaction with others in that is setting. These decisions are best made using the infectious disease review team, which should include the student where appropriate, the student's parent or guardian, the student's physician, the school nurse, local public health authorities, and personnel associated with the proposed care or educational setting. In each case, risks and benefits to both the infected student and others in the setting should be weighed. For infected students, including preschool and neurologically handicapped students who lack control of body secretions, or who display behavior such as biting, the review team shall consider recommending a more restricted environment.

Prioritization of diseases under surveillance will improve the overall reactivity of the system. It is therefore recommended to focus on infectious diseases for which early detection matters. A list of those diseases must be made according to context and should be reviewed periodically. Infection prevention is not specific to an outbreak but represents a major task in epidemic control and mitigation. The principal objectives of infection prevention and control are to protect patients, protect care providers, auxiliary staff and reduce spread of the infection. Effective infectious disease management plans should include only the most common/probable diseases according to disease prevalence and history of epidemics in the area. The plans should be updated on a yearly basis.

In Serbia, every educational object (university, college, secondary or primary school) have to prescribe Plan for Emergency Situations (enacted in Law on Emergency Situations). During the H1N1 pandemic, all educational institutions in Serbia prepared Plans for the pandemic H1N1 flu and according to that plan students and staff have to act in case of a major outbreak of diseases. The plans in Serbia had to adopt all the major companies, sectors, educational institutions, etc. All these plans had to be in line with the National Plan of Activities Before and During an Influenza Pandemic, which was issued in 2005.[15] Recommended objectives and activities in all phases of the Plan are grouped into five categories: planning and coordination, situation monitoring and assessment, prevention and control, the activities of the health system, communications. The Plan established a list of priorities for immunization. In the second group, there is staff working in kindergartens, schools, and hostels for students belonging to the third group.

Through the media, Working Group prescribed Guideline for pandemic flu control and Guidance for surveillance of human infections with A (H1N1) virus,[16] when it's stated in the introduction to the policy recommendations of the closure of schools/colleges can improve prevention of influenza, but that such a policy must be proportionate to the actual needs, at that moment. Some of these recommendations are: students with symptoms of influenza-like illness do not attend school, if a student who comes to school has flu-like symptoms, the attending teacher/professor or class master of such students should send him/her home, school/college should have to develop systems for distance learning to be applied to students with chronic illnesses; etc. The highest percentage of positive subjects was registered in the age group 15-19 years followed by children aged 5-14 years. Both diagnostic and protective titers were about twice higher in the vaccinated as compared to the non-vaccinated group.[17]

At the level or educational managers and planners in the system, another kind of impact may occur. Assuming that the current generation of such individuals is fairly well trained, better at least than the generation before, their illness, absenteeism, death and the resulting turnover of personnel will signal a loss of considerable competence and erode the system's capacity to plan, manage, and implement educational policies and programmes,[18] both routine and innovative, that are meant to maintain and even increase the supply and quality of education. The impact will likely be especially

15 National Plan of Activities before and During an Influenza Pandemic, Ministry of Health, Belgrade, 2005.
16 Guideline for pandemic flu control and Guidance for surveillance of human infections with A (H1N1) virus, Ministry of Health, Belgrade, 2009.
17 Vladimir Petrović, et. al., Overview of the winter wave of 2009 pandemic influenza A (H1N1) in Vojvodina, Serbia, op. cit.
18 Kamuzora, C. L, The Demographic Impact of HIV/AIDS in Africa Joint Population Conference: The Demographic Impact of HIV/AIDS in South Africa and its Provinces Port Elizabeth, 2000, p. 12.

significant in resource-poor environments. Due to the rather poorly organized system of information and creating a somewhat paranoid situation in Serbian society during the pandemic H1N1 virus, it is very important in the future to improve information system through: establishment of an intra-sect oral epidemic-related information systems; the need for more accountable and cost-effective financial management at all schooling levels in response to reduced national, community and private resources for education; and the need for sensitive care in dealing with personnel and the human rights issues of affected employees and their dependants is urgently required.[19]

DRR POLICY FOR SUPPRESSION OF INFECTIVE DISEASES IN SCHOOLS

For the future of Serbia, a developing into a comprehensive system of disaster risk reduction is very important. On several occasions, an attempt was made to develop a unique national platform for disaster risk reduction in Serbia, but it had never been completed. Despite these efforts, it is an attempt, based on the experiences of other countries in the region, to provide some basic guidelines for the development of a comprehensive system of DRR and school management in place within such a system.

Schools may be more susceptible to outbreaks of infectious diseases, such as influenza, meningitis, colds, hepatitis, and measles, than other environments because students can easily transmit illnesses to one another as a result of their poor hygiene skills and the dense populations in schools. As infections may occur and spread rapidly, it is important that school personnel and their partners, such as public health departments, mental health providers and police and fire departments, be prepared to swiftly implement procedures to mitigate the spread of disease, communicate with staff and families, make closure decisions, provide medical and mental health services to staff and students and ensure that the schools are clean and sanitary before a decision is made to reopen schools.

During an infectious disease outbreak there are many alternative uses for schools, such as immunization sites or clinics. When using a school building as an immunization clinic, the planning is essential. In any school population, there are certain individuals who may have a higher risk of complications if exposed to specific diseases. Students and staff with anemia; immunodeficiency; pregnant; and/who have chronic disease, nutritional deficiencies, or debilitating illness should be informed of the possible risks of acquiring an infection. School's responsibility is not to determine the extent of that risk, but to inform these individuals and to encourage consultation with their licensed health care provider. The licensed health care provider will assess the risk and make appropriate recommendations for further action or treatment.[20]

One possible model to help infected people, students and school staff's application of modern concepts of Disaster Risk Reduction. Disaster Risk Reduction (DRR) is the conceptual framework of elements considered with the possibilities to minimize vulnerabilities and disaster risks throughout a society, to avoid (prevention) or to limit (mitigation and preparedness) the adverse impacts of hazards, within the broad context of sustainable development.[21] During emergencies (epidemics) traditional support systems may be disrupted. Therefore, peer support and school clusters support play an important role and can be mechanisms through which to incorporate training on DRR.

Procedures before epidemics of infectious disease:

- Conduct vulnerability/capacity assessments, and identify gaps in school-level response capacity with the participation of students, teachers, school administrators, parents and community members;
- Based on the assessments, it's important to develop school contingency plans; then identifying safety measures appropriate for different age groups and with regard to hazards of infectious

19 Thekowakhotla Phillimon Mosea, The role of school management teams in dealing with the HIV/AIDS epidemic at schools, [dissertation], Vanderbijlpark, 2006, p.56.
20 Terry Bergeson, at all, *Infectious Disease Control Guide for School Staff*, Office of Superintendent of Public Instruction, Washington, 2004, p. 5.
21 *Living With Risk: A Global Review of Disaster Reduction Initiatives*, UNISDR, 2004, p. 17.

disease, establishing basic emergency procedures, locating safe assembly areas, and providing for records' safekeeping;

- Conduct prepositioning of education materials and temporary learning spaces, prepare for teacher deployment and training plan, incorporate a protection mechanism for young children, girls, disabled persons and other vulnerable groups, define the responsibilities of stakeholders, and set a timeline for action and coordination with provincial authorities;
- Implement regular drills of safety measures, especially in disaster-prone areas;
- Ensure all schools in risk-prone areas have first aid kits, pre-stocked emergency life-support supplies and education materials for students and teachers;
- Prioritize unsafe schools for retrofitting and reinforcement;
- Ensure the immune systems of all schools;
- Promote the establishment of a school-wide early warning mechanism and ensure everyone in school and community knows how to respond to early warning signals, where applicable.[22]
- Procedures during and after epidemics of infectious disease:
- Conduct a baseline study on the knowledge and skills of school administrators, teachers, and community leaders concerning predominant local hazards of infectious diseases, disaster prevention, mitigation, preparedness and response;
- Based on this baseline information, conduct an audit of existing educational materials (training kits, teachers' guides, student manuals, including materials that have been developed at national level) to identify gaps;
- Based on the identified gaps, integrate DRR aspects into education materials, engaging local experts and teachers, as well as incorporating local knowledge and effective disaster management practices;
- Based on the baseline, train school administrators and teachers in assessing risks, managing risk factors, and providing psychosocial support to affected students;
- Conduct DRR-related training and activities for school clusters.

CONCLUSION

Usually, pandemic or epidemics in past have occurred at irregular and unpredictable intervals and have been associated with substantial morbidity, mortality and economic cost. Preparing for the next influenza pandemic requires multidisciplinary support and collaboration from partners at the local, national, regional and international levels. National preparedness planning is not a quick or simple process and will require time, a multisectoral approach, the involvement of communities and commitment from the highest political levels.

At one point so unpredictable, the education system has a very important place. The emergence of infectious diseases primarily affecting the school population, where the fastest-growing. Therefore, it is necessary that in the future, especially in Serbia, the issue of managing infectious diseases in school buildings and between students and staff should be given to the experts who will be specially trained. Overall responsibility in this case would continue to lie to the principal, who should act on the orders of experts. In future, it is expected that infectious diseases will be more dangerous than ever; and in this regard, a trend of future problems and go to meet them on preemptive basis, should be adapted to this situation. In this sense, the introduction of the DRR is essential in the overall Republic of Serbia security system, and the school population and school staff must be a priority to be protected against outbreaks of infectious diseases.

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APPLICATION OF SOME GENERAL INSTITUTES ON CRIMINAL OFFENCES IN THE FIELD OF HIGH TECH CRIME

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Abstract: Criminal offences of high tech crime, as a new group of incriminations in a special part of criminal legislation, emerged as a result of reaction on high level of social danger of this kind of illicit behaviours. Even though a great number of criminal offences belonging to this category can be ascribed to already existing incriminations, the need to respect *lex scripta* principle required their separation and their precise definition through new forms of criminal offences for the existence of which precise legal conditions have to be met. This paper deals with the manners in which some of general criminal-legal institutes, such as offences of minor significance, mistake of law and joinder, can be applied to criminal offences against computer data security.

Key words: high tech crime, criminal offences against computer data security, an offence of minor significance, mistake of law, joinder

INTRODUCTION

High tech crime, which will, in parallel to alterations on technical-technological level, change and become more and more complex every day[1], requires multidimensional approach in terms of countering and fight against it. Therefore, we observe different levels or types of protection that represent response to this type of legally illicit behaviours characterized by the order of their appearance. Namely, preventive and repressive measures or activities are necessary in order to prevent and sanction the existing as well as future violations of legally permitted activities related to the work and use of computers and computer technology.[2]

The legal aspect of protection, primarily organizational-legal aspect, refers to issuing and application of series of laws that define and determine state authorities relevant to counter computer crime adequately, as well as rules that define criminal offences included in a set of computer criminal offences and, in a broader sense, criminal offences of high tech crime.

In regard to the suppression and fight against the high tech crime, it is significant to point out that, apart from the national level of protection, the efficient fight against this kind of crime is impossible without intensive and harmonized international cooperation, since it is a transnational crime which, more than all other types, knows no boundaries and takes place simultaneously on many continents and on the territories of different countries. To that end, a great number of international acts have been adopted on different levels and within different regional and universal organizations. Among the said documents, we would like to mention primarily the Council of Europe's Convention on High Tech Crime and Additional Protocol to that Convention, related to the incrimination of offences of racial and xenophobic nature perpetrated via computer systems.[3]

However, before the mentioned Convention was signed, numerous regulations regarding the regulation of cyber space had been signed by the Republic of Serbia, among which are recommendations of the Council of Europe on criminality related to computers and on observation of problems in criminal procedure law related to the information technology from 1995, EU Directive on Protection of Computer Programs from 1991, EU Action Plan on Promoting Safer Use of Internet from 1999 and Resolution on Computer Crime of the VII OUN Congress on Prevention of Criminality and similar.(Milosevic,2007:58).

1 This is primarily contributed by sophisticated technology that hinders detection, by both untrained and insufficiently skilled investigative authorities and lack of awareness of potential victims on their endangerment, which is why they avoid applying adequate protective measures and disregarding security recommendations (Budimlic, Puharic, 2009: 9).
2 On measures for the protection of information see more (Nikolic, 2010).
3 Signed by the Republic of Serbia in Helsinki in 2005, and ratified by the National Assembly of the Republic of Serbia in April 2009.

The signing of the said documents contributed to raising awareness regarding the increased number of computer crime criminal offences and their danger, which influenced law-makers in the Republic of Serbia to incorporate, after long period of being inactive[4], a group of criminal offences committed by the use of computers into the Serbian legislation. The law on amendments to the Criminal law of Serbia, dated April 11, 2003, defined eight criminal offences from the group of criminal offences against computer data security.[5] With smaller alterations, those criminal offences have been introduced to the existing Criminal Code of the Republic of Serbia (SCC), with one additional criminal offence included by the last amendment to the SCC in September 2009.

A group of criminal offences against computer data security is defined in XXVII Chapter of the SCC, within which there are eight criminal offences:

1) Damaging of computer data and programs (article 298 of the CCS);
2) Computer sabotage (article 299 of the CCS);
3) Creating and introducing of computer viruses (article 300 of the CCS);
4) Computer fraud (article 301 of the SCC);
5) Unauthorized access to protected computer, computer network or electronic data processing (article 302 of the SCC);
6) Preventing and restricting access to public computer network (article 303 of the SCC);
7) Unauthorised use of computer or computer network (article 304 of the SCC);
8) Creating, acquiring and providing others with means for perpetration of criminal offences against security of computer data (article 304a of the SCC).

OFFENCE OF MINOR SIGNIFICANCE

The offence of minor significance, as a general institute of criminal law, which exists in the SCC from 2005[6], is one of three legal bases for exclusion of the unlawfulness of a criminal offence, apart from self-defence and extreme necessity.

Legal nature of this institute is justified by the need to exclude criminal-legal reaction in those cases when, due to the low level of social danger, it appears as superfluous. Namely, the law-maker is not always in position to exclude, on the level of entity of a concrete criminal offence, those types of illicit behaviours from the criminal zone, which by the degree of their concrete (specific) social danger deserve no criminal-legal reaction, since they belong to the so-called bargain criminality.[7] Determining of the entity of a criminal offence and its classification into a certain group of criminal offences with a common object of protection, is connected with the law-making process carried out by the law-maker who is guided by the general degree of social danger, which such illicit behaviours may provoke in a society. Special danger of a concrete criminal offence can be gradated in each case, so in that sense, criminal offences, which, owing to the height of threatened sanction, are not qualified as serious criminal offences, may in each concrete case obtain the character of an offence of minor significance, which then excludes the existence of the criminal offence itself.

4 Namely, in 1991, Dj. Ignjatovic underscored the need for introduction of new incriminations in national criminal legislation of that time, due to the fact that the number of this type of delicts, as well as their social danger, increased, which at that time represented one of general elements of criminal offence(Ignjatovic,1991:136-144)

5 This has been done by taking over the resolution from the Draft CC of SRJ from February 2000.

6 It replaced the existing institute of insignificant social danger and eliminated dilemmas related to the lack of criteria for its application, which characterized institute of insignificant social danger, where the law-maker left room for courts to make a discreet decision in which cases certain behavior can be considered as insignificant in terms of social danger, which led to the violation of legality principles. On the other hand, an act of minor significance implies the fulfillment of three legal conditions which, in each concrete case, have to be determined by court, in order to exclude existence of a criminal offence while applying this institute.

7 *Minima non curat pretor* – A judge cannot think about minor things is a Latin saying known in the Roman law, which also considers unnecessary reaction by criminal law to behaviors where the level of non-legality is such that the application of criminal sanctions would be meaningless. Most countries are not familiar with this institute, and issues of bargain criminality are being resolved with help of the principle of opportunity of the prosecutor's criminal prosecution, regulated by criminal procedure provisions.

One prohibitive norm from the special part of the SCC gets derogated here by permissive norm of general character, and at the same time it removes the character of a criminal offence from behaviour, which actually includes all necessary conditions prescribed in the entity of a criminal offence.

Before the introduction of the institute offence of minor significance, there was an institute of insignificant social danger in the Serbian criminal legislation, the legal nature of which is basically the same as the legal nature of the offence of minor significance. Insignificant social danger was adequate general institute in the system of criminal law which started from incomplete material-formal definition of a criminal offence, and which included social danger in its general definition. Abandoning of an outdated way for defining a criminal offence, characteristic for Soviet criminal-legal legislation model, meant shifting to purely formal defining of general idea of criminal offence from which the element of social danger is rightfully left out.

Since it represents material element, the introduction of which creates unnecessary confusion, and when theory as well as practice are in question, social danger represents a motive for the introduction of certain new incriminations into a corpus of criminal-legal regulations, which is estimated by the law-maker in each new redaction of the existing criminal offences. This social danger represents material side of predictability in law, i.e. materialized justification of the law-maker's formalization of certain behaviour as a criminal offence.

However, each criminal offence carries its own special social danger,[8] which is realized by committing the act of perpetration in the outer world and, depending on objective and subjective characteristics which it is made of, it cannot be subjected to the institute offence of minor significance, assuming that the sentence for the offence can be 5 years of prison[9] or a fine sentence, if conditions for the application of this institute are met, and those are the following:

1) that the degree of the perpetrator's guilt is low;
2) that there are no adverse consequences or they are insignificant;
3) that general purpose of criminal sanctions requires no imposition of any sanction.

In terms of the application of the offence of minor significance to criminal offences against computer data security, it can generally be stated that the institute offence of minor significance can be applied in most of criminal cases from this group, if legal terms are met, but a characteristic criminal offence from this group is the unauthorized use of the computer and computer network from Article 304 of the SCC. This is primarily due to the significance that the law-maker attributed to this act, proscribing as sanction a fine or imprisonment up to three months, as well as due to the fact that it is being prosecuted on private suit, which can also indicate the lower level of its social danger. Although separated into a special incrimination from the said group, this criminal offence is actually theft directed against data or time that are, in sense of article 112, paragraph 16 of the SCC[10], also regarded as movable assets, which can be object of criminal offence theft. The need to specialize criminal-legal regulations urged the separation of this criminal offence into a special article of the law, but the practice shows that this criminal offence most often appears as a minor one, i.e. it has tendency to become bargain criminality, which is its greatest difference from the standard criminal act theft from article 203 of the SCC.

8 Special social danger of each single criminal offence can be the reason for which the offence of minor significance should perhaps be the basis for the mitigation of sentence, and not the general basis for the exclusion of criminal offence existence, since, even though it has indisputable significance in the field of response to bargain criminality, a question arises whether it is justifiable to free from all responsibility an individual that committed all features of a criminal offence with the existence of guilt or it would be better to apply some other forms of social condemnation for the perpetration of a concrete criminal offence, such as judicial admonition, suspended sentence(Delic, 2009: 98).

9 Before the Law on amendments to the SCC in paragraph 3, article 18 of the SCC, it was stipulated that the offence of minor significance can only refer to an offence for which a potential sentence is up to three years of prison or a fine sentence (where court practice determined that provisions on the offence of minor significance can also be applied when cumulative sentence up to three years of prison and fine sentence is proscribed, which was in accordance with the purpose for which this institute exists, i.e. to limit criminal-legal reaction only to cases when even the law-maker himself would not stipulate a certain behavior as a criminal offence if he had other legislative-technical possibilities available (Delic,2009: 40). The introduction of the mentioned limit had the aim to eliminate drawbacks of the institute that preceded the offence of minor significance (which primarily referred to court's arbitrage in the decision making process), and which were related to the fact that the law-makers determined no penalty that would represent boundary for the application of this institute. However, the said Law on amendments to the SCC raised the said boundary to five years by which it enabled the application of this institute in numerous criminal offences.

10 Movable asset is produced or collected energy intended for light, heat or movement, telephone impulse, as well as computer data or program.

In case that property gain, which was the objective of the perpetration of this criminal offence, is insignificant, it is possible to exclude the existence of a criminal offence, having in mind the level of guilt, proposed sentence and insignificant consequences.

If the act of perpetration would be carried out in line with the saying "the cheapest internet is my neighbour's internet", durable deprivation of someone else's movable asset, in the form of internet time or information flow, would represent an act with significant consequences, which most certainly could not be regarded as the act of minor significance. In terms of this example, which refers to the behaviour of an individual directed to obtaining of unlawful property gain, who more than once, i.e. for a longer period of time, uses someone else's time or flow, causing harm in that way to both the internet provider to whom he pays no service, and the individual whose flow he uses without authorization, article 61 of the SCC could be applied. According to legal conditions, an extended criminal offence exists when the same perpetrator has been continuously committing several same or similar criminal offences, where at least two out of five circumstances exist: the same aggrieved, similar object of offence, the exploitation of the same situation or the same durable relation, the unity of place or space or unique intent. In the said example, the perpetration of **several successive offences** of this criminal offence, by **the same individual** for a longer period of time against the same aggrieved individual in a building or other object in which they live or work, would signify that legal conditions for the existence of an extended criminal offence have been met, which would certainly exclude every possibility to call for the application of the offence of minor significance.

If the perpetrator uses someone else's time and flow which remained unused by the account owner at the end of the monthly account payment, and by doing so he obtains insignificant property gain, without affecting the account owner or internet provider, this offence could be perceived as the offence of minor significance, given that the consequence would be insignificant or nonexistent, the degree of the perpetrator's guilt low, and the general purpose of criminal sanctions would not require passing of one in the said case. Thus, in the similar case where remainings of cut trees were taken by two defendants, with the aim to acquire small unlawful property gain, the verdict of the District Court in Belgrade Kz-2088/06, from September 2006, issued a decision to free two defendants from charges for perpetrating small theft in collaboration, from article 210 of the SCC. The verdict states "that in the concrete case conditions have been met for the application of the offence of minor significance, having in mind that the level of the perpetrator's guilt is low and this is primarily also because of the very significance that the law-maker gave to this offence, proscribing a fine sanction or six months of prison, that defendants took twigs and other branches, from the previously cut trees, which is certainly a situation that indicates the low level of the defendants' guilt, and that adverse consequences are insignificant, especially since no representative of aggrieved Public enterprise "Srbija sume" could provide information on the extent of the damage inflicted, and that general purpose of the punishment requires no issuing of criminal sanctions in the concrete case."(Simic, Tresnjev, 2008:21-22).

Although the offence of minor significance includes precise criteria that have to be met for its application, there are still cases where court decisions are inconsistent in terms of the application of the mentioned criteria, and decisions are made in line with previously existing conditions for the application of insignificant social danger, especially with condition on "the significance of an offence."[11] Thus, according to the verdict of the District Court in Belgrade Kz 942-06 from April 2006, "it cannot be accepted that ten recorded copies of video carriers containing documented movies is the offence of minor significance", having in mind the **nature** of the criminal offence and the object of criminal-legal protection. (Simic, Tresnjev, 2008:128).

Each verdict, in order to be legally valid, has to describe specifically all legal conditions for the existence of the offence of minor significance, as it is stated in the verdict of the District Court in Novi Sad K.14706, dated February 24, 2006, saying "the first-instance court gives no reasons for its conclusion that in the concrete case the general purpose of sanctioning requires no criminal sanctioning of the defendant, which is one of the three cumulative conditions the existence of which is necessary to determine in order to apply the institute of the offence of minor significance." This is the reason why the mentioned verdict has been cancelled, as the court failed to give reasons for vital facts, which represented an important violation of criminal procedure regulations from article 368, paragraph 1, point 11 of the SCC.

11 Conditions for the application of the institute insignificant social danger were cumulatively designated as minor significance of offences and insignificance or the lack of adverse consequences. Greater attention was attributed to determining the meaning of the significance of an offence, for which two questions were important, whether every offence can have minor significance and which criterion to apply in designating the significance of an offence (Delic, 2009: 30-34).

MISTAKE OF LAW

Bearing in mind the date when they were introduced in the national criminal legislation, criminal offences against computer data security are considered to be new incriminations, and they can certainly not be classified as standard criminal offences, which are, in terms of their character, wrongs in themselves (*mala in se),* but they depend on the law-maker's choice in line with the reality of a concrete moment and are directly linked to the use of up-to-date technology, the misuse of which raised the need to incriminate certain behaviours (*mala prohibita*).[12] In that sense, it cannot be expected of a common citizen, who is not a lawyer or expert from this field, to be familiar with new criminal offences from this area. Hence, some criminal offences from this group can be expected to include mistakes of law as institute, the existence of which can lead to the lack of features characterizing certain behaviour as a criminal offence, since our Criminal Code takes mistake of law as the basis for the exclusion of guilt, and simultaneously as the basis for the exclusion of a criminal offence.

The introduction of a new concept - mistake of law in the SCC, which excludes the existence of a criminal offence when the perpetrator was in compelling mistake of law, is directly related to the adoption of normative-psychological theories on guilt, contrary to the previously excepted psychological theories. The existence or lack of awareness regarding the unlawfulness of an offence, which is at present a constitutive feature of guilt, negates the possibility to apply criminal-legal repression against someone, even though he was not aware that his acts were prohibited by the law. *Ignorantia iuris nocet*, i.e. a rule that ignorance of the law does not excuse, is absolutely inacceptable in modern criminal legislations, given that those are legal acts of great volume, which, apart from the tendency towards limited criminal-legal reaction, increasingly expand the catalogues of criminal offences and move towards the hypertrophy of incriminations. As a result, inability to have awareness on whether a certain behaviour is declared to be a criminal offence, is determined, regardless of the intent or negligence, to be integral part of guilt and its existence constitutes mistake of law, which, if compelling, excludes guilt and, consequently, a criminal offence as well (Simic, Tresnjev, 2008:19).

The division of mistake of law to direct and indirect one, meaning the one that refers to ignorance, i.e. the lack of awareness on prohibition of a certain behaviour or conviction that such behaviour is permitted, and the one that refers to the wrong assessment of conditions for the application of a certain basis that excludes the unlawfulness or wrong assessment that something represents the basis that excludes unlawfulness, can be significant in considering possibilities of mistake of law existence in certain criminal offences from the field of high tech crime.

We believe that the mentioned group of criminal offences would more often include direct mistake of law, as the perpetrator would primarily have no knowledge on legal prohibition of his behaviour, i.e. on situations where there is conviction that such behaviour is permitted. As an example we can present a case of the lack of awareness on the fact that copying, i.e. multiplication of school books, guides or for example workbooks is the act of the perpetration of a criminal offence from article 199 of the SCC, the unauthorized use of copyright or object of similar right. Guilt can be excluded in this case if a responsible individual is aware that he multiplies a copy of a book willingly, when there is no awareness on the fact that the said behaviour is prohibited by the SCC norms or when he believes that such behaviour is permitted.

The second example, which exists in numerous cases in our country, refers to the case of use, i.e. recording and installing of an unlicensed program on a computer. Namely, before a commercial campaign on the necessity to use licensed programs intensified, individual users acted in numerous cases contrary to prohibitive regulations of the SCC, not being aware that their behaviour is prohibited by the law. Those are also mentally capable individuals aware that they have a pirate program on their computer willingly, but they are not aware that they are perpetrating a criminal offence of the unauthorized use of copyright or object of similar right, and therefore they are experiencing the mistake of law.

Given that the awareness of unlawfulness can be divided into an actual and potential one, the very mistake of law in concrete cases can be non-compelling and compelling. Only in concrete cases, when the perpetrator did not have the obligation and possibility to be aware of unlawfulness, the mistake of

12 It is quite possible that criminal offences that depend only on the law-maker's assessment and which are not simultaneously subjected to moral condemnation include mistake of law, as most of citizens and lawyers are not familiar with it (Stojanovic, 2009: 134).

law will be compelling, which excludes the perpetrator's guilt and therefore the existence of a criminal offence, while in concrete cases, where there are the obligation and possibility to be aware that the act is prohibited, non-compelling mistake of law will exist, which represents a facultative reason for the mitigation of a sentence.

Considering that mistake of law refers to a negative side of awareness of unlawfulness, which is presumed the same as accountability, its existence in every single case has to be established for the perpetrator, in order to possibly exclude the existence of a criminal offence or open the possibility for the mitigation of punishment.

JOINDER

Apart from the need to respect the principles of legality, the separation of specific criminal offences against computer data security is also a result of the need to establish a precise, applicable and rational normative system of criminal legislation, in order to be able to counter criminal behaviours in an adequate manner and to be applied by criminal policy and prevention of illicit behaviours. Classical criminal offences against economy and constitutional order, which are perpetrated by the use or misuse of computers or computer technologies, represent the specialization of standard criminal offences. In that sense, the existence of joinder of criminal offences among similar behaviours from different groups of criminal offences is possible. However, joinder in these cases can be both falsely ideal, in terms of specialty or subsidiarity, and heterogenic (real).

In terms of specialty, falsely ideal joinder can exist between a criminal offence sabotage and computer sabotage, when the later criminal offence appears as a special regulation derogating the general one (*lex specialis derogat legi generali*). However, criminal offences from article 208 and article 301 of the SCC can also appear in real joinder, when with several activities the perpetrator carries out several independent criminal offences, for which he is simultaneously on trail. In this case joinder would be real, and not a construction, which means that regulations for determining the sentence for criminal offences carried out in joinder, would apply.

Falsely ideal joinder on the grounds of subsidiarity can appear in a criminal offence creating and introducing of criminal viruses, in which the first basic form will exist only if the introduction did not take place, the same as the misuse of paying cards will refer to the existence of only the second form, while the first will exist only in case the card is counterfeited, but not put to use, as well as in criminal offences damaging of computer data and programs and computer sabotage, that will always have precedence in regard to the previous one if the consequences are graver and if introducing of data took place, which appears to be a special form of perpetration in computer sabotage, by which data is introduced in a computer, the consequence of which is making the computer data or program useless, i.e. the computer destruction or damaging. In case those are not computers relevant for state authorities, public services, institutions, enterprises or other subjects, the offence from article 314 of the SCC will exist.

FINAL REMARKS

The follow-up of innovations in the sphere of information-telecommunication technologies, through an intensive cooperation with experts in this field, represents a focus of modernization and adequate response of criminal legislations worldwide and nationally. The participation of police and judicial authorities that implement provisions of material criminal law in their daily work, in the development and adjustment of legal solutions is also of unparalleled significance, as those authorities are in the best position to feel all the needs for adjustment of legal definitions related to (im) possibility to process certain criminal-legal cases in an adequate way.

We believe that the existing system of incriminations in the Serbian criminal legislation is a necessity and not hypertrophy of incriminations, as the mentioned criminal offences can, in most direct way, jeopardize or violate vital assets and interests of individuals and states.

When it comes to the extension of incriminations catalogue, it is required to act restrictively in terms of the criminal law, and not to reach for criminal legal reaction in all the cases in which certain

illicit behaviour is possible to assign to some of standards, the already existing criminal offences, as it would weaken both special and general preventive functions of the criminal legal reaction. However, it should, by no means, be interpreted so as to leave room for "black holes" in legislation, which would leave unpunished all the behaviours the consequences of which can gravely affect the state, economy or individuals, and the level of social danger of which unequivocally points to the need to react by criminal law in those cases.

As the result of a uniform definition of criminal offences on the international level, there would be no country in which perpetrators of these criminal offences could find safe-heaven from criminal prosecution and in that way avoid an appropriate sanction.

When it comes to the sanctions, a tendency for certain kind of uniformity should exist, because if we accept the position that the criminal offences in question can reach extremely high level of social danger, then penal policy should by no means be inappropriately mild or milder in proportion to solutions in the comparative law.

Although the existing criminal offences represent an adequate basis for fight against the high tech crime, we believe that there is a need to point to some new threats and concerns that follow contemporary technical achievements. Namely, the need to optimize performance, both in public and private sector, led to the apparition of one new informational-technical concept, which is considered to be feature of new business era, and which can rightly be designated as informatics phenomenon of today. We refer to ***cloud computing,*** or SAAS (*Software as a Service*)[13] that incorporates buying or renting of complete informational-communicational resources from specialized companies[14], which offer those services for monthly or annual compensation.

The said entrepreneurship decreases initial and current expenses, which is, in the time of recession, in the interest of both state and economy actors in private sector. Furthermore, it accelerates and facilitates executing of basic functions by managing the entire procurement and maintenance of informational-communicational systems, with dislocation of data to remote servers by which working space within internal informational systems of a subject that uses this type of services is liberated in terms of content and capacity.

Apart from its undisputable advantages, this type of services leaves space for misuse because of the dislocation of data on the subject's business and on employees, with absolute digitalization and virtualization that decreases standard, direct control of the existing data. Business "in clouds" is an ideal space for criminals operating in the field of high tech crime, as in such a digitalized system of processing, storing and updating of data and systems themselves, there is a great possibility for different types of misuses related to data, secrecy of documents and entire security, which can be perpetrated through different existing forms of criminal offences, but also some new activities closely related to this new type of business.

In that sense, there is a possibility for programmers to carry out attacks by breaching into software, by data malversation, from alteration, over deletion and destruction, to fraudulent use of data with the aim of gaining a better competitive position on the market, protect their own interests or for the retribution or other motives.[15]

Naturally, the development of SAAS led to the development of a new type of criminal activity from the field of high tech crime, that refers to the use of internet service offering the use of malware programs in line with the model presently known as *Crimeware as a Service(*CaaS)[16], for perpetration of criminal offences in virtual surrounding. Namely, instead of dealing with the solutions for technical challenges that would help them execute certain criminal offences, criminals more frequently use on-line services for carrying out criminal offences of high tech crime. By using the already existing infrastructure, criminals from the field of high tech crime pay for the use of internet services offering malware programs as service to other criminals who developed the said network

13 See more (Milasinovic, 2010).

14 See more: *Microsoftcloud, Googlecloud. Ciscocloud.*

15 There is a new trend, i.e. malversations with payrolls in computer systems of enterprises, that refer to restricted access to the sector with data on employees, within which the data on employees are modified whether through the alteration of the existing data or introduction of new ones, with the aim of transferring financial means intended for salaries to other people's accounts, which would result in the annual accumulation of enormous property gain.

16 On the use and role of Internet services that provide malware programs as service in cases of high tech crime in the Republic of Serbia see more (Urosevic,2010: 177-189).

infrastructure in order to obtain data needed for perpetration of criminal offences or for perpetration of the complete attack and process of infection of computer belonging to a passive subject. This is the way in which organized criminal groups follow the trend of the development of legal organizations, so instead of investing in development and maintenance of malware computer programs, they develop software tools, which they subsequently offer to others as assistance in execution of criminal offences.

Activities related to sophisticated computer programs for secret obtaining of information used for the purpose of espionage, which is not necessarily national, but also non-profitable operation, are also dangerous. Privacy in cyber space is highly endangered owing to the possibility of interception of communications by means of high technology, copying and confiscation of private data, and stealing of identity in two ways, by state authorities while performing certain competences or by individuals who can also endanger privacy right of another individual or group of people. This is the reason why the interception of communications by police or prosecutor's office is severely regulated and subjected to certain principles mandatory in their work, while the issues related to accountability of an individual are differently regulated in comparative legislation.

Apart from the mentioned problems, it is impossible to determine and produce the number of technical-technological solutions, the misuse of which can potentially result in carrying out of numerous criminal offences, which in the best way reflects a need to categorize this type of criminal offences as one of the most dangerous, as society digitalisation and addiction of all forms of contemporary informational-technological achievements is such that we can plausibly say that in the future period a great number of criminal offences will, in some of their aspects, be related to computer systems and technology. In that sense, the development of criminal-legal solutions of the special part of the Criminal Code is to be restrictively-fine tuned, in order to provide in this way the protection from all forms of illicit behaviours that use computer or other computer-related technology as an object or an instrument for criminal offences perpetration.

Taking into consideration the mentioned problems, we believe that future potential alterations in legislation could be related to the exemption of some of the existing criminal offences, owing to the fact that they are outdated and intertwined with some other incriminations, as well as to the complementation of the already existing criminal offences with new forms, all in accordance with the internationally recognized obligations of our state.

Thus, we are of the opinion that the exemption of criminal offence unauthorized use of computer and computer network from article 304 of the SCC is justifiable. We consider that illicit behaviours the aim of which is to obtain unlawful property gain for oneself or other individual, and which are manifested in acquiring computer data and other services that can be designated as movable assets in the sense of article 112, paragraph 16 of the SCC, can be considered as theft from article 203, so in that sense there is no duplication of protection. However, the United Nations initiative to proclaim Internet access as the third generation right available to everyone, and thus free of charge, also potentially leads to the decriminalisation of the mentioned unauthorized use of computer services and network, which is the action of perpetration of this criminal offence.

Even though the harmonisations of incriminations with the provisions of the Convention on cyber crime in domestic legislation are in most cases assessed as adequate, the interception of communication remained without an adequate protection, which leads to the violation of some of the most important rules and freedoms, primarily freedom to individual privacy. Interception could be incriminated within the existing criminal offence unauthorized access to a protected computer, computer network and electronic data processing from article 302 of the SCC, by adding another alternatively stipulated action of perpetration, which would refer to the interception of data transfer within the system, towards the system and from it. This action could be defined as the interception and recording of such obtained data, which are not public, i.e. which were intended to a precisely determined circle of people. Such a criminal offence could acquire its qualified form, if the offence is carried out against state authorities, enterprises, public facilities, etc.

The said criminal offence incriminates acts of unauthorized computer access, data and systems interference, but not an *unlawful interception* that refers to the interception of private data transferred in any manner between two computers or networks, and which would, within the potential

amendments of the existing incriminations, be connected with the existence of a perpetrator's special intent to obtain in this manner data intended only for a determined circle of individuals.

The incrimination of data manipulation should also be taken into consideration, as they could be used without authorization in legal traffic, through their introduction, deletion, modification or their making useless. The said manipulations of computer programs or data with the aim of their misusing would represent computer counterfeiting.

Finally, we believe that future will be characterized by increasing number of criminal offences which in some way use or misuse computers, computer systems or computer networks. A high level of social danger of these criminal offences, reflected primarily in the availability of technology to a wider circle of individuals - potential perpetrators, in speed of perpetration, transnational character, high gloomy number and difficulties in providing evidence, justifies the existence and future harmonization of the incriminations with real situation, and at the same time it is not an activity that leads to the hypertrophy of incriminations.

In the future period of time the misuse of informational technologies will inevitably become the main tool for perpetration of criminal offences or the object of many of those, and, as such, they have to be protected by provisions of criminal legislation.

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LAW, FREEDOM AND PUNISHMENT

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Abstract: The paper discusses three different approaches to the legal punishment. Due to its coercive character, it is highly important in a democratic culture that criminal law is understood entirely apolitically, reflecting only the most fundamental values which make part of the universal will (volonte generale). The tradition of Marxism – on account of its concept of law that is based on perception of legislation being merely the expression of interests of superior social class – aggravates democratic understanding of criminal law. Two authors of classical German philosophy (I. Kant and G.W.F. Hegel) offer two approaches to indicate that there is absolutely no antagonism between penal law and freedom of an individual. If Kant shows that the content of penal law is autonomous, whereby sanction remains as an instrumental relation, Hegel, however, demonstrates that sanction is also the emanation of freedom. The most famous and neither less controversial is his remark that the punishment is "the right" of the criminal.

Keywords: philosophy of law, legal sanction, I. Kant, G.W.F. Hegel

INTRODUCTION

Democracy is the most hazardous political culture concerning the application of coercion. The use of force must never remain brute force (*violentia*), it must always be symbolized through the principles and proved as the government (*potestas*). Penal law in this point of view is a highly delicate field of government activity. Nowadays, the skeptical attitude toward the state as such is widely widespread. The supposition that the society is tanged in numerous antagonisms is accepted as self-evident. The most influential philosophical concept of this understanding of society is Marxism which also was the dominating theory in many countries in the south-east Europe.

PENAL LAW AND DEMOCRATIC CULTURE

The law – not specific rule, the law as such – is interpreted in Marxism as the instrument of superior class for suppression and exploitation. Its function is to maintain the social order which is based on the difference between labor and enjoinment of its products. The law is a part of the "ideology" (including religion, moral, customs and, finally, the state as such) that has the function to present the social relations as "natural": as just, eternal, self-legitimated etc. Marx describes the law as following:

»*Your very ideas are but the outgrowth of the conditions of your bourgeois production and bourgeois property, just as your jurisprudence is but the will of your class made into a law for all, a will whose essential character and direction are determined by the economical conditions of existence of your class*".[1]

Marxian criticism of law is one of the most profound: law as such is unmoral. The very existence of law is the proof of the social pathology. If the core of the pathology (the economical relations) were solid, the law would become obsolete.

This tradition makes the starting point for democratic understanding of penal law very difficult since it suggests that punishment is just brute instrumental communication. Hegel rejects such a concept of punishment with illustrative phrase "dog and the cane". It is the fact that a dog can also be coerced to a specific behavior by being inflicted with pain. This pattern, indeed, can be used in penal law as well: in the case of occupation or in the fascist regimes, for instance, the penalization is very close to the logic of a dog and a cane. But this understanding of penal law is the most destructive for democratic political culture since it hinders to release that its content is not strange to the addressee. The transgression of democratic penal law is not the "rebellion" against unjust social oppression;

1 Karl Marx, Friedrich Engels: *Manifesto of the Communist Party*, http://www.gutenberg.org/cache/epub/61/pg61.html).

and the sanction is not the mere swing of the cane. On contrary, criminal life is self-destructive and will most probably lead to the dead-end of one's personal development. Consequently, the penalization is the measure to bring the delinquent back to himself. If it succeeds, this person is not subordinated to a strange will; he is reunited with the general will (*volonte generale*) which in the same time is his genuine will.

This is the only possible way to successfully implement penal law. If the addressee of the penal law gets the presentiment that its prescriptions are something heteronomous to him (what Marx suggests), this will provoke additional repulsion against it since a human being must prove his freedom:

"*In this view of punishment it is much the same as when one raises a cane against a dog; a man is not treated in accordance with his dignity and honour, but as a dog. A menace may incite a man to rebellion in order that he may demonstrate his freedom, and therefore sets justice wholly aside.*"[2]

We must be aware that the democratic theory of (penal) law cannot be mechanically introduced in the mentality of specific social environment. But it is important that the faculties where the lawyers are educated implement the democratic concept of law as part of curricula. The paper discusses two approaches to the penal law which were developed in the period of classical German philosophy. Immanuel Kant focuses his concept of (penal) law on the notion of *autonomy*: legal rules are the products of human own legislation. Consequently, they are not something heteronomous to him, and if he obeys them, he actually obeys himself. This is the characteristic of the (penal) law, however, not of the sanction. Kant, due to his dualistic ontology, cannot also use the concept of autonomy for the explanation of how the legal sanction works. Although the *duty* to penalize the criminal in Kant's theory is a categorical duty, its *execution* remains bare instrument. Hegel, however, succeeds to show that the sanction as well, not only the content of (penal) law, has for its base the freedom of the man. The way from Marx to Kant and Hegel is, according to the following table, the transition from heteronomy to autonomy:

	Penal law	*Sanction*
K. Marx:	Heteronomy	Heteronomy
I. Kant:	Autonomy	Heteronomy
G.W.F. Hegel:	Autonomy	Autonomy

Marx's understanding of the law as well of the sanction is heteronomous – both of them are bare instruments. Kant succeeds to show that the law is autonomous i.e. the result of our own legislation. But the sanction remains an instrument. Hegel, finally, also moves the sanction to the field of freedom. This is the final step in bringing the penal law, as coercive normative system, in the proximity with a free and autonomous human being. Without this idea, the democratic understanding of penal law is impossible.

KANT – PRINCIPLE OF LAW AND LEGAL ANTHROPOLOGY

Kant's main works represent three critiques: *Critique of pure reason*, *Critique of practical reason* and *Critique of Judgment*. In the second *Critique* he investigates the practical ability of the reason and discovers that the reason can give us certain rules: it is legislative. Due to the fact that this is *our* reason, its prescripts are *autonomous*. The content of the legislative of reason is rather simple - it demands the universality of every act. Practical reason gives us a test: before doing something we should ask if an act can be universalized. For example, if one attempts to steal something in the store, he should wonder what the consequences if *everybody* did the same would be. In this case, the property (and consequently the store, goods, supply etc.) would perish. Conclusion: this act cannot be universalized and in this case it is unmoral and/or illegal.

The practical reason is origin of two normative systems, of law and of morality (which in this article is left aside). It must be emphasized that Kant's interest is put only in the law *a priory*, not in concrete positive legislation. The starting point of law *a priory* is the legal principle which originates from practical reason itself:

2 G.W.F. Hegel: *The Phenomenology of Spirit*, § 99 (Adition).

"*The law is the sum of conditions under which one's choice (Willkür) can be united with other's choice according to universal prescripts of freedom*"[3]

The problem for further development of law *a priory* is the circumstance that the practical reason functions beyond empirical world. Its prescripts have its validity, like mathematics, on logical level not on empirical (as the connection of the cause and the effect). This is the consequence of Kant's dualistic ontology according to which he divides the human existence on phenomenal level (investigated by *Critique of pure reason*) and non-phenomenal, i.e. metaphysical level (investigated by *Critique of practical reason*). At the same time, this is the reason that the sanction as empirical act remains the mere instrument.

Due to this dualistic ontology the concept of law must be composed of two elements. The fist element is a legal principle mentioned above, which is the basis of the validity of *a priory law*. The second element is legal anthropology, the sum of empirical circumstances where the legal principle is applied. Example: if the legal principle is applied to the fact that a man is a mortal being, the result is the legal institute called prohibition of murder; if in the circumstance that a man needs means for his existence, the result is the protection of property. If the man were not mortal, the murder as a legal institute would not exist, although the legal principle would be the same. Or, if a man got ill by seeing red color, prohibition of this color would be part of legal institutes.

The penalty also origins from the legal anthropology: from the circumstance that the people coexist and, consequently, the acts of one can affect the life of the other:

"*The mere idea of state-entity within the people implicates the notion of penal justice which belongs to supreme authority*"[4]

The mechanism of functioning of the penalty, however, is not the part of the legal theory. A human being is on the one hand intelligent and free creature, capable of the prescripts of the reason; on the other hand, it is a bare machine, creature which functions within the chain of the causes and effects. Like a dog who "understands" the meaning of a cane.

Kant's concept of (penal) law is, however, clearly distinctive from heteronomous (for ex. Marxian) understanding. The (penal) law is not strange to the man, it is his own prescript. Consequently, the sentence must be passed according to the human's dignity and the sanction must never become measure for some expected benefits. But the realization of the penalty, what happens through it, remains indescribable for the Kant's legal theory. Inflicting the pain to someone remains on the level where the man is in the same situation as a dog. Hegel will change this.

3. G.W.F. HEGEL – THE LAW AS EMANATION OF FREEDOM IN THE WORLD

The main characteristic of Hegel's philosophy is introduction of dialectical method which is capable to bridge the gap between the reason and empirical world. This is crucial for his theory of law and sanction. Hegel makes the first step toward the concept of law by demonstrating that it is impossible to introduce a free relation between people only by force. Even the most powerful subject emerges in Hegel's analysis as an un-free person. This proof is carried out in the most famous chapter of *Phenomenology of spirit,* in *Mastery and servitude*. It is basically the mental experiment of the encounter of two subjects, observed as self-consciousness. The characteristic of such a subject is that it tries to understand everything in the world as the object which exists for the self-consciousness: the object can be consumed, modified, destroyed etc. The problem arises when one's self-consciousness meets another and they both start to treat the other as an object, belonging to the subject. This attempt unavoidably leads to the conflict, to the life and death struggle. The fight ends when one of them fears to die and accepts the role of the servant. From now on the winner is the master.

At first sight, it seems that the master is a free subject. He has the power; he has the right to give orders to the servant, he does not work but only enjoys his results; he can do whatever he decides. It is Hegel's lucidity to see the trap of this interpretation. Namely, the master *needs* the servant to be what he is. On this account, the master *depends* on the slave:

3 Immanuel Kant: *Die Metaphysik der Sitten,* a34.
4 Ibidem, *Zusatz zur Erörterung der Begreife des Strafrechts*, b 179.

"*The unessential consciousness is therein for the master the object which constitutes the truth of his certainty of himself. However, it is clear that this object does not correspond to its concept. Rather, the object in which the master has achieved his mastery has become, in the master's own eyes, something entirely different from a self-sufficient consciousness.*"[5]

To put it shortly: *"In these terms, the truth of the self-sufficient consciousness is the servile consciousness."*[6] The only way to surpass this deficient attempt of construction of social relations is in mutual recognition of persons. The name of this act of recognition is the *law* where the person is recognized as absolutely free. The emanation of one's free will is the property: if the person puts his free will in a concrete object, this object becomes the existence of his freedom. The illustration for this process is the difference between property and the possession. If one has something in his possession, this is bare empirical fact. In the next moment somebody (violently or by fraud) can take his possession over. If something is in one's property, however, even the whole army cannot make that object cease to be his own. There is only one way to do it: by free decision of the owner who takes back his free will out of the object (by the contract, dereliction, donation etc.).

This concept of law is a starting point for understanding the sanction. The one's will can abandon the general will (the law as system of freedom) and act against its prescripts, for instance by stealing something. The fundamental characteristic of such an act is its "nullity" (Nichtigkeit):

"An injury done to right as right is a positive external fact; yet it is a nullity. (…) Nullity consists in the surpassing of the place of right. (…) But what is null must manifest itself as such, and make itself known as that which violates itself. (…) Actual right destroys and replaces injury, thus showing its validity and verifying itself as a necessary factor in reality."[7]

This term expresses the most fundamental circumstance regarding the Hegel's concept of sanction. The *nullity* emphasizes that the crime act is a dead-born child: it is not the opposition to the government; it is not the rival to the social order. This point of view would remain on the level of master-servant dialectics which has been proven as the dead-end in respect of seeking for free coexistence. The crime is "nothing" which exists. It is a self-defeating, contradictory act:

"*Since it is only in so far as the will has visible existence that it is the idea and so really free, and its realized existence is the embodiment of freedom, force or violence destroys itself forthwith in its very conception. It is a manifestation of will which cancels and supersedes a manifestation or visible expression of will. Force or violence, therefore, is, according to this abstract treatment of it, devoid of right.*"[8]

The offender has not attacked only a concrete object; he has also attacked the infinite in one's personality:

"*The first violence, exercised by a free man, and doing injury to the concrete embodiment of freedom, namely right as right, is crime. Crime is the negative-infinite judgment in its complete sense. It negates not only the particular object of my will, but also the universal or infinite, which is involved in the predicate 'mine,' the very capacity for possessing rights.*"[9]

And in this aspect the offender has attacked the entity that recognizes him as an absolutely free person. He has offended himself. This is what the nullity of the crime-act consists of. Consequently, the sanction is the act of demonstration of nullity; it is the second part of the crime.

Hegel emphasizes that the sanction is not the "evil for evil" (what is vulgar interpretation of the retributivist theory of punishment). If this were accepted, it would be impossible to distinguish between the intentional injury and (for example) coincidental sport injury; or between stealing the item and losing it through carelessness. In both cases the "evil" is the same. But it is the conceptional characteristic that distinguishes the crime from the other unfortunate events. For that reason Hegel insists that the crime is *injustice* (Unrecht) and not the evil. The evil occurred in the past cannot be abolished while the injustice can be. Once the crime is sanctioned, the injustice ceases to exist. The rest is actually bare evil which has, as an empirical past event, the same character as a coincidental (sport etc.) injury. Since the primary characteristic of crime is conceptual, not empirical, the sanc-

5 G.W.F. Hegel: *The Phenomenology of Spirit,* p. 192.
6 Ibidem, p. 193.
7 G.W.F. Hegel: *The philosophy of Right*, § *97.*
8 Ibidem, § 92.
9 Ibidem, § 95.

tion is the abolishment of the concept, the negation: *"punishment is only the negation of a negation"*.[10] It is the act of reaffirmation of the law, of its validity.

The specificity of the Hegel's theory of punishment is that the sanction can also be justified from the particular will, from the will of the criminal. This aspect in Kant's theory is entirely absent. Since a criminal is a reasonable person, his acts are always conducted on the basis of universal judgment. By committing the crime the offender promulgates the new law. If he steals, he actually claims that the stealing is allowed; by murdering, that the manslaughter is allowed, etc. Hegel's conclusion is that the penalization is not only justified by general will; it is also justified by the particular will of the criminal. When the criminal is sentenced, he is also sentenced on the basis of *his own law* which he has promulgated by his act. With regard to this topic, Hegel writes his famous and often misunderstood words that the penalty is the right of the criminal:

"*The injury which the criminal experiences is inherently just because it expresses his own inherent will is a visible proof of his freedom and is his right. But more than that, the injury is a right of the criminal himself, and is implied in his realized will or act. In his act, the act of a rational being, is involved a universal element, which by the act is set up as a law. This law he has recognized in his act, and has consented to be placed under it as under his right.*"[11]

CONCLUSION

The goal of this paper is to suggest an approach to understanding penal law and, consequentially, the sanction which is consistent with a democratic concept of society. An inappropriate approach is repugnant, both, to the democratic culture as such and to the efficiency of legal system. The (penal) law is not brute instrument for subordination. Kant's and Hegel's accounts of law offer two different ways to realize that the law is not something radically strange to a human being. In contrary, it is his prescript (Kant) or the emanation of absolutely free will (Hegel). Hegel's theory is more mature and complex – especially concerning the dialectic of the sanction. However, the main message is as far as both authors are concerned very similar. It is impossible to build a democratic legal culture on the theory which is entirely opposite to the basic ideas, illustrated by these philosophers.

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LEGISLATIVE FRAMEWORK AND COURT PRACTICE REGARDING DETENTION/RELATED PROVISIONS IN BOSNIA AND HERZEGOVINA FOR THE PERIOD SINCE 1992

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Abstract: Those countries that declared independence upon dissolution of the former Yugoslavia directly adopted a number of laws including the criminal procedure laws. Once it declared independence on April 6, 1992, Bosnia and Herzegovina adopted the Criminal Procedure Code of the Social Federal Republic of Yugoslavia (SFRY) as the only procedural law in the entire territory of the SFRY; material criminal codes existed at the level of the former republics. The Criminal Procedure Code of SFRY was adopted through the Law on Adopting and Applying the Federal Laws that were enforced as the republic laws.[4]

Upon many discussions and dilemmas regarding the competencies of the state and the entities, in 1998 the Criminal Code and the Criminal Procedure Code were enacted at the entity level through mediation of the High Representative for Bosnia and Herzegovina. Firstly, the Criminal Procedure Code was enacted at the level of the Federation of Bosnia and Herzegovina consequently abolishing the Criminal Procedure Code of SFRY that was adopted from the previous system.[5] At the same time, the Criminal Code of the Federation of Bosnia and Herzegovina was enacted. Republika Srpska acted similarly enacting the Criminal Procedure Code[6] and shortly after the Brcko District Assembly did the same.[7]

As part of the comprehensive judicial reform from 2003, new procedural laws were enacted at the entity level, Brcko District and the level of Bosnia and Herzegovina. The Criminal Procedure Law of the Federation of Bosnia and Herzegovina was published in the Official Gazette of the Federation of Bosnia and Herzegovina number 35/03 and it came into force on August 1, 2003; The Criminal Procedure Law of Republika Srpska was published in the Official Gazette of RS number 50/03 and it came into force on July 1, 2003; the Criminal Procedure Code of Brcko District was published in the Official Gazette of Brcko District number 10/03 while the Criminal Procedure Code of Bosnia and Herzegovina was published in the Official Gazette of Bosnia and Herzegovina number 3/03 and it came into force on March 1, 2003. Procedural laws and the detention matters have been changed and amended on several occasions since their enactment.

Key words: detention, criminal procedure, human rights.

DETENTION PROVISIONS STANDARDIZATION THROUGH THE ADOPTED PROCEDURAL LAWS

Detention provisions were standardized through the articles 190 to 202 of the adopted Criminal Procedure Law of SFRY.[8] Primarily the law prescribed that detention could have been ordered only under the conditions defined within the law and the length of detention had to be reduced to the minimum necessary time. It was made obligatory for the institutions participating in the criminal

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8 Official Gazette of RBiH number 2/92 and 14/94

procedure as well as those providing legal assistance to act promptly if a suspect was detained. At any time during the procedure, detention was to be terminated if the reasons for ordering detention seized to exist.[9]

Provisions of the Article 191 of the Law made ordering of detention mandatory in those instances where there was a probable cause that a person has committed a crime for which, pursuant to the Criminal Code, a death penalty was prescribed. If the circumstances were such that for the crime in question a milder criminal sanction was prescribed, detention did not have to be ordered.[10] Milder sanctions for those crimes for which a death penalty was prescribed can be prescribed by separate parts of the Criminal Law or through the certain legal mechanisms within general parts of the Criminal Law, such as: considerably diminished mental capacity; mistake of law; exceeding the limits of necessary defense; extreme necessity; inappropriate attempt; voluntary abandonment of the attempt. If it is determined during the proceedings and before imposing of the punishment that there were such circumstances that could lead to a conclusion that for the case in question the law prescribes possibility of imposing milder punishment, in such instances ordering detention would not be mandatory.

Existence of one or more conditions for detention is not required for ordering mandatory detention and therefore in the written decision on ordering of detention it is not necessary to present any additional legal basis.

In those cases where a court finds circumstances which allow for a decision to not order mandatory detention, it will be decided if there are basis for ordering optional detention.

When there is probable cause as a general condition for detention, pursuant to Article 191 paragraph 2 of the Law, detention can be ordered in the following cases: 1) if a suspect is hiding or suspect's identity cannot be determined, or if other circumstances exist that suggest a possibility of flight; 2) if there is justified fear that a suspect will destroy traces of a crime or if particular circumstances indicate that a suspect will hinder the inquiry by influencing witnesses, accomplices or accessories; 3) if particular circumstances justify a fear that a suspect will repeat the criminal offense or complete the criminal offense or commit a threatened criminal offense; 4) if the criminal offense is punishable by a sentence of imprisonment of ten years or more, where the manner of commission or the consequence of the criminal offense or other circumstances surrounding the criminal offense caused the citizens to be disturbed or there could be such disturbance that for the purpose of conducting criminal proceedings in an undisturbed manner or for the purpose of safety of people ordering of detention is necessary.

In relation to the prescribed conditions for ordering detention, the court practice of the supreme courts in the Republics and the Supreme Court of SFRY in a number of cases established positions which in the further application of the detention provisions managed to harmonize the practice of the lower level courts. For the purpose of ordering detention based on the fear of interference, it is not sufficient to only emphasize the abstract possibility of influence but to present concrete specific circumstances that can confirm existence of such danger.[11] Detention that was ordered based on this shall be ended once the witnesses are interviewed and cannot be extended due to possibility that a suspect could influence witnesses that have already been interviewed. [12] In regard to the item 3 – detention based on fear of repeating the criminal offense, existence of the previous criminal convictions is not sufficient for ordering detention while the absence of previous conviction does not necessary mean that detention based on this reason cannot be ordered.

Detention based on the severity of the criminal offense or the consequences was described in the Article 191, paragraph 2, item 4 of the Law.[13] When analyzing this basis for detention, it is apparent that the legislators strived to precisely define these matters by prescribing many cumulative conditions that had to be fulfilled simultaneously and with the purpose to ensure that the severity of the criminal offense is not decisive in ordering detention. In spite the efforts of the legislators

9 Article 190 Criminal Procedure Law of SFRY
10 Article 42 item 1 of the Criminal Law of SFRY
11 Supreme Court of Croatia II Kž. 117/73; Supreme Court of Slovenia Kž. 38/68.
12 Supreme Court of BiH Kž. 942/69 dated October 24, 1969
13 "If the criminal offense is punishable by a sentence of imprisonment of ten years or more, where the manner of commission or the consequence of the criminal offense or other circumstances surrounding the criminal offense caused citizens to be disturbed or there could be such disturbance that for the purpose of conducting criminal proceedings in an undisturbed manner or for the purpose of safety of people ordering of detention is necessary".

to make ordering of detention based on these conditions an exception, the courts had tendency to interpret this provision of the Law widely and in principal as the rule detention was ordered for severe criminal offenses for which the prescribed punishment was 10 years imprisonment. Detention based on these conditions was often ordered for the purpose of personal security of a suspect. Disturbance of citizens was often assessed based on relationship suspect's and victim's families. [14]

Detention is ordered by an investigative judge of the competent court.[15] Upon decision of the panel of judges (Article 23, paragraph 6) detention can be extended for maximum of two months. If the proceedings are being conducted for a criminal offense for which prescribed punishment is over five years imprisonment or a more severe punishment, the panel of judges of the Republic/Province Supreme Court may, for some important reasons, extend detention for no more than additional three months. Written decision on the extension of detention shall be enacted upon justified proposal of the investigative judge or public prosecutor. [16]

If a suspect is not indicted until expiration of the deadlines from the paragraph 2 of this Article, he/she will be released from custody.[17] During the investigation, investigative judge may order termination of detention with the consent of the prosecutor. Should the prosecutor refuse to give consent, decision shall be made by the panel of judges. [18] Defense lawyer and a suspect are not authorized to file request for termination of detention; should such request is received it shall be refused by a decision of the investigative judge.[19]

Once the indicting proposal has been presented to the court and until the end of the main trial, custody may be ordered or terminated only by decision of the panel of judges after hearing the competent prosecutor. Jurisdiction of the investigative judge regarding detention ends once the indictment is presented to the court and not with the time the indictment goes into effect. Panel of judges is obligated to, two months after the last decision on detention goes into effect, without proposals from the parties in the proceedings, review whether the ground for detention exist and to bring decision on extension or termination of detention.[20]

The Law did not prescribe length of detention after indictment is presented to the court and it may last until the first instance judgment.

This Law introduces a few provisions on ordering of detention by a lower level court as well as by a police body.[21]

CRIMINAL PROCEDURE CODE FROM 1998

Firstly, the Criminal Procedure Code was enacted at the level of the Federation of Bosnia and Herzegovina consequently abolishing the Criminal Procedure Code of SFRY that was adopted from the previous system.[22] At the same time, the Criminal Code of the Federation of Bosnia and Herzegovina was enacted. The other entity - Republika Srpska acted similarly enacting the Criminal Procedure Code[23] and shortly after the Brcko District Assembly did the same.[24]

Newly introduced provisions of the Criminal Procedure Code enhanced the procedural status of a suspect especially in the pre-criminal proceedings. Police detention was abolished allowing only for a court to order detention. Detention related provisions were defined within articles 182 to 194 of the Code.

Custody shall always be ordered against a person if there is a probable cause (grounded suspicion) that he/she has committed a crime for which the law prescribes a sentence of long-term

14 Supreme Court of Croatia II-V Kr. 76/80 dated February 8, 1980
15 Article 192 paragraph 1
16 Article 197 paragraph 2
17 Article 197 paragraph 3
18 Article 198 of the Law
19 Supreme Court of Slovenia – Kž. II 403/81 dated October 15, 1981
20 Article 199 paragraphs 1 and 2
21 Articles 194 and 195 of the Law
22 "Official Gazette of FBiH" number 43/98
23 "Official Gazette of RS" number 2/98
24 "Official Gazette of BD" number 7/00 dated November 30, 2000

imprisonment.[25] Apart from other reasons for detention, this Code prescribed in an identical manner like the Criminal Procedure Code of SFRY risks of flight, interference and repeating of criminal offense as grounds for detention. In regard to the grounds for detention in those instances when a severe criminal offense was committed and the consequences of such offense, the legislators attempted to precisely define these grounds in order to avoid any dilemmas in the court practices. In that regard, within Article 183, paragraph 2, item 3, it was prescribed that custody will be ordered if the crime is one for which because of the manner of execution or the consequences of the crime, detention is necessary for the safety of the citizens. Defining of the detention provisions based on the severity of the criminal offense and the consequences of the offense has never been done in a manner that would remove or at least reduce dilemmas of the courts which usually treated these grounds for detention as the mandatory detention. Detention is ordered by investigative judge of the competent court[26] while detention based on such order can last no longer than one month.[27] The length of detention within an investigation is limited within a maximum length of six months and within this period a suspect must be indicted or released from detention. During the investigation, before expiration of the ordered detention, investigative judge may terminate detention upon interrogation by the prosecutor. The Law does not prescribe possibility for a defense lawyer and/or a suspect to request termination of detention; however, the court practice allowed for such request to be submitted and decided by the investigative judge or panel of judges through enactment of a separate decision.

Panel of judges decides on detention after submission of the indictment if the prosecutor requests ordering or extension of detention. The length of detention after submission of the indictment is not limited and it lasts until the first instance judgment. Panel of judges is obligated to conduct reviews every two months weather further detention is justified.[28]

The Law did not introduce provisions regarding procedures for ordering and extending of detention nor the detention after the first instance judgment. Generally speaking, detention provisions in the manner they were defined by the Law as well as in the court practice did not provide assurances to the citizens that they will not be deprived of freedom when such action is not necessary nor that detention will be terminated when the grounds for detention do not exist any longer. This statement is in regard to severe criminal offenses and point 4 and the fact that the court practice showed that detention was always ordered without analyzing of the cumulative grounds and severity and consequences of the criminal offense and its impact on the safety of citizens. Apart from the mandatory detention for criminal offenses for which the long term imprisonment is prescribed, the court practice imposed mandatory imprisonment for all severe criminal offenses.

DETENTION PROVISIONS IN THE PROCEDURAL LAWS FROM 2003

Through the overreaching judicial reform from 2003, new procedural laws were enacted at the entity level, Brcko District and the level of Bosnia and Herzegovina. The Criminal Procedure Law of the Federation of Bosnia and Herzegovina was published in the Official Gazette of the Federation of Bosnia and Herzegovina number 35/03 and it came into force on August 1, 2003; The Criminal Procedure Law of Republika Srpska was published in the Official Gazette of RS number 50/03 and it came into force on July 1, 2003; the Criminal Procedure Code of Brcko District was published in the Official Gazette of Brcko District number 10/03 while the Criminal Procedure Code of Bosnia and Herzegovina was published in the Official Gazette of Bosnia and Herzegovina number 3/03 and it came into force on March 1, 2003.

Along with the procedural laws, material laws were also enacted. Criminal Code of BiH came into effect on March 1, 2003[29]; Criminal Code of the Federation of BiH[30] came into effect on

25 Article 183 paragraph 1 of the Law
26 Article 184 paragraph 1 of the Law
27 Article 188 paragraph 1 of the Law
28 Article 190 paragraph 2 of the Law
29 "Official Gazette of BiH" number 3/03
30 "Official Gazette of the Federation of BiH" number 36/03

August 1, 2003; Criminal Code of RS[31] came into effect on July 1, 2003 and Criminal Code of Brcko District of BiH[32] came into effect on July 1, 2003. Apart from different approach to investigations which, as per the new concept within procedural law, were entrusted to prosecutors, introduction of the court control over indictments and possibilities for plea bargaining and many other changes, the legislators strived to, in our opinion successfully, harmonize the detention related provisions with the convention standards. Apart from the fact that detention is never mandatory, special procedures were prescribed for its ordering and extending including written proposal by the prosecutor and hearing before the court. The length of detention after indictment is limited depending on the range of the prescribed punishment.

After nine years of enforcement of the procedural laws, in the court practice and after changes and amendments of the Criminal Procedure Law, the relationship between provisions of the law and reality were harmonized to the certain extent. Papers that were published about this field, practice of the supreme courts of FBiH and RS, Cantonal Courts and Appellate Court of the Brcko District, rulings of the Constitutional Court of BiH, practice of the European Court, offer incomplete picture of the relationship between provisions of the law and the reality, dilemmas in the court practice, withholding to the principles in crating positions and harmonizing of the practice at the level of the state.

LEGAL GROUNDS FOR ORDERING AND EXTENDING DETENTION

General and Special Grounds for detention

Criminal Procedure Law of FBiH in the Article 146 prescribes that detention may be ordered for a person after general requirement for ordering detention, probable cause (grounded suspicion) is met and one of the special grounds for ordering detention is met.[33]

Actually, the first dilemma in the court practice was about evidence regarding probable cause that the prosecutor forwards to the court and for the purpose of informing the defense lawyer – the dilemma was in regard to whether the defense lawyer is entitled to review proposed evidence in order to be adequately prepared to respond to those evidence.[34]

Testing the existence of "probable cause" pursuant to Article 5, paragraph 1, item (c) of the European Convention requires the bodies of the domestic country to review, at the time of deprivation of freedom, the existence of the facts or information that could convince an objective observer that the person who was deprived of freedom had committed a criminal offense. It is not necessary in this early stage for the satisfying evidence to be ensured.[35]

Provision of the Article 5, paragraph 3 of the European Convention requires that a person is deprived of freedom pursuant to the Article 5, paragraph 1, item c) of the European Convention meaning that depriving is "lawful" in the sense of the quoted article and it incorporates equally procedural and material protection of such persons. The European Court concluded that respecting of the Article 5, paragraph 3 requires judicial authorities to review all aspects regarding detention and to decide on ordering of detention based on all objective criteria prescribed by the law. At the same time, existence of probable cause that a person has committed a criminal offense for which he/she is being charged, is conditio *sine qua non* for ordering or extension of detention; however, after

31 "Official Gazette of RS" number 49/03

32 "Official Gazette of BD" number 10/03

33 Article 132 of the Criminal Procedure Code of BiH; Article 197 of the Criminal Procedure Code of RS; Article 132 of the Criminal Procedure Code of the Brcko District.

34 Article 145 paragraph 3 of the CPC of FBiH; Article 131 paragraph 3 of the CPC of BiH; Article 131 paragraph 3 of the CPC of BD; Article 196 paragraph 3 of the CPC of RS;

35 In accordance with what was mentioned, the Constitutional Court of BiH in the case number CH/03/14486, Huso Tahirović against the Federation of BiH dated July 27, 2007 finds it sufficient that at the time of deprivation of freedom – during detention there was probable cause that justified detention. Furthermore, the applicant did not provide any evidence that this conclusion was not founded throughout the criminal proceeding. Also, probable cause was confirmed with the first instance judgment in which the applicant was found guilty and based on this the Constitutional Court concludes that detention was justified from the point of view of existence of probable cause

a certain period of time that is not sufficient and it has to be assessed if there are relevant and sufficient reasons for ordering of detention.[36] When deciding if ordering of detention for a suspect or an indictee is justified, severity of a criminal offense is certainly relevant element for deciding. For this reason, the European Court acknowledges that severity of the criminal offense as well as the severity of the prescribed punishment, present an initial risk that competent bodies have to consider. However, the European Court, at the same time, emphasizes that the severity of criminal offense and punishment alone may not be sufficient to justify extension of detention.[37]

Revealing evidence to a defense lawyer at the early stage of the investigation for the purpose of request for detention would jeopardize the goals of the investigation and it would place the prosecutor in the position to reveal all collected evidence; there is no prosecutor who would like something like this in an early stage of the investigation. For this reason, the court practice was quickly harmonized so the courts do not allow defense lawyers access to proposed evidence. It is for sure that this places defense lawyers in an unequal position since they cannot comment evidence that they are not aware of; at this moment, there is no alternative solution that would not jeopardize goals of the investigation. Provisions of the Article 5, paragraph 4 of the European Convention are not violated in those instances when defense lawyers and suspects were not given access to the evidence for which the court, pursuant to procedural laws, determines that such access would jeopardize efficiency of the investigation. [38]

If he hides or if other circumstances exist that suggest a possibility of flight[39]

Article 5, paragraph 1, item (c) of the European Convention prescribes the right of every country to deprive of freedom and keep in detention a person and when there are credible reasons to prevent the person to flight after committing criminal offense.

Possibility of flight, as a special ground for detention, defines two different grounds for ordering detention: if a suspect hides or if there is a possibility of flight which would include special circumstances in a given case. If the suspect hides, it is a matter of facts that the court will review on a cast-to-case basis. However, assessment of a possibility of flight may create various standards in practice especially if the suspect holds another citizenship apart from the citizenship of Bosnia and Herzegovina. In many reference materials that were based on the analysis of the court practice, the following circumstances were mentioned that were used by the courts to conclude possibility of flight: a suspect has really fled; does not have temporary or permanent residence, changes addresses all the time; reported false information on his/her residence; if there was an arrest warrant issued for a suspect, the courts unconditionally accepted this fact as a possibility of flight.[40]

In the court practice, the relationship between the severity of the criminal offense and detention based on the item a), was raised as an issue; it was concluded that the severity of the criminal offense cannot influence detention in regard to this ground. Indeed, in the court decisions on ordering or extending detention, the severity of the criminal offense was never presented an argument for justifying detention pursuant to item a). It is completely different issue how much the severity of the criminal offense realistically influences decisions of the courts since it appears that the severity significantly influences not only when this legal ground for detention but all others as well.

In one of the first cases before the European Human Rights Court, Neumeister vs. Austria (1968) the standards for determining possibility of flight in every concrete case have been established and these are still used in the court practice.[41] The Court reviews possibility of flight based on case-by-case basis and prescribed punishment cannot be the decisive factor in ordering detention. Furthermore, the court also finds that the flow of detention time reduces possibility of flight.

36 See, European Court, Trzaska vs. Poland, judgment dated July 11, 200, application number 25792/94, paragraph 63.
37 See, European Court, Ilijkov vs. Bulgaria, judgment from July 26, 2001, application number 33977/96, pages 80-81.
38 Decesion of the Constitutional Court of BiH, number AP-934/09 dated July 10, 2009
39 Article 146, paragraph 1, item a) CPC of the FBiH; Article 132, paragraph 1, item a) of the CPC of BiH; Article 132, paragraph 1, item a) of the CPC of BD; Article 197, paragraph 1, item a) of the CPC of RS
40 Sijercic-Colic, H., Hadziomeragic, M., 2005, Commentary of the Criminal Procedure Code in Bosnia and Herzegovina; Council of Europe and European Commission, Sarajevo
41 1936/63 from June 27, 1968

Detention due to fear of interference

Interference jeopardy as the ground for ordering detention exists if along with the general ground for detention there is reasonable fear that a suspect will destroy evidence or clues important to the criminal proceedings or if particular circumstances indicate that he will hinder the inquiry by influencing witnesses, accessories or accomplices.[42]

In the court practice, the most common reason for ordering detention due to the fear of interference is for the white collar crimes where the investigation and indictment rely on the documentation at the business entity and destroying of such documentation or altering would make obtaining of evidence questionable. It is a factual issue that has to be reviewed in every individual case when there can be assumed that a suspect could destroy evidence or clues important for criminal proceedings or when there is jeopardy of making agreement with accomplices and decision on (not) ordering detention depends on the severity of the criminal offense.

Certain positions were established by the Supreme Court of the Federation of BiH and the Constitutional Court of BiH in regard to the grounds for detention when there is possibility of influencing witnesses which is the most common ground for detention in the court practice. In order to accept existence of the basic circumstances indicating that a suspect will obstruct the investigation by influencing witnesses, it is not sufficient to only emphasize the abstract possibility of influence but to present concrete specific circumstances that can justify such jeopardy.[43]

The court cannot make assumptions nor can the prosecutor speak hypothetically regarding the presence of the circumstances that indicate that a suspect could obstruct criminal proceedings by influencing witnesses; it is obligatory for them to provide valid arguments on the existence of concrete circumstances and actions of a suspect or other persons that could really achieve such influence. Therefore such circumstances must be reviewed in every individual case and some of those circumstances seize to exist after a certain time period, primarily after confirmation of the indictment. After submission and confirmation of the indictment, possibility of influencing witnesses seize to exist since the prosecutor has already conducted hearings of the witnesses and presented their statements as evidence for probable cause along with the indictment.[44]

If a suspect confesses to the criminal offense for which he/she is being investigated, there is no fear of influencing witnesses and in that manner obstructing the criminal proceedings.[45]

Detention for jeopardy of repeating criminal offense

Application of the ground for detention regarding jeopardy of new criminal activity of a suspect implies, primarily, existence of the general ground for detention – probable cause. Additionally, there must be evidence of special circumstances that justify fear that a suspect will repeat the criminal offense or complete the criminal offense or commit a threatened criminal offense, and for such criminal offenses a prison sentence of three (3) years or more may be pronounced.[46] These special circumstances are not defined by the procedural laws and their existence is reviewed in the court practice on the case-by-case basis.

These circumstances could be divided in three groups: circumstances of the offense (repeating – especially special, the way of commission of offense, short time period in which a suspect committed a number of criminal offenses, character of the relationship between perpetrator and victim), personal characteristics of a suspect (personality pathology, health condition) and social factors (suspect does not have place of residence, unemployed, tendency to be a tramp, financial means for living obtained through commission of criminal offenses).[47] The least used circumstance in the practice is to one in regard to commission of a threatened criminal offense simply because it is not

42 Article 146, paragraph 1, item b) of the CPC of FBiH; Article 132, paragraph 1, item b) of the CPC of BiH; Article 132, paragraph 1, item b) of the CPC of BD; Article 197, paragraph 1, item b) of the CPC of RS

43 Decision of the Supreme Court of the FBiH number Kž-331/97

44 The European Human Rights Court provided such interpretation in the case Trzaska vs. Poland

45 Supreme Court of Serbia -Kž-44/92

46 Article 146, paragraph 1, item c) of the CPC of FBiH; Article 132, paragraph 1, item c) of the CPC of BiH; Article 132, paragraph 1, item c) of the CPC of BD; Article 197, paragraph 1, item c) of the CPC of RS;

47 Sijercic-Colic, H., Hadziomeragic, M., 2005, Commentary of the Criminal Procedure Code in Bosnia and Herzegovina; Council of Europe and European Commission, Sarajevo

likely that a suspect will threat publicly. Opposite to this, jeopardy of a suspect repeating the same or similar criminal offense is the most common ground for detention when it comes to the jeopardy of repeating criminal offense.

Conclusion on existence of the special circumstances that justify fear of repeating criminal offense as the ground for detention pertinent to the Article 146, paragraph 1, item c) of the Criminal Procedure Code of the FBiH can also exist in those cases where it was determined by the final court judgment that a juvenile has committed the same or similar criminal offense prior to committing the criminal offense for which detention was ordered.[48] The fact that suspects have committed a number of criminal offenses presents a special circumstance from which derives the fear that suspects will repeat criminal offense.[49] However, in a different case, deciding on the application of a convict, the Constitutional Court finds that there was violation of article II/3 d) of the Constitution of BiH and Article 5, paragraph 3 of the European Convention in the situation where detention was extended for the applicant only on the basis of the court's assumption that there was possibility for this applicant to continue with her activities regarding drug dealing because of the nature and severity of the criminal offense she was convicted for; such assumption was not supported by sufficient concrete and relevant reasons that could objectively imply that the applicant tried or that there was serious risk that she will try to continue her activities.[50]

Detention for the reasons prescribed within item d)

Pursuant to provisions within item d), detention may be ordered in special circumstances when the criminal offense is punishable by a sentence of imprisonment of ten (10) years or more, where the manner of commission or the consequence of the criminal offense requires that custody be ordered for the reason of public or property safety. Among all cumulatively prescribed conditions for ordering detention based on these grounds, the only condition that was objectified was the one regarding sentence of imprisonment of ten or more years. Assessment of other three cumulatively prescribed conditions is up to the court and depends on the circumstances of the given case. It is to be emphasized that the legislators did not provide definition of special circumstances nor reference provision that would more closely define special circumstances. Severity of the criminal offense, the way of commission and the consequences of the offense play dominant role in the court practice when the assessment of the grounds for detention pertinent to item d) is done.

Application of this provision in the court practice is often questionable due to the fact that it is not clearly drafted and striving of the prosecutors to impose mandatory detention by proposing item d); this causes objections by suspects and defense lawyers and as a result the Constitutional Court of BiH had to act upon many of those objections. There was violation of article II/3 d) of the Constitution of BiH and Article 5, paragraph 3 of the European Convention in the situation where detention was extended for the applicant only on the basis of the court's assumption that there was possibility of jeopardizing public or property safety; such assumption was not supported by sufficient concrete and relevant reasons that could objectively imply that the public interest of protecting citizens is over the rights of individuals from Article 5 of the European Convention.[51] Deciding on the reasons for detention from item d), the Supreme Court of the Federation in the case number 070-0-Kž-07000417 dated August 28, 2007, finds the appeal of the suspect founded and concludes that in order to extend detention pursuant to item d), among other things, it is necessary to determine and explain in the written decision existence of circumstances which imply that extension is necessary for the sake of the safety of public and property and this necessity has to derive from the special way of commission of the criminal offense but also from the nature and severity of the caused consequences. If that was not the case, if this was not determined and justified in the written decision, this, by its nature optional ground for extension of detention, would be turned into mandatory and this is not allowed by the law.

48 Decision of the Supreme Court of FBiH, number Kž-15/04 dated January 19, 2004
49 Supreme Court of Vojvodina, Kž. 18/86
50 Decision of the Constitutional Court of BiH, number AP - 566/08 dated June 12, 2008
51 Decision of the Constitutional Court of BiH, number AP-2095/08 dated May 13, 2009

PROCEDURES REGARDING ORDERING AND EXTENDING OF DETENTION

General observations regarding the procedures for ordering and extending detention

The law did not prescribe separately procedures for ordering of detention, apart from suggesting that the court is obliged to conduct hearing of a suspect or an indictee in order to give him/her opportunity to express his/her views regarding the proposed detention; however, the courts introduced the practice of holding hearings where prosecutors and defense lawyers are summoned while the suspect or indictee is apprehended. At the hearings, applying adversary principle, the court gives to all parties to present their arguments and counter arguments as well as the reasons "for" and "against" detention. However, the court practice, at the same time, tolerates absence of a prosecutor at such hearing and by doing so deprives a prosecutor of the right to hear arguments presented by a defense lawyer and a suspect and the court relies on the prosecutor's written proposal and the evidence submitted to the court.

Detention after confirmation of the indictment

Confirmation of the indictment through which additional extension of detention is proposed created in the practice a dilemma regarding functional jurisdiction for extension of detention and deadlines in which this has to be done; the dilemma is in regard to whether the preliminary hearing judge is competent to decide on extension of detention upon confirmation of the indictment.

The Supreme Court of the FBiH was deciding on the above mentioned dilemma in a few occasions.

After confirmation of the indictment, detention for the indictee can be ordered, extended or terminated by the preliminary hearing judge until submission of the indictment to the judge or the panel of judges for scheduling of the main trial.[52]

The legislators did not prescribe in which time frame after confirmation of the indictment decision on extension of detention has to be made. In the majority of courts in the Federation of BiH, time frame of 48 hours was accepted as deadline in which decision on proposed detention has to be made. Of course, in cases when the prosecutor submits the indictment at the expiration of the detention time ordered during the investigation, it is expected that the court will act urgently on both confirmation of the indictment and the extension of detention.

It is completely different situation when a suspect is free and detention request is included in the indictment. In this case, competence of the preliminary hearing judge is unquestionable who can accept proposal of the prosecutor and order detention or deny prosecutor's proposal for detention.

Detention after the first instance judgment

Following the first instance judgment, the third detention period starts and it lasts until the end of the proceedings. The regime of detention in this period is different from the regime between the indictment and the end of the main trial and pronouncement of the first instance judgment which is understandable considering different procedural situation. After pronouncing of the judgment in which a suspect is found guilty, decision on detention does not depend on prosecutor's proposal; if that was the case it would suggest that the judgment is ignored as well as court's decision that the convicted person has committed

52 Decision of the Cantonal Court in Novi Travnik number 13/05 dated March 9, 2005, Domestic and foreign court practice, number 17/06, pages 15 - 17.

criminal offense and the court's right to take measures to ensure lawful finalizing of the criminal proceedings, execution of the judgment and achieving of the judgment's goals.[53]

After pronouncing of the first instance judgment, the panel of judges of the first instance court is obliged to, through special decision, order detention if the reasons for ordering detention exist or to extend detention if the indictee is already in detention . If the court pronounces judgment in which the indictee is sentenced to imprisonment, the court is obliged to order detention or extend detention if the conditions from the Article 132, paragraph 1, items a), c) and d) exist. It is good to mention amendments and changes to the procedural laws in BiH through which mandatory detention is again introduced in those cases when the first instance judgment is pronounced and a person is sentenced to five or more years of imprisonment.[54] Re-introducing of mandatory detention is directly in conflict with the practice of the European Court. Since the European Convention is directly enforced in our legal system and it has direct effect, it is questionable how the court will act when pronouncing imprisonment sentences of five or more years. However, in practice this dilemma does not exist since the courts have accepted, without exception, new mechanisms within CPC over mandatory detention.

Detention after the judgment with final force and effect

Provisions regarding detention, in all procedural laws, are placed in the chapter "measures for ensuring presence of a suspect or an indictee during criminal proceedings". It is therefore perceived that after the judgment is final and goes into effect there is no space for traditional detention in spite the punishment since the further procedures are defined by the Law on Execution of Criminal Sanctions in the manner that a convicted person is presented with a forwarding order. However, in the court practice, it has never been like that. In principle, convicted persons were kept in detention after the final judgment and directly from detention transferred to the prison. Such practice was ended with the Decision of the Constitutional Court of BiH number 1426/05 where the detention after final judgment was found to be unconstitutional.

Following such decision of the Constitutional Court, procedural laws were amended to incorporate detention after final judgment; extension of detention after final judgment was thereby finally incorporated in the Law.[55] Pointing to the practice of the European Court which decided in a number of cases against mandatory detention, in the case before the Constitutional Court of BiH number 753/07, the Court accepted application against decisions of the regular courts on the detention and confirmed violation of Article II/3 d) of the Constitution of Bosnia and Herzegovina and Article 5, paragraph 1 of the European Convention. The appealed decisions ordered detention for the applicant pursuant to Article 348, paragraph 1 of the Criminal Procedure Code of the Federation of Bosnia and Herzegovina which prescribe that "when the court pronounces judgment sentencing a convicted person to five years' imprisonment or more severe punishment, the panel of judges shall order detention if the convicted person is not already in detention".

CONCLUSIONS

With the enactment of the reformed laws in 2003, Bosnia and Herzegovina, in the normative field, succeeded to get close to the maximum in respecting guaranteed rights of suspects in the criminal proceedings. Detention is not mandatory any longer; significant improvements have been introduced regarding possibilities for a suspect to effectively dispute detention both in writing and during the detention hearings which are mandatory when deciding on the detention and its extension. In the process of improving procedural laws in Bosnia and Herzegovina another step forward was made through the provisions that impose an obligation for a prosecutor to submit to the Court, no later than 5 days before termination of the last detention, a new proposal for an extension of de-

53 Decision of the Supreme Court of the Federation of Bosnia and Herzegovina number 09 0 K 001427 10 Kž 14 dated March 25, 2010

54 Article 152, paragraph 1 of the CPC of the FBiH; Article 138, paragraph 1 of the CPC of BiH; Article 138, paragraph 1 of the CPC of BD; Article 203, paragraph 1 of the CPC of RS;

55 ZID ZKP BiH „Sl. gl. BiH br. 93/09"; ZID ZKP FBiH „Sl. n. FBiH br. 12/10"; ZID ZKP BD „Sl. gl. BD BiH" br. 12/07"; ZID ZKP RS „Sl. gl. RS br. 29/07".

tention; once such proposal is received at the Court, it is the obligation of the Court to forward the proposal without any delay to the suspect and his/her defense lawyer.

However, through all changes and amendments to the procedural laws regarding detention provisions, those old and well known procedural solutions have been gradually re-introduced. Finally, there is again mandatory detention as well as enforcement of item d) as the ground for detention for majority of severe crimes.

Mandatory detention was again introduced after the first instance judgment and imprisonment sentence to five and more years in spite the existence of other grounds for detention as well as detention after judgment becomes lawful which was not the case in the previous legislations. Though the Constitutional Court of BiH - upon reviewing these matters - has instructed the Council of Ministers of BiH to change procedural law and to abolish the category of "mandatory detention", such changes have not been made to date.

Detention procedures in the court practice have been formalized and simplified in the manner to only meet a minimum of requested form.

Item d) created space for detention to be ordered and subsequently extended in all severe cases, actually in those cases for which the prescribed punishment exceeds ten years' imprisonment.

Finally, we concluded that Bosnia and Herzegovina, both in the fields of legislative and court practice is again distancing itself from the rights that are guaranteed to a suspect by the European Convention and the European Human Rights Court practice and in regard to criminal proceedings and the procedures for ordering detention.

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CORRUPTION AS THE CRIME IN THE PROCEDURE OF CRIMINALIZATION IN THE LEGAL SYSTEM OF UKRAINE

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Abstract: The paper analyzes the generalization on legal estimates of corruption, trends that represent modern state of legal sphere, addresses to the social and economic consequences of corruption in society; it also underlines the necessity of criminalization of corruption as the independent integrative crime and the basic directions of counteraction to this negative phenomenon.

Keywords: corruption, criminalization, counteraction, praxiological aspect, prophylaxis.

INTRODUCTION

Since the integration of the institute of the "corruption" in the realm of the doctrinally-legal research object (at the beginning of the XX century "corruption" as the term was brought by A. Estryn into the sphere of scientific consideration in the administrative and penal means of this phenomenon, but the promulgation of this social category in our society had happened only in the mid 90-ies) in the scientific community incessant discussions about optimization of the approach to the representation of content and forms of manifestation of this complex legal phenomenon are still going on.

THE RESEARCH OF THE STATE'S PROBLEM

Corruption as the essential problem of the modern social system has been widely analyzed in the researches of the following scientists: Omelchenko S. [1], Schneider G. [2], Camlyk M. [3], Lyis F. [4], Kabanov P. [5], Golik J. [6], Andrianov V. [7] etc. Despite the breadth of the spectrum of approaches, dominant on the results of the system analysis of the phenomenon of corruption studies should be considered the criminal, administrative, disciplinary and moral-psychological concepts of its operationalization. Duration of those troublesome discussions on the subject and nature of corruption, contrary the axiomatic praxiological expectations has not led to the synchronization of theoretical and methodological tools of this legal institution; instead of that it has determined obstructive trends in this area. Current status of synthesis in legal doctrine-reflexive epistemological basis of identification of the phenomenon of corruption constantly assumes the character of a destructive dissonance not only prognostic-heuristic aspect, but also in the sphere of the fundamental theoretical and methodological categories such as subject, object, scope display and the consequences of this phenomenon. Thus, we can say that instead of consolidation and consensual dialectical understanding of corruption as a legal category the modern vector of scientific production forms the basis of total stagnation of theoretical basis and therefore inevitably leads to the devaluation of the role of legal doctrine in the formation of an effective system of corruption resistance.

THE PRESENTATION OF THE ESSENTIALS OF THE PAPER

Without claiming that he will disclose the full range of issues related to the doctrinal institutionalization of the phenomenon of corruption, the author, assuming the significant resonance caused by those debates regarding the advisability of formal consolidation (criminalization) of integrative separation of the crime of "corruption", is willing to reveal the contents and prerogative properties

of such process through the prism of praxiological tools within the philosophical and legal aspects of the study of corruption.

A priori of coverage of the main issues of this study it is necessary to reveal the inherent organization of criminal component of the legal dimension of corruption in order to ensure a consistent consolidation of the factors regarding the advisability of formal of integration called the crime as autonomic substructure of the Special Part of the Criminal Code of Ukraine [8].

The fundamental feature of criminal law concept of the corruption is actually the essence of this phenomenon built to define a set of socially dangerous acts stipulated in the national legislation of the certain state. The main criteria for distinguishing corruption offenses that constitute the independent segment of legal regulation of administrative and criminal law is the level of social danger of acts and the branch of law the requirements of which involve illegality and punishment for these law-offensive acts, and therefore, in the context of representation of the essence of the scientific paradigm contents of corruption we should separate the criminal, administrative and disciplinary-legal subsystems that consolidate the corruption crimes and offenses (administrative and disciplinary law offenses).

The author believes that the entire continuum of corruption offences under the criminal law should be differentiated according to the criteria of chronological-positional sequence of these offenses and their importance in the procedure of structuring of the coherent or eventual corruption cooperation mechanism establishment into two subgroups:

– corruption-initiating offenses: This segment of corruption encompasses a form of illegal activity of corrupted officials and corrupters that focused on the emergence and further development of the information and functional channels of interaction between these contractors for implementation of their intention of misusage of powers and related opportunities of the official for obtaining undue advantage;
– crimes and other offences that constitute the essence of these participants' corrupt collaboration, the essence of which is related to the illegal exploitation of official powers and related facilities for the practical implementation of the agreement that has been previously reached between them.

This concept of criminal law paradigm of corruption phenomenon content representation forms the basis for effective prevention, elimination and control of corrupt activity, as endowed with attributes of consistency and comprehensiveness that are the only indicators of the efficiency of formation of anti-corruption measures. Similar to the previous specified position is reflected in the monographic research of S. Proyava [9]. The author identifies the need of offenses that constitute the content of corruption separation on those that precede corruption as such, and those that are determined by the first component and demonstrate the corruption features in its "absolute" manifestation. The main correlation feature offered by us and by the pre-lighted view of the corruption content separation process in the aspect of properties of the array of corruption by certain functional criteria appears in the conglomerate of law-offensive acts that are related to each of the examined subcategories.

In our opinion, for effective coverage of the content of the first subcategory of the penal segment of corruption offenses should be provided by the definition of the existential determinant of corruption, the sphere of which serves to create a socio-economic basis of the society functioning. Thus, in the researches of K. Surkov it is stated that the dominant cause of corruption is: "... the need to interchange benefits. Any of existing in nature social systems tends to absolute its state by balancing the internal components. A similar pattern is evident in the interaction of different clusters, formed as a result of society separation due to the need of exchanging goods. Thus, the social groups that have obtained access to significant financial resources desire to make coherent their own position through the exchange of such resources on the authority functions, which also apply to the indifferent social group, whose dominant asset consists of authority and is also interested in such barter transfers. As a result of this interaction indicated social groups balance their own position in the socio-economic and political measures, correlating with general social and state interests that advocate defining manifestation of corruption "[10]. Based on the analysis of that obstacle, most scholars lawyers who investigate corruption-legal issues, form judgments about the necessity of absolute synchronization of the content we are considering corruption-initiating offenses in the penal aspect within the range of actions that in its unity of form are interpreted as bribery. In other words, if this position is interpreted in line with the national legislation

of Ukraine, the essence of this category is identified with the three following common crimes under the Criminal Code of Ukraine [8]: art. 368 (bribery: obtaining the bribe), art. 369 (bribery: giving the bribe) and art 370 (provocation into the bribery). It should be noted that the previous position is not quite plausible, since it lacks the fundamental need to distinguish its corruption based model of relations and course of participants relationships components into two categories: trans-active and extortive. Trans-active corrupt communication model is characterized by the fact that the interaction between entities is mutually beneficial because the corrupter is interested in accessing the corrupt use of official authority, and the corrupted official is interested in receiving illegal remuneration which he was promised. Instead of that, the extortive corrupt collaboration model is characterized by the operation of one of the counterparties in the context of the merits of a corruption offense caused by an unlawful influence on him by the counterpart side, which is usually related to a physical or psychological destructive influence in order to persuade the other part to the unlawful acts of corruption.

The previous facts give the opportunity to raise a more detailed representation of corruption-initiating offenses system due to separation of those two subcategories:

– corruption-initiating offense based on forced integration of one of the participants (dominantly of the corrupted official) in a corrupt system, against his will. This category of offenses include crimes under articles 127 (torture), 129 (threat to murder), 146 (unlawful imprisonment or kidnapping), 147 (hostage taking), 189 (extortion), 190 (cheating), 195 (threat of property destruction), 345 (threat or violence against a law enforcement officer), 346 (threat or violence against the state or public figure), 350 (threat or violence against an official or citizen who performs a public duty), 371 (arrest under illegal detention), 372 (illegal prosecution of criminal responsibility), 375 (ruling, decision, or order of the unjust verdict by a judge / or judges), 377 (threat or violence against a judge, assessor or juror), 405 (threat of violence against the superior);
– corruption-initiating offenses of consensual type for which the mutual interest of the participants in the aftermath of a corruption offense is usual. This subcategory of corruption offenses is represented by a set of three criminal offenses under articles 368 (bribery: obtaining the bribe), art. 369 (bribery: giving the bribe) and art 370 (provocation into the bribery) of the Criminal Code of Ukraine.

After the initiation of actual corruption communication and agreement about the essential terms of further corruption cooperation, the next stage of unlawful activity targeting corruption is activated – the direct corrupt activities. At this stage, unlike the previous phase of the corrupt interaction that has informational or information-material nature, functioning contractors shall only operate property and legal-realization or service activity.

It should be stated that the identification of the penal acts that constitute the content of the current stage of corrupt activity is attributed by significant complexity. Most scientists comply with the thought that the range of offenses (in penal terms) that mediate the interaction of corrupt contractors at this stage should be associated with a conglomerate of criminal illegal acts under Chapter XVII of the Criminal Code of Ukraine (Crimes in the area of public performance and professional activities associated with the provision of public services). However, among the multiplicity of the assertions and hypotheses, associated with the desire to give a reasonable answer to this question there are such that expand the list of criminal-illegal acts of the "secondary" phase of corruption. Specifically, M. Melnyk in his research titled "Corruption- the corrosion of public service" offers a range of corruption offenses allocated to: "... certainly corruption offenses and crimes that are corrupt only because of agglutination of certain features and elements during their execution. Corruption is socially dangerous acts, all signs of which are pointing to their corrupt nature specified in the law or from its content. These, inter alia, include: bribery (article 368 CC), abuse of power or position (article 364 CC), provocation into bribery (article 370 CC), the appropriation of another person's property through the abuse of office (art. 191 CC), knowingly bringing innocent person to criminal responsibility (article 372 CC), ruling, decision or order of unjust verdict by a judge (or judges), (article 375 of the Criminal Code), abuse of military official authority or position (article 423 CC). These crimes can be committed only by officials and are always associated with the abuse of power or authority, committed for mercenary or other personal interest.

The moment, which is confusing the situation with unambiguous recognition of some of these crimes as corrupt, is the possibility to commit them not only in the field of public administration and local government.

Crimes that are not always accompanied with a sign of corruption - in some cases they are corrupt, in other – they are not, are usually included in the number of the so-called conditional corruption crimes. This is usually determined by the legal description of the characteristics of the committer of the crime (can be performed by both: official and non- official persons) and of the subjective side of the crime (the offense of the law does not require a material motivation or other personal interest).

This category of corruption crimes consists of the particular violation of the budgetary system of Ukraine (article 210 CC), publication of legal or administrative acts that are changing revenues and expenditures contrary the procedure established by law (art. 211 CC), obstruction of election law (art. 157 CC), improper use of ballots, forgery of election documents or incorrect counting of votes or announcement of election results (article 158 CC), violation of secrecy of voting (article 159 CC), violation of the inviolability of the home (article 162 CC), abuse of power or authority (article 365 CC), provocation into the bribery (article 370 CC), forgery (article 366 CC), deliberately unlawful detention or arrest (art. 371 CC), unfair judgment (article 382 CC), omission of military power (article 426 CC) and the subjective aspect of the corruption acts that are not associated with the mercenary or other personal interests: violation of equality regarding the race, nationality or religion (art. 161 CC), resistance to legitimate business activity (article 206 CC), interference with the judicial authorities (art. 376 CC), interference with a law enforcement officer (article 343 of the Criminal Code) - the subject of these crimes may be both private persons and public officials.

Under the condition that such offenses are committed by the officer of the state or local government allow us to recognize them as corruption "[11]. A positive feature of the conceptual view of corruption criminal law segment of the inherent nature is that the author properly hypertrophies the steady approach to the coverage of the subject of corruption, while abstracting from stereotypes and other archaic approaches.

So, on the basis of these factors, and system legal doctrine analysis, one could argue that the "secondary" criminal law segment of corruption consists not only of crimes that are instituted by Article XVII of the Criminal Code of Ukraine (crimes in the area of public performance), but also of other socially dangerous acts. In order to facilitate the process of defining the essence of corruption, of the post-institutional corruption, the author proposes the use of the following basic representational signs of this social-economic phenomenon:

- corruption can be recognized in the offenses that are committed afterwards the direct or indirect illegal interaction of corrupted official and corrupter, and such corruption as "primary" and "secondary" belong to integrative offenses - those that are inextricably linked with other facts of unlawful activity;
- corruption offenses are characterized by selfish motivation, and therefore the offense which is not inherent with selfish motive cannot be recognized as corruption;
- the category of corruption should not be attributed only with wrongful acts aimed at forming corrupt illegal motivation, but also with the crimes, committed after the criminal agreement of counteragents and thus we should not reduce corruption to bribery which is unacceptable and can only indicate false perception of the nature and characteristics of corruption as a complex socio - economic, political and legal phenomenon.

Using the previously-named factors, continuum of criminal-illegal acts that constitute the content of "secondary level" of corruption under the criminal law, the Criminal Code of Ukraine includes acts of corruption provided by articles: 210, 211, 364, 364-1, 365, 365-1, 365 -2, 366, 367, 371, 372, 373, 375, 382, 423, 426, and under certain conditions, crimes under articles 206, 343, 376. The author believes that only this approach to the interpretation of the inherent criminal-illegal dimension of the phenomenon of corruption is the key to the production of a coherent and, most importantly, effective of corruption-counteraction measures.

Summarizing these arguments, we conclude that despite the significant assimilation of the corruption system that makes up the content of criminal component of the phenomenon of corruption

due to the significant variability of the direct objects of corruption interference, the union of them within the disposition of a single article is absolutely impossible, or extremely difficult. It should also be taken into the consideration that in the case of integration of the various objects of legal protection in the special article of the Criminal Code of Ukraine that will establish the unlawfulness of "corruption acts" (consolidated within the disposition of a single article) the antinomy paradox, concerning the positioning of the rules of qualification will arise, because each component of the Special Part of the Criminal Code includes the provision that identifies social danger of acts united by identity of the generic object of criminal trespass, and therefore, are given the due classification and nomenclature of corruption within the criminal law, so there will be irrefutable competition between sections II (Crimes against life and health), III (crimes against freedom, honor and dignity), V (crimes against property), VI (offenses against the property), XVII (offenses in the area of performance and professional activities related to the provision of public services), etc.

CONCLUSION

Thus, the author believes that the inclusion in the legislation of Ukraine on criminal responsibility of a single consolidated article of "corruption" that will summarize the entire range of corruption offenses such as criminal-illegal acts is an unjustified and ineffective measure that impedes the functioning of anti-corruption mechanisms both at the theoretical and methodological and practical-applied levels. Instead, the formalization of a single hypertrophied norm seems to be reasonable for a clear definition of corruption in the specialized regulation, such as the Law of Ukraine "On Principles of Prevention and Combating Corruption" [12]. The specified event must improve law enforcement in the realm of prevention and combating corruption as the key factor including identification of manifestations of this phenomenon and, unlike common norms of the Criminal Code of Ukraine it should contain detailed object-subject and procedural features of identification and investigation of this category of crimes, which is a key factor of the illegal practice of the officials.

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SCHOOL POLICE OFFICER
THE ROLE AND BENEFITS

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This paper explores the role of the police and police officers in school in maintaining safety in schools, which became a popular question in terms of increased violent behavior of pupils in schools.

The implementing of police officers in schools imposes certain dilemmas. Accordingly, we can conclude that for optimal effects of their work, first of all certain criteria in terms of who could work as a police officer in schools should be established, as well as who will be responsible for their training and education. However, the police, school and community will face several challenges regarding the role of police officers in schools. This include negative perceptions regarding the police, the ways / methods of how the police and police officers in schools will provide school safety and the liabilities and tasks that they will have.

This paper will also elaborate and highlight the benefits of having a police officer in schools, such as an easier accessibility to the police, establishing or improving relationships between pupils and the police and community/families and the police, reducing violence in school and increasing the feeling of safety with creating a safe place for upbringing and education of children and staff at schools.

Keywords: school, police officer, pupils

INTRODUCTION

Violence among children in schools is an issue troubling the world in the last decade with frequent information by the media about numerous incidents in primary and secondary schools in the world.

School violence received its wider publicity in an event that shocked the USA, and the entire world for that matter, with the murders that took place in the Columbine High School, Littleton, Colorado, when 15 persons were killed and additional 23 injured in a single day by two school students (Peggy, 2009). The increased interest in this type of violence can also be identified in the electronic and printed media coverage of events relating to school violence in many countries (Show, 2004), thus making this phenomenon a matter of grave concern both nationally and internationally. The dramatic and shocking violence in the USA left the teachers and the students both stunned and worried over the potential that violence has in their school (Skiba, Boone, Fantanini, Wu, Strussell, & Peterson, 2011). The presence of school violence or bullying is also demonstrated by the researches carried out in a number of European countries (Germany, Italy, Austria, Belgium, and Netherlands).

Relevant indicators of violence among children in the schools in the Republic of Macedonia can easily be found in the television news and also on some videos posted on YouTube web page. These are amateur mobile phone videos that show violent conduct. The videos entitled "*A Fight in Geography Class*,[1] *A Fight in 'Dimitar Miladinov'*,[2] *A Fight in 'Goce Delčev' in Tetovo*,[3] *A Girl Fight in the Economic School in Prilep*[4] are but a portion of the recordings that can be found on the Internet (Stojkovska & Jovanova, 2011)

Every society is interested in identifying measures and activities that should be used for school violence management, how efficient they are, but also to seek new and more efficient all-inclusive violence prevention measures. According to Johnson (1999), the fear of perceived violence led to the development of multiple prevention programs, many of which placed police officers in pub-

1 Available at http://www.youtube.com/watch?v=U-dmoAX51N0&feature=related
2 Available at http://www.youtube.com/watch?v=A7Zm39O2AyI&feature=related
3 Available at http://www.youtube.com/watch?v=HaBH_vgBnUY&feature=related
4 Available at http://www.youtube.com/watch?v=wxvaQ_j8PLk&feature=related

lic schools, making visits or giving educational services for children in schools. (Denham, 2010) Among the many measures that the public asked for to maintain safety in schools was the introduction of a school police officer. There were many reasons given for establishing a school police officer including national media attention about school violence, crime prevention, drug awareness education, mentoring, and as part of community policing efforts (Travis III & Kiernan Coon, 2005).

But the main question is what the role and the benefits from the work of school police officers in terms of reducing school violence and improving the safety among children in the environment in which they are educated and socialized will be.

HISTORY AND THE NEED FOR SCHOOL POLICE OFFICERS

Police involvement in schools is not a new phenomenon. Police officers have been acknowledged as a potentially important partner for schools in planning and implementing school safety efforts (Travis III & Kiernan Coon, 2005). In the last decade the cooperation between police and the schools has been present in many countries in different forms. If we take a look back, we shall see that the police was mostly involved in dealing with truants, ensuring bicycle or traffic safety or the prevention of child abuse. (Shaw, 2004)

There is no consensus in the literature regarding the first positions of school police officers. Brown claims that in 1939 the schools in USA sought help from the law enforcement, and that Indianapolis Public School Police started when the schools hired a special investigator who worked in a school as a detective for over a decade, and later became a supervisor of larger team of special watchmen, then in 1970 this team evolved into the Indianapolis Public School Police (Denham, 2010). According to Lambert and McGinty, many of the school police programs were developed in 1960s, then in 80s and early 90s there was a stagnation of the number of school police officers and later on their number increased again as a result of development and their link to community-oriented policing with regard to the safety, security and order of schools. (McDaniel, 2001) In the last two decades the applying principle of the involvement of police in schools is with appointing school police officers who will dedicate their entire work in the schools.

The first signals and appeals from the public for the need for a school police officer arose as a result of a repeated media reports on children violent behavior in and around schools in the last five years in Republic of Macedonia. Regarding that the fundamental role of the police is to protect the human rights, liberties and the protection of their safety, the public expected from the Ministry of Interior to undertake appropriate steps regarding the safety in schools. But the first dilemma was the justification of establishing a school police officer and the results of their work! The Ministry of Interior and the Ministry of Education and Science in 2011 promoted the project "Community police officer". The Ministry of Interior found the justification for the project in the reports that in 2010/2011 57 events of violent behavior of pupils were registered, from which 42 events were with brute force, in four cases a knife was used, and 9 with different attacking objects. But there are certain problems that the schools are facing with necessary for the appointment of a school police officer or they can be solved with school capacities (though psychological/pedagogical service and school staff), taking into account that not every school in the society is affected with serious safety problems and concerns.

DUTIES OF A SCHOOL POLICE OFFICER

The models and the programs by which police is connected with schools are different in every country. In the USA the presence of police officers in schools is widely accepted as a common practice. They have a strong presence and they are seen as a powerful tool for safer schools and protection from certain types of crime. Beside the strong presence, projects for the cooperation between police and schools in the USA emerge in programs as police explorers, police athletic leagues, and other youth-oriented programs, giving opportunity to the school officials in towns and cities to be proactive in protecting their schools and improving their educational environment (Benigni, 2004).

Leaving aside the USA, police involvement in schools in Europe is not as developed and mostly is based on the police educational role. Scandinavian countries have a long history of a police school liaison (as well as in England), but their function is different and not as aggressive as the school police officers' in the USA. In Denmark, social services, education and police have a legal mandate to work together in crime prevention. Germany has set up police – school programs dealing with bullying and thieves in the mid-1990s, Belgium has some schools that have asked the police to investigate drug abuse, while in the Netherlands since 2001 school agents have been appointed in some schools in a two-year experimental project (the officer has an office, and is available to all members of the staff, students, and the local community to provide information, and respond to arising problems) (Shaw, 2004).

Leaving aside the cooperation between police and police officers with schools as a part of their classic duties (which mostly is present) (Travis III & Kiernan Coon, 2005), there are several modalities of police officers' involvement in schools and accordingly their activities:

– *As a full time school police officer performing that function;*
– *As a school police officer who aside its regular duties will have assignment to perform occasional and certain controls in school districts, contacts with school personnel and solving certain problems*
– *As a school police officer will have educational role for questions connected with children in schools.*
– *Or a combination of different activities*

These modalities are often mixed when a certain program is designed for the school and police cooperation, and school police officers have different duties, from law enforcement activities, advising the school staff, students and families and activities related to education of students about issues regarding drug abuse, conflicts, traffic, crime, legal etc. (Finn & McDevitt, 2005) .

Most common duties for a school police officer assigned only for the school safety are: primary responsibility for managing the calls for service from schools and coordinating the response of other police sources, addressing the problems arising caused by crime and disorder, gangs and activities related to drugs that are present in or around school, providing information to the appropriate investigative units, monitoring of halls in schools. Apart his duties regarding the prevention of crime, he will be the first person that will react in a case of critical incidents in schools, like accidents, fires, explosions and other life threatening events. (Raymond, 2010)

For successfully performing of the required function it is necessary to prescribe the duties and the responsibilities of the school police officer. Usually this can be done by prescribing certain acts and by developing general or special protocols that will specifically define the responsibilities of the all involved subjects, the manner of their acting (performing) and the measures that can he undertake. Only in this way it can accurately be determined what might be expected from a school police officer.

The concept which has formally been presented in the Republic of Macedonia and promoted by the Ministry of Interior is that the community police officer is the one who will several times in the year inform the Ministry about the condition in schools and undertake measures for the safety in schools in his area (Министерство за внатрешни работи, 2011). That means that in the Republic of Macedonia the role of a community police officer does not mean that a school police officer must constantly be present in schools, because his duties are only focused on occasional visits and gathering information from the principals and psychological/pedagogical service about situation in schools without direct contact between a police officer and pupils, as well as in some segments educational role which will be carried out by some other police officer from certain departments of the Ministry of Interior. Contrary to the Republic of Macedonia, the Republic of Serbia and their Ministry of Interior have slightly different attitude (Никач & Васиљевић, 2011) indicating that police will increase communication with children in order to establish trust (by visiting schools with the aim of introducing the work and activities of the police, their participation in cultural and sport events). For those schools that are estimated as endangered on the basis of the police assessment 311 police officers will be engaged in 568 schools, whose task will be to be strictly present in schools. That means that beside the educational role of the police, there are school police officers

with full time presence in schools with concrete defined duties (Deca i policija): *immediate presence in the school area especially during the beginning and end of classes, breaks and similar; perceiving and detection of behavior and actions with elements of crime and misdemeanors, as well as initiation for undertaking the necessary measures against perpetrator; timely perceiving the presence of persons that are not pupils from school, asocial behaviors in the school zone and taking measures for their prevention; undertaking an activities for traffic safety of children; taking measures toward the owners of entertainment and other facilities in the area of school in order to prevent the sale of alcohol to minors; perceiving of activities that are oriented to disrupting educational process and classes and undertaking measures for their removal and cooperation with the responsible persons in* schools (Deca i policija).

CRITERIA FOR SCHOOL POLICE OFFICERS

Regardless the modality of the involvement of police officers in schools, whether they will be appointed in order to occasionally visit the schools or spend their entire work in school, the question is who a school police officer can be, and if there are any specific criteria that a police officer should meet before being appointed as a school police officer and if there is the need for special training of such a person.

There are different ways for appointing school police officers depending on the system in a particular country. In some countries, police officers who are scanned and recruited, who first must pass certain examinations and trainings or courses or just are scanned by their superiors and suggested for that post may be appointed as school police officers. In general, according to international standards regarding the children's rights, there is the principle for specialization of all persons that have some contacts with children, including the police officers who will work with them. According to that, in the process of the selection, candidates have to fulfill certain standards related to his characteristics and abilities as well as knowledge and skills that are necessary for the work in schools. Some key characteristics are inherent, others can be developed through their education and training. (Raymond, 2010).Thus, given the specificity of the role of school police officers, in the process of selection and appointment, the person should have the following minimum qualifications

– certain level of education and work experience with minors
– attending a special training
– ability and desire to work with children
– capacity to work independently
– ability to educate
– to poses characteristics, such as calmness, friendliness and patience (Finn, Townsend, Shively, & Rich, 2005)

Despite these qualifications that school police officers should possess, the question remains whether the criteria in the process of the selection of school police officers should include the approval given by the school staff and parents as well whether the person that will be appointed for the position should come from the local community where the school is located! Some researches show that confidence in the school police officer is greater when he comes from that local community and is well known to pupils and parents (Finn & McDevitt, 2005) and that such a fact influences the surge in the number of records about incidents by pupils as well as the confidence in the police as an institution.

– Special training and education

Taking into account that most pupils can identify themselves with the school police officers or consider them a role model, they as professionals need to possess certain skills and knowledge. Bearing in mind that children are a specific category, and school violence has some specificity which differs from the violence that occurs between adults, it can be concluded that without special training and education for performing their activities within the schools, the existence of school police officer can remain without effects. These trainings should include a certain number of hours in which a person will gain theoretical knowledge about minors, certain characteristics of school vio-

lence prevention methods as well as practical exercises to gain certain skills that are necessary for successful performance of the function of a school police officer.

For this purpose it is considered that the training will help a person to gain the relevant skills such as:

– understanding of a child's development and psychology
– ability to work with pupils from different age groups.
– ability to work with parents
– ability to work with principals and other members of the school staff
– knowledge of school-based legal issues
– knowledge of social service resources
– teaching skills (Raymond, 2010)
– understanding crime prevention
– management in specific conflict situations.
– skills for preparing accurate and concise written reports
– public speaking skills

MENTORING (OR SUPERVISION) OF THE WORK OF THE SCHOOL POLICE OFFICER

Apart from fulfilling the specified criteria for a school police officer, the next dilemma is related to the question who the mentor or supervisor of the school police officer's activities will be and how his work will be evaluated. This is especially important in order to determine the efficiency of the school police officer and his role in the school. The countries that established a full-time school police officer have different forms of supervision:

– through writing reports to the supervisor (or to the local police station) in the form of daily, weekly and annual written reports about his activities;
– writing monthly and annual reports and evaluations with regard to the performance of the school police officer and sending them to the supervisor (from the local police station); (Finn & McDevitt, 2005)
– the supervisor's visits to the school to observe the interaction of the school police officer with pupils and the school staff and the analysis of the reports related to the events in schools, meetings every six months with the purpose of adding or changing some duties or tasks of the school police officer
– informal daily discussions of the school police officer with their supervisors (from the local police station) and routine sharing of comments and concerns by school principals with supervisors without formal evaluation of the school police officer activities (Finn & McDevitt, 2005)
– a combination of all previous models of supervision

POSITIVE EFFECTS OF ESTABLISHING A SCHOOL POLICE OFFICER

The most important part of any established and undertaken measure is its effectiveness. Therefore, it is necessary to establish certain indicators according to which the work of a school police officer and the positive effects from this position or function will be evaluated.

The concept of a school police officer implemented through various projects in certain countries has shown to be quite effective. In Toronto, some researches were done in order to assess the changes in schools that were involved in such projects. The results have showed that pupils, teachers and other members of the school staff said that they felt safer in and around the school than before;

after the implementation of the school police officer, pupils more often report the cases in which they have been the victims of crimes but not so often the cases in which they have been witnesses of some crimes; the police also report that there is a reduced number of reports of pupils that they have been victims in the school and around it. According to that, the persons who have performed the evaluation concluded that this concept shows very positive effects on the school and pupils, especially on those pupils who have interaction with the school police officer and that this program has positive effects on the crime prevention, on reporting of crime and building the relationships between the schools and local communities. (Raymond, 2010)

The research conducted by Finn & McDevitt that evaluated certain programs for school police officers in USA showed that a number of pupils said that they felt safe to report crimes to their school police officer, a half of the pupils said that there was a positive improvement of their attitudes towards the police after the implementation of the project and that they appreciated the officers' approachability and assistance with personal, as well as law-related, concerns. The parents and the school staff have said that they strongly support the project for involvement of the school police officer, taking into account that smoking and possession of cigarettes, and gang activity, appear to have declined in those schools. The supervisors have confirmed those statements; according to them the citizens' support for the school police officer is confirmed with the 30 monthly calls in which they expressed their gratitude because the school police officer has helped their children. These programs have proved useful for the police, too, because according to their reports there has been an apparent decline in arrests and criminal misbehavior three schools included in the school police officer program; police records in urban districts showed a steady fall in the number of calls for sending beat officers to schools, while in rural schools discipline reports suggest the achievements in terms of the conflict resolution and early detection of criminal behavior. (Finn & McDevitt, 2005)

Positive effects of the program "School police officer" in the Republic of Serbia have been confirmed with the evaluation conducted in 2005. Based on this evaluation, this program has been well accepted and the "School police officer" has improved safety in schools, not only with regard to crime but also to other incidents that have occurred in schools. Based on this evaluation and with the purpose of improving safety in schools, their jurisdiction has extended on the area of more schools (Никач & Васиљевић, 2011)

Based on these effects in the countries that have implemented the school police officer, the benefits can be recognized in two directions. In one direction they provide feedback to the police stations, so police officers better understand the concerns and fears of young people from the local community but also based on that information they create certain prevention programs. In the other direction, such participation and cooperation of the school police officers can cause *a change in the children and adults image and perception of the police (Benigni, 2004), the improvement of the relations between the police and young people, change the perception of the safety, reduce offending behavior and victimization, reduce truancy rates and total absences, safer school environments and safer routes to and from school, improvements in educational attainment and other additional benefits*. (Raymond, 2010)

Despite the popularity of the school police officers, however, few researches have been conducted regarding an adequate evaluation of the effects of their activities (McDaniel, 2001). Highlighting the need for such evaluations is important in order to enrich the future programs that involve school police officer and find out how to get maximum effects with limited resources. In general, these researches should determine that there are overlapping of the objectives set by the program and the outputs of the programs. Mainly, when the implementation of these programs is concerned, no explanations about the achieved results are evaluated, but mostly the duties or tasks of the school police officer and the people's perceptions of them. If the researches are focused on outputs of the specific programs, such as those including a school police officer when the police invests certain resources, it is very important to determine whether and how much school police officers are effective in reducing violent behavior, disorder and crime and how they contribute to safer schools. That can be achieved by creating specific instruments that will give certain indicators based on which the school police officer's performance and activities will be evaluated. But if we want to make the evaluation of a particular program such as school police officer, there is the need for the implementation of the program for a longer period of time, in order to measure the effects and to determinate which segments of a certain program should be changed for the improvement of school police activities.

CONCLUSION

The cooperation between the police and schools through numerous projects among which is the school police officer program is very important for the safety in schools. In conditions of increased violence in, around and out of schools, increased presence and greater control by police officers is sometimes a necessary step when schools facilities are not sufficient or do not have capacities to solve the problems. Implementing the position- school police officer in general has a positive input in the creation of a safer environment in which children are educated, especially if the person has reputation among pupils, parents, school staff and the local community. *But in a time of limited resources, police are often faced with the question how to organize police personnel best and what the financial implications in the case of the appointment of school police officers are. The answer to this question regarding the justification of the existence of this position or function and its optimal deployment, is that the relevant institutions should prepare a data base with information about the problems and needs of the schools, which will give additional information for the analysis of specific safety problems in schools on the basis of which concrete solutions on how to solve problems and the necessity for the appointment of a school police officer in certain schools will be considered.*

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TRAFFICKING IN HUMAN BEINGS FOR THE PURPOSE OF ORGAN REMOVAL AND TRAFFICKING IN ORGANS, TISSUES AND CELLS: CAN HUMAN LIFE BE BOUGHT?

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Abstract: The end of the XX and the beginning of the next one, the XXI century, were and still are years marked with many crimes connected with trafficking. The three leading forbidden industries today contain the word trafficking. The drug trafficking, trafficking in arms and trafficking in human beings financially gain the most of the criminal profit. The last one of them, the trafficking in human beings although, is still the third criminal industry in the world, has the most complex process that ends with many possibilities of exploitation, starting from the sexual one, to the labour exploitation, slavery, servitude, and removal of human organs.

Trafficking in human beings for the purpose of organ removal today, in the Macedonian and the international scientific thought is one of the topics that suffer from a lack of research. Maybe it is because of its dark side, the lack of domestic and international documents, and the dark figure of cases.

On the other side of trafficking in human beings for the purpose of organ removal there is trafficking in human organs, tissues and cells which is a different crime, but with the same purpose. A purpose filled with material benefit for the traffickers, illegally transplanted organ and a new life for the patient in most of the cases.

The paper will try to explain the differences and the similarities between the two crimes connected with illegal sale of human parts and their transplantation, the criminal organizations and their way of act, their consequences, the ones for the patients, the victims and the ones for the society, the international documents and domestic legislature.

Keywords: criminal organizations, trafficking in human beings, trafficking in human beings for the purpose of organ removal, trafficking in human organs, tissues and cells.

INTRODUCTION

Human history is replete with examples of countries founded on slavery, which believed that the exploitation of slaves was not immoral. Rather, those slaves were simply inferior to others and deserve their circumstances. Modern slavery – bearing similar but not identical hallmarks of past practices – has taken on new lingo, such as human trafficking, which in fact is the trading of people over boundaries for the purpose of enslavement. Slavery and society have been, and continue to be, walking side by side.[3]

Today, trafficking in human beings is still one of the main criminal industries and thanks to the wide human fantasy it contains different kinds of ways of exploitation. Using the demand for sexual services results with exploitation in the sex industry, than labour exploitation is used in every sector starting from agriculture, to the industry sector. Then the slavery and practices similar to it, the child adoptions, bonded labour and many others.

Although the sexual exploitation is still the main goal in the most of the cases of modern slavery, there is a type of exploitation that through the years was in the shadow of the others. It is the traf-

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3 Angelina Stanojoska. *Human Trafficking in Europe: Character, Causes and Consequences*. Book review. Available at http://cejiss.org/book-reviews/human-trafficking-europe-character-causes-and-consequences [01.02.2013]

ficking in human beings for the purpose of organ removal, which today is not still in the focus that it deserves, because of its dangerous consequences to the victim and the side of need of human organ for transplantation, the supply for the black market of organs, and the economic consequences for the society.

On the other side of the illegal business of human parts and organs is the trafficking in organs directly, as a process that excludes the victim, its recruitment and transport to the country of destination. It is a business of direct buying and selling human organs, a way for the rich people to buy their life and a way for the poor ones to save their own from the misery they are in.

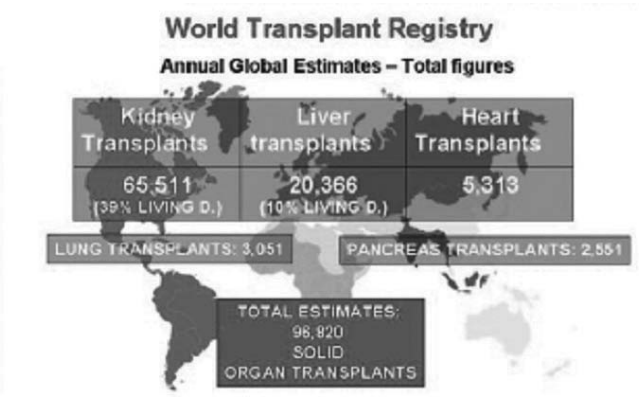
First by explaining the process of trafficking we will explain its type, the trafficking for the purpose of organ removal, and from there we will get to the trafficking in human organs as an independent process, with differences and similarities with the first one.

TRAFFICKING IN HUMAN BEINGS FOR THE PURPOSE OF ORGAN REMOVAL AND TRAFFICKING IN ORGANS, TISSUES AND CELLS: DEFINITION, PROCESS, DIFFERENCES, CONSEQUENCES

The first successful kidney transplant was performed at the Peter Bent Brigham Hospital in Boston in 1954 and this subsequently led to the awarding of a Nobel Prize. The transplant was performed between identical twins, overcoming the main difficulty in performing successful organ transplants at that time – the immunological discrepancies between donors and recipients – which inevitably led to activation of all immune response, resulting in rejection and loss of the graft. Since that first successful kidney transplant, organ transplantation has developed into a well-established clinical therapy which saves the life and improves the quality of life of thousands patients every year. Kidney transplantation now represents the most desirable therapeutic option for patients with end-stage renal disease, providing better outcomes in terms of survival and quality of life than other renal replacement therapies. Kidney transplantation is now considered to have a more favourable cost effectiveness ratio than dialysis therapy, the alternative treatment for end stage renal disease.[4]

Scheme No. 1[5]

Estimates of the number of solid organ transplants performed annually worldwide



In the early years of organ transplantations the sources of human transplantable organs were either living donors or donors who have died from cardio-respiratory arrest. But after the accep-

4 United Nations Council of Europe, *Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs*. (Strasbourg: United Nations/Council of Europe, 2009), p.17

5 *Ibid*., p.18

tance of the definition of brain death, starting from Finland in 1971, another category of donors was added.

The development of medicine and the flourish of organ transplantations resulted with opening possibilities for new black markets and new criminal acts. Today both of them are trafficking, but the first one in human beings for the purpose of organ transplantation, and the second one in organs, tissues and cells.

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, in its Article 3, defines the process of Trafficking in Human Beings as:

"the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs." [6]

Explained like this the process contains three key points: an act (recruitment, transportation, transfer, harbouring or receipt of persons), the means (threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person), and the exploitative purpose (exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs).

Scheme No. 2[7]

Trafficking in Human Beings as a Process and Other Related Crimes

Recruitment/Entry	Transportation	Exploitation[22]	Victim Disposal	Criminal Proceeds
• *Fraudulent promises* • *Kidnapping* Document forgery Illegal adoption (for purpose of exploiting child) Corruption of government officials	• *Assault* • *Illegal deprivation of liberty* • *Rape* • *Forced Prostitution* Corruption of government officials Document forgery Abuse of immigration laws	• *Unlawful coercion* • *Threat* • *Extortion* • *Sex or Labour exploitation* • *Illegal deprivation of liberty* • *Theft of documents* • *Sexual Assault* • *Aggravated Assault (cruel and degrading treatment)* • *Forced participation in crimes (forced begging, transportation of drugs, organized theft)* • *Rape* • *Murder* • *Removal of organs* Corruption of government officials	• *Assault* • *Abandonment* • *Murder* • *Victim sold to another trafficker*	Money Laundering Tax Evasion Corruption of government officials

As with human trafficking for other exploitative purposes, victims of trafficking for the purpose of organ removal are often recruited from vulnerable groups (for instance, those who live in extreme poverty) and traffickers are often part of transnational organized crime groups. Organized

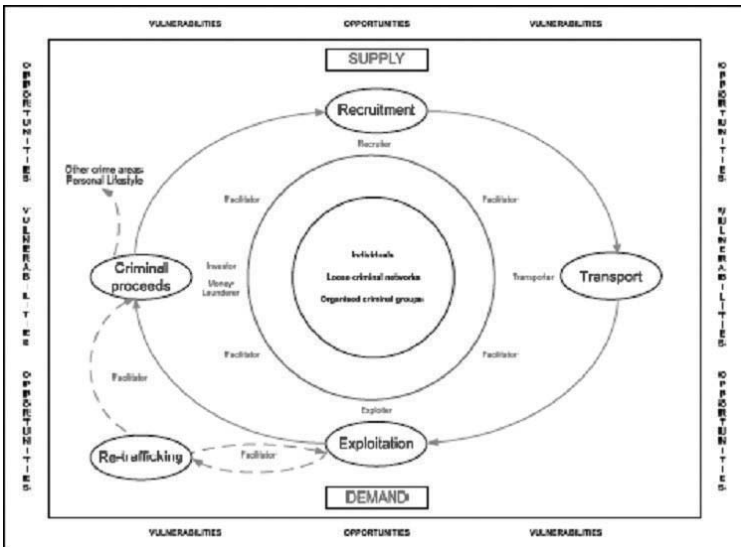
6 Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, available at http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf [01.02.2013]

7 United Nations Council of Europe, *Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs* (Strasbourg: United Nations/Council of Europe, 2009), p.19

crime groups lure people abroad under false promises and convince or force them to sell their organs. Recipients of the organs must pay a much higher price than donors receive, part of which is beneficial to brokers, surgeons and hospital directors, who have been reported to be involved in the organized criminal network. The commission of this crime can be distinguished from other forms of trafficking in persons in terms of the sectors from which traffickers and organ "brokers" derive; doctors and other health-care practitioners, ambulance drivers and mortuary workers are often involved in organ trafficking in addition to those involved in other human trafficking networks.[8]

The inclusion of this form of exploitation into the Protocol is intended to cover those situations where a person is exploited for the purposes of a trafficker obtaining profit in the "organ market," and situations where a person is trafficked for the purpose of removal of their organs and/or body parts for purposes of witchcraft and traditional medicine. In the former situation, market forces drive supply and demand; those in desperate need of an organ transplant will purchase an organ from those who are desperately poor, or from "brokers" who forcibly or deceptively obtained the organ. In the latter situation (not the focus of this background paper), "muti" (magical medicines used in some parts of Africa) involves the removal of body parts including skulls, hearts, eyes and genitals which are sold and used by deviant practitioners to increase wealth, influence, health or fertility.[9]

Scheme No. 3[10]
The Framework of Trafficking in Human Beings



Trafficking in human beings for the purpose of organ removal is most often committed by organized criminal groups. Their internal structure can either be vertical or horizontal. But when it comes to trafficking in human beings, the horizontal structure is the one that is most often found in some of the criminal groups.

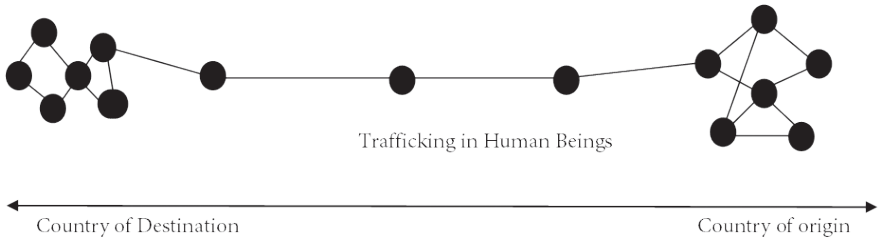
Whereas traditional hierarchies are based on top-down management, networks are at and decentralized with decision making and action dispersed among multiple actors exhibiting a high degree of local autonomy. Second, unlike hierarchies, which can rely on authoritative rules and legal arbitration to govern relations, networks are self-enforcing governance structures disciplined primarily by reputation and expectations of reciprocity. As a result, networks tend to require higher

8 UN GIFT. Background Paper. *Human Trafficking for the removal of organs and body parts,* p. 2. Available at http://www.unodc.org/documents/human-trafficking/2008/BP011HumanTraffickingfortheRemovalofOrgans.pdf [31.01.2013]
9 UN GIFT. Background Paper. *Human Trafficking for the removal of organs and body parts,* p. 2
10 Europol. *Trafficking in human beings in the European Union*. Knowledge product (The Hague, 2011), p.9

levels of trust than other organizational forms. Third, unlike the impersonal, rule-guided relations that characterize interactions in hierarchies, networks tend to be based on direct personal contacts. As a result, they are often composed of members with similar professional backgrounds, interests, goals, and values. Relations and connections within networks tend to be informal and loosely structured. Finally, the lack of central authority and rule-guided interaction implies that decision making and coordination in networks tend to be based on consensus and mutual adjustment rather than administrative at.[11] A fluid structure is said to provide networks with a host of advantages including adaptability, resilience, a capacity for rapid innovation and learning, and wide-scale recruitment. Networked actors are also said to be better at exploiting new modes of collaboration and communication than hierarchically organized state actors. The suggestion that "it takes a network to fight a network" is therefore gaining currency, both among academics and in the wider security community.[12]

Because of these advantages today most of the organizations involved in trafficking in human beings business use a fluid network that schematically looks like the one on Scheme No. 4.

Scheme No. 4 [13]



The roles criminals have in the market of human organs are strictly divided and connected. The difference with the roles in other kinds of trafficking for a different exploitations is that in case of organ removal, most of the actors involved are coming from the medical sector, of course, because of the importance of the commodity, in this case the human organ. The actors are:

- Medical directors of transplant units;
- Hospital and medical staff;
- Technicians in blood and tissue laboratories;
- Dual surgical teams working in tandem;
- Nephrologists;
- Postoperative nurses;
- Travel agents and tour operators to organize travel, passports and visas;
- Medical insurance agents;
- Kidney hunters (to recruit "donors" locally or internationally from among vulnerable and marginalized populations);
- Religious organizations and charitable trusts, which sometimes call upon organ brokers;
- Patient advocacy organizations, which sometimes call upon organ brokers.[14]
- Each one of them has a strict obligation in the phase they work in, starting from the country of origin till the country of destination.

On the other side of the business with human life, poverty and human organs as commodities is the trafficking in organs, tissues and cells, or also known as organ trafficking.

11 Mette Eilstrup-Sangiovanni. Calvert Jones. "Assessing the dangers of Illicit Networks: Why al-Qaida may be less threatening than many think". *International Security 33(2)* (2008): 12

12 *Ibid*., p.8

13 Gerben Bruinsma, Wim Bernasco, "Criminal groups and transnational illegal markets", *Crime, Law & Social Change 44* (2004): 90

14 UN GIFT. Background Paper. *Human Trafficking for the removal of organs and body parts,* p. 7

The first known case of organ selling dates from the beginning of the XIX century. William Buerke from Great Britain killed 16 people and sold their parts to a local medicine school so they can be used in anatomy classes. This case was the first step toward regulating the question of donation and distribution of human organs for transplantations and other uses.

The spread of transplant technologies has created a global scarcity of viable organs. At the same time the spirit of a triumphant global and "democratic" capitalism has released a voracious appetite for "fresh" bodies from which organs can be procured. The confluence in the flows of immigrant workers and itinerant kidney sellers who fall prey to sophisticated but unscrupulous transnational organ brokers is a subtext in the recent history of globalization.[15]

The main terms connected to this crime are determined in the Declaration of Istanbul, an international document created at the Istanbul Summit on Organ Trafficking and Transplant Tourism in 2008. It clarifies the issues of transplant tourism, trafficking and commercialism and provides ethical guidelines for practice in organ donation and transplantation.

Organ trafficking is the recruitment, transport, transfer, harbouring or receipt of living or deceased persons or their organs by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving to, or the receiving by, a third party of payments or benefits to achieve the transfer of control over the potential donor, for the purpose of exploitation by the removal of organs for transplantation.[16]

Organ sale, as it is popularly known, can occur in a number of very different forms. The most troubling is where living people have their organs stolen for their cash value or, even worse, are killed so that their organs can be harvested and sold. Becker's disturbing account of the execution of Chinese prisoners (above) appears to fit into this category. There have also been worrying reports (from several countries including Brazil, India, Israel, and the Philippines) of body parts being stolen both from cadavers and from living hospital patients. These parts are said to include whole eyes (not just the cornea), bone, skin, pituitary glands, and heart valves.[17]

A less disturbing – but still, some would argue, unethical – practice would be for us to use a commercial market to distribute the organs usable for transplantation from people who die "naturally" from accidents, age, or disease. A third practice is one in which living individuals volunteer to sell one of their own organs (one which they can live without, such as a kidney) in order to satisfy their need or desire for money.[18]

Transplant commercialism is a policy or practice in which an organ is treated as a commodity, including by being bought or sold or used for material gain.[19]

Travel for transplantation is the movement of organs, donors, recipients, or transplant professionals across jurisdictional borders for transplantation purposes. Travel for transplantation becomes **transplant tourism** if it involves organ trafficking and/or transplant commercialism or if the resources (organs, professionals, and transplant centres) devoted to providing transplants to patients from outside a country undermine the country's ability to provide transplant services for its own population.[20]

According to Bovenkerk, one criterion for organized crime is that criminals, operating in the underground economy, are organized to make money through criminal methods. This is the case when it comes to trafficking in organs because the organs are supposedly transplanted in private hospitals, usually by internal medical staff, where medical records are not being checked on by the government and often the transplantations take place at night – aside from the licit daily business of the hospitals.[21]

Trafficking in organs requires a well organized network due to the complex nature of this business. It requires highly qualified medical professionals to carry out the transplantation, as well as

15 Nancy Scheper Hughes, "The ends of the body: Commodity fetishism and the Global Traffic in Organs". *SAIS Review 22(1)* (2002): 61
16 Declaration of Istanbul. http://www.hks.harvard.edu/cchrp/isht/study_group/2010/pdf/Declaration Of Instanbul.pdf [31.01.2013]
17 Stephen Wilkinson, *Bodies for sale: Ethics and exploitation in the human body trade,* (London: Routledge, 2003), p.101
18 *Ibid*., p.101-102
19 Declaration of Istanbul. http://www.hks.harvard.edu/cchrp/isht/study_group/2010/pdf/Declaration Of Instanbul.pdf
20 Ibid
21 Silke Meyer. "Trafficking in human organs in Europe", *European Journal of Crime, Criminal Law and Criminal Justice 14(2)* (2006):211

intermediaries or brokers who recruit willing donors, usually out of poor communities, and find well-paying recipients, in many cases supposedly via the internet. In addition, the exchange of the illicit good cannot take place anywhere, as it is possible in other forms of trafficking in illicit goods, because it requires a setting which provides the entire necessary medical instruments, e.g. an operating theatre.[22] The business of trafficking in organs is far different from the idea of organ snatching criminals, who are willing to kill people in order to sell their organs on the black market. While this phenomenon is rather new and shows a relatively modest scale in European countries, worldwide it has been an issue ever since the 1980s. Back then, experts became familiar with the so-called *organ tourism* or *transplant tourism,* which included wealthy Asians travelling to Southeast Asia, e.g. India, to purchase organs from donors living in poverty[23]

At the beginning of the chain there is a recruiter who finds a young and healthy donor who is ready to sell his organ. Together with him there are many other actors in the countries of export and the ones of import, and of course medical staff.

Trafficking in organs is about living donations from people living in very low socio-economic standards. These people are willing to sell an organ – usually a kidney because it is the most common organ from living donors – in order to improve their living standards. This phenomenon meets the needs of many people from industrialized countries, desperately waiting for a kidney donation. Just like any other form of trafficking, this business is demand-driven and the demand is high in Europe but also worldwide.[24]

In Europe, organ trafficking is associated with Moldova, Ukraine and Turkey. Beyond them Bulgaria, Georgia, Romania and Russia have reported recruitment of donors for organ trafficking.

In India, kidneys from living donors used to be sold more or less openly due to a lack of national legislations regulating transplantations. Recipients are mainly affluent Middle Easterners and Europeans that arrange the transplant procedure and hospital stay with Indian agents – or so-called brokers. Furthermore, several allegations about human rights violations were made against the Chinese government in the 1990s for selling organs of executed prisoners. One of the main discussion points of human rights activists in this field – besides the alleged financial profit gained by the government through selling other people's body parts – was the question whether prisoners, awaiting execution, are able to give voluntary consent as required by Article 19, chapter VI, of the *Convention on Human Rights and Biomedicine* of 1996.[25]

Trafficking in human beings for the purpose of organ removal and trafficking in organs, tissues and cells are often confused and mixed up.

The similarities between trafficking in organs, tissues and cells, and trafficking in human beings include the root causes, which are mostly the same: shortage of organs to meet demand for transplantation, inequities in health care and poor economic and other conditions that put persons in vulnerable situations. Therefore, they often end up finding it hard not to agree to take part in the proposed activities and (seemingly) to consent – however comprehensive, detailed and correct their knowledge about what awaits them might be. [26]The consequences for the individuals are also similar: they face stigmatization and discrimination in their communities for "what they have done" or "what has happened to them". When they return to their own environment they have to live with the fact that other people there know that they have sold (a part of) their body or that something (their sexual integrity or organs) has been taken from them involuntarily – both of which are morally sensitive issues. And they face long-term consequences regarding their physical health and bodily integrity.[27]

Both of them are connected to commodification of human beings, making them objects.

22 *Ibid*
23 *Ibid*., p.215
24 *Ibid*., p.215-216
25 Silke Meyer, "Trafficking in human organs in Europe", *European Journal of Crime, Criminal Law and Criminal Justice 14(2)* (2006):216-217
26 United Nations. Council of Europe, *Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs,* (Strasbourg: United Nations/Council of Europe, 2009), p. 55
27 *Ibid*

Commodification is a *social practice* for treating things as commodities, i.e. as properties that can be bought, sold, or rented. To commodify something is to exchange it for money, to buy or sell it.[28]

The fundamental difference between the two cases is the fact that trafficking in organs is a crime where the organ and the use of it are the central elements; it does not matter whether the organ has been removed from a living or a deceased donor. On the other side, trafficking in human beings is a crime where the exploitation of an individual is the central aspect and where a combination of three elements (action, means, purpose; see below) has to be applied in order to constitute the crime.

The conclusion is that trafficking in human beings for the purpose of organ removal can only be committed if organs are removed from living donors in one of the cases mentioned in the definition.

As the exploitation of the victim results in the removal and further use of an organ, a case of trafficking in organs (and thereby both offences) also applies. However, as the aim of the two crimes is not the same, they overlap but differ in scope. Trafficking in organs can be committed separately from trafficking in human beings, e.g., if organs are removed from deceased donors or if no illegal activities or means have been used with respect to a living donor but, e.g., if the requirements for legal intervene infringed. Additionally, *per definitionem*, trafficking in human beings for the purpose of organ removal is limited to removal of organs; all the documents (the United Nations Trafficking in Persons Protocol, the Council of Europe Anti-Trafficking Convention and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography) only mention the removal of organs and none makes any reference to cells or tissues. The *travaux préparatoires* to the United Nations Trafficking in Persons Protocol show that the discussions did indeed cover the issue of broadening the scope to include the removal of cells, tissues and body parts, but, ultimately, the decision was taken only to include the removal of organs in the definition, so all provisions regarding trafficking in human beings refer to cases of the removal of organs only.[29]

A clear distinction between the two crimes is also needed, on the one hand, to better prevent and prosecute such acts and especially because the needs of victims can be completely different. Living donors involved "only" in trafficking in OTC have certain needs for protection and care, but living donors who fall victim to trafficking in human beings for the purpose of organ removal need a far more comprehensive protection regime, as they have been affected by a serious crime. On the other hand, deceased donors do not need such protection measures at all, but there must be a system in place to prevent illegal activities and unethical behaviour, among other reasons, because of the serious damage that these activities cause to the image of donation and transplantation, which further heightens organ shortage by precluding altruistic donation.[30]

THE REPUBLIC OF MACEDONIA: CRIMES, THEIR INCRIMINATIONS AND CRIMINAL POLICY

On several occasions, Macedonia has been mentioned as a country of illegal transplantation and human body parts trafficking. For example, the American Medical Association pointed out our country as part of the organ trafficking chain ("Dnevnik", 09. 12. 2009). On several occasions, Mr. Sam Vaknin, analyst, (the last time in the interview for "El Pais"1) claimed that Macedonia is also included in this chain. Likewise, very frequently, there are indications (around ten years ago) of the case of the Israeli physician Zaki Shapira and his illegal transplantations and kidneys smuggling in order to make Macedonia destination of human organs transplantations. However, according to the claims of Dr. N. Ivanovski, President of the Macedonian Association for Transplantation of Body Organs and Tissues, the illegal traffic in organs does exist in the region, but this is not the case in Macedonia. Therefore, the offer done by Dr. Zaki Shapira was rejected. In our country, there is no human organs trafficking but it is also true that some citizens travel to India, Pakistan or Egypt with the intention of buying a kidney. So far, 16 Macedonian residents and around 40 citizens from

28 Stephen Wilkinson, *Bodies for sale: Ethics and exploitation in the human body trade,* (London: Routledge, 2003), p. 44

29 United Nations Council of Europe, *Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs,* (Strasbourg: United Nations/Council of Europe, 2009), p. 55

30 United Nations Council of Europe, *Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs*, (Strasbourg: United Nations/Council of Europe, 2009), p. 55

Kosovo have undergone kidney transplantation in these countries, paying up to 30.000 EUR..." ("Dnevnik" 25. 10. 2008).[31]

Trafficking in human beings has been incriminated in the Macedonian Criminal Code in 2002. Based on the Protocol of Palermo's definition, the incrimination (418-a of the Criminal Code) today contains the possible ways of exploitation and among them the organ removal as a goal to the criminal process. The punishment for trafficking in human beings for the purpose of organ removal is imprisonment of at least 4 years. If the victim is a child then the punishment is at least eight years of imprisonment (Article 418-g of the Criminal Code).

Analyzing the crimes from the Criminal Code of the Republic of Macedonia that are connected to our theme of interest, beside Article 418-a, we can mention Article 210 (Illicit transplantation of parts of the human body). The punishment for selling or mediating in the sale of human body parts taken from living or deceased donors for transplantation is up to three years.

The Criminal Code contains group of criminal offenses related to illegal removal of human organs and tissues which is very specific aspect, since they are committed in specific conditions (state of war or armed conflict) and on the basis of violation of international law. The **criminal offences against crimes of war** criminalize the illegal removal of human organs and tissues.[32]

In 2011 the Macedonian Parliament brought the Law on collection transplantation of parts from the human body for purpose of medical treatment. The goal of the new law is to regulate the area of organ donation.

In Part VI it also contains a part in which the possible crimes connected to selling, collecting and buying human parts are explained.

Article 65 incriminates the cases when a person orders, purchases, transfers, transports, stores and buys human organs, tissues or cells in order to gain unlawful material benefit. The punishment is at least four years imprisonment.

When the crime is committed by an organized criminal group the punishment is higher and it goes to at least eight years of prison for the perpetrators.

Also with prison of at least ten years or life imprisonment will be punished the person that will kill another person for the purpose of organ, tissues or cells removal. The punishment for those who advertise the need or assessment of human parts for their offer or claim material benefit or another kind of benefit, is at least three years of prison.

The National Coordinator for Transplantation[33] will be punished with imprisonment from one to ten years if he/she gives a patient a human organ in cases in which the patient is not on the National List of waiting or does not fulfill the criteria to get a human organ.[34]

CONCLUSION

Human lives do not have a price. They are sacred. That is why using every method to save or to continue a life are welcomed, but not at the price of another's life or of the ruining of somebody else's life.

Today, organized criminal groups are using almost everything to gain material benefit. They are trafficking things that can be trafficked, but also are trafficking human beings commodifying them and making them to become objects. Things that can be bought as a whole or things from someone can buy a part.

Trafficking in human beings for the purpose of organ removal and trafficking in organs, tissues and cells without a doubt deserve to bring the adjective of modern evils. Although they are the same

31 Oliver Bachanovic, Angelina Bachanovic, "Trafficking in human organs and/or body parts-form of human trafficking", International Scientific Conference *Security in the Post-Conflict Western Balkans: Transition and challenges faced by the Republic of Macedonia vol.1* (2011):20

32 *Ibid*., p. 25

33 The National Coordinator is a person that coordinates the program for transplantation and secures coordination among all the subjects that are part of the Law.

34 Член 69 од Законот за земање и пресадување на делови од човечкото тело заради лекување. Службен Весник на Република Македонија 47/2011

in the core, somewhere during the process they use different paths so still exist as different crimes, but with the same goal - selling a human organ on the market.

The difference comes from the source; the reasons are the same, the consequences as scary as they are, are also the same.

Dick Marty's Report on behalf of the Council of Europe for the organ removal in Kosovo and then organ trafficking to Turkey, clearly opens another chapter in the scientific research, giving scientists a new field of questioning, that with no intense is forgotten since the beginning of its existence.

We should continue researching, asking questions, building policies, discovering methods, because human life cannot be bought.

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PENALTY REACTION ON CHILD ABUSE IN SERBIA

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Abstract: This paper analyzes the penal and legal response of the society to the child abuse with a special emphasis on the role of the state institutions in the prevention and protection of children. Violence, child abuse and neglecting of children threaten and undermine the physical and mental integrity and are violation of fundamental rights of the child. The response of the society is heterogeneous and causes complex consequences. Beside the analysis of legislation regulating the protection of child rights in Serbia, this paper explains the main international conventions governing different segments of life and the rights of the child. Protecting rights means above all, a variety of social activities aimed at preventing and eradicating these phenomena, and to organize and direct the implementation of protective intervention in specific cases of abuse and neglect.

This paper explores aspects of the criminal justice responses in regard to protection of children from abuse and focuses on the special needs and specific forms of protection.

Keywords: penalty and legal response, child abuse, child protection, child victims, etiology of violence against children, the human rights of children, the role of institutions in the protection of children.

INTRODUCTION

Child abuse is present during the whole history of human kind, but it has only been recognized during the last years of past century, when Henry Kempe, an American pediatrician, described the term "battered child syndrome" (or BCS) by documenting drastic cases of child abuse with fatal outcome. This case represented an overlap in reaction to child abuse. Many experts raised their voices against child abuse and negligence and started an action to pass a law about mandatory report on child abuse suspicion[1]. All forms of violence, abuse or negligence, which distort child's physical and psychological integrity, represent one of the fundamental violations of children's rights, rights to life, existence and development.

The protection of children's rights implies different social activities that are directed to preventing and exterminating these phenomena, as well as organizing and conducting preventive interventions in cases of abuse and negligence. The Convention on the Rights of the Child has different regulations that predict modules for prevention of physical and mental violence, abuse and negligence; prevention of illegal use of narcotics and psychoactive substances; prevention of all forms of sexual exploitation and abuse, kidnapping and trafficking; prevention of "all forms of abuse that are harmful by any means for child welfare"; prevention of inhumane and degrading treatment and punishment; measures of support for physical and psychological recovery of child – the victim of violence and its social reintegration. In the Protocol on Child Protection from Abuse and Neglect, the definitions of certain forms of abuse and negligence were accepted by the World Health Organization (WHO)[2]. Child misuse or abuse includes all forms of physical and/or emotional abuse, sexual abuse, negligence as well as commercial or any other exploitation, which leads to real or potential violation of child health, its survival, development or dignity that includes responsibility, trust or power[3]. On Consultation about child abuse prevention, apart from general definition of child abuse, different types of child abuse were defined: physical abuse, sexual abuse, emotional abuse and child neglect. In some classifications, exploitation stands out as a particular form of abuse, as well as bullying. Child abuse is a phenomenon which is affected by complex set of conditional factors, and that is why multidisciplinary and intersectoral approach is essential. It is of a key value that all participants in this process have shared understanding and unique approach on child abuse. The most impor-

1 In the U.S. in 1974, the act was passed on mandatory reporting of child abuse that contributed to the creation of a system for the protection of children.
2 Consultation on the Prevention of Child Abuse held in Geneva in 1999.
3 Išpanović-Radojković V. I Ignjatovi, T. (2011), Forms and indicators of abuse and neglect, protect children from abuse and neglect, Child Rights Centre, Belgrade. p. 11.

tant condition for a successful child protection is concurrence. System of preventing interventions would have to include different levels of preventions, detection and investigation of cases, providing with legal protection, and health and social rehabilitation of abused children, as well as abusers. In that sense, abuse protection would include activities of multiple institutional systems: education, health care, social protection, police and justice. Beside, this problem draws attention of nongovernment organizations, professional association and citizens association[4]. The UD study data about violence over children shows that between 133 and 275 million of children a year worldwide testify about family abuse. Partner violence is increasing the risk of child violence inside family, and research shows that there is a close connection between violence over women and over children.

Social reaction and prevention of violence, misuse and abuse, is a main task of modern society, because only with healthy population the civilization has a perspective. All subjects in child protection should create a unique strategy for successful violence ending, and provide adequate protection for a child, with as less as possible additional traumatic consequences. All activities should be connected in a holistic process of professional recognition, research- detection and decision. The baseline in building a social mechanism in child protection is certainly normative definition of violence and abuse terms, as well as clear differentiation of crime and any other responsibility for violence over children. The development of legal protection starts on penalty level where the changes are common and significant.

INTERNATIONAL ACTS OF AND NATIONAL LEGAL FRAMEWORK ON THE CHILDREN PROTECTION

Violence and child abuse have been recognized as a serious social problem on a global scale, according to the United Nations (UN) adopted Convention on the Rights of the Child, which in Article 19 obliges Member States to take all appropriate legislative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse. In the Convention, these measures fall into social programs for the support for the child, together with all forms of prevention, identification, reporting, referral, investigation, treatment and follow-up on reported cases of child abused, and accordingly involvement of the court. The United Nations in its guidelines on justice and matters that regards child victims and witnesses of crimes, obliged its members to respect the principle of the best interests of the child, which includes a right to protection and the right to healthy development, as well as right to participation. The Convention specifically emphasizes respect for children's right to dignity, the right to protection from discrimination, the right to information, the right of the child to be heard and express their views, the right to privacy, the right of the child to be protected from exposure to harmful additional procedures during the court procedure, the right to safety, the right to reparation, the right to special preventive measures etc. Furthermore, Member States shall ensure that uncertainty as to the age of the victim shall not prevent the initiation of criminal proceedings, including investigations aimed at establishing the age of the victim, so that in the treatment by the criminal justice system, with children victims of unlawful acts, the child's best interest will be a priority. Member states are obliged to take measures to ensure appropriate measures to reinsure adequate training, in particular legal and psychological, for persons working with victims of unlawful acts prohibited under the Protocol on the Rights of the Child and to adopt measures to protect the security and integrity of the victims of such unlawful acts. With the advent of a pronounced presence of violence against children in the countries of Europe, the activities on the adoption of conventions, recommendations and resolutions of the Council of Europe on the protection of children and minors from all forms of violence and abuse have been intensified. As a regional international body, the Council of Europe pays much of the attention to the particular forms of crime and the protection of victims of violence, and has recognized that it is necessary to determine the victims' rights and obligations of Member States to protect all forms of abuse and violence against children. In recent years, the Council of Europe has adopted a number of regulations governing the protection of the minor rights who are each dealing with a particular type of

4 Igrački, J. (2012), Police - the subject in prevention of child abuse, Journal of the Institute for Criminological and Sociological Research, No. 2. pp. 259-275.

violence against children: Rec (2001) 16 on the protection of children from sexual exploitation; Rec (2005) 5 on the rights of children living in state institutions, Recommendation 1778 (2007) on child victims: the suppression of all forms of violence, exploitation and abuse, Rec (2009) 10 on integrated national strategies for the protection of children from violence, Recommendation 1905 (2010) on children who witness violence. The Council of Europe, on 17/11/2010 adopted the Guidelines on child friendly justice based on the same principles and rights as well as the UN Guidelines on Justice[5] in matters regarding child victims and witnesses of crime[6]. As these are all recommendations that are called soft law, the Council of Europe has started to develop a set of legally bounding documents and conventions whilst the most important being:

- European Convention on The Realization of Children's Rights (ETS No. 160, 1996)[7], which in the Article 3, guarantees children the right to be informed of the court proceedings and to possibility to express their opinions;
- Council of Europe Convention on Action against Trafficking in Human Beings (ETS No. 197, 2005)[8], which includes specific provisions with regard to child victims of trafficking;• Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (ETS no. 201, 2007)[9], with special emphasis on the protection of such forms of violence within the family;
- Council of Europe Convention on Preventing and Combating Violence against Women and National Violence (ETS No. 210, 2011)[10], in which, for the first time, the obligation of States Parties to protect children witness domestic violence victims was clearly established[11].

Building an efficient criminal justice model for protection of children from violence and abuse means to accurately determine the obligations of all participants in the legal protection of minors. The Republic of Serbia has ratified the Convention on the Fight against Human Trafficking and the Protection of Children from Sexual Exploitation and Sexual Abuse and is well on the way to incorporate new solutions in its legal systems that will adopt all relevant EU standards in the field of protection of children from violence and abuse. New solutions incorporated in the Law on Juvenile Offenders and Criminal Protection of Minors (further as Juvenile Justice Code)[12] represent a foundation for future reforms in this area, which will in large part be implemented in our criminal justice system. Also, it is important to note that in June 2009, the Minister of Justice rendered the Special Protocol for Operation pf the Judicial Authorities to Protect Minors from Abuse and Neglect, which should ensure, above all, coordinated management procedures that protect minors from further victimization and provide them with adequate support[13].

The Juvenile Justice Act provides that certain bodies of the proceedings must have special knowledge in the field of child rights and legal protection of minors. Thus, for example, the Juvenile Justice Act states that in the investigation of criminal offenses against minors, a specialized police authorities who have special skills in the field of child rights and legal protection of minors must participate when certain actions are entrusted to these bodies (Article 151, Paragraph 3). Specialization is designed also for the public prosecutor, the investigating judge, the presiding judge and a

5 Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice, http://www.coe.int/t/.
6 UN Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime (ECOSOC resolution 2005/20), http://www.apav.pt/portal/pdf/ECOSOC_RESOLUTION_2005-20.pdf.
7 European Convention on the Exercise of Children's Rights, GETS No. 160, 1996, http://untreaty.un.org/unts/144078_158780/17/8/8234.pdf.
8 Law on Ratification of the Council of Europe Convention on Action against Trafficking in Human Beings "Official Gazette of the Republic of Serbia - International Treaties", No. 19/2009.
9 Law on Ratification of the Council of Europe Convention on the protection of children from sexual exploitation and sexual abuse ¬ ing "Official Gazette of the Republic of Serbia - International Treaties", No. 1/2010.
10 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, CETS No. 210, 2011, http://conventions.coe.int/Treaty/EN/Treaties/HTML/DomesticViolence.htm
11 Jovanovic, S., Simeunović-Patić, B., Macanović, V. (2012), The criminal justice response to domestic violence in Vojvodina, Novi Sad, pp. 104-111.
12 Službeni glasnik RS. No. 85/05.
13 Petrušić, N. Stevanović, I. (2011), Legal Protection of Children in Serbia and the International standards, victims' rights and the EU challenges of providing assistance to victims, Belgrade, p. 97.

representative plaintiff. However, in this request for specialization, a single judge who leads criminal proceedings against juveniles for certain types of offences, is omitted.

In practice, the problem arises in the application of the Article 154 of the Juvenile Justice Act, which expressly provides that a minor as a victim shall have a representative from the first interrogation, and that if a juvenile does not have a representative, one should be assigned on the decision of the President of the Court appointed from the ranks of lawyers who have special skills in the field of child rights and legal protection minors. The costs of representation in such cases shall be paid from the budget, as directed by the Law on Juvenile Justice. What one notices is that this provision is not applied accordingly, that is that the proxies to juvenile victims are not placed for those cases where it is required by law.

In addition to demands for specialization, (Article 157), the law contains provisions on the prohibition of dealing with juvenile victim with the offenders in a hearing of the statutory requirements (Article 153). Unfortunately, the Juvenile Justice Act does not explicitly exclude the possibility of a minor victim facing the defendant (Article 153 of the Juvenile Justice provides that: "If a witness is questioned as a juvenile due to the nature of the offense, or the result of other circumstances, particularly sensitive or is in a particularly difficult state of mind, it is forbidden to carry out confrontation between him and the defendant"), which is the failure of the legislature. Our opinion is that, at least with respect to minor victims of crimes against sexual freedom, like all criminal offenses with elements of violence or criminal human trafficking, this explicitness must be established by law (that is, explicitly prohibit the possibility of dealing with the offender). Likewise, in the Juvenile Justice Act there is no prescription of explicit professional obligation to face and introduce the juvenile to the process, which would also be covered by the changes and amendments to the law in accordance with international obligations.[14]

The Law on Juvenile Justice paid special attention to the judicial authorities and law enforcement agencies and their training for working with minors, the treatment and all the important elements that can affect the overall protection of minors. The law provides specialization of internal affairs officers, prosecutor, investigating judge, the presiding judge and attorneys. It is important to note that the Minister of Justice issued a special Protocol on Handling the Judiciary in Protecting Minors from Abuse and Neglect[15], which should ensure, above all, coordinated management procedures that protect minors from further victimization and provide them with adequate support. In accordance with the obligations arising under the National Action Plan for Children, the strategic document of the Government of the Republic of Serbia, which defines the general policy of the state towards children and young people, as well as the basic principles and guidelines of the General Protocol for the Prevention of Child Abuse and Neglect, the Minister of the Internal Affairs issued a Special Protocol on the Conduct of Police Officers in Protecting Minors from Abuse and Neglect.[16]

The primary tasks of the police as a public service are to safeguard the life of citizens and prevent crime. Children are citizens with the right to protection provided by the Magistrates, Family and Criminal Code. The police have a duty and responsibility to investigate cases of child abuse. Such investigations should be carried out carefully, thoroughly and professionally. While working on the offenses of which the victim is a child, the police are obliged to cooperate with the centre for social work and other agencies and institutions that are supplied by public authority to protect children from abuse and always take into account the best interests of the child. The police have a favourable position to recognize and detect cases of child abuse, because it is in the community and at the same time can take all the necessary actions in terms of prevention of violence against them. Preventive action of the police is unthinkable without the cooperation of the service centres for social work, as well as with all other agencies and institutions authorized to protect children from abuse. This cooperation is reflected in good communication, information sharing, as well as joint participation in prevention programs in this area. The police must be prepared to share information and sensitive data with the centre for social work, as well as all other authorized services and institutions. In relation to this is the duty of the police and all government bodies, institutions, organizations, and every citizen, to report every case where a juvenile is in need of protection to the Centre for Social

14 Petrušić, N. Stevanović, I. (2011, Legal Protection of Children in Serbia and the International Standards, victims' rights and EU challenges of providing assistance to victims, (U)-Ristanović Nikolić, Ćopić, S.) pp. 97-99.

15 The Protocol was adopted in June 2009.

16 The Protocol was adopted in October 2005.

Work (guardianship authority). In the process of securing legal protection of children from abuse, it is necessary, first of all, to discover the crimes and their perpetrators. One of the main tasks of the police is to detect and identify offenders. In this sense, the police takes the series of operational and technical and tactical actions, but in any case, their performance is related to the fact of the good cooperation with the representatives of centres for social work, other authorized government agencies and institutions, as well as representatives of nongovernment organizations that deal with issues of child abuse, victim protection services, as well as citizens who can be entrusted with a child (relatives, friends, neighbours). One of the most important roles of the police and the implementation of certain pre-trial investigation, in order to provide evidence that should enable initiation of criminal proceedings by filing criminal charges against the suspect for child abuse, or those that are essential for conducting misdemeanour proceedings. Police collects and provides all the evidence relevant to the initiation of criminal proceedings or proceedings for petty offenses. This especially applies to the collection of physical evidence which is of particular importance for the future criminal proceedings. Criminal procedure, as a rule, is preceded by taking a series of actions which are primarily implemented by the police. This type of procedure is commonly known as pre-trial proceedings. Its goal is to eventually enable a prosecution. The actions in this procedure are primarily characterized by operational actions, but do not have the credibility of evidence in criminal proceedings, although some of them could be made in procedural form, i.e. characteristic for inspection prior to the investigation.

If there is reasonable suspicion that a criminal offense of abuse has been conducted and there is sufficient evidence, the police initiate criminal proceedings by filing criminal complaints to the competent prosecutor. Also, the police have the authority to arrest the abuser – perpetrator of abuse. Sometimes the arrest of the suspect will be enough to protect the child, so that it's would be not necessary for the child to be taken away from his/her home. There are situations that require immediate separation of the child from the environment in an abusive relationship. Such situations sometimes require close cooperation between the police and representatives of the centre for social work in terms of providing assistance to the Police Centre for Social Work (guardianship authority) in the conduct of its own jurisdiction. The Ministry of Internal Affairs of the Republic of Serbia, as a public service, is supplied with rights to protect children from abuse and neglect. Application of the authorization for the officer for juvenile and young adults is determined primarily by the police. On the basis of this law, authorized officers specially trained to work with juveniles apply police powers to minors, young adults in cases of legal protection of children and minors. Police officers who have special skills in the field of child rights and the criminal-law protection of minors, in collaboration with the directors and psychological educational offices of the educational institutions at the territory of the Republic of Serbia, implement the preventive activities among school children and adolescents, according to the model workshops[17].

The public prosecutor is in charge for the criminal proceedings in subjects of criminal protection of minors from violence and abuse. The basic principle in the work of the public prosecutor is the principle of legality, that is, Deputy of the Public Prosecutor who acts in the legal protection of individuals from abuse and neglect is required to assess each received criminal application. Criminal application is submitted to the public prosecutor, but the citizens can also submit it to the Court and police, who will forward it to the competent body. A proposal for prosecution shall be filed with the public prosecutor, while the private complaint goes to the competent court. Public prosecutors and deputies, specialized in handling this type of matter work closely with centres for social work, the Ministry of Internal Affairs, the Ministry of Justice, the Ministry of Education and other institutions and organizations which are competent to care for the young and family.According to the General Protocol, if the results of the initial assessment indicate that there is a need to protect minors from abuse or neglect, the centre for social work calls for a conference for planning services and measures to protect minors from abuse and neglect. It is desirable that a case conference is attended by a specialized prosecutor. In the event of his/her absence, he/she shall receive the report.The investigation is the stage of the preliminary procedure, carried out by the court, on request of the competent public prosecutor against a person reasonably suspected of having committed a criminal offense of harming a minor. The aim of the investigation is to gather evidence and information that will form

17 Igrački, J. (2012), The role of the police in the prevention of juvenile delinquency, tort, fines and the possibility of social prophylaxis, Institute for Criminological and Sociological Research, p. 355.

the decision whether to bring an indictment or initiate the proceedings against certain persons who are suspected of having committed a criminal offense to harm a minor. The aim of the investigation is also collecting evidence for which there is a danger that cannot be repeated at trial, as well as other evidence that may be used for the procedure, and whose performance, given the circumstances of the case, shows as expedient (Code of Criminal Procedure, Article 241).

Crimes "to the detriment of children and minors (minors)", represent those criminal offenses in which the victim (passive entities) may be minors. These are the offenses for which a minor is the constituent element of the offense, in which he/she was victim; in connection with this we mean, first of all, the offences included in the Criminal Code in sections called "crimes against life and body", "crimes against sexual freedom" and "offenses against marriage and the family" (Stevanović, I. 2005, Stevanović, I. 2008). According to the Law on Courts, the Law on Public Prosecution and the Law on Seats and Territories of Courts and Public Prosecutors, trial jurisdiction in criminal proceedings in which a minor appears as a victim, or the victim, of 1 January 2010, is divided among 34 primary (main court in the first instance for criminal offenses for which the main punishment is fine or imprisonment up to ten years and ten years, unless some of them are not assigned to another court) and 26 high courts (higher courts for crimes for which a principal penalty of imprisonment is exceeding ten years; higher court in the first instance always act in criminal proceedings against juveniles as offenders), or basic and higher prosecution. Appellate courts (in Belgrade, Novi Sad, Kragujevac and Niš) decide on appeals against decisions of the higher courts and the main court decisions in criminal proceedings if the decision of the appeal court does not have jurisdiction irises[18].

Protecting children from violence and abuse in practice encounters certain difficulties, because there is still no set procedure on how to collect evidence in order to prevent secondary victimization of child victims or witnesses. Child testimony in court often requires expertise in determining the truthfulness of statements, there are no available services for the reintegration of children who are victims of violence, children and their caregivers cannot provide the necessary information about the process and their rights, etc.

CONCLUSION

Attitude toward children, in contemporary world, is assessed as strategic issue of development of civilization and it requires a comprehensive approach to minor protection in their development. According to that, contemporary system of social protection of minors must be based on multidisciplinary approach, with need for continued education of all subjects in system. Social reaction and prevention of child violence, abuse and neglect should create a unique strategy for efficient ending of violence and provide adequate protection for a child, with as less as possible traumatic consequences. All activities should be linked to an independent process of professional recognition, research, detection and determination. The baseline in development of social mechanism in child protection is normative definition of terms violence and abuse, as well as clear differentiation of criminal and any other criminal liability for committed violence against children. The development of legal protection against child violence and abuse starts on a penitentiary level where the changes are frequent and significant. In child violence and abuse protection system, legal protection has a very important place, in which mechanism of legal protection of children has a special significance. The level of legal child protection efficiency certainly depends on several factors, where their relationship with other institutional systems of protection is most important, such as system of social protection, health protection, educational system, etc. Very important segments in child protection are non-governmental organizations, associations of profession, individuals and experts in various fields. Only in collaboration of all relevant social factors in child protection process, there is a real possibility of normal mental and physical development of children.

18 Stevanović I., Vujović, R. (2011), The role of the judicial system to protect children from abuse and neglect, protect children from abuse and neglect of general-application protocol, the Center for Children's Rights, Ministry of Labour and Social Policy, Belgrade, pp. 154 -159.

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JOINT INVESTIGATION TEAMS AS AN INSTRUMENT OF POLICE COOPERATION IN EU

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Abstract: Practical experience shows that when authorities of one state investigate the crime with cross-border dimension, especially in the case of offenses of organized crime, the investigation of criminal cases benefits from the participation of the relevant competent authority of another state, or a state with which the criminal matter in this case is in some way connected. Cooperation between the authorities can be achieved in several ways and using different legal instruments, and the idea of a joint investigation teams has its origin in the fact that the existing instruments of international police and judicial cooperation were not sufficient to effectively combat severe forms of crime, so it would be useful to form a team of representatives from the police and judicial authorities from two or more countries to work together in accordance with clearly defined powers, rights and obligations in the discovery and preservation of evidence for criminal proceedings, whose subject is crime with cross-border elements. Within the European Union as a regional organization, the need to provide the possibility for the formation of joint investigation teams as an instrument of police and judicial cooperation between Member States in criminal matters has been recognized. Although even before the setting up of the relevant legal framework spontaneously formed investigative teams acted, there were no supranational regulations to ensure consistency of such practices across borders of member states. Therefore, one of the obstacles related to the joint investigation teams was the lack of a specific framework on the basis of which such teams would be set up and operate.

Keywords: EU, police, judiciary, cooperation.

INTRODUCTION

The first step toward creating a framework for the establishment and operation of joint investigation teams composed of the competent authorities of the Member States of the European Union was the adoption of EU Convention on Mutual Legal Assistance in Criminal Matters in 2000[1]. The purpose of the Convention is to facilitate and improve cooperation between police, judicial and customs authorities of the Member States in criminal matters, and in this sense solutions contained in the Council of Europe Convention on Mutual Legal Assistance in Criminal Matters of 1959 are used as a model and then further enhanced[2]. Given the lack of a slow process of ratification of the Convention on MLA 2000 by the EU member states, in order to allow the establishment and improvement of work of joint investigation teams, the Council of the European Union adopted a Framework Decision on joint investigation teams on 13 June 2002[3], which the Member States were required to implement up to 1 January 2003. The Article 5 of the Framework Decision prescribes that it will cease to exist when the Convention enters into force in all Member States, which has not happened yet, so the provisions of the Framework Decision are still the most important legal framework for the use of this instrument of international legal cooperation of Member States in criminal matters.

1 Council Act of 29 May 2000 established in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000/C 197/01): http://eur lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2000:197:0001:0023:EN:PDF.

2 European Convention on Mutual Assistance in Criminal Matters, http://conventions.coe.int/Treaty/en/Treaties/Html/030.htm.

3 Framework Decision of 13 June 2002 on Joint Investigation Teams (OJ L 162 of 20/6/2002, 1/1/2003): http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:162:0001:0003:EN:PDF.

LEGAL FRAMEWORK

Necessary legal framework for establishment of joint investigation team is created by the adoption of the Convention on Mutual Legal Assistance in Criminal Matters between the Member States of the European Union as a binding legal instrument of the European Union. The Convention was adopted in order to improve the hitherto existing forms of cooperation between judicial, police and customs authorities, so that mutual assistance and cooperation could be provided in a fast and efficient manner compatible with the basic principles of national law, and supplementing and facilitating the application of the provisions governing the provision of mutual legal aid, in particular of COE Convention and its Additional Protocol[4], the provisions of the Mutual Assistance in Criminal Matters of the Convention implementing the Schengen Agreement on the gradual abolition of checks at their common borders (of 19 June 1990)[5], the provisions of the Chapter 2 of the Treaty on Extradition and Mutual Assistance in Criminal Matters between the Kingdom of Belgium, Luxembourg and the Netherlands (of 27 June 1962), as amended by the Protocol in the context of relations between Member States and the Benelux Economic Union (of 11 May 1974)[6].

One of the forms of international cooperation established by the Convention is the formation of joint investigation teams, for which there is a legal basis in the Article 13 of the Convention. Namely, by mutual agreement by two or more States, the competent authorities of those States may, for a period of time (which may be extended by mutual agreement), form a team that works with a specific purpose, and that is the implementation of a joint investigation into a criminal matter in the territory of one or more Member States which signed the Agreement. However, the entry into force of the Convention has been delayed, because some individual provisions ensued discussion in some countries, which slowed down the process of ratification of the Convention as the basis for the establishment of joint investigation teams. For this reason, the Council of the European Union passed down in 2002 the Framework Decision on Joint Investigation Teams, based on the above-mentioned articles of the Convention, and created a mechanism for the mandatory implementation of the relevant provisions.

Therefore, legal framework for the establishment of joint investigation teams is, therefore, the two sources of EU law: the Convention and the Framework Decision. Framework decisions as a source of EU law are binding, but lack direct effect, and the full implementation of their provisions in national legislation is necessary. However, conventions as a source of EU law are binding for all Member States when they enter into force and have a direct effect. At this point, it should be noted that the validity of the Framework Decision is "temporary". Specifically, in the Framework Decision terminates when the Convention enters into force in all Member States. Although this has not happened, until the entry into force of the Convention, there is a possibility for Member States to provide that its provisions are clearly and unconditionally formulated, and can be applied directly if they are in accordance with national legislation. The purpose of the Framework Decision is the provision of a legal framework for the conduct of joint investigations by a team of representatives of the judicial and police authorities of the Member States, and it entered into force upon its publication in the Official Journal of the European Union. As a source of law, FD is binding for the Member States, in the sense that they are obligated to achieve certain results set as a goal of implementation, and that is enough to create clear and precise rules in national legislation that will ensure the full implementation of the provisions of the Framework Decision, while possibility to choose the most appropriate form and method of implementation is left upon them (and these are adoption of new statutes or amendment and supplementing the existing ones). Member States were obliged to take

4 Although the Convention does not contain explicit provisions on joint investigation teams, one can take into account the provisions of Paragraph 4 Article 15, which foresees the possibility of a direct addressing to the requesting judicial authority of the requested State, by sending letters rogatory through the relevant ministries, if the request for assistance is related to the investigation preceding the indictment, which sought to facilitate/expedite communication between the competent authorities.

5 The Schengen acquis - Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922%2802%29:en:HTML.

6 Treaty between the Kingdom of Belgium, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands concerning extradition and mutual assistance in criminal matters: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/polju/en/EJN220.pdf.

measures necessary to implement provisions of the Framework Decision into national legislation until 1 January 2003, and after the terrorist attacks of 11 March 2004 in Madrid, the EU Council called on Member States to adopt measures that are necessary for the fulfilment of the implementation of the Framework Decision by June 2004, and ensure that representatives of Europol are involved in teams, as much as possible. In order to allow Europol staff to participate in work of teams, the EU Council adopted the Protocol to the Convention on EU Police on 28 November 2002.

The provisions of the regulations need not be identical to the provisions of the Framework Decision. Thus, some Member States transposed the Framework Decision into national statutes which contain nearly identical provisions as the Framework Decision (Spain, Portugal), while others modified existing regulations or adopted new legislation which provides for rules on joint investigation teams (Denmark, France, Latvia, Hungary, Austria, Finland, Sweden). Three Member States (Germany, Lithuania Malta) have taken the position that a special law for the implementation of FD in national legal system is not required. The EU Commission adopted on 7 January 2005 a report which shows that the states have generally complied with implementation of the provisions of the Framework Decision into their national legislation. However, it is important to note that neighbours, in terms of implementation of the provisions of the Framework Decision, have no authority to sanction non-compliance of the Member States; this report presents a simple evaluation of the actual situation in the national legislation of the Member States and not the basis for the application of any sanctions against Member States that have not satisfactory implemented provision of FD. States have acted differently under obligation required by the Framework Decision for implementing provisions on joint investigation teams in national legal systems. Some states have adopted specific legislation on joint investigation teams (Cyprus, Finland, Luxembourg, Spain) and in some other states the provisions on investigative teams were included among the provisions of existing laws, such as: Law on International Legal Assistance in Criminal Matters (Austria, Belgium, Portugal, Germany, Hungary, Romania, Sweden), Law on Criminal Procedure (Belgium, Bulgaria, Czech Republic, Estonia, France, Greece, Ireland, Latvia, Lithuania, Malta, Netherlands, Poland, Slovakia, Slovenia), Law on Police (Great Britain). However, Spain is the only country that fully implemented the provisions of the Framework Decision. In addition, some Member States predicted by Law the direct application of the Convention in the national legal systems (Bulgaria, Denmark, Germany, Norway), while Italy is the only country that neither implemented the Framework Decision nor ratified the Convention and, therefore, no legal basis for formation of joint investigation teams is provided. Apart from the 2000 Convention and the FD, several other legal instruments deal with JITs:

- Article 24 of the Convention on Mutual Assistance and Cooperation between Customs Administrations (Naples II Convention) of 18 December 1997 provides for the setting up of joint *special* investigation teams operating in the limited area of customs investigation;
- on 28 November 2002, the Council adopted a Protocol amending the Convention on the Establishment of Europol. As required by the Tampere Conclusions (point 43), the Protocol establishes a legal basis for Europol to participate in JITs;
- on 8 May 2003, the Council adopted a non-binding Recommendation on a Model Agreement for Setting Up a Joint Investigation Team;
- Article 5 of the Agreement on Mutual Legal Assistance between the European Union and the United States of America provides for joint investigation teams "for the purpose of facilitating criminal investigations or prosecutions involving one or more Member State and the USA *where deemed appropriate*";
- according to the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union and the 2001 Protocol thereto, Article 13 of the 2000 Convention, dealing with joint investigation teams, shall be applicable in the relations between Iceland and Norway and in the mutual relations between each of these States and the Member States of the European Union.

CASES IN WHICH JIT IS FORMED

The Article 13 of Convention and the Article 1 of the Framework Decision provide that a joint investigation team may be formed when there is a need to conduct a joint investigation by the competent authorities in several states in investigating crimes with cross-border dimension, particularly in the following cases:

(a) when a criminal investigation on the territory of a Member State requires undertaking complex and demanding investigation actions with the assistance of the competent authorities of another Member State.

(b) when competent authorities of several Member States independently from each other are conducting an investigation of certain offenses and circumstances surrounding the particular criminal cases require a coordinated and joint action in the Member States.

The fact that the Convention and the Framework Decision cited these two cases does not mean that a possibility for the formation of teams in other cases is excluded. From the above-mentioned, it can be seen that the concept of joint investigative teams is based not so much on the seriousness of the offense, but on their cross-border dimension that arises from the need to investigate a crime carried out jointly by the authorities of several countries. Although the formation of teams could be related to the investigation of more serious forms of crime, other criteria for assessment if such a form of cooperation between the competent authorities is required in specific cases could be determined, and there is no obstacle to form joint investigation team even for investigation of simpler cases and less serious offences with trans-border dimension, as long as use of this instrument could be fruitful.

PROPOSAL FOR ESTABLISHING JIT AND JIT AGREEMENT

The proposal to form a joint investigation team, in accordance with the Article 13 (1) of the Convention and the Article 1 of the Framework Decision, may be appointed by any Member State, and the team is formed in Member State in which it is expected that the most of the investigations would be carried out (this state is referred to as the State of Operations). These provisions do not indicate which competent authority proposes formation of a team and in what manner or whether the proposal could be made orally or in the form of requests for international legal assistance. However, the Article 13(2) explicitly addresses the Council of Europe Convention on Mutual Assistance in Criminal Matters, which means that the proposal to form a joint investigation team should be treated as a request for mutual assistance in terms of the said Convention of the Council of Europe, and general requirements of the Convention must be met, and initiative for the formation of team should be in written and contain needed data in accordance with COE Convention. In addition, the proposal for the formation of the team should propose the composition of the team and the place where the investigation is to be (mostly) conducted, which are important elements of the future agreement, bearing in mind that the investigation can be conducted under the rules of the State of Operation. It is recommended that the representatives of the competent authorities of the Member States that are considering the formation of the team, along with delegates from EUROJUST and EUROPOL, meet to discuss all matters of importance for the formation and operation of the team as early as possible before making a formal proposal and achieve agreement. Both the national rules on international assistance in criminal matters oblige to inform and communicate through the competent ministries in the preparation stage, and the early involvement of representatives of the competent authority is of the utmost importance not to jeopardize or slow down the process. It is important to note that during the negotiations on the joint investigation team, the basic objective of forming a team should be kept in mind and at the same time the differences in national regulations in respect of the rules of procedure, and in particular the rules on evidentiary actions and on procedural coercion, should be taken into account.

When in negotiations that follow, a need for coordinated and joint investigative activities in criminal matters in the territory of several Member States is established, the competent authorities of the relevant countries conclude an agreement setting out the rules by which it operates.

The agreement signed by the Member States which formed a joint investigation team includes at least the following elements (which can be changed with the consent of all parties involved):

1) members of team;
2) purpose and tasks of actions;
3) period of time within which actions of team are conducted.

Therefore, the agreement is an important document because it must set out the specific purpose of the team as well as the expected period during which it will operate and the composition of the team in order to facilitate formation of teams. On 8 May 2003, Recommendation on a model agreement for the establishment of joint investigation teams was adopted. A significant number of JITs have been set up since 2003, and there is now much greater readiness to set them up than there was a few years ago, and since practice in the establishment and operation of JITs developed and with due regard for the problems and difficulties encountered to date, it was found necessary to replace the Model agreement under Council Recommendation of 2003 with an updated one, so in 2010 EU Council adopted Model Agreement on The Establishment of a Joint Investigation Team[7]. Such a model agreement is comprehensive, but also flexible so as to ensure that the competent authorities may adapt it to the particular circumstances of each case, and therefore is a useful guide when setting up a JIT.

PLACE OF ACTION AND COMPOSITION OF JOINT INVESTIGATION TEAM

Joint investigation team conduct investigation actions on certain place within certain period of time. The team is formed in one of the Member State in whose territory joint investigations will be conducted and it shall be called the state of operation (Article 13(1) of the Convention and Article 1 of FD). Some team members may be authorized to temporarily perform certain tasks and outside their territorial jurisdiction, however, there is no requirement that a member of the team must physically attend the activities of the team, which is based in another country. For example, it is possible that Sweden and Finland agreed on the establishment of an investigating team from the "headquarters" in Helsinki, a member of the team investigates person in Stockholm and never comes to Finland. Similarly, it can be agreed that one member represents all the participating countries, while other team members work in their home countries. There are several possibilities, but organizational issues related to the composition of the team depend on a case-by-case basis, taking into account factors such as cost, availability of personnel, the expected duration of the investigation, the nature of the investigation, etc.

Joint investigation team is primarily comprised of representatives of the competent judicial and police authorities of countries that have concluded an agreement to form a team with the role of a team leader, a member, a delegated member and a participant in the work of the team. Such distinguishing of characteristics of the relevant authorities is not related to terminology only, but also implies different powers, duties and responsibilities in connection with the work of the team. Team members are representatives of the competent authorities of the Member State in whose territory the investigation is conducted, and one of them is determined as a team leader. (Article 1(3) of FD and Article 13(3) of the Convention), while the representatives of the competent authorities of the Member States setting up the team that are not from the state of operation, are referred to as delegated members: as being "seconded" to the team (Article 1(4) of FD and Articles 13(4) of the Convention).

Each team has one or more members who manage the work of the team. Since neither the Convention nor the Framework Decision specify who may be the team leader, it is left to national interpretations, so in accordance with the regulations of one state, a leader of the team can be a public prosecutor, a judge or senior police officer. Given that the joint investigation teams in some countries are defined as a form of mutual legal assistance, it would be acceptable that a team leader is a representative of judicial authorities in the countries in which the investigation is conducted by investigating judges or prosecutors, while in other cases, in accordance with national regulations of the operation, a team leader could be a police officer. As to the question of how many team leaders could be in one team, there are two concepts. According to one interpretation, there can be only one permanent team leader with undivided responsibility for the team and he/she is the representative of the competent authority of the country in whose territory the preponderant part of the investiga-

7 https://www.europol.europa.eu/sites/default/files/council_rec_on_jit_agreement___march_2010.pdf.

tion is conducted. According to another interpretation, the leader of the team is the representative of the competent authority of state in which at that point team conduct one of the investigation's actions and under whose leadership team members perform their tasks in that Member State, or the team may have more team leaders who share responsibility depending on place where the investigative action is taken at a time. Past experience indicates that the Member States in practice mainly determined more than one team leader.

Member States may, in accordance with the Article 1(12) of FD and the Article 13(2) of the Convention, if it is in accordance with the applicable national law, provide that in the activities of the team also participate those who are not representatives of the competent authorities of the Member States setting up the team. There is possibility to include in the work of the team persons who are representatives of the EU institutions (e.g. EUROPOL) or the competent authorities of the Member States that have not established that team or even countries that are not EU members. They have the status of participants in the work of the team. For example, in the team formed in the agreement between Belgium and the Netherlands, a member of the FBI from the United States may be a participant, but never a member or seconded member. Since they are not subject to the provisions on the powers, duties and responsibilities of members and seconded members of the team, the agreement on the basis of which the persons can be involved in the work team, should regulate these issues.

POWERS AND DUTIES OF JIT MEMBERS

The roles, powers and duties of team members (including their responsibility) are regulated in general in the Framework Decision (Article 1 (5), 1(6) and 1(7) and (Article 1 (5), 1(6) and 1(7) and are precisely defined in the agreement on forming a team. It is important to emphasize that the agreement cannot predict something that is not provided in the regulations of state of operations, while the state law of this country provides a framework for the conduct of team members. The Team Leader shall act within the limits of the powers granted to him/her by the pre-trial and criminal procedure law by the appropriate national regulations (Article 1(3) of FD, Article 13(3) of the Convention), and team members are required to take action in accordance with national regulations of the state of operation, acting on the orders of the team leader, while also taking into account the conditions that were set in the agreement on the formation of team set by authorities of their country (Article 1(3) of FD, Article 14(3) of the Convention). This is a very important issue that needs to be fully taken into consideration when drafting an agreement to provide more accurate positioning of team members, and it is necessary to ensure that the team members, especially those seconded from other Member States, are familiar with the structures of line management and powers and duties that they are entitled to under the law of state of operation.

The most important issues related to the activities of the joint teams are powers of delegated members. In accordance with a supranational legal framework, seconded team members are authorized to attend the conduct of investigative actions in the state of operation, but the team leader may decide differently, especially in the important cases, if it is in accordance with the law of a Member State in which team operates (Article 1.5 of FD, Article 13.5 of the Convention). The seconded members are generally not entitled to undertake investigations on the territory of the state of operations, but the team leader may, if it is in accordance with the regulations of the state of operation, entrust them the task of taking certain investigative measures, if approved by the competent authorities of the state of operation and the state who seconded them. In terms of the powers that may be trusted to delegated members, state may in its regulations provide more than it is provided in these terms, and the solutions are very different from country to country. In some countries, investigative actions that may be entrusted to delegated members are specified in the law (France, Malta and Finland), in others the provision are very general (Lithuania), while in Spain the legal provision on powers simply refers to an agreement on forming a team that regulate also these issues. In Germany, the delegation of powers to seconded members need the approval of the competent authority or the ministry of interior/justice of state of operation, and in some countries, it is entirely left to the team leader to decide which powers will be given to seconded members in connection with the present investigation (Latvia and Portugal). With regard to the operational powers of the seconded members, the Article 13(7) states that they are entitled to be present when investigative measures are taken in the Member State of operation, unless the team leader decides otherwise. Any decision to exclude a seconded member from being present may not be based on

the sole fact that the member is a foreigner. The team leader takes these decisions in accordance with the law of the Member State where the team operates. The team leader may decide that seconded members will be entrusted with certain investigative measures. Such an operation takes place in accordance with the law of the Member State where the team operates and must be approved by both the Member State of operation and the seconding Member State. Preferably, such approval is included in the agreement establishing the team, but it may also be granted at a later stage. It may also apply in general terms or it may be restricted to specific cases or circumstances.

In cases where it is necessary to carry out certain investigative actions in one of the states that have formed a joint investigation team and which are not state of operation, seconded team members can make a request to the competent authorities of the Member States whose representatives they are, to take such action. At the same time, such a request for undertaking investigations is considered by competent authority under the same terms which would be relevant in considering the request to undertake any investigation in connection with the investigation which is being conducted on the territory of the State (Article 1(7) of FD, Article 13(7)of the Convention). For example, a Dutch policeman who was delegated to a team member who works in Germany may send a request to the police in the Netherlands to execute the warrant to search the apartment that had been rented in accordance with Dutch law in the Netherlands for the purposes of joint investigations. In doing so, it is worth noting that this provision shall not have priority over the national legislation. For example, a Dutch officer may ask the British counterpart to seek the interception of telephone calls in the UK, but the possibility of using this information in court proceedings depends on the relevant domestic legislation of state where the proceedings will be conducted. Although the purpose of drafting this provision was to avoid the need for referral letters rogatory as a tool in the regular regime of international legal assistance (even when taking certain investigative procedures and the use of coercive means, such as the execution of search warrants) which was actually one major advantage of the existence of this instrument of international cooperation, only three countries (Spain, Finland, Sweden) predicted this possibility in national legislation.

As far as data exchange is concerned, a seconded member may, in accordance with national regulations of state that delegated him/her and within the limits of its authority, provide the team with information that would be useful for the investigation, which are available in the state of origin (Article 1(9) FD, 13(9) Convention). For example, a team member can make available information about the team or the subscriber or car registrations data from criminal records from his country, which bypasses the need for regular means of data exchange through the competent authorities of the countries that formed tit. However, regarding the possibility of a delegated member of the team to make available the data in the Member State where he/she is delegated, it is necessary only in three countries (Latvia, Portugal and Sweden) and the relevant provisions in other countries do not exist. In addition, the Framework Decision provides that information which came to knowledge of members and seconded members of the team during the investigation and which are otherwise not available to the competent authorities of the Member States whose representatives they are, can be used only for the purposes for which the JIT was formed, and with the prior consent of the Member State in which the information is made available for: a) the detection, investigation and prosecution of perpetrators of other crimes (where such consent may be withheld only in cases in which the use of such information would jeopardize a criminal investigation in that Member State or in which the State is otherwise entitled to refuse to provide mutual support), b) for preventing an immediate and serious threat to public safety; c) for other purposes to the extent that it has been agreed between the Member States setting up the team.

CONCLUSION

The formation of the joint investigation team, as an instrument of international cooperation of the competent authorities in the investigation of crime with cross-border dimension, has several advantages. Joint investigation team form a coordinated approach to the particular cause of action by the investigating authorities of different Member States from the very beginning of the investigation, which is a way to determine the optimal strategy for the investigation and prosecution in the matter. At the same time, there is a possibility of a competent organ of state involved in the formation of a team to be involved in the decision making process as to which investigations should be undertaken, how it contributes to building and promoting mutual trust between team

members from different countries and work environments. The competent authorities of the states that participate in the formation of the team are informed in real time about the status and results of the investigation, since the delegated members that are present when investigative measures are undertaken thus coordinate activities on site, with an informal exchange of professional knowledge. In addition, in this way, the direct exchange of information between team members without formal requests (request) is enabled. When it is necessary to take certain investigative activities in a non-state participants in the operation, delegated members, representatives of the State, may request the competent authorities to take the necessary action, which is in accordance with the Article 1(7) of the Framework Decision equated with the requirement set out in the investigation at the national level. Also, of great importance is the existence of opportunities of involvement of representative EUROPOL and EUROJUST, with direct financial assistance and logistic support. Participation in joint investigation teams should raise awareness about the usefulness of international investigations, because not only it can facilitate cooperation in this case, it may prepare the groundwork for the formation of teams in the future, building mutual trust and providing cross-border experience. Therefore, we can say that this concept can be very useful in specific criminal matters and represents an effective way of solving complex cases of crimes with cross-border aspects and hence connections with several Member States, thus reducing the risk to overlook important issues in the investigation at the national level, and that cooperation is ineffective and untimely if we use the traditional modes of cooperation.

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PROTECTION OF CHILDREN IN THE LEGAL ORDER OF REPUBLIC SERBIA

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Abstract: After the well-known events in the last century, the children and youth in Serbia are paid special attention by the legislature of the Republic of Serbia. Given that there are a number of papers relating to the legal protection of children, child victims of abuse and neglect, as well as the occurrence of juvenile violence, this paper discusses the protection of a minor in the family and in society in terms of the Constitution, the protection of family, then the position of children in the social welfare and health care, and children in the education system, all aimed at considering the position of children starting from the highest law of the state.

The introduction presents the main characteristics of legal protection, then certain legal regulations that protect the integrity of the minor children, and the whole in relation to the right to education and the right to health and social care. At the end, there is the instead of the conclusion section.

Key words: the Constitution, the rights of the child, the position of the child, the protection of the child.

INTRODUCTION

Having ratified the United Nations Convention on the Rights of the Child[1], the Republic of Serbia assumed the obligation to ensure the realization of children's rights, especially the right to protection from all forms of violence, abuse and neglect, the fair treatment and protection of privacy, and that the child who has been exposed violence, is provided support for the physical and psychological recovery and social reintegration.

According to Article 6 of the Convention, States Parties recognize that every child has the inherent right to life, with Article 8, the states undertake to respect the right of the child to preserve his or her identity, including nationality, name and family ties. Also, Member States are required to take legislative, administrative, social, educational and other measures to protect children.

The rights of children and pupils in the Republic of Serbia shall be exercised in accordance with the ratified international treaties, the Constitution of the Republic of Serbia[2], the Criminal Code[3], the Law on Juvenile Offenders and Criminal Protection of Minors[4], Criminal Procedure Code[5], the Law on Misdemeanors[6], Family Law[7], the Law on Health Care[8], Health Insurance Law[9], the Law on Social Protection[10], Inheritance Law[11], the Anti-Discrimination Act[12], the Law on the Bases of Educational System[13], the Law on Pre-School Education[14] and other laws governing the rights of children and pupils.

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1 Convention on the Rights of the Child of the United Nations, Official Gazette of SFRY - International Treaties', No. 15/90 and Official Gazette of FRY - International Treaties, No. 4/96 and 2/97;
2 The Constitution of the Republic of Serbia of November 08, 2006, Official Gazette No. 98/06;
3 The Criminal Code Official Gazette of RS, No. 85/05, 88/05-correction, 107/05-correction, 72/09 and 111/09;
4 Law on Juvenile Offenders and Criminal Protection of Juveniles, Official Gazette of RS, No. 85/05;
5 The Code of Criminal Procedure, Official Gazette of FRY, no. 70/01 and 68/02 and Official Gazette of RS, No. 58/04, 85/05- State Laws 115/05, 46/06, 49/07, 122/08, 20/09- State Laws and 72/09;
6 Law on Misdemeanors, Official Gazette of RS, No. 101/05 and 116/08;
7 Family Law, Official Gazette of RS, No. 18/05 and 72/11;
8 Health Protection Act, Official Gazette of RS, No. 107/05, 72/09 – State Laws, 88/10, 99/10, 57/11 and 119/2012;
9 Health Insurance Act, Official Gazette of RS, No. 107/05, 109/05 corr., 57/11, 110/12 decision of U.S. and 119/12;
10 The Law on Social Protection, Official Gazette No. 24/11;
11 Inheritance Law, Official Gazette of RS No. 46/95 and 101/03;
12 Anti-Discrimination Act, Official Gazette of RS No. 22/09;
13 Law on the Bases of Educational System
14 Law on Pre-School Education, Official Gazette of RS No. 18/10;

Serbia is a country of written constitutionalism, therefore the Constitution and Constitutions appear as the main source of the constitutional right in legal or formal sense. Only short periods of no written constitution, and that, as a rule, the periods in which major changes occur in the character of the whole government and development can be ignored.[15]

The provisions of the Constitution of the Republic of Serbia establish the most important principles, such as the prohibition of discrimination (Article 21), the inviolability of physical and mental integrity (Article 25), the right to health care (Article 68), the right to social security (Article 69) , the right to education (Article 71) and others.

The Constitution guarantees and defines a large number of human rights. In democratic countries, the position of individual relative to the executive power is defined by human rights. All forms of violence, abuse or neglect ion of children constitute the violation of the basic rights of the child.

The Constitution of the Republic of Serbia provides general protection against discrimination and the right to life is defined as an inalienable right. The principle of non-discrimination, which is proclaimed by the Constitution of the RS, "All are equal before the Constitution and the law"[16], consists of the constitutional guarantees of equality before the law and the Constitution, and the prohibition of discrimination on any grounds.

According to the Constitution of the Republic of Serbia, "Upon becoming of age all persons shall become capable of deciding independently about their rights and obligations. A person becomes of age after turning 18."[17] From the above definition, it can be concluded that the RS Constitution defines all persons less than 18 years of age are children - minors. The Constitution of the Republic of Serbia, in the title "The Rights of the Child", Article 64, guarantees that "Children enjoy human rights suitable to their age and maturity[18]. In the further elaboration, in the same article, the Constitution acknowledges and gives guidance to the further elaboration of the legislative activity of a number of individual rights such as the right to a name, the right to enroll in the birth certificate records, the right to know origin, the right to preserve identity. So, the right and duty of parents to consent to their child a name is according to the constitution. Parents are free to choose the name of their child. The limitations of parents regarding the selection of the name are provided in Family Law "Parents have the right to freely choose their child's name, but cannot determine a derogatory name a name which offends morality, or a name that is contrary to the beliefs and customs of the community"[19]. Also, parents have the obligation to report the child's birth and enter them in the register of births. Constitutional right to know origin is given to every child regardless of age. Every child has the right to a name, registration of birth, the right to learn about their background and the right to preserve their identity[20]. In Family Law, there is the elaboration of knowledge of origin in the way that a child who has reached the age of 15, and is able to reason, may inspect the birth registration records and the other documents relating to his/her origin.[21] The child's right to knowledge of biological origin is part of the right to preserve their identity. The right to know the biological origin was first standardized in the Convention on the Rights of the Child. In the further elaboration, the same article of the Constitution proclaims the principle of equality of children born out of wedlock and children born in wedlock. Equality of children, regardless of family status, is one of the most important prerequisites for human family relations. Norms of Family Law supplement the constitutional ones in terms of complete equality of legitimate, illegitimate and adopted children regarding the right of the child to live with their parents, the right to be supported, the right to acquire the common property, etc. In the section Rights and Duties of Parents, the Constitution of the Republic of Serbia finds that "Parents have the right and duty to support, bring up and educate their children, and that they are equal in that"[22], and in the section Special Protection of the Family, a Mother, a Single Parent and the Child it defines "Family, mother and a single parent and child in the Republic of Serbia shall enjoy special protection under the law"[23]. Special protection, in the same section of

15 Dragan Bataveljić, Constitutional Law of the Republic of Serbia Vol. II, University book, Kragujevac, 2007, p.36;
16 The Constitution of the Republic of Serbia in 2006, Official Gazette of RS, No. 98/06, Article 21;
17 The Constitution of the Republic of Serbia in 2006, Official Gazette of RS, No. 98/06, Article 37;
18 The Constitution of the Republic of Serbia in 2006, Official Gazette of RS, No. 98/06, Article 64;
19 Family Law, Official Gazette of RS, No. 18/05 and 72/11, Article 344;
20 The Constitution of the Republic of Serbia, November 08, 2006, Official Gazette of RS, No. 98/06, Article 64;
21 See: Family Law, Official Gazette of RS", No. 18/05 and 72/11, Article 59;
22 The Constitution of the Republic of Serbia, November 08, 2006, Official Gazette of RS, No. 98/06, Section 65;
23 The Constitution of the Republic of Serbia, November 08, 2006, Official Gazette of RS, No. 98/06, Article 66;

it is intended and provided for children without parental care and children who are challenged in their mental and/or physical development. Therefore, the principle of special protection means that families and children in the Republic of Serbia always enjoy special protection, the type of family notwithstanding. The principle of special protection is of the general interests of the state, since each society is concerned to protect the social group that provides child-bearing and raising of children and thereby reproducing the society. In the elaboration of principles of special protection Family Law defines the following:

1) Everyone is obliged to act in the best interest of the child in all actions concerning the child;
2) The State has the obligation to take all necessary measures to protect children from neglect, physical and sexual, and emotional harassment, and from any form of exploitation;
3) The state has the obligation to respect, protect and promote the rights of the child;
4) A child born out of wedlock has the same rights as a child born in wedlock;
5) An adopted child has the same rights to the adoptive parents as a child to the parents;
6) The State is obliged to provide care to children without parental care in a family environment whenever possible.[24]

Juveniles without parental care and children with special needs, also fall under the special protection of Family Law. The same article of the Constitution stipulates the prohibition of work for children who are younger than 15, while for children under 18 years of age prohibits the work on activities harmful to their health and/or morals. In the section of the Constitution that relates to health care, it is stated that "children, pregnant women, mothers on maternity leave, single parents with children under seven years of age and the old, shall be provided health care from public funds, unless it is provided otherwise in accordance with the law".[25]

THE REGULATIONS THAT PROTECT THE INTEGRITY OF JUVENILES

The State exercises its legislative function by legal regulations.

In addition to the RS Constitution, the Family Code of the Republic of Serbia, which regulates the legal protection of the child in the Republic of Serbia, the ratified international conventions and special legislation that regulates various segments of the rights of the child also make legal regulations.

Complying with the provisions of the Constitution of the RS, the Family Code of the Republic of Serbia is the fundamental law of the Republic of Serbia on the protection of the child. The issue laws that regulate and define the rights relating to the rights of the child, such as Law on Pre-School Education, Law on Basic Education and others stem from the basic guidelines of the Family Code. Family Law regulates most of the matter of the family and family relationships. In addition to constitutional rights, the provisions of the Family Code, recognize other rights of the child such as the right of the child to express his or her opinion, the right of the child to address the court or administrative authority and request the appointment of a temporary representative, the right to financial support, the right to adoption, and others and arrange special protocols for their protection.

Prescribing specific protocols before the state authorities in the field governed by law makes a special part of the Family Code. The court proceedings differ from the proceedings before administrative bodies. Proceedings pending before the courts deal with the personal name disputes, protection of children's rights, disputes over alimony, etc., while proceedings in connection with marriage, recognition of paternity, then the process of adoption and the process of guardianship are conducted before the state administrative bodies.

A significant social form of child care is reflected in the direct financial intervention of the state, passed through the Law on Financial Support to Families with Children.[26] The Act, together with the relevant by-laws, provides the exercise of financial assistance reflecting in wage compensation during maternity leave, child care and special child care, additional financial child benefits,

24 Family Law, Official Gazette of RS, No. 18/05 and 72/11, 6;
25 The Constitution of the Republic of Serbia, November 08, 2006, Official Gazette of RS, No. 98/06, Article 68;
26 The Law on Financial Support to Families with Children, Official Gazette of RS, No. 16/2002, 115/2005 and 107/2009;

compensation for expenses for a stay in a pre-school facility for children without parental care, compensation for expenses for a stay in a facility for children with disabilities, refunding expenses for children in pre-school for children from financially disadvantaged families.

The principle of non-discrimination, proclaimed by the Constitution is elaborated by the Act on the Prohibition of Discrimination. The Act provides that every child has the same rights and protection in the society. It is forbidden to discriminate against a child in the medical condition, marital or extra-marital birth, and public advocate giving priority to children of one gender in relation to children of the other, as well as distinguishing according to any characteristic of any one of the child's parents or guardians and family members.

The Health Care Act and the Health Insurance Act, provide free health care for children and children of certain vulnerable groups.

Social Welfare Law, which was adopted in 2011, through the contents and conditions of the acquisition of protection, also stems from the constitutional principles and provides special status of the child.

The right to education is guaranteed by the Constitution as a universal right. "Everyone has the right to education. Primary education is free and compulsory, and secondary education is free."[27] For the higher education level, the Constitution guarantees the right to equal access to education. The Law on Pre-School Education and the Law on the Bases of System of Education, adopted in 2010, establish the rights and obligations of the child in pre-school and school education.

THE RIGHT TO SOCIAL SECURITY

UN Convention on the Rights of the Child, adopted by the UN General Assembly Resolution 44/25, November 20, 1989, in the part related to social security rights, stipulates that every child has the right to benefit from social security, including social insurance. It also provides that each State should take all measures to achieve the full realization of the right to social security in accordance with national law, and that the measures should be implemented taking into account the circumstances of the child and the circumstances in which the child is located.[28]

Socio-economic rights are numerous and include various rights. In accordance with the principle of social justice and respect for the human person on which the social security system is based, the RS Constitution guarantees the right to social security: "Citizens and families in need of assistance to overcome their social and life's difficulties and create conditions for their subsistence, have the right to social security, the provision of which is based on social justice, humanity and respect for human dignity".[29]

The Constitution does not define the content of social security, but provides the space for legislation. In addition to the right to social security, in the same article, the RS Constitution especially establishes the rights to social security and insurance.

Under the Law on Social Security, a number of rights that include the provision of social services and financial support are established.

Article 2 of the Law on Social Security, in an indirect way, recognizes the child as a beneficiary to the social protection rights and/or services. "Social security, according to this law is an organized social activity in the public interest with the aim of giving assistance to individuals and families and empowering them for independent and productive lives in society, as well as preventing the occurrence of negative effects of social exclusion, and their elimination."[30] So social security is provided when the child and/or family, faces obstacles in meeting the needs, which is why it cannot maintain the quality of life, or when there are not enough resources to meet their basic needs and may not achieve them with their work, income from property or from other sources. Thus, the user, in terms of this Act, is the child whenever his or her health, security and development is threatened due to family and other living conditions, or if it is certain that without the social security system he or she cannot reach an optimum level of development.

27 The Constitution of the Republic of Serbia, November 08, 2006, Official Gazette of RS, No. 98/06, Article 71;
28 Look: The UN Convention on the Rights of the Child, Article 26;
29 The Constitution of the Republic of Serbia, November 08, 2006, Official Gazette of RS, No. 98/06, Article 69;
30 See: Law on Social Protection, Official Gazette of RS, No. 24/11, Article 2;

Starting from the position of the child, the rights arising from the section of the law, which is called "User Rights - the Right to Information", the right is determined for all kinds of information to be provided in a manner appropriate to the needs and abilities of the user, and the user who has turned 15 has the right to inspect the case file. Also, the right is found that in accordance with the age and maturity, the child and/or the child as the beneficiary participates and expresses their views freely in all proceedings in which decisions are made about their rights.[31]

In the section "Social Security Services and Users" the Law singles out the child as the user when, due to a variety of life situations, their health or safety is threatened, or they are prevented from achieving or maintaining the quality of life, or when there are not enough resources to meet their basic needs, the resources cannot be achieved with their work, income from property or from other sources.[32]

If necessary, the law provides accommodation in a residential care institution, in which the child is provided housing and basic needs are met, health care, and attendance at an educational institution. Providing health services in institutions for the accommodation is defined in accordance with the law governing health care.[33] "Accommodation in a residential care institution is provided to the user, who cannot achieve or it is not in their best interest, to remain in the family, community services or foster care. A child younger than three years is not provided residential care accommodation. Reception centers render services to the users so as to provide a preparation for their return to their biological family or going to another family, and their preparation for independent living, according to family resources, needs and best interest."[34]

THE RIGHT TO HEALTH CARE

The right to life is a fundamental human right that is proclaimed and protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms.[35] The Constitution of the Republic of Serbia stipulates that "Human life is inviolable"[36], while the health care for the child is guaranteed by Article 68. Only a healthy person can contribute to the wealth of society. However, disease, and damage to health are inevitable side effects of life. The health of a society depends on the system and the organization of health care. States through legislative activity show concern about their population's health care. Health promotion, defined as the process of enabling people to take control over their own health in order to enhance and improve it, using the values, ideas and energy of the broadest community should support efforts to move the focus of the health system and the entire community from illness to health.

Health care is an organized and comprehensive effort of the society, with the aim to achieve the highest possible level of health protection of citizens and their families. It includes implementing measures to preserve and enhance the citizens' health, prevention, suppression and early detection of disease. Health Care Act regulates the health care system in the Republic of Serbia.

"A citizen of the Republic of Serbia (hereinafter referred to as the Republic), and any other person who has permanent or temporary residence in the Republic has the right to health care, in accordance with the law, and the duty to protect and improve their health and that of other citizens, and conditions of the environment in which they live and work."[37] So, the right to health care of all citizens of the Republic of Serbia is defined, while the health care for children under 15 years of age, school children and students by the end of regular education is separated in accordance with the law in the part of Article 11 of this law. Article 25 stipulates that every child up to the age of 18 has the right to the highest attainable standard of health and health care.

31 See: Law on Social Protection, Official Gazette of RS, No. 24/11, Article 41; See: Law on Social Protection, Official Gazette of RS, No. 24/11, Article 34, 35;
32 See: Law on Social Protection, Official Gazette of RS, No. 24/11, Article 34, 35;
33 See: Law on Social Protection, Official Gazette of RS, No. 24/11, Article 50, 51;
34 The Law on Social Protection, Official Gazette of RS, No. 24/11, Article 52;
35 See: the European Convention for the Protection of Human Rights and Fundamental Freedoms, Council of Europe Member States, Rome, November 04, 1950, Article 2;
36 The Constitution of the Republic of Serbia, November 08, 2006, Official Gazette of RS, No. 98/06, Article 24;
37 Health Care Law, Official Gazette 107/05, 72/09 – State Laws, 88/10, 99/10, 57/11 and 119/2012, Article 3;

The position of the child, in addition to other health care beneficiaries, is further specified in Article 12 of this law, which stipulates that health care for children is funded from the mandatory health insurance in accordance with the law regulating the field of compulsory health insurance, funds for health care for people who are not covered by compulsory health insurance are provided in the budget of the Republic of Serbia, unless otherwise regulated. The importance of this provision, based on the position of the child, is large, since it means that access to children's health care is not conditioned by the existence of compulsory health insurance. Position of the child is determined by the Article 35 of the Law, which states that every child who has reached 15 years of age and who is capable of reasoning may give consent to a proposed medical measure.

In most cases, until the age of 15 a child acquires the capacity of insured person through a family member. If a child, for any reason, does not acquire the capacity of an insured person, the Law on Health Insurance in Article 22, paragraph 1, point 1 states that "Children under the age of 18, school children and students by the end of regular education, but no later than age 26 in accordance with the law"[38], i.e. determines that when a child does not achieve insurance through a family member, becomes insured on the basis of their age. Also, a child older than 15 may be insured from any of the insurance acquisition modes that are stipulated in the Law on Health Insurance, i.e. child working, child who is registered with the national employment office, who is self-employed, etc.[39]

To comprehend the position of the child, it is important to determine that "The child of ensured person exercises the rights to compulsory health insurance until the age of 18, i.e. until the end of the prescribed secondary or higher education not later than 26 years of age."[40] So, the right of the child to exercise rights to health insurance until they turn 18 is defined without setting the condition that the child is in full-time education. The requirement that the child was in full-time education is placed for students from the age of 18 until the age of 26.

Program of preventive health care of children in educational institutions, involves the provision of adequate daylight living conditions for children, nursing, nutrition and health care, all in order to ensure proper physical and mental development. Health care, nutrition and care of children in pre-schools are regulated by the Act and regulations in the field of Health and Education: Health Care Law, the Law on Protection of Population from Communicable Diseases, Law on Sanitary Inspection, the Law on Food and Consumer Goods Safety, as well as a number of Books of Regulations governing more closely specific areas in this field.

Special care in kindergartens and schools is aimed at protecting the health and safety of children and students. Measures and activities of special protection provide additional protection. Special protection system operates in accordance with the rules and principles laid down by law and other regulations. Educational institutions are responsible not only for the consistent implementation of legislative measures on health care, but also for additional measures and actions for its raise to a higher level.

Management of educational institutions will be fully responsible for providing friendly and safe working conditions, protection of physical and mental health of children and students, as well as the facilities and employees. Such responsibility, among other things, results from more legal regulations. Common injuries and accidents have contributed to the tightening of laws and regulations on occupational safety, health protection and safety and so on. (Thus, for example, according to Article 80 of the Serbian Labor Law, all persons are entitled to health and safety at work in accordance with the law, and the management is obliged to organize the work of ensuring the protection of life and health of employees).

In accordance with the Law on Basic Education and Upbringing, "The institution is required to prescribe the measures, manner and procedure for the protection and safety of children and students during their stay at the facility and all activities organized by the institution, in cooperation with the competent authorities of the local self-government",[41]

38 Look: Health Insurance Act, Official Gazette of RS, No. 107/05, 109/05 corr., 57/11, 110/12 U.S. decision and 119/12, Article 22;

39 Look: Health Insurance Act, Official Gazette of RS, No. 107/05, 109/05 corr., 57/11, 110/12 U.S. decision and 119/12, Article 17;

40 Health Insurance Act, Official Gazette of RS, No. 107/05, 109/05 corr., 57/11, 110/12 U.S. decision and 119/12, Article 17;

41 Law on Primary Education, Official Gazette of RS, No. 72/09 and 52/11, Article 42;

while in accordance with Article 57 of this law, it is obliged to make a Book of Rules for the protection and security, adopted by the administrative body of a preschool or a school board. Health protection and safety is achieved through hygiene in the school building and the school yard, food hygiene, regular medical checkups and sanitation, education of students, educators and teachers on health preservation, identification of infectious diseases and the like, and through other activities in order to ensure the health of children and students.

Preschool, school-age children and adolescents constitute a special group, because of their biological and social characteristics, that requires specific measures for the preservation and improvement of health. In addition to legislation, teachers, tutors, and professors play important roles in the implementation of these measures.

THE RIGHT TO EDUCATION

Education is certainly one of the most interesting issues when it comes to the realization of children's rights in our country. The right to education is acknowledged to every citizen of Serbia by the Constitution of the RS, and is one of the more cultural rights of citizens stipulated by the constitution. The right to education is acknowledged and it allows attending educational institutions in the Republic of Serbia, from pre-school up to higher education institutions. Primary education is compulsory and free, while secondary education is free. The Constitution of the Republic of Serbia thus provides that all citizens, regardless of religious, ethnic or other affiliation, have access to pre-primary, primary, secondary and higher education under the same conditions.

The right to education is one of the most important and fundamental rights of every child. Interest of every country is to invest in the education of its citizens. In the second part of the Constitution, entitled "Human rights and freedoms", it is specified that "everyone has the right to education",[42] and "parents and legal guardians have the right to provide their children with religious and moral education in accordance with their beliefs."[43]

The provisions of the Basic Law define the system of education. "The system of education includes preschool education, elementary and secondary education and is an integral part of the overall lifelong learning for all citizens in the Republic".[44] The part of the Law, which is called The Right to Education, finds that "Serbian citizens are equal in their right to education, regardless of sex, race, nationality, religion or language, social and cultural background, financial state, age, physical and mental constitution, whether they are mentally challenged or physically impaired, disability, political affiliation or other property", and "mentally challenged or physically impaired people and people with disabilities have a right to education that respects their educational needs in the regular system of education, in the regular system of education with individual or group additional support, or in a special preschool group or school, in accordance with this and the special law." So the right of every child to education is determined,[45] without restriction.

Law on the Bases of System of Education sets the role of socialization as the one of special importance to preschools and schools, with special emphasis on the prohibition of discrimination, violence, abuse, neglect, all participants in the system of education. Also the anti-discrimination measures are defined, as well as the prediction of the Ordinance on the measures, the manner and procedure for the protection and safety of children and students. The law, in addition to compliance with the priorities of the Republic of Serbia, governs the goals of education, defines the role of the school in the process of socialization, and gives the right - the equal right to education and access to education without discrimination and separation of children, students and adults from marginalized and vulnerable social groups, as well as those with disabilities.

The core activity of primary school is the educational activity within the framework of education carried out independently by the school or in cooperation with other organizations and institutions. "The rights of children and pupils are implemented in accordance with recognized international treaties by this and special laws, and institutions that all employees are required to ensure their

42 The Constitution of the Republic of Serbia 2006, Official Gazette of RS, No. 98/2006, Article 71;
43 The Constitution of the Republic of Serbia 2006, Official Gazette of RS, No. 98/2006, Article 43;
44 Law on Primary Education, Official Gazette of RS, No. 72/09 and 52/11, Article 2;
45 Law on Primary Education, Official Gazette of RS, No. 72/09 and 52/11, 6;

implementation, and in particular the right to: 1) high quality educational work that provides the implementation of the principles and objectives in Article 3 and 4 of this law; 2) respect for person; 3) support for the all round development of the person, expressed support for the special talents and their affirmation; 4) protection of discrimination, abuse and neglect; 5) timely and complete information on issues of importance to their education, etc. "[46] The school carries out educational activities on the basis of the prescribed curriculum. Elementary education of children takes place for eight years and is continuing with two-cycle education. The first cycle covers the period from first to fourth grade, while the second cycle goes from fifth to eighth grade.

According to the Law on Primary Education, there are three types of secondary schools and students attend them, depending on their preference, success in elementary school and the results of the final exam.

- Grammar Schools - last four years and provide a basic and broad education. Students can choose between the social science curriculum (social sciences and foreign languages), the natural science curriculum (math and science) and general curriculum. For gifted high school students there are special secondary schools like philology or mathematics schools.
- Secondary Schools - last four years and train students in specific areas, but also provide a broad education.
- Craft Schools - last three years, students are trained in certain areas, but are not provided the opportunity to continue their education.

The education of children begins at an early age, in preschool. Preschools therefore have their own separate identity, as they realize the educational as well as health and social functioning, and in the unity of all aspects of the above mentioned activities in a way that is more different than similar to the functioning of basic educational, health or social institutions. Therefore, multifunctional activity of preschool institutions must be and is legally defined. In this way, society, families and children are getting the desired results, and pre-schools can expand their work domain in fields related to humanization of society, as well as its life and development.

Law on Pre-School Education, for the first time passed in Serbia, and adopted at the session of the National Assembly of the Republic of Serbia on March 23, 2010, defines that "pre-school education is provided in accordance with the Constitution, the law governing the foundations of education and training, ratified international conventions and this law, starting from the right of the child, the development, educational, cultural, health and social needs of children and families with preschool children".[47] In carrying out activities for preschool education, preschool must enact legislation regulating the increased safety of children, prohibiting all forms of violence, abuse, neglect and all activities that threaten, discriminate against or single out children or groups of children for any reason.

With adopting the Law on the Bases of System of Education, the preparatory preschool program becomes a part of the nine-year compulsory education. Also, in addition to being compulsory the pre-school program is defined as free, which is a very important measure in ensuring an equal start for all children in primary school. The adoption of the Law on Preschool Education, this matter is compliant with the Constitution, the European Union and the new Law on the Bases of System of Education.

The law creates a legal framework for an effective system of education which corresponds to the society, parents, and especially children, to raise the quality of education of the entire population. "Within the frame of the preschool program the full program of education in all-day and half-day duration is realized, and other specific and specialized programs are realized in accordance with the needs and interests of children, parents or guardians, according to the capacities of pre-schools and local governments."[48] In the part of the law, called "Specific and specialized programs", it is found that "The specific and specialized programs can be realized within the preschool program including: 1) programs of specific areas of educational work; 2) fostering language and culture programs of national minorities and others."[49] The law also recognizes the importance

46 Look: the Law on Basic Education, Official Gazette of RS, No. 72/09 and 52/11, Article 103;
47 Law on Preschool Education, Official Gazette No. 18/10, Article 2;
48 Law on Preschool Education, Official Gazette No. 18/10, Article 18;
49 Law on Preschool Education, Official Gazette No. 18/10, Article 19;

and stipulates the process of organization of exercising the preschool program for children who are currently being treated at medical facilities.

The principles of equality and non-discrimination are introduced, and the approach to children is individualized. Duration of preparatory preschool program stipulates a mandatory period of 9 months.

The role of the legal system in the process of securing the rights of children and the realization of preventive care in the care of children, is realized by introducing the regulations on the prohibition of certain forms of behavior, and predictive procedures under the care of family and the filing of cases and trials for crimes the victims of which are minors.

INSTEAD OF A CONCLUSION

Children's rights are a set of legal, psychological, technical, medical, pedagogical and other activities carried out to ensure the safe position of children in a society, unhindered living and work of children and/or students in institutions, as well as to detect and eliminate threats to life and health of young children, students, and to identify measures, procedures and policies to eliminate or reduce these hazards. Creating a society that aspires to take the title of a responsible society, i.e. to be qualified as such, requires it to use its full potential and quality in the construction and upgrading of modern and high-quality system. At the same time, the given system should be flexible and open to modern educational concepts and the needs of society and the individual. Assumptions for the promotion of children's rights should be associated with the development and reform of the institutions and the entire society. The theory of law recently pays a deserved attention to children's rights. It is essential that the future work, taking into account the existing theory, is directed to further development of children's rights, because resolving legal protection leads to an increase in the number of happy families, and this is a prerequisite for the normal development of the child, to which every contemporary civil society aspires.

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MURDER OF A POLICE OFFICER AS AN AGGRAVATED MURDER CRIMINAL OFFENSE

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Abstract: More frequent assaults on police officers often resulted in death, initiated issues on modalities for improvement of their personal security, as well as of adequacy of legal protection being legislated by actual legislature. By incriminating certain offenses, i.e. their particular forms, legal protection of police officers, their lives, personal and bodily integrity, as well as legal, regular and efficient execution of legal duties have been provided.

By designating murder of either an official or military person while executing legal duty a special form of an aggravated murder criminal offense, legal protection of life and security of police officers has been provided. For this form of aggravated murder to exist, in addition to elements of an entity of a murder offense, cumulative existence of qualifying circumstances is also necessary – namely, an act should have been executed against either an official or military person and while exercising their legal duty. Having in mind actuality of implementation of the present legal provision and issues of their possible modification, we shall particularly imply mutual relationship between positive legal norms for providing legal protection of police officers, with reference to the modern practice in the courts in our country.

Keywords: aggravated murder, police officer, legal duty.

INTRODUCTION

Almost every day, police officers are subjected to various forms of inflicting injuries and endangering life and bodily integrity. A specific protection role which they play while performing everyday activities, implies that it is necessary to consider adequacy of positive legal regulations used for providing protection of their personal and bodily integrity, as well as of protection of legal, regular, timely and efficient execution of their legal duties. The issue of adequacy of legal protection of police officers and punitive reactions of the criminal justice is most often actualized just after the most severe offenses resulted in death. In the Republic of Serbia, seven police officers lost their lives while performing their legal duties in the time period between 2009 and 2012.[1]

Legal protection of police officers is, generally, provided by positive legal regulations which stipulate rights and obligations of police officers in executing their legal duties, a method, procedure and conditions for exercising police duties, and also the offenses as the most severe forms of inflicting injuries and endangering life, bodily and personal integrity of police officers.

In positive law of the Republic of Serbia, provisions in the Criminal Code and the Law on Public Peace and Order stipulate several offenses for protecting police officers while executing their duties in providing security and maintaining public peace and order. The Criminal Code[2] stipulates the following offenses: murder of either an official or military person while executing their legal duty (Article 114, Paragraph 1, Section 6), murder of a judge, a public prosecutor, a deputy public prosecutor or a police officer in relation to exercising their legal duty (Article 114, Paragraph 1, Section 7), obstructing an authority in executing its legal duty (Article 322), assault on an official while executing his legal duty (Article 323) and being a part of a group that obstructs an official in executing its legal duty (Article 324). By incriminating aforementioned offenses, legal protection of authorities has been generally provided, as well as special protection of authorized authorities with the Ministry of Internal Affairs.

The offense of obstructing an authorized official in executing either security activities or maintaining public peace and order is imposed by the Law on Public Peace and Order[3] (Article 23).

1 More in: Najznačajniji rezultati rada Ministarstva unutrašnjih poslova www.mup.gov.rs.

2 The Criminal Code of the Republic of Serbia ("The Official Gazette of the Republic of Serbia", No. 85/2005, 88/2005-amend., 107/2005-amend., 72/2009, 111/2009 and 121/2012).

3 The Law on Public Peace and Order ("The Official Gazette of the Republic of Serbia", No. 51/92, 53/93, 67/93, 48/94, 101/2005 – st.law and 85/2005 – st.law).

Danger to life and bodily integrity of police officers comes from both their profession and a symbol of the state authorities which they directly represent. The most endangered category is police officers in uniforms who exercise their everyday duties in the street, most often urgently, so there is no either delay or waiting. Endangering or inflicting injury on their bodily and personal integrity often comes while they execute their duties of maintaining public peace and order, patrolling, and controlling traffic, namely when they are in a direct contact with citizens. On the other hand, police officers, who do not wear uniforms, are also exposed to numerous either indirect or direct dangers, particularly when they are in conspiracy operations, engaged as undercover investigators, while apprehending a perpetrator in his act, and also during other secret operational and tactical or investigational measures and duties. Likewise, at the same time, police officers represent the state authorities so they can be targets of terrorist attacks or other political or hostile actions organized by individuals or groups.

The most severe offense which directly endangers life and inflicts injury on bodily integrity of police officers is aggravated murder criminal offense, i.e. murder of either an official or military person while executing legal duty, Article 114, Paragraph 1, Section6 in the Criminal Code of the Republic of Serbia (CCRS). In its essence, this act has characteristics of murder, i.e. unlawful deprivation of other person's life, but it is also accompanied by some qualification circumstances that make it more severe and socially more dangerous than ordinary murder.

CONCEPT AND ELEMENTS OF MURDER

Murder (Article 113 of CCRS) is unlawful premeditated deprivation of other person's life. It may be done in different ways, with different means and under various conditions and circumstances, while there are no elements making this act more or less severe.

An object of legal protection and an object of this offense is a living human being, i.e. alive person from the moment of his birth until his death.

Murder act has not been legally specified, but it is determined by "consequential norm", i.e. it represents each activity causing death of other person. From an act defined in this way, it follows that murder may be committed by committing acts, i.e. by taking active activities, but also by non-acting, i.e. by passing a due act. Murder may be committed by using various physical, chemical, radiological, bacteriological and other means, either directly (when an offender deprives victim's life himself) or indirectly (when some other person or a victim itself does it)[4].

A consequence of the offense is a death of a person against whom the act of depriving life was executed. For this is to be an offense, it is not important if a death comes immediately after committing the act or after longer or shorter time period, but it is necessary that there is a cause and effect relationship between the act and its consequence. Murder offense shall exist even in the case when there was bodily injury first and then subsequently a death as a result of that injury[5].

Establishing cause and effect relationship between a human activity, i.e. commitment and a death as a consequence of that commitment may, particularly, represent a problem when a death comes as a result of several factors. While determining if a certain action caused a death, an equivalence theory is predominant in murder offense, namely *condicio sine qua non*, where each condition that either indirectly or directly preceded a consequence, and without which it would not occur, is a cause of that consequence[6]. If there is some subsequent condition of such significance and intensity that diverts the flow and creates new cause and effect chain, and which resulted in death, namely if the first causal relationship has been terminated, an offender will be responsible for the consequence that has existed by that moment. However, if the death occurred within interaction between the first action of an offender and other actions or circumstances "there is a causal relationship between the offender's act and the death, regardless some other circumstance interpolated into this relationship"[7].

"In the defender's appeal, it is stated that the expert pathologist established that the injured party previously suffered from diseases, and that those diseases contributed his death; the Court of First Instance erroneously applied substantive law because offender's act gains characteristics of serious

4 More in: Lj. Lazarević, *Komentar Krivičnog zakonika Republike Srbije,* Belgrade, 2006.
5 D. Jovašević, T. Hašimbegović, *Krivično pravna zaštita pripadnika policije*, Belgrade, 2002, p. 48.
6 Z. Stojanović, O. Perić, *Krivično pravo posebni deo*, Belgrade, 2005, p. 87.
7 Lj. Lazarević, *Komentar Krivičnog zakonika Republike Srbije,* op. quot., p. 341.

bodily injury qualified with death from Article 121, Paragraph 3 of the Criminal code, and not aggravated murder from Article 114, Paragraph 1, Section 5 of the Criminal Code. The Court of Appeals appraised that previous diseases of the injured party were not circumstances that could terminate causal relationship between acts of the minor and inflicted serous life threatening bodily injuries, with resulted consequence, i.e. death, because it regards an older person, who is possible to have such diseases, and a death came suddenly in a short time period of about 2 hours after injuries had been inflicted; therefore, by highlighting these appeal allegations, conclusions on the cause of death made in the Court of First Instance are not questioned. Established circumstances of committing the offense … imply that he was aware of doing these acts to deprive life of the injured party and that he wanted such result of these acts, and that due medical help could only possibly save life of the injured party, but the minor's guilt for the subsequent result would not be omitted because it did not result in termination of causal relationship between inflicted injuries and a death of the injured party."[8]

For this offense to exist, it is necessary that the offense was committed in an unlawful manner, i.e. that unlawfulness was not excluded on either some general basis (murder in either self-defence or as a last resort) or a special basis (when either an official or military person kills somebody by using a gun in accordance with the regulations of the service)[9].

Regarding guilt, intent is necessary, either direct or possible, namely that the offender is aware that he deprives other person's life and that he wants it or consents to it. Awareness of unlawfulness of the offense is not necessary because depriving other person's life is always unlawful, except when that unlawfulness is excluded by some either general or a special basis. If, however, the offender is not aware of some actual characteristic of the entity of this offense, there may be negligent homicide (Article118 of CCRS) if the offender should and could have been aware of that circumstance.[10]

Murder is done when a death of other person occurs. If the offender commits the offense, but a death is not a result, there will be an attempt of this act which is liable to punishment by general rules. If the entity of some other offense was realized in the attempt, depending on its nature, there will be an ideally concurrence of the act or just an attempt of murder. This offense may be committed by several individuals. If several people agree to kill a certain person and start a realization of such intent with different intensities, and a death is a result of action of one of the participants, they will all be considered as co-offenders.

By depriving other person's life, some of the legal characteristics of the aggravated murder entity may be realized (Article 114 of CCRS), i.e. it may be committed in manner, motivated, against a passive subject or under other specific qualification circumstances that make it more serious than ordinary murder. Among the forms of aggravated murder, the murder of either official of military person while performing his legal duty is incriminated, which characteristics shall be implied in further.

MURDER OF POLICE OFFICERS WHILE EXECUTING THEIR LEGAL DUTIES

Aggravated murder, i.e. murder of either an official or military person while executing their legal duties (Article 114, Paragraph 1, Section 6 of CCRS) is the most serious offense which directly endangers life and bodily integrity of police officers. By incriminating this offense, legal protection of the legal duty itself, i.e. its legal, due and efficient execution, as well as a protection of police officers, namely, official and military people in general, have been provided. For committing aggravated murder, at least ten years or thirty to forty years' imprisonment is prescribed.

Murder of either official or military person consists of intended deprivation of life of a person that has this qualification, just regarding executing his legal duty[11]. It is about the murder committed under legally established qualification circumstances, while the protection object, commitment act, consequence, cause and effect relationship and the form of guilt the same as in ordinary murder.

8 The Judgment of the Appellate Court in Nis KžmA.No. 19/10 and the judgment of the Appellate Court in Vranje Km.No.53/10.

9 Lj. Lazarević, *Komentar Krivičnog zakonika Republike Srbije,* op. quot., p. 344.

10 D. Jovašević, T. Hašimbegović, *Krivično pravna zaštita pripadnika policije*, op. quot., p. 49.

11 V. Đurđić, D. Jovašević, *Krivično pravo posebni deo*, Belgrade, 2006, p. 28.

This form of aggravated murder exists if deprivation of life was committed under the following circumstances[12]:

– a passive subject qualification (official or military person);
– committing offense against these individuals while they are executing their duties and tasks;
– committing offense against these individuals just regarding duties and tasks they exercise;
– motivation or motives that drove the offender while committing the offense.

A Passive Subject Qualification

A passive subject in this offense may be either official of military person. According to the provisions of Article112 of the Criminal Code, an official person is: 1) a person that executes legal duties in the state agency; 2) elected, appointed or designated person in the state agency, local government agency or a person that permanently or temporarily executes his legal duties or official functions in those agencies; 3) a public notary, agent and arbiter, as well as a person in an institution, company or other subject entrusted with public authority, who decides on rights, obligations or interests of either physical or legal entities or on public interest; 4) a person who is entrusted for executing some legal duties or tasks is also considered as an official person; 5) a military person. A military person is considered to be a professional soldier (a professional officer, a professional non-commissioned officer, an officer under contract, a non-commissioned officer under contract and a soldier under contract), a soldier on military service, a military academy student, a military school student, a person from the reserve while in military service and a civilian who exercises a certain military duty.

Any other person who exercises certain duties or tasks based on the law or regulations, e.g. an official person who exercises his legal duties in an institution where either a punishment of imprisonment is administered or some other institutionalized punishment, may be a passive subject.

Murder of either an official or military person is most often exerted against police officers with the Ministry of Internal Affairs, in the first instance against authorized official persons. Namely, police officers are employees whose post includes police duties and/or duties that are in direct relation with police duties[13]. According to provisions of the Article 4 of the Law on Police[14], police officers are employees with or without uniforms who implement police powers (authorized official persons) and employees at either special or specified duties whose tasks are in direct connection with police tasks, namely they are security and confidential in their nature. Authorized official persons execute entrusted duties either wearing a prescribed uniform or a civil suit, and they are obliged to perform necessary actions in order to protect life and personal security of people and property (Article 13 of the Law on Police). While executing police duties, they implement their powers established by the Law on Police and other regulations from the internal affairs field, the Criminal Procedure Code, the Law of Misdemeanour and other. Moreover, all authorized official persons have an official identification (and an official badge if they wear a uniform), official guns and ammunition.

Murder of either an official or military person, as an aggravated murder offense, may not be committed against every official or military person, but this qualification is limited by the nature of duties that those persons execute and during which execution they are murdered[15]. Although a passive subject qualification is the basic qualification circumstance, it is required that it concerns either an official or military person that executes legally established duties and tasks and that the offense was committed during that execution.

Executing Legal Duties

The concept of legal duty encompasses numerous different actions that official persons perform based on the law or other regulations. However, it is considered that enhanced legal protection is mainly intended to those people who execute legal duties and tasks during which execution they are particularly exposed to dangers and possibility of endangering their lives and bodily integrity[16].

12 D. Jovašević, Ubistvo službenog ili vojnog lica pri obavljanju poslova bezbednosti kao poseban oblik teškog ubistva, *Pravni život,* 9/2001, p. 55-72.
13 S. Miletić, *Komentar Zakona o policiji*, Belgrade, 2009, p. 31.
14 The Law on Police ("The Official Gazette of the Republic of Serbia", No. 101/2005).
15 Lj. Lazarević, *Komentar Krivičnog zakonika Republike Srbije,* op. quot., p. 355.
16 D. Jovašević, T. Hašimbegović, *Krivično pravna zaštita pripadnika policije*, op. quot., p. 55.

Above all, duties of the state and public security single out among these duties and tasks. The state security services are activities intended for detecting and preventing individual or group activities directed toward undermining and overthrowing the constitutional arrangement of our country, its independence, territorial integrity, sovereignty, external and internal security[17].

In order to maintain public security, there are, in the first instance, police duties, which, according to the Law on Police (Article10) include security protection of life, rights, liberty and personal integrity, as well as support to rule of law; security protection of property; prevention, detection and resolving criminal cases, violations and other offenses, other forms of fight against the crime and elimination of its organized and other forms; detecting and apprehending offenders and other individuals being searched for and bringing them to authorities; maintaining public order, providing help in danger and providing other security help to those who need it; regulation, control and providing help and monitoring in traffic on the roads; providing security services to some public meetings, person, agency, objects and space; surveillance and protection of the state border, border crossing control, enforcement of regime within border area and determining and solving border incidents and other forms of the state border violations; executing tasks defined by regulations on foreigners and execution of other tasks defined by the law and by-laws based on the authorizations from the law.

Moreover, the state and public security duties include guarding individuals deprived of their liberty, namely, undertaking various activities in providing surveillance over individuals who serve either a prison sentence or are in juvenile detention, who serve a prison sentence for an offense, some of security measures of institutional character or educational measure by referring to a reformatory, over individuals who are in custody and individuals who are sentenced to prison in criminal proceedings.[18]

Depriving either an official or military person a life should be done while executing their legal duty, i.e. while these persons perform their legally defined duties. This legal definition implies connection of murder with performing activities and duties by official persons, and which are of the special security significance, but, at the same time, it is emphasized that the offense was committed while a passive subject was performing those activities[19].

A defendant was found guilty for the offense of aggravated murder from article 114, section 6 of CC and sentenced to prison to 20 years because "he killed an official person while he was executing his legal duty, by driving a motor vehicle on the road ... while he was approaching the place where the injured party A.A. was standing on the road and who raised his right arm in the air, and with his left hand, several times showed to the defendant to stop by the road on the right, in order to perform a vehicle control, when the defendant, without reducing the speed of the vehicle, still driving along the middle of the road where the injured party was standing, hit the injured party with the front of his vehicle, at speed of about 80 kilometres per hour, inflicted serious life threatening bodily injuries that resulted in death lately, and then continued to drive a motor vehicle at the same speed"[20].

If a life was deprived while a passive subject was executing his legal duty it is a factual issue adjudicated by the court in each case. One should bear in his mind that the period of executing legal duty is both duration of named activities of either official or military persons, and also the time for preparing and organizing that activity, even "a time between several actions that run continuously and represent a sequence and flow of several planned activities by authorities and security services"[21].

However, one should also have in his mind that the scope of legal protection of life of certain categories of official persons is expanded, so it encompassed not only the legal protection of his life while he is executing his legal duty, but within "the area connected to executing legal duty"[22]. Namely, as a special form of aggravated murder, depriving a judge, public prosecutor, deputy public

17 Lj. Lazarević, *Komentar Krivičnog zakonika Republike Srbije,* op. quot., p. 355.
18 Ibid.
19 D. Jovašević, Krivičnopravna zaštita života pripadnika policije pri obavljanju službene dužnosti, *Zbornik radova sa Međunarodnog naučno-stručnog savetovanja Ugrožavanje bezbednosti pripadnika policije – uzroci, oblici i mere zaštite*, Belgrade, 2003, pp. 99-119.
20 The judgment of the Supreme Court in Belgrade K.No. 945/10 of October 31, 2011
21 N. Srznetić, Komentar Krivičnog zakona Republike Srbije, Belgrade, 1995, in: D. Jovašević, T. Hašimbegović, *Krivično pravna zaštita pripadnika policije*, op. quot., p. 59.
22 D. Milojević, Prikaz izmena i dopuna Krivičnog zakonika, *Bilten sudske prakse Vrhovnog suda Srbije*, Belgrade, 3/2009, p. 49-67.

prosecutor or police officer's life is incriminating in relation to executing their legal duty (Article 114, Paragraph 1, Section 7). The particularity of the position of these official persons category, i.e. intention of their enhanced protection reflects not only in legal protection provided by incriminating murder of either an official or military person while executing their legal duty, but in simultaneous protection of life in the area that is related to execution of their legal duty. For this form of aggravated murder to exist, it is necessary that two qualified circumstances are cumulatively met: 1) a passive subject qualification – a judge, public prosecutor, deputy public prosecutor or police officer and 2) committing offense in relation with executing legal duty. Since regarding other elements of the offense entity, murder of a judge, public prosecutor, deputy public prosecutor or police officer in relation to execution their legal duty have characteristics of murder of either an official or military person while they are executing their legal duties, it is on the court to establish a passive subject qualification in each case, and then to establish if murder happened while a passive subject was executing his legal duty or it is in relation with that execution.

ELEMENTS OF THE OFFENDER'S INTENT

Subjectively, committing an offense comes from an offender's decision, i.e. his motives motivated by any circumstance in relation to executing legal duty by a passive subject. On the other hand, deprivation of life that is not motivated by circumstances in relation to executing aforementioned security services, does not have characteristics of aggravated murder entity, i.e. murder of either an official or military person while executing their legal duty.

Murder of either official or military person while executing their legal duty may be committed with either direct or indirect intent. For the intent to exist, contents of an offender's consciousness is of importance, and it should particularly contain the awareness of a passive subject qualification, awareness of the fact that the offense will be committed while a passive subject is executing his legal duty and that it is in relation to it, while the offender was conducted by a certain motivation in that sense. If it is a uniformed police officer, whose qualification is clearly and visibly marked, determining an offender's consciousness is facilitated. However, if it is about a police officer not wearing a uniform, the court has to establish if the offender was aware of his qualification and an offense he was to commit. Since a passive subject qualification and execution of legal duty are basic qualification circumstances, a fallacy on these qualifications is legally relevant. "Since in this case the injured party was not wearing a prescribed uniform, but a civil suit, and since he had not shown his identification before having executed his legal duty ... evidence does not completely deny defender's defence that he did not know that the injured party has a qualification of an official person."[23] In each case, the court establishes the contents of the offender's consciousness, i.e. the existence of necessary elements.

Moreover, some authors note that this form of aggravated murder will not exist if either an official or military person was deprived of life while executing legal duty, but not related to duties that he executes on that occasion, but for some other reasons such as greed, jealousy, revenge and other.[24]

Like in the other forms of aggravated murder, an attempt of murder of either official or military person while executing their legal duty is possible. There is an attempt, if an offense is directed toward intentional deprivation of these persons' lives while they are executing their legal duties, but the result was not lethal. However, when there is no lethal consequence, but there are either lighter or more severe bodily injuries, there are certain similarities with other offenses which provide legal protection of police officers.

"Offenses, based on established facts by the Court of Appeals, instead of being qualified as an attempt of aggravated murder, they are legally qualified as obstructing an official person in providing security services or maintaining public peace and order from the Article 23, Paragraph 3, in relation to section 1 of the Law on Public Peace and Order of the Republic of Serbia. During the appellate proceedings ... the Court of Appeals established that the defendant did not attempt to force a burning part of the torch into the injured party's mouth since the location of burns is not directly in the area of the mouth, but in the area of the back and of the left side of the face including a hairy part.

23 The Judgment of the Municipal Court in Kragujevac K-830/03 from 22.03.2005, and the Judgement of the District Court in Kragujevac Kž. 693/05 from 25.11.2005

24 A. Milutinović, Teška (kvalifikovana) ubistva s obzirom na posebna svojstva pasivnog subjekta, *Jugoslovenska revija za kriminologiju i krivično pravno,* 2/1999, p. 33-49.

By watching a video, it was established that the assault with the torch lasted 2 seconds. In this way, the Court of Appeals established that those were ordinary serious bodily injuries and that the defendant's intent was not to murder the injured party, but to assault an official person while executing his duties in maintaining public peace and order"[25].

Therefore, the Court has to establish an offender's intent in each case, i.e. if an offense was directed toward obstructing an official person in either providing security services or maintaining public peace and order (Article 23 of the Law on Public Peace and Order), obstructing an official person in executing his legal duty (Article 322 of CCRS), assault on an official person while executing his legal duty (Article 323 of CCRS) or murder of either official or military person while executing their legal duty (Article 114, Paragraph 1, Section 6 of CCRS). Moreover, if while obstructing, preventing or assaulting an official person, regardless contents of an offender's intent, his death occurs, there will be only an offense of aggravated murder from Article 114, Paragraph 1, Section 6 of the Criminal Code.

Finally, we have to imply the issue of permissibility of self-defence in relation to activities taken by an official person. For the self-defence to exist, according to the general rules of the criminal law, unlawfulness of the assault is necessary, and the Supreme Court of Serbia took the same stand with a conclusion that "self-defence against the official activity of an authority that is based on the law is not allowed".[26] However, considering this issue, some authors imply a case where a public prosecutor dropped from further prosecution of the defendant because "the defendant committed the offense in self-defence, and particularly because the departed R.G. intervened on his own initiative ..., he did not show his official identification, although he had enough time to do that, but suddenly pointed a gun at the defendant dragging him into the hall...and it should be noted that the departed both R.G. and S.D. were wearing jeans and denim jackets, and the defendant could not realize that they are official persons – employees in the Internal Affairs, but that it is a 'personal assault', as the defended stated in his defence...".[27] Having in mind above mentioned, namely, that in this case official persons had not indicated their qualification before starting a procedure, and that the defendant was mistaken regarding both the passive subject qualification and the legal duty, it may be concluded that the prosecutor's decision is acceptable, as an exception to aforementioned stand of the Supreme Court of Serbia.

CONCLUSIONS

Legal protection of police officers in the Republic of Serbia has been provided through incrimination of offenses that include life, bodily and personal integrity of official persons as the protection object. Provisions of the Criminal Code and the Law on Public Peace and Order prescribe enhanced protection for the members of the police from all forms of injuries and endangers, and in which way a higher level of security of the Republic of Serbia is indirectly realized, but also the conditions for due, efficient and quality execution of the legal duty are created. Complete and quality protection of police officers depends not only on normative arrangement of issues in protection while executing duties and tasks, but also on the efficient enforcement of legal regulations.

In further development of legal protection of police officers, it should be particularly indicated to a need that all offenses that endanger life, bodily and personal integrity of police officers should be systemized, above all within provisions of the Criminal Code, namely within one group of offenses. Offenses used for providing legal protection of police officers are provided by the Criminal code within a group of offenses against life and body and offenses against the state authorities, like in the Law on Public Peace and Order. Since the obstruction of an authorized official person from the Law on Public Peace and Order has been incorporated within the Criminal Code since 2006, it is still unclear why the obstruction of an authorized official person in providing security service or maintaining public peace and order is the only one offense provided by the Law on Public Peace and Order. Within a particular chapter of the Criminal Code that should provide legal protection for police officers, there could be systematization into offenses that endanger life of police officers, then bodily integrity, personal integrity, i.e. name and reputation, as well as into the offenses that endanger legal due and efficient execution

25 http://www.bg.ap.sud.rs/cr/articles/sluzba-za-odnose-sa-javnoscu/vesti-i-saopstenja/saopstenje-apelacionog-suda-povodom-presude-donete-u-postupku-koji-je-vodjen-protiv-okrivljenog-urosa-misica.html, retrieved on 26/01/2013.

26 A. Milutinović, Teška (kvalifikovana) ubistva s obzirom na posebna svojstva pasivnog subjekta, op. quot., p. 44.

27 Ibid.

of legal duty. Moreover, it is necessary to establish clear borders between above mentioned offenses, particularly if we bear in mind that positive legislation incriminates obstruction of an authorized official person, assault on an official person and attempt of murder while executing his legal duty, i.e. offenses that may be committed through identical actions and result in serious injuries of an authorized official person.

In addition to incriminating certain offenses and prescribing corresponding sanctions, the implementation of criminal policy significantly influences the position of police officers, i.e. duration of a criminal proceeding, type and height of imposed criminal penalties, as well as adequate reaction of prosecution in charge. Legally and quickly implemented criminal proceeding, with efficient imposing and implementation of criminal penalties, may significantly achieve an adequate effect of special and general prevention, and thus the protection of society from criminality as whole. Moreover, protection of police officers is conditioned by the state of security in society, i.e. by the level of personal and property security and by keeping public order stable.

While executing their legal duty, firstly through everyday contact with citizens, police officers present their profession, and also represent the state government. Endangering and injuring police officers that happen very often, as well as more and more impertinent actions, indicate that it is necessary to consider the efficiency of actual legislation and adequacy of penalty policy. Having in mind a high level of social danger that offenses have at peril of police officers, in order to provide better protection of their lives, bodily and personal integrity, simultaneous preventive and repressive action of all state agencies is necessary, as well as raising general awareness on need for enhanced protection of these official persons.

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A STUDY ON CERTAIN QUESTIONS ABOUT COMMUNITY CORRECTION IN CHINA

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Abstract: The practices of the modern community correction in China began from the public surveillance punishment during the Anti-Japanese War. With the development of penal theory, China began the pilot implementation of community correction from 2003. The authors believe that community correction is a penalty implementation measure (such as non-imprisonment or suspended sentence) and a security protection measure. Criminals, who are sentenced to be controlled, to be reprieved, to temporarily serve their sentence outside prison, and to be convicted as parolees, are mainly included in the application scope of community correction in China. Law enforcement officials and other social participants are viewed as the main participants of community correction in China.

Keywords: community correction, attribute, applicable objects, main participants

INTRODUCTION

Modern community correction was born in the judicial practices of Europe and the United States. Pilot projects of community correction in China were tried out in the second half of 2003, accompanied with "The notice of carrying out the trial implementation of community correction" which was issued by the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Pubic Security, and the Ministry of Justice. The pilot implementation was carried out throughout the country in 2009. On January 10, 2012, "Implementation Measures of Community Correction" which was issued by the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Pubic Security, and the Ministry of Justice marked the initial formation of community correction system with Chinese characteristics. After nearly 10 years' judicial practice and exploration, community correction system in China is steadily advanced; however, certain theoretical questions about the community correction system with Chinese characteristics remain controversial. Continuing research and exploration needs to be enhanced to make the system improve gradually.

The Attributes of Community Correction in China

Community correction is a reflection of "light" in the principle of "light heavy"criminal policy, is the need to strengthen human rights protection, is the need of the socialized execution, socialized educational penalty, and civilized execution, also is the inevitable choice of the idea of modesty and economy of criminal law.[2] So far, there are 932 thousand community correction personnel who have been received all over China. 512 thousand of them had been released; the crime rate among them during the correction is 0.21%. The community correction gained good legal and social effects.[3] However, the attributes of community correction as an important issue lack a systematic study.

"The notice of carrying out the trial implementation of community correction" which was issued by the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Pubic Security, and the Ministry of Justice considered that community correction is an execution measure opposite to the prison correction. Community correction refers to the non-confinement enforcement activity which places the criminals who fit the conditions of community corrections in the community, by using social groups, non-governmental organization and community volunteers to correct criminals' psychological and behavioral mistakes and promote them to return to the society within the period of execution. It is clear from this notice that community correction is defined as

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3 Wu Aiying: Insist and improve the community correction system with Chinese characteristics. Seeking Truth, 2012, Volume 17, pp. 32-34

an execution measure opposite to the prison correction. In 2005, "The notice of expanding the trial range of community correction" which was issued by the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security, and the Ministry of Justice considered that community correction refers to the non-confinement enforcement activity which sets criminals in community, follows the social management rules, uses social work methods, integrates the social resources, and educates criminals. These methods will make criminals return to the society as soon as possible. In this case, the crime rate would be reduced, and the society would be stable and harmonious in a long run. This notice viewed community correction as a non-confinement enforcement activity. In 2009, "The suggestion of national trial community correction" regulated that community correction as a non-confinement enforcement activity. Community correction places the criminals who fit the conditions of community corrections in the community, uses social groups, non-governmental organization and community volunteers to correct criminals' psychological and behavioral mistakes and promotes them to return to the society within the period of execution. This suggestion defined community correction as a non-confinement enforcement activity.

From the above, the property of community correction in China was defined in a narrow sense. It is a non-confinement enforcement activity opposite to the conventional performed imprisonment.[4] However, in the strict sense, only public surveillance in community correction belongs to non-imprisonment penalty. Parole and serving sentence temporary outside prison are system changes in the process of execution of punishment, but not penalty method. Probation is a penalty execution system which is a non-punishmental; it does not belong to penalty.[5] Therefore, it is based to generally define community correction as non-confinement enforcement behavior, and it also goes against the original intention of setting community correction system. For this reason, we consider that community correction should be defined as a penalty implementation measure, such as non-imprisonment or suspended sentence, and a security protection measure. Community correction, which exercises a combination of inflexibility and yielding characteristic, possesses both the attribute of penalty execution and obvious attribute of "social welfare."

Applicable Objects of Community Correction in China

The attributes of community correction directly determine the objects of community corrections. As there are various understandings of the attributes of community correction, the definitions of the applicable objects of community correction in the current Chinese legal norms are not the same. Before 2009, it was believed that community correction was a non-confinement enforcement activity which contained the following five kinds of criminals, people who were sentenced as under control, who were reprieved, who temporarily served their sentence outside prison, who were paroled, and who were deprived of political rights while serving a sentence in a society. With the introductions of "The implementation measures for community correction", the Criminal Law Amendment (Eight), and the amendment to the Code of Criminal Procedure, the range of the applicable objects of community correction should be re-defined.

(A) Criminals Who are Sentenced as Under Control

Public surveillance is the earliest non-custodial sentence which possesses the nature of community correction in China. Historically, "The amended temporary measures of trialing judicial cases in Huaihai District" in the Anti-Japanese War had made clear provisions on public surveillance, which is, the criminals who are sentenced as under control could not be imprisoned, but need to serve the statute labor which was called "executed in the village."[6] In China, this punishment is an original crime which has the obvious Chinese characteristics in community correction. According to the present legislative perspective, it is regulated in the Chinese Criminal Law Amendment, that criminals who are sentenced as under control should be implemented community correction. The community correction institutions should execute and be responsible for community correction. It can be seen that there is no doubt that criminals who are sentenced as public surveillance are one of the applicable objects of community correction.

4 Wang Yanfei: The new thinking of community correction based on the recent modified Criminal Law, Criminal Procedure Law. Shandong Police College Journal, 2012, Volume 4, pp. 112-115

5 *Wang Shun'an: Legal issues about community correction. Tribune of Political Science and Law (China University of Political Science and Law Journal), 2004, Volume 3, pp.102-109*

6 Dong Chunpu: *Summary on the features of Chinese contemporary community correction*. Study on Public Security, 2012, Volume 10, pp. 34-42

(B) Criminals Who are Reprieved and Paroled

Probation is the basis of community correction, while parole is the core of community correction. In other countries, the majority of the earliest and even present execution objects of community correction are probationers and parolees.[7] It is regulated in the Chinese Criminal Law Amendment, that "During the probation period, criminals who are reprieved take community correction. If the situation described in the Article 77 does not happen and the probation is expired, the original penalty could not be implemented. This information needs to be made public." It is regulated in the amendment to the Code of Criminal Procedure that criminals who are reprieved and paroled should be implemented the community correction. The community correction institutions should execute and be responsible for community correction. It can be seen that criminals who are reprieved and paroled are applicable objects of community correction. However, some local community correction measures regulate that community correction could only be performed to the criminals who are reprieved and paroled possessing the official local household and possessing long-term fixed residence. This artificial rule eliminates the applicable objects, deprives the criminals' rights, goes against the principle of equality, and is harmful to the reform of the criminals. It needs to be re-examined.

(C) Criminals Who are Sentenced to Temporarily Serve their Sentence Outside Prison

Temporary serving sentence outside prison is a flexible way of the punishment execution which aims at the criminals who should but cannot serve their sentences in prisons or other detention places due to special circumstances. According to the amendment to the Code of Criminal Procedure, criminals who were sentenced to imprisonment or criminal detention could temporarily serve their sentence outside prison, if they fit the following circumstances. 1. Criminals are seriously ill and need to have medical parole. 2. Women criminals are pregnant or are breast-feeding their own baby. 3. Criminals cannot take care of themselves and will not harm the society. The theorists have a dispute on the issue that if the community correction should be used in temporary sentence serving outside prison. From the perspective of applicable conditions of community correction, some negate the possibility of using community correction in temporary serving outside prison, as the danger of these criminals could not be excluded.[8] From the perspective that criminals who are sentenced to temporarily serve their sentence outside prison could not effectively fulfill the legal obligations of the community correction, some exclude these criminals out of the applicable objects of community correction.[9] Community correction should be used for the criminals who temporarily serve their sentence outside prison, which is regulated by Chinese Criminal Law Amendment which provides legal basis for the above opinions. We believe that the above views are biased. First of all, because the danger of the criminals who temporarily serve their sentence outside prison could not be excluded, it is necessary to place them into the community correction system. Otherwise, there will be no supervision of these criminals. They will bring greater potential threat to the society. Secondly, it is true that criminals, who are seriously ill and need to have medical parole, who are pregnant or are breast-feeding their own baby and who cannot take care of themselves and will not harm the society, could not actually complete the obligation of community correction. Therefore, we should humanely implement community correction and develop appropriate corrective plan which fits criminals' characteristics, instead of using these as excuses of excluding these criminals out of community correction. Furthermore, the reason why Chinese Criminal Law Amendment, does not regulate community correction should be used for the criminals who temporarily serve their sentence outside prison is due to the task and range adjustment of the criminal law. Temporarily serving the sentence outside prison should belong to the adjustment scope of the Code of Criminal Procedure. It is ruled in the amendment to the Code of Criminal Procedure that criminals who temporarily serve their sentence outside prison should get community correction which is executed by the community correction institutions based on the law. It can be seen that China possesses a clear and positive attitude on using community correction for the criminals who temporarily serve their sentence outside prison.

7 Yuan Aihua, Tan Yan: *Discussion on the applicable objects of community correction.* Yunnan Agricultural University Journal, 2012, Volume 4, pp. 51-56

8 Liu Yong: *Micro-examination of the applicable objects of community correction in China.* Shandong University of Science and Enginnering Journal (Social Sciences), 2007, Volume 1, p. 65

9 Liu Xingxing, Zeng Wenyuan: *Problems and Countermeasures of the current community corrections.* Theoretical Aspects, 2011, Volume 7, p. 80

Whether community correction should be used for the criminals who are deprived of political right is a notable question. Before 2009, it was believed that community correction should be used for these criminals in China. However, it should be noted that criminals who are deprived of additional political right besides the principal penalty have already had relative correction. Whether there is a need to continue the implementation of community correction is a question. Furthermore, depriving of political rights is a non-custodial sentence which is not entirely consistent with the attributes of the community correction. In the judicial practice, what the criminals conflict the most is fitting political right deprivation into community correction, while the corrective effect is the worst. According to this, we do not agree to use community correction in temporary sentence serving outside prison. The amendment to the Code of Criminal Procedure in 2012 provided the same opinion. It regulated that public security organs should be in charge of the criminals who are deprived of political right. After the sentence is served, the executive organs should use written notice to inform the criminals, their work units, and residence organizations.

The above discussion about the applicable objects of community correction is built under the current Chinese legal and regulatory framework. From the trend of the punishment execution, the applicable object of community correction is not limited all over the world. It should be expanded at an appropriate time. As stated, the attributes of community corrections should be redefined and reacquainted.

Main Participants of Community Correction in China

Implementing community correction is a systematic project. Any single part could not make this system become successful. Multiple departments and multi-level personnel need to participate in implementing the real community correction and forming a truly effective crime correction system. Based on the attributes and characteristics of community corrections, the main participants of community correction should not only contain law enforcement officers, but also extensive social participants.

(A) Law Enforcement Officers

Law enforcement officers of community correction are the national officials who are in charge of law enforcement functions in community correction. They are also known as "community correction officers."[10] Chinese judicial and administrative authorities are responsible for directing, organizing, and implementing community correction. Community correction agencies in judicial and administrative authorities at county level supervise, organize, educate, and help the criminals who get the community correction. The office of justice is in charge of the specific daily work. It can be seen that law enforcement officers of community correction are national officials in judicial and administrative organs of China. The following duties and powers of the judicial and administrative authorities and its civil servants within community correction should be included.

Investigate and assess before the community correction. When the judicial and administrative authorities need to investigate the residential influence of the defendants or criminals who are about to get community correction, they could accept the authorization from People's Court, People's Procuratorate, the public security organs and prisons and begin to assess. Investigation and assessment should be developed considering the defendant or offender's residence condition, family and social relationships, consistent performance, the consequences and impact of the crime, the opinions from Village Commission and victims, and the issues which are prohibited. Assessment advice could be formed based on the above aspects and provides references for community correction decision-making authority.

Receive criminals who get community correction. Receiving criminals who get community corrections could be divided into passive and active reception. Passive reception is a normal behavior. Criminals who have been decided to get community correction register at the county level judicial and administrative authorities within a specified period of time. These authorities receive the criminals, prepare the legal instruments, conduct relative registration formality in time, and deliver receipt within three working days. Active reception refers that county-level judicial and administrative authorities set staff to People's Court to conduct hand-over procedures after temporary

10 Wu Zongxian: *Discussion on several quetiones about participated social forces in community correction.* Law Review, 2008, Volume 3, p.133

sentence serving outside prison is made by People's Court. In the case of passive reception, if the criminals are late for registering without reasons, judicial and administrative authorities should find the criminals and inform the decision-making authorities.

Manage community correction. After judicial and administrative authorities receive the criminals who get community correction, they should implement the following issues, announce the community correction decision (the period of community correction, the rules which should be followed, forbidden issues, the legal consequences of the violation of the provisions, the enjoyable and forbidden right of the community correction staff); establish a community correction team; sign letters of responsibility for correction; establish the executive file; supervise community correction staff to participate in the training of public moral, legal knowledge, and current affairs and policy; supervise the community correction staffs who have the ability to work to participate in community service; implement individual education and counseling to correct their criminal psychology and to improve their ability to adapt to society; carry out vocational training and employment guidance to help the implementation of social security measures; adopt on-site inspections, communications, information verification, and other measures to grasp the activities of the community correction staff; regularly inform and verify the dynamic thoughts and realistic performance of the community corrections staff; regularly contact the treatment hospital about the situation of the criminals who get medical parole and grasp the physical condition and disease treatment in time; timely record the situation of community correction staff who accept the supervision, management and education; evaluate the performance after they receive the community correction; propose the revocation of probation and the parole; put forward the imprisoned execution proposal; and provide advice on reduction proposal.

Release the community correction. The release is divided into the expiration of the period and the change of circumstances. After the criminals finish the community correction, judicial officer preside and organize the declaration of release of community correction. After the release, the community correction officers should give the staff the certificate of community correction, notice decision-making authorities in written form, and send copies to the county-level People's Procuratorate and the public security organs. If the community correction taker dies, is judged to be put back into prison to serve the sentence or is sentenced to a custodial sentence, community correction will be terminated.

(B) Social participants

Social workers, volunteers, relevant village (neighborhood) committees, work units, schools, family members or guardians, and guarantors should be involved as community correction officers and units. Social forces which participate in community correction should be adhering to the following principles, the principle of using expanded, scientific, and payable (money-services) social forces.[11] "1+X" model is generally used in the organization of community correction officers.[12] In this model, 1 means the law enforcement officer, while X means social participants. 1 and X are not isolated from each other, but rather have the relationship of coordination, cooperation and supervision from each other. It can be seen that the social participants play an important role in the community correction.

Social workers. Social workers are the professionals who are choosen and trained to implement social work related to community correction according to certain conditions. Social workers do not have the identity of the community corrections law enforcement officers.[13] In the community correction process, social workers are mainly responsible for the education and training, volunteer laboring, psychological counseling and skills training. They belong to auxiliary community correction personnel. Due to the lack of relative legal norms and specific operational methods, there are some questions in the recruitment, traning, specific duties, and benefits of the social workers in community correction system. These questions greatly affected the implementation of the social workers' function in community correction.

11 Wu Zongxian: Discussion on several quetiones about participated social forces in community correction. Law Review, 2008, Volume 3, p. 133

12 Wu Zongxian: *Problems and Prospects of community correction.* Law Discussion, 2007, Volume1, p. 7

13 Liu Wujun: *Monograph on the social forces in community correction.* Justice of China, 2012, Volume 7, pp. 27-33

Volunteers. Volunteers refer to the people who are unpaid to work in the community correction and assist law enforcement officers to complete the task of the community correction. The composition of the volunteers is very large and complex. Experts, professors, students, and other government civil servants could be involved in this group. So far, the number of the social volunteers engaged in community correction has reached 468 thousand. The participation of the volunteer could make up for the lack of community corrections law enforcement officers. Volunteers could play their own professional expertise to better serve the community correction staffs, which is also good for the transformation of the people who get community correction. However, we should notice the following factors; volunteers are part-time working staff whose working time is not fixed; volunteers do not have the professional knowledge and ability, and volunteers are unpaid. These factors determine that the function of the volunteers in the community correction should be noticed correctly. Certain policies and regulations should be made to gradually standardize these participating subjects.

Other related personnel. Relevant departments, village (neighborhood) committees, work units, schools, family members or guardians, and guarantors should be involved as other related personnel in the community correction system. They assist community corrections agencies to implement community correction. Other related personnel are also unpaid auxiliary forces. Based on the characteristics and advantages of Chinese grass-roots organizations, these participants assume an important task and play a nexus role in the work of community correction. In the future judicial practice, cultivation of these participants should be continually strengthened. Some areas with good conditions could try the method of "money-service" to gradually mobilize the positive attitude of these participants.

CONCLUSION

The understanding of community correction is a deepening process. Along with the continuous development of China's economy and society, especially the continuous development and improvement of the punishment execution theory, the understanding of the attributes of community correction in China will become deeper, the applicable objects of community correction will become more extensive, the participants of community correction could become more scientific and reasonable, and the legal supervision of community correction will become more perfect.

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RESEARCH ON THE NEW DEVELOPMENT TENDENCIES OF CHINA'S UNDERWORLD - NATURE CRIMES AND THE COUNTERMEASURES FOR FIGHTING AGAINST THEM

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Abstract: Currently, the underworld-nature crimes are rather prominent in China. This thesis analyzes the new development tendencies of China's underworld-nature crimes and discusses the countermeasures for fighting against them, which include boosting the normalization of the mechanism construction, establishing the system of analysis and judgment of the clues, focusing on the development of the police force, further deepening the work of investigation and exclusion, and making full use of the mass power. These countermeasures contribute to prevent the development of underworld-nature crimes. What's more, basically, we should try to eliminate the social "soil" for the occurrence and existence of underworld-nature organizations, further to improve the precaution for the re-occurrence of such kind of crimes.

Keywords: underworld-nature crime; underworld-nature organization; development tendencies; countermeasures.

INTRODUCTION

The underworld-nature crime has been listed as "one of the three crime-disasters of the world" by the UN, and it has already become the most difficult problem for a lot of countries. It is becoming more and more serious today, and sometimes it has penetrated into the governments and threatened the basis of regime and the stability of society. [1][1]Therefore, to analyze the characteristics and the reason of formation of the underworld-nature crime, and to absorb the experience and lessons of fighting against it are very meaningful for constructing the long-term working mechanism of anti underworld-nature crimes.

THE NEW DEVELOPMENT TENDENCIES OF UNDERWORLD-NATURE CRIMES DURING RECENT YEARS IN CHINA

The underworld-nature crimes are a kind of organized crimes which seriously damage the social security. In recent years, the underworld-nature crimes in China present such new development tendencies:

The formation period of the underworld-nature organizations has been greatly shortened, with the tendency of "speeding-up formation"

Presently, the underworld-nature organizations usually form very quickly, develop in a fast speed, and can be organized with their own model in a short period of time. The underworld-nature organizations that illegally occupy some industries and fields can be substituted for in a very short period of time if they have been destroyed. Especially in the industry of transportation, different kinds of wholesale markets and the industry of entertainment, the underworld-nature organizations are indomitable, having never been exterminated. For instance, near the master station of long distance passenger transportation of a district in Shenyang City of Liaoning Province in China, the operation incomes of some taxies which belong to a taxies company are very profitable, which

1 [1] Felix Berenskoetter. Under Construction: ESDP and the Fight Against organized Crime [J]. Journal of Intervention and State building, 2008(6).

aroused the attention of some lawbreakers, and they created several injuring cases to scramble for the routes and monopolize the operation, and some of these cases are even lethal.

The realms invaded by the underworld-nature organizations are obviously enlarged, tending to achieve "diversification"

Whenever judged from the distribution of geographic regions or from the industries invaded by the underworld nature organizations, the underworld-nature crimes show the tendency of extensification and diversification, and penetrate into the grassroots political power. As the situation in Dalian City of Liaoning Province can show, the underworld nature organizations mainly occupy the sea area contracting, the mudflat aquaculture, the mine exploiting, the sand for building, the transportation, the wholesale of merchandise, and the dancing halls, bath centers, restaurants, etc.. Some of these organizations directly control pornography crimes, gambling and drug crimes, while some others monopolize the high-profit industries such as tourism, land demolition and auction.[2][2] Some even make every endeavor to penetrate into the regimes, particularly the rual grass-roots political power, stirring a finger into the administrative affairs that should be charged by the governments, which lead to the block of the public management function and endanger the grassroots political power. According to the statistics, from 2009 till now, the industries and fields involved with the underworld-nature organizations that had been destroyed by the public security organs in Liaoning Province, range (according to the sequence of proportion) from mineral products (about 26%), food (about 21%), waste purchasing (about 13%), transportation (about 8%), the entertainment industry (about 5%), to tourism, fishery breeding, grit yard, and real estate removal (about 27%).

There is an obvious change to the structure of the main body of the underworld-nature organizations, with the tendency of "lowering age"

Through the analysis of the age of the underworld-nature organizations that had been destroyed in recent years, teenagers take up a high proportion. Therefore, strengthening education to the teenagers and the released personnel from reeducation and reform through labor should arouse attention from leaders of different levels. For example, in the case of an underworld-nature organization which was destroyed by the police of Shenyang City in 2010, of the 14 members of this organization, 7 were born after 1980, 5 were born after 1990, and the proportion of teenagers was up to 86%, which was astonishing. It was reported that, from 2009 till now, of the underworld-nature organizations that had been wiped out by the police of Liaoning Province, the ratio of the members of these organizations who were born after 1980 has amounted to 31%.

The resistant ability of the underworld-nature organizations is becoming stronger, with the tendency of "being secret"

On one hand, the systematization of the underworld-nature organizations is improving, the gang leaders retiring backstage. The rigorous organizational system has formed in some of the underworld-nature organizations. There are clear-cut division of task among the organizers, the cadres and the gang members, who usually have previous conviction and the ability of anti-investigation, which make it very difficult to strike their crimes. On the other hand, the fraudulence of the underworld-nature crimes is becoming stronger, and the methods of "bleaching" and "soft-violence" are increasing at the same time. Some underworld-nature organizations manage to hide their crimes with legal identities as the operators of companies and enterprises. Further more, with the propaganda of striking underworld-nature crimes, the underworld-nature organizations have begun to conceal their crimes, with the characteristics of "soft-violence" growing, in order to resist investigation.

2 [2] Gambetta, Diego and P. Reuter. Conspiracy Among the Many: The Mafia Legitimate Industries. In Fiorentini, G. and Peltzman, S. (eds.) The Economics of Organized Crime, Cambridge University Press. 1995.

The Mafia-like gangs increasingly penetrate into the grass-roots political power, with the tendency of "politicalization"

In order to escape from being destroyed, the criminals of the Mafia-like gangs take the economic strength as the capital to cheat for the political ranks with various means, attempting to "incarnadine" themselves. [3][3]A head of an underworld-nature organization once gained the title of Deputy to the People's Congress by cheating, and the backbones of this organization also cheated to obtain the title of vice-chairman of the Industry and Commerce Association of a district in Shenyang Province. Shielded by the form of company, this underworld-nature organization did a lot of evils and fostered the underworld-nature crimes with commercial management, and protected their commercial management with the underworld-nature crimes. Another problem that should be paid attention to is that, some of the leaders of the rural grass-roots political power have disintegrated into the Mafia-like gangs. There was a criminal, who once was the secretary of a village, organized and led an underworld-nature organization to tyrannize with violence, occupy the properties of the village and impress the land, sell the mountain and forest, and commit injuries, arousing the people's wrath of the village.

The shelter of the "protective umbrella" becomes the main reason of the rising of the underworld-nature organizations

From the practice we can find that, almost all of the underworld-nature organizations will hook in and corrupt the officials of the organs of power, and this has become a necessary procedure and basic rule of the development process of the underworld-nature organizations. The growth of the Mafia-like gangs is closely related to the protection of the "protective umbrella".[4][4] Countless cruel cases show us that, where the underworld-nature crimes are prominent, the "protective umbrella" and "informer" must exist in the local public security organs and Party and government offices. These protections deprived of Party spirit and principles embolden the underworld-nature organizations and greatly damage the images of our government and public security organs. The "protective umbrella" has following features: first, the "protective umbrella" exists in a wide range, not only in public security organs and courts, but also in other judicial organs and administrative agencies, and mainly in the public security system; second, the officials that form the "protective umbrella" range in different levels of the power organs; third, the relationship between the "protective umbrella" and the underworld-nature organization is relatively complicated, can be summarized into three kinds, which are the relation of mutual controlment, the relation of common interests and the relation of family relatives.

COUNTERMEASURES FOR FIGHTING AGAINST UNDERWORLD-NATURE CRIMES

To boost the normalization of the mechanism construction on striking underworld-nature crimes

There is an organization in China named "Leading Group Office of Striking Underworld-Nature Crimes", with the headquarters settled in the Ministry of Public Security, and the branches in provincial public security bureau. "Leading Group Office of Striking Underworld-Nature Crimes" is not only the staff for the Party committees and governments for the work of striking underworld-nature crimes, but also the headquarters responsible for the guidance, coordination and supervision. It plays an important role in the special struggles against underworld-nature crimes. In the future, the "Leading Group Office of Striking Underworld-Nature Crimes" should strengthen the key-point supervision on key areas and key cases, and invest more into the analysis and judgment of the information of underworld-nature crimes. Meanwhile, it should also explore and construct

3 [] Luciana M. Fernandez. Organized Crime and Terrorism: From the Cells Towards Political Communication, A Case Study[J]. Terrorism and Political Violence. 2009(10).
4 [] Felia Allum & Percy Allum. Revisiting Naples: Clientelism and organized crime[J]. Journal of Modern Italian Studies, 2008(9).

the long-acting mechanism of striking underworld-nature crimes, and consistently insists on the combination of centralized strikes and routine strikes, the principle of taking temporary solution and permanent cure. The "Leading Group Office of Striking Underworld-Nature Crimes" should improve the system of job responsibility of striking, the system of leading and coordination of special struggles, the joint-conference system of public security organs, the procuratorates, the courts and the judicial departments. It should also insist and improve the listing and supervision of serious cases involving underworld-nature crimes, the transfer of police from places outside the location of the case, the trial and custody in places outside the location of the case, the system of sealed handling of the cases.

To focus on the management of the sources, and to absolutely implement the policy of "striking at the embryo stage"

(a) To sufficiently apply the achievement of informatization, and to establish the system of analysis and judgment of underworld-nature crimes

The formation of the criminal gang is a process, during which much information is spread within a certain scope. With the collection, classification, check and putting into use of these scattered information, they can become the trump card of beating the underworld-nature crimes. "The long-standing business dealings" can help the police to know the situation and details of underworld-nature crimes well. The police should know the details of the staff of the criminal gang, the structure and crimes and criminal methods of the underworld-nature organizations, and even the weak points of the organization members. The precautionary measures at the early stages can also perish the underworld-nature organizations when at embryo stage, and correct the potential criminals who are at the edge of slipping into the mire. The analysis of the intelligence involving the Mafia-like gangs should be carried on carefully and in a long term. The collection, response and accumulation of the intelligence will help the police form systematic materials and find the leak of the intelligence system as well as summing up the experience, studying the countermeasures and dynamically grasping the tendency of the underworld-nature crimes. Presently, the public security organs are improving and upgrading the file stores and information bases of the underworld-nature crimes, and establishing the "blacklist" system. Meanwhile, the analysis and judgment mechanism is also being explored and developed together with the overall intelligence system.

(b) To comprehensively sum up the lessens from the past and to establish the system of information analysis and judgment of the underworld-nature crimes

The experience of fighting against underworld-nature crimes should be generalized, thereby being improved as the theory of directing the practice. The worthwhile experience should be spread, as well as the mistakes couldn't be repeated. The investigation and exclusion of the earlier stages, the case that were found later during the process of investigation, the activities of the suspected staff, the verdict and its execution, and the tendency of the suspected staff after the verdict, all these data and information should be accumulated to establish the system, breaking the limitation of dealing with the present cases, making lateral and vertical contrast, and thus forming the systematically and thorough data platform.

To focus on the development of the policing force, and to consistently improve the degree of specialization of fighting against underworld-nature crimes

The requirements for fighting against underworld-nature crimes are accuracy and powerfulness. Developing and training a high-quality special team which is reliable in politics and working style, strictly obey the discipline, excellently equipped, good at investigation and interrogation, is the key of successfully fighting against underworld-nature crimes. Therefore, we should devote ourselves into improving the special team of fighting against underworld-nature crimes, in order to realize the fundamental principle of "striking at the embryo stage".

To further deepen the work of investigation and exclusion, and to improve the ability of finding out the underworld-nature organizations

Firstly, we can find the underworld-nature organizations from the mass' accusation, which includes the accusation letter box, the accusation telephone line, the broadcast of media and visits. While going deep among the masses, we should pay attention to take targeted strategies and methods, and dig crime clues from the information.

Secondly, we should try to find the underworld-nature organizations from the control of the emphasized population, which includes the suspects, the released personnel from reeducation and reform through labor. Thirdly, we should try to find the underworld-nature organizations through combing the cases and events. The most common criminal behaviors involved with the underworld-nature crimes are the intentional injury, the forced trading, drug trafficking, gambling, the organized prostitution, the trading of firearms. Through the analysis of these routine cases, we should try to find the implied characteristics of underworld-nature crimes with the viewpoint of connection.

Fourthly, we should try to find the underworld-nature organizations from the control of the emphasized locations, departments, industries and markets, which can bring high profit and are chaotic.[5][5] Hence, local public security organs should strictly control the industries of entertainment, transportation, construction, catering and mineral within their jurisdictions.

To innovate the thoughts and measures to strengthen the ability of striking the underworld-nature crimes

The police should change the traditional concepts and innovate the investigation thinking style. The thinking style should be changed from the idea of "investigating the cases with the aim of uncovering them" when dealing with the ordinary criminal cases to the idea of "proving the cases with the aim of determining the nature of the underworld-nature crimes". The police should endeavor to show the truth of the cases to the prosecutors and the judicial personnel. Among the underworld-nature crimes, the individual cases and the entire case are connected with each other and they support each other. When making the investigation of a special case, those single delinquencies and illegal criminal activities should be connected with the crimes of the entire organization, and thus to form an integrated underworld-nature crime case. According to the experience accumulated in recent years, when investigating the cases involving underworld-nature organizations, the investigators should deal with the case with the thinking model of clarifying the constitutive components of the underworld-nature crimes and the basic characteristics of the underworld-nature organizations, and then draw the conclusion according to the facts and evidence which are found out during the process of investigation. The train of thought should be like this: first, when investigating the individual case, the investigators should collect evidence around the four characteristics of underworld-nature organizations; second, the investigation should focus on establishing the essence connection between the facts and cases; third, it is necessary to establish the consciousness of long-term management and grasp the best opportunities of drawing in the net of catching the criminals; fourth, some hyper normal measures such as dispatching the police from places other than the hometown of the underworld-nature organizations and detaining the suspects of the underworld-nature crimes outside their sphere of influence; the fifth point is to strengthen the linkage between investigation and prosecution, and the prosecution organs can intervene at the right moment in advance, in order to guide the public security organs in collecting and fixing the evidence.

To take the propaganda work seriously, and to construct favorable mainstream public opinions

We should combine the special work and the mass line. So long as we have the mass base, we have the "clairvoyance" and the "clairaudience", the underworld-nature crimes are bitterly hated by the mass, who, yet, dare not to say. Therefore, the police should let the mass know the confidence and ability of public security organs, and form a kind of impression of "justice always defeats the evil". We should broadcast and encourage the mass, construct the atmosphere, to form the Trinitarian "People's war" which includes the public security organs, the propaganda departments and the masses of the people. Meanwhile, the education department should strengthen the propaganda among the students, guide them to set up the right outlook on life and values, in order to efficiently prevent and reduce the juvenile crimes. The schools, parents and communities should also strengthen the supervision of the juveniles deprived of education and quitting school, and create favorable learning and working conditions, ensuring they grow healthily.

5 [] Gambetta, Diego and P. Reuter. Conspiracy Among the Many: The Mafia Legitimate Industries. In Fiorentini, G. and Peltzman, S. (eds.) The Economics of Organized Crime, Cambridge University Press. 1995.

To perfect social management measures

From the experience of fighting against crimes we can draw the conclusion that, the strategy of "comprehensive management of social security" plays an important role, and the precautionary measures within the frame of the social management greatly eliminate the crimes. "Comprehensive management of social security" mainly includes: (a) to reduce the negative effects of economic development, to take effective measures to narrow the gap between rich and poor, to take measures to increase employment opportunities, and to strengthen economic operation regulation, which mainly focuses on strengthening financial regulatory scrutiny and strengthening qualification etc; (b) to Strengthen education and cultural construction. Not only should the government and society pay attention to family education, but also to moral education for students in schools. Meanwhile the government should strengthen the propaganda of mainstream culture, and eliminate the negative effects of underworld-nature organization subcultures; (c) to strengthen the construction of community, and to enhance the control of floating population; (d) to crack down on political corruption; (e) to strengthen the management of guns and other dangerous articles; (f) to perfect social security measures; (g) to improve the work of correction and education of offenders.

CONCLUSION

This thesis focuses on the new development tendencies of underworld-nature crimes and the countermeasures for fighting against this type of crime, which include the strategies to curb, the team up to strike, different jurisdiction patterns, the cooperation between different departments, and responsibility mechanisms. Reflecting on the current countermeasures, this thesis holds the view that the group to control the underworld-nature crimes needs further specialization, and the department responsible for controlling and combating the underworld-nature crimes should explore more lines of sharing and exchanging the relevant information. In addition, the special rights of investigators and protection of witnesses should be emphasized in future, and the construction of a preventive measures system will become a powerful method of fighting against the crimes.

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RESEARCH ON THE DEVELOPMENT STATUS OF THE UNDERGROUND BANKS IN CHINA AND ITS INVESTIGATIVE AND PREVENTIVE COUNTERMEASURES

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Abstract: With the deepening of China's reform and opening in recent years, the illegal financial activities of the underground banks in China have become increasingly rampant and have been in a growing trend. The underground banks seriously disrupted the normal financial management order and affected the national economic security and social stability. Therefore, effective countermeasures must be taken to strengthen the prevention and governance to the underground banks in China. This paper gives a research on the concept of the underground banks and their types, development trends, and puts forward some beneficial and investigative countermeasures.

Key Words: Underground Banks; Development; Investigation; Prevention

INTRODUCTION

An underground bank, which is expressly prohibited by Chinese law, is commonly known as a class of organizations engaged in illegal financial business. In recent years, the underground banks in China showed an obvious expansion trend. According to the latest statistical data released by the State Administration of Foreign Exchange (SAFE), in 2011, China has cracked a total of 39 underground banks with foreign exchange illegal crimes, involving up to more than 700 billion Yuan; and nearly 200 suspects were arrested. The number of cases, the amount of money involved and the number of criminal suspects arrested has reached a new high record. The underground banks not only seriously disrupt the normal financial order, but also endanger the country's economic security and social stability. First, the existence of the underground banks will result in the loss of huge amounts of taxes; secondly, it also fuels the criminal activities. By money laundering through the underground banks, the corruption and bribery proceeds got by the corruption criminals could become legitimate, and it also gives financial support to the drug-related crimes, smuggling crimes, tax-evading and fraud crimes, underworld crimes and false funded crimes, it even helps to transfer the funds earned through the above crimes. Therefore, combating and curbing the illegal underground banks by making targeted investigative and preventive countermeasures has important significance to the safeguard of the national economic security and financial management orders.

CONCEPTION OF UNDERGROUND BANKS

"Underground banks" are commonly known as the organizations or individuals who engage in illegal financial business beyond the normal financial institutions. It often specializes in fund raising, loan-sharking, and bill discounting, financing guarantees and other illegal financial operations, which are under the cover of public or semi-public consignment stores, pawnshops or financing guarantee companies. The high fees and interests are their main source of profit. The main illegal financial business which the underground banks engage in includes: illegal depositing from the public, illegal borrowings lending, illegal usury lending, unlawful pawning, private equity funding, illegal trading in foreign exchange outside the prescribed places and money laundering.

CURRENT DEVELOPMENT STATUS OF THE UNDERGROUND BANKS IN CHINA

Since the 1980s, some non-governmental financial organizations appeared in China southeast coastal areas. They absorbed idle funds from the civilians promising high interest rates, and then lent out the absorbed funds to make profits. China has set strict limitations and conditions on the use of private capital in the economic activities, especially in the financial activities, but these non-governmental financial organizations apparently did not meet the qualifications. This makes the activities which the organizations engaged in have an illegal nature and also leads to the birth of a new term - underground banks.

With the changes in the structure of socio-economic, there has been a fundamental change in the business content and the managing way of the underground banks. Besides the original illegal usury lending, they have expanded their business to the criminal activities of illegal depositing from the public, illegal trading in foreign exchange, illegal depositing and loaning and money laundering.

Main types of underground banks in China

There are mainly three types of underground banks in China

Underground banks engaging in illegal deposit and loan business

This kind of underground banks mainly engages in illegal depositing and loaning. They usually take the way of high interests to solicit depositors or usury lending. Their appearance is often in the form of Civil Bidding, Rotary Fund or Mutual Aid Association.

Underground banks engaging in illegal foreign exchange business

This kind of underground banks mainly engages in two kinds of illegal business activities: one is foreign currency exchanging which results in gaining illegal interest margins; the other is cross-border transferring of funds by gaining a certain percentage of fees. They often transfer the funds abroad by means of evading financial regulation and exchange controls or colluding with the foreign staff.

Underground banks engaging in illegal practice of the payment and settlement of funds

This is a new and the most active form of underground banks. They cater to the some lawbreakers' need for illegal transfer of funds for its easy practice and quickness. The illegal operators would set up some shell companies in advance. By controlling the shell companies' and individual accounts, they will complete the fund transfers from the company's account to the individual account through online transactions, which will help the customers achieve the goal of cash withdrawals smoothly. In the end, the underground banks will gain the handling charges. In 2011 Chongqing Police cracked the first serious case of illegal operating underground bank. The family crime gangs engaged in illegal practice of the payment and settlement of funds under the cover of the shell companies. The amount involved in the case is up to more than 560 billion. A new mode of practice appears that the illegal operators help the individual custom to cash out with the credit card by consuming in the POS machines which are controlled by them.

Development Trends of Underground Banks in China

The amount of the illegal business will continue to enlarge

Take the three cases cracked by the public security organs in 2011 for example, the total amount of the money involved in the underground banking case of Hainan "1.23", Beijing "4.28" and Chongqing "3.25" is up to more than 1,600 billion Yuan. The increasingly active cross-border capital flows will make the amount of money involved in underground banks to maintain a growing trend.

The crime scene will continue to increase

In addition to the traditional coastal developed areas, the illegal operators of underground banks have turned to the central and western inland areas. In Tibet, Qinghai, Xinjiang and other regions there have already been such cases and more cases are expected to happen.

Financial transactions will be more complex and hidden

With the increase of modern means of payment and settlement and the potency dimension of striking crimes by the public security organs, the illegal operators will increasingly use others' identity cards to open an account, transfer the funds through online banks or third party payment platform as their methods of settlement of funds. Some suspects even open an account in China and then transfer the funds abroad.

The nature of upstream funds will be more complex

Because of the weakness of the expected appreciation of RMB, the "hot money" flowing to overseas may increase. Especially cross-border transfer of funds for arbitrage through underground banks will substantially increase.

Cross-border settlement will develop in the direction of corporatization

For the domestic and offshore capital settlements, the State Administration of Foreign Exchange has strengthened the control on the personal foreign investment funds. The illegal operators of underground banks will complete their cross-border capital settlement by increased use of setting up shell companies, falsely attracting foreign investments or false trading.

INVESTIGATIVE COUNTERMEASURES OF UNDERGROUND BANKS

Underground banks have become a malignant tumor that endangers China's economic security and social stability. The criminal activities of underground banks have the character of strong concealment, wide range cover, and difficult evidence obtaining, long case-handling period and high case-handling cost. The public security organs must take practical and effective investigative strategies to combat and curb the criminal activities of underground banks.

Strengthen the collection, analysis and collation of criminal intelligence

The illegal activities of underground banks rarely entrap or deceive the masses, so there are almost no victims in the criminal cases. And it has fewer criminal clues, informants and evidence. More attention should be taken to the collection, analysis and collation of the suspicious clues during the daily investigation. An intelligence information database should be set up and collect the information of suspicious companies, persons, accounts, transaction clues and financial institutions. In addition, it is necessary for the public security organs to establish the system of exchanging and sharing information between departments and regions. Only by having sufficient, adequate and accurate information, and the analysis and research on it, could the underground banks criminal cases be investigated rapidly.

Timely collection of evidence and proper control of a crime scene

The crime scene of the underground banks should be carefully processed, and the collected documents, certificates and articles, such as deposits, bank cards (credit cards), record documents, computers, cell phones, fax machines and U shields for online bank, should timely extracted. A signature should be made by the criminal suspect and an on-site trial of the suspect could be held for further fixing the evidence. During the process of rooting out the underground bank dens, much attention should be made that there might be some companies or individuals who have no informa-

tion about the blow and still come to the criminal scene for transaction. The public security organs should control the criminal scene and sit back and wait in order to further enlarge the results of attack.

Proper querying and freezing the bank accounts involved in the case

The underground bank criminals generally have a large number of bank accounts and these accounts have frequent trading and huge amount of transactions. Therefore, the real-time trading records of the accounts could be obtained by the query of the bank accounts involved in the query. Also it could get the written evidence of the illegal transactions, get to know the flow of the suspicious funds and the foreign funds inflowing, determine the capital chain of the criminal activities in their character, and master the context of the underground banks transactions. Furthermore, some means of technical investigation could be used for getting useful information or clues about the cases during the query of the involved bank accounts, such as information of the identity of the suspicious persons, other related persons and the regularity of illegal activities. If a bank account is found during the investigation, it should be frozen in time to prevent the loss of the funds involved.

Use the investigative measures reasonably and flexibly

It is often very difficult to catch both the criminals and the booties because these illegal underground banks activities are concealed, their transaction ways and methods are flexible, simple and fast, and there are generally no contracts or records about the transactions. The investigating authorities must constantly summarize the experiences and lessons; make full use of the investigative techniques and compulsory measures which are endowed by the law; collect and preserve all the pieces of evidence comprehensively and objectively. For example, the controlled delivery measure, which is often used during the investigation of drug crime cases, could be used as a reference. It can help to solve the case and obtain the valid key evidence under the condition of both sides are just trading the case. Another useful measure is the temptation in the investigation. The investigators could demand a trade to enable the suspect to commit the crime by posing as a party of the transaction, and obtain the criminal evidence.

Strengthen the position control and make full use of the secret power

Strengthen the position control is an effective means of crime prevention and control. The illegal underground bank criminal activities are often in the form of family or networking, so that keeping good position control, tracking and waiting to the multiple regions and industries is conducive to grasp the law of the criminal activity. Building secret power in special persons and entering the underground banks within the criminal gangs are helpful for obtaining information and collection of criminal evidence.

Establish a sense of long-term operation

Because of the complexity of the illegal activities of underground banks, the wide range and large number of well-informed persons involved, the investigative organs should establish a long-term operating awareness. Once a crime clue is found, relevant departments should cooperate with each other, expand the scope of the investigation on the basis of in-depth investigation and evidence collection, operates the cases carefully, trace the block source, and crack down the crime in proper time.

Intensify the efforts to crack down crime and carry out special rectification actions

The economic crime investigation department should play the role of the main force to crack down the illegal operation of underground banks. Under the principle of quickly and severely combating crimes, it is to maintain a high pressure on the underground bank crimes. According to the clues and illegal crime situation, rectification actions should be carried out in an organized and planned manner and be united with the People's Bank, the foreign exchange administrative departments and other sections of the public security organs. By striking out some important cases, this should effectively contain the illegal activities of underground banks.

PREVENTIVE COUNTERMEASURES OF UNDERGROUND BANKS

The existence of underground banks has seriously damaged and disrupted the socialist market economic order and financial order, even severely affected the social stability. It has become a social problem which cannot be ignored. In order to ban the underground banks, it should put grooming in the first place, combine grooming with combat, carry out comprehensive management and get the goal of tackling the problem.

Further improve the foreign exchange policies and strengthen its monitoring of bank foreign exchange and cross-border exchange earnings

With the rapid growth of China's economy in recent years, the demands for foreign exchange of the businesses and residents have also increased. It is necessary to further relax the policy restrictions, improve the foreign exchange management policies and regulations, simplify the formalities and as far as possible meet the normal demand for foreign exchange of the businesses and residents. At the same time, strengthen the internal control and management of all commercial banks, improve the audit on the identity of customers, enhance the supervision of the banking settlement and cross-border exchange earnings, and build up real-time monitoring system of cross-border capital flows.

Strengthen the supervision of industry, commerce bureau and tax bureau

The most active form of underground banks is the one engaging in illegal practice of the payment and settlement of funds by setting up shell companies. Therefore, the industry and commerce administrative departments should strengthen their management, regulate the operation order of the agent company, enhance the execution to the industry and commerce inspection system and tax examining system. As long as the business sector checked carefully, fraudulent use of other identity cards to register a shell company will not be successful. If the tax departments perform their duties in place, such a shell company is also difficult to be manipulated by the criminals

Strengthen the coordination and cooperation with relevant departments and form a comprehensive force

To effectively combat and curb the illegal activities of the underground banks, it is needed that the People's Bank, the foreign exchange administrative departments, the public security authorities, customs, industry and commerce bureau, tax bureau and other departments work together. Therefore, an abnormal circumstance bulletin analysis system should be established between their different departments. Full play should be given to the advantages of the various departments in combating underground banks criminal activities and the timeliness and effectiveness of combat work enhanced while a comprehensive regulatory system should be set up.

Strengthen the social public opinion propaganda

The relevant departments should make full use of newspapers, radio, television and other news media; make the typical cases public; expose the underground banks' nature as elusive, deceptive and hazardous; build a public opinion atmosphere energetically to frighten crimes and educate the masses; set up a telephone hotline and establish the clues fund; reward will be given to the citizens who provide valuable clues. The whole society should join together to resist and crack down the underground banks.

CONCLUSIONS

Currently, the activity of underground banks is rampant and spreading; also, it seriously disrupts the normal order of financial management and impacts China's economic security and social stability. The existence of underground banks has its objective reality base and its unique mode of operation which make them have enough living space. In order to fight against underground banks, governance must be in accordance with the principle of "Combining with dredging and blocking, fighting simultaneously using preventive measures". On the one hand, it should strengthen the financial reform and innovation, actively diverting the informal finance and suppressing the existing business and profit margins of underground banks; on the other hand, it should bring the work of cracking down on underground banks into the anti-money laundering system, strengthening the investigation and intensifying the power to crackdown.

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FINANCIAL INFORMATION PROPERTY CRIMES INVESTIGATION OUTLINE

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Abstract: On the Internet, there are more and more financial crimes against information system perpetrated by making use of computer technology. How to resolve such a case, select suitable investigation means, and find case clues in the complicated computer information system have become the emergent professional competence requirements for the police to combat such crimes. This paper offers an in-depth analysis of two typical instances of computer property crime. The two real cases illustrate investigation of the financial information system property crimes in order to provide some concepts of the same cases for the police.

Keywords: financial information system, property crime, investigation.

INTRODUCTION

With the popularity of the computer and cyber technology in the daily life and production, more and more enterprises would like to make use of computer and cyber technology to facilitate production and business management, and more and more people would like to make use of computer and cyber technology to perform monetary and financial transactions. When there is a large amount of digital financial assets, real right assets, electronic funds and virtual property in the computer information system, the property crime necessarily occurs. Globally, among computer crimes, the rate of property crimes makes the top. Among these crimes, the most typical crime is the cyber theft crime.

From the aspect of a victim, the cyber theft crime can be divided into two types. One aims at specific objects to perpetrate theft crimes. The other aims at nonspecific objects to commit theft crimes on a larger scale. From the aspect of technical means, the property crime aiming at specific financial information system can be divided into two types. One is operational type (illegal operation with legal authority). The other is programmable type (designing a specific program, software or hacker technique for a specific aim). The paper introduces two complicated computer theft cases which were handled by the writer in order to analyze some regular and characteristic ways and methods of thinking and to sum up common problems and experiences in work to share with other police agencies.

Generally, business enterprises will adopt suitable financial management software in the realization of information management. According to different professions, natures and scales, enterprises will adopt different software systems. First, we need to be familiar with the software system of the involved enterprise during the investigation on property crimes aiming at the financial information system and we must be sure if the case exits.

BE FAMILIAR WITH THE SOFTWARE SYSTEM OF THE INVOLVED ENTERPRIES AND MAKE SURE WHETHER THE CASE EXITS

During this phase, the investigator should pay attention to the following:

- Be familiar with the running mode of the targeted software system, network structure, security setting, log types.
- Have knowledge about interdependence of the system data and the correlation of database tables.

Figure 1 Charging System Data of the Net Bar (from the real case)

The system in Case B is typical procurement-sale-stocking software of retail business. Through data interaction of the three sessions of procurement, sale and stocking, the functions, such as information management of enterprise and financial reporting and statistics, are finished, as shown in Figure 2.

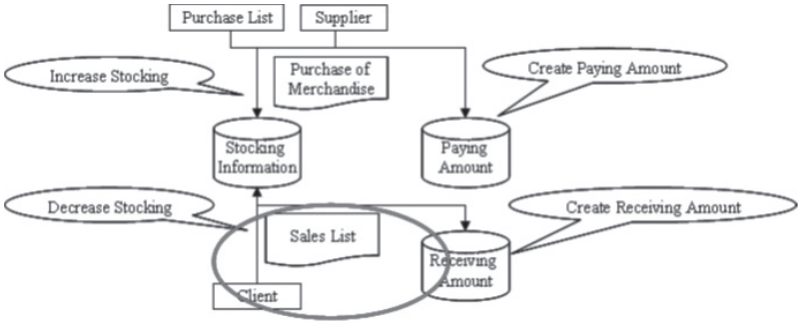

Figure 2 Software Structure of Procurement, Sales and Stocking

This big business retailing enterprise uses financial computerized system, so its core clues are in the system. The following figure shows the system is composed of three sessions of procurement, sale and stocking. The procurement is input and the sale is output. The core of data correlation is the stocking information. This kind of software checks the account in real time. If the sale and the income are balanced, theoretically there is no problem in procurement and stocking. That is to say that whether procurement or sale process, occurrence of every business is bound to correlate to the change of the stocking amount. In this case of occurrence, much more attention was paid by the enterprise and the opening session of police investigation focused on the detail of the marked place in the Figure 2. The sale and stocking business process and data relation can be simplified by Figure 3. The business enterprise uses the monthly settlement system. The business enterprise settles sale income in the end of each month. After backing up all the data, they clear out sale details to decrease the stocking amount so as to enhance the operation speed.

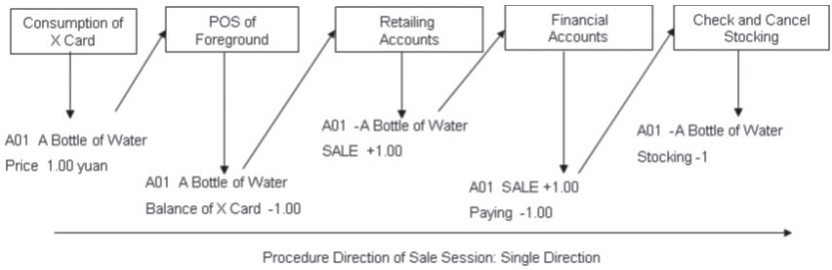

Figure 3 Simplified Diagram of Consuming a Bottle of Water

The background data of the system is very complicated. After combining the data detail of every month, there are more than 300 forms, most of which have more than ten fields. The biggest form has more than 90,000,000 records. After making the relation of the form data clear, make sure if the case exits. As this case involves the prepaid card usage environment, calculate the prepaid card data outside the system. That is to calculate every card's Total Consumed Account + the Remained Account – Prepaid Card Face Value. The result should be 0 theoretically. But after calculating, there are 3,193 cards with problems. The total abnormal amount is 1,030,000. So the case B exits.

REVERSE DEDUCTION CONCERNING THE CRIME COMMITTING TECHNIQUE FROM THE CASE RESULT

Knowing the targeted system structure and data relation is the basis for cracking down upon a case. Once be familiar with the targeted system and make sure that the case exits, what should be done is to reversely deduct to the crime-committing technique session from the appearance result. This work is generally very complicated. The technique difficulty is big and it needs clear work thinking way. But this is the key job determining if the case can be successfully handled. Because knowing about the technique session on the crime scene can help to know about the key behavior procedure that the suspect commits the crime, the investigation scope can be reduced from the angle of crime technique condition and the investigation direction can be determined.

In case A, after further knowing about the charging function of the system, the following are found out:

- The agent server is directly connected with the Internet access server, so the system time can not be modified.
- If the system parameter setting is modified, the security log will record it.
- If the amount of paid-up is not in accordance with the amount receivable, when settling the accounts, the displayed amount will not be in accordance with the calculated amount by the system.
- If the amount of received and paid-up displayed by the system is modified, the financial log will record it.
- The recharging and renewal of the member card can not be modified. If there is any mistake needing modifying, modify it by the means of adding plus or minus amount.

First, analyze the financial audit log of this financial management software. It is found that the status of the log file is normal and there is no abnormal operation in the log record. Then, examine the system security log. It is found that there are the records of only the last 24hours in the security log. Obviously, it is determined that case A is an operational case through system logs. That is to adopt the legal authority of the system to log on the foreground and commit illegal operation in the system. The result is that almost 10,000 records are abnormal and the involved amount is over 50,000 yuan. This data relation is that Usage Time × Fee Rate = Amount of Money. The Usage Time is a fixed amount. If the Amount of Money is abnormal, the most possible problem will be in the

Fee Rate setting. Thus the technique mean used by the suspect to commit crime is almost clear. So how does the suspect commit the behavior of crime concretely?

Through analyzing the almost 10,000 records with problems in the aspect of regularity, the possibilities, such as some special computers have problem or some special top limit of the amount receivable has problem, are successively excluded. At last, it is found that the time has obvious regularity: at about 21 pm of every night (This is the time when the victim goes to the net bar to settle the accounts.) the suspect changes the system Fee Rate into 0 yuan/hour and he will change it back into 2 yuan/hour at 8 am the next morning. Thus, at night the suspect can use the manual charging mean to get a lot of income and there is no any record in the system.

In case B, the direct result is the over 1,000,000 yuan of abnormal difference in the over 3,000 prepaid cards. Whether it is intentional human error or operation mistake, the abnormity is bound to be prompted when accounting the accounts. The accounts seem balanced and the extra consumption amount of money is not shown, so the case must be shown in other way. That is to say that since the property crime case exits, some session of procurement, sale and stocking must have problem in the market. After further asking the client, it is found that *the responsible person is doubt that the warehouse keeper steals what is entrusted to his care. Even though the video surveillance is installed, the effective evidence can not be got. So in one year, three groups of warehouse keepers are dispensed*. This feedback of indirect result actually shows that there is problem in stocking. The basis of it is that the stocking accounts are not in accordance with the actual products in the warehouse. The problem in stocking accounts can reversely deduct that the account items are modified. So the sale and income are not balanced and they are not in accordance with the stocking. How does the suspect commit the crime behavior procedure?

If there is any important, sensitive and abnormal operation in any financial software, most of the financial software will have log records (Some software has no independent log, but has detail records in corresponding items.). So if someone modifies and delete the system financial data, the log will record it and show it (as in case A). But in this case, the log file is sound and intact and does not record any abnormal information. That is to say his case is a programmable case. In such case, the underlying data or the background data is intruded, modified and deleted. So it is very difficult to crack down upon this case. For programmable case, it can be begun with investigating the original status and present status of the targeted system attributes to find out the modifying features. According to the body of modified program or the data attached to the program (In this case, the program is the financial software and the data attached to the program is the content of the background database.), analyze its function or characteristics and combine other clues to limit the scope of the suspects. But in this case, the beginning clues are the backup data and a core server. There are no deeper clues.

TECHNIQUE ANALYSIS AND COLLECTING CLUES AT THE CRIME SCENE

The technique analysis of crime scene actually continues the thought and standard of the scene investigation in the traditional criminal investigation work. It includes scene investigation and technique analysis.

In case A, the crime scene is a public net bar place. The Internet staff in the net bar has high mobility. Even if the suspect uses manual charging to escape from the system accounts settlement, it is hard to check every Internet staff in the net bar for the investigator. But according to the known clues, it has already had comprehensively collecting and analyzing condition. In this case, the suspect's aim is the property. So if he wants to reach his crime goal, the conditions for the crime committing are as the following:

TECHNICAL CONDITIONS

Know the highest authority of the system (It is the necessary to own the highest management authority to modify the important parameters, such as the fee rate).

OUTSIDE CONDITIONS

Have the condition to access to the business cash (Or the actual profit can not be got even though the electronic account items are modified.).

TIME OF CRIME PERPETRATION

From January 2006 to June 2008 (It is the time window that all abnormal records appear.).

After summing up the above clues, the several conditions with which the suspect commits the crime are clear. Obviously, from January 2006 to June 2008, Ding was the manager of the net bar and Yu was the cashier. They are the major crime suspects. After the follow-up investigation, it is found out that Ding and Yu are lovers. They are colluded with each other to commit the crime. Ding tells Yu the specific amount of stolen money after modifying the parameters. Yu gives the corresponding part of the business cash to Ding to take away.

In case B, the crime scene is the comprehensive business and management system of a market. So it is more complicated than case A. Besides, in the beginning work, enough clues have not got yet and the suspect's technique means and crime committing procedure are not known.

The crime scene can often provide the most, direct and effective clues for cracking down upon crimes. But it has passed ten months from the crime committed day to the scene analysis day (At the beginning, the police of the basic level have examined the crime scene. Ten months later, the investigation expert examines it for the second time.). Besides, after the case comes out, the victim enterprise can not make sure of the reason and extent of the harm. So the market replaces the original financial system with a new financial software system of another company. According to the new system requirement, the devices are changed a bit. The server has been changed. So when the investigator of the second examination arrives at the crime scene, the original status of the scene has been totally destroyed.

When referring to the initial case files, it is found that only the position of the core server and the neighboring wiring are recorded in the scene investigation records and the network topology, process information, volatile data, authority distribution and other facets of the market information system are not recorded. As the case happens within the enterprise local network, the scope of scene investigation should cover all the network area. If the crime node is clear, the investigation can be focused on this node and the neighboring nodes are the auxiliary nodes. The investigation can be conducted both in detail and briefly and the focuses are different. If the crime node is not clear, the investigation should cover all the topology structure, device distribution, authority setting and other facets of all the network system. At the same time, the key devices, such as the server, sensitive area, the computer with sensitive authority, should be examined emphatically. In this case, because the original scene has been destroyed, the key part of scene job is to reconstruct the scene.

There are two ways to reconstruct the computer crime scene. One is physically reconstruction. That is to actually restore to the original scene according to the original position and the wiring of the computers, and auxiliary devices and the system working status of that day. This method is usually applied in the situation that there is special auxiliary device on the scene or the system itself belongs to special application mode. The other is virtual reconstruction. That is to virtually restore to the original scene through the way of drawing the picture, listing, data simulation and other facets according to the contents, such as the topology structure, device distribution, authority setting and data flow of the computer system. This way is usually applied in such situations as in the local network, with a lot of devices, with complicated topology, with physically large span. These situations are hard to reconstruct physically or the goal of such situations are to filter if there is any target uninvestigated, know about the detailed profession work procedure and data flow.

The virtual scene reconstruction is suitable for this case. Ask the market's manager, the system supervisor, the directors of every department, installer and debugging person of the new system when the financial system is changed. According to the information they provide and think it over and over again, reconstruct the scene by drawing the figure, as shown in Figure 4. By drawing the picture, it is found that an intermediate layer server is neglected during the previous investigation. This server has been abandoned to the warehouse. Theoretically, the intermediate layer server is usually used in complicated network structure, functioning as connecting the client node with the server node and logic control. But in this case, the network scale of the victim market is not large. It is not necessary to add this device. So this abnormity should arouse the attention of the investigator.

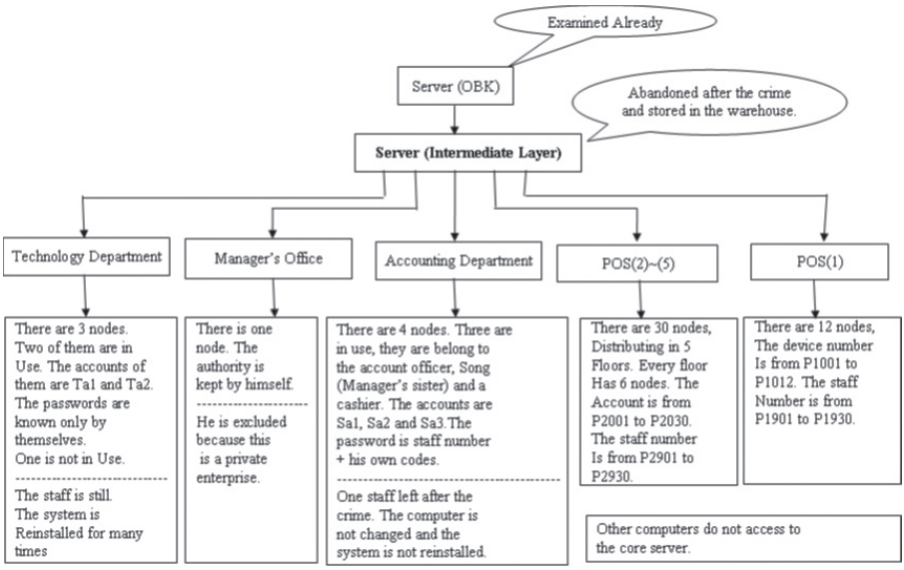

Figure 4: Virtual Reconstruction of the Scene Diagram

When investigating the intermediate layer server, the surprising information is found out first: This server opens the telnet. For an enterprise with the sales of several hundred million yuan, that its financial system opens telnet, although it has passwords, is equal to put a locked safe full of cash on the grass in the wayside. The possibility of being stolen exits all the way. After further investigation, it is known that the provider of the former financial system is from a province 2,000 km away. In order to save the service cost and for the convenience of service and updating, the telnet of the system is open. By investigating the telnet log, it is found that there are dozens of logons from the IP of other province and the IP of local province from March 2007 to August 2007. The logon time of the local IP is from March to June. The number of IP is over 20. Obviously, the IP of other province is from the software provider. But the local IP should not appear. It is abnormal. It is very likely left by the suspect. But as two years have passed from the IP time to the investigating time, it has been invalid.

During the following examination on file system of the intermediate layer server, it is found that there is a hidden file folder of TTI in the path of SYS. The created time is February 2007. The installation time of the system is January 2007. Generally, the attributes of the files in the intermediate layer server are staying the same except that the files like the log need updating. After open the folder of TTI, there are two files of tti.exe and tti.pb. Superficially, the executive file of tti.exe are developed and compiled by Powerbuilder. After using the tool of UltraEdit to examine the code characteristics of the executive program (The anti-compiling tool software is also OK for examination.), it is found that the function of tti.exe is as the following: According to the queried prepaid card number, display the consumption detail. According to the income database table of using the transaction flow number to correlate the sale records, retail records and other facets, delete the corresponding records one by one till checking and canceling the stock. After delete all consumption records one by one according to the flow number, display the original card value table. Use the original value of this card minus total consumption amount to calculate the remaining sum of this card. However, after this program deletes all the consumption records, the result got through the last calculation step is the restored the totally consumed and abandoned card to the original value, as shown in Figure 5. But this program only can restore the card to the largest value of 1,000 yuan. How does the card with 20,000 yuan come out? After analyzing the original financial software and asking the financial personnel about the work procedure, it is found that the original value table in the database is provided by the card producer, it is not programmed by the software company itself. The card original value is not directly correlated with the financial items. In the process of selling

cards, according to the rule of prescribed card number is related with amount of money, finish the sale behavior. So if the amount of the original value table is modified, the financial item will not reflect it. Check the time attribute of the original value table, it is found that it is indeed modified in May 2007. Because the office of the financial department is connected with the office of the technique department and there is a 24-hour video supervision, the suspect should have committed the crime outside the local scene. It is speculated that the suspect has copied the tti program to the intermediate layer server in advance. Then by the way of telnet, he displays and modifies the original value table of the card. Next, by the way of telnet, he executes the tti program to finish modifying the balance of the involved cards. Till now, the technique means that the suspect uses to commit the crime are very clear. The condition of comprehensive analysis on clues is got.

Figure 5: Example of Part of tti.exe Code (from the real case)

Through the above steps get the judging result, it is presumed that the suspect must have the following conditions to commit the crime:

TECHNICAL CONDITIONS

The suspect must know about the IP address and authority of accessing to the Internet and completely master the characteristics of the this financial system. Besides he has the ability of PB programming.

OUTSIDE CONDITIONS

The suspect can come into contact with the recycled and abandoned cards (The suspect gets the profits by producing and selling a lot of illegally recharged cards. The scene space shows that the office of financial department where the abandoned are is connected with the office of technique department.).

TIME OF CRIME PERPETRATION

From February 2007 (the time when the tti.exe is created) to June 2007 (the time of the last logon time of local IP).

By comprehensive analyzing, it is judged that the most possibility is the insider, especially the staff of the technique department. According to the salary account of this market, first the time window should be locked. That is Wang who is the system supervisor at that time and has left in May 2007.

By examining Wang's computer at his home, the traces of remotely logging on the server (server's name), part involved card numbers, logging on background database (original card value name in database), execution of TTI program are found out. The above data verifies that Wang is the

suspect of this case. But in Wang's computer there is no trace of having installed PowerBuilder. So he must have the accomplice.

Widen the time window of the clue judging condition once more, it is found that Liu who is the successor of Wang also has the suspicion. The situation of Liu's computer at his home is the almost the same with Wang's. When Liu is confirmed to be the suspect, it is determined that there are still other suspects. There is no further clue after investigating everyone of the enterprise.

After transforming ideas to analyze this case, it is found that it is only one month from the system installation to the creation of tti program. So who has the ability to accurately find the specific form and the meaning of the specific field in the complicated database forms in such short time and accurately program the specific program? The extreme possibility is the program developer. By investigation, the third suspect of this case is found out, that is Hu. During the crime committing time, he is designated to install and debug the financial management system for this market by the software company. He also maintains and helps to run this software. This man left the crime scene in April 2007 back to his company. In February the next year, he left his company back to his hometown for his own business.

By investigating the outside evidence of Hu and crossover interrogating Wang, Liu and Hu, Hu admits that TTI program was written by him and the three persons confessed for the theft criminal facts.

EVIDENCE COLLECTING AND SUMMING UP THE CASE

Comparing Case A with Case B, it has be found that although the technique of investigation is comparatively simple, it is hard to collect the evidence. However, although it is hard to investigate, it is easy to collect the evidence. This is because the crime committing means and procedure of the suspect in case A are simple, the objective materials left are few. So it is hard to collect the evidence. The evidence of this case focuses on the identification and analyzing result of the data left in the system and the confession of the two suspects. However, once the suspect does not admit the crime behavior, it is necessary to investigate all the net bar personnel when the crime is committing. By the circumstantial evidence, the only highest authority of this system is verified. At the same time, the advice of the procuratorate and the court of law is required. In case B, the operation procedure is complicated and there is a lot of evidence, involving network devices, file residual of computer data and entity evidence. So the evidence collecting procedure is simple.

It is very common to commit theft crime on special computer information system in present computer network crimes. But as the system characteristics and the security arrangement of every case are different, the technique means used by the suspect and the direct access nodes are different. So generally, the following should be noticed in such cases:

- First know about this system according to the special system of the case. Know about the system structure, work process and data characteristics. Only after knowing about the involved system, the abnormity of system can be analyzed accurately in order to form the successive investigation work way.
- Select rational investigation means. In computer theft crime case, the common initial clues are as the following: Property class, such as the bank accounts; Communications class, such as mobile and landline; Network data class, such as Email, QQ. Rationally and accurately select investigation ways and finding out the best starting point can save the case handling resource, improve the efficiency and increase the success rate of case handling. Take case B for example, in the first phase, by selecting the server log for the starting point, the main working direction and emphatically investigate the background database are ascertained. In the second phase, by selecting scene reconstruction for the starting point, the key evidence and clue are directly found out.
- Pay attention to the clue timeliness of the involved case. Both the computer dynamic and volatile data and network data trace have strong timeliness and are easy to be lost. In case B, the system is not closed when the crime is committing, display the process information of the intermediate layer server. It is possible to find out the TTI file, thus the case can be quickly handled in several days.

- Pay attention to the conservation and storage of the evidence. In case B, in the whole process of the crime committing of the suspect, the important evidence and clue are both exiting in the form of digital data except illegally recharging the card. So in the suit process, the technique means and standards should be adopted to maintain the legality and the effectiveness of the evidence. For example, identify the function of the TTI program, cloning conserve the data of the hard disk in the suspect's computer (Use MD5 check.) and combine the traditional evidence to reproduce the suspect's crime committing process.
- Maximize the result. In cyber crimes, the application environment and the system distributed on Internet are different and complicated. So when the suspect develops a set of special crime technique means and after successfully committing the crime, usually he will look for the same case conditions to commit the crime again and again. The probability of repeated crime committing is high and the means of crime committing are almost the same.

Under the present circumstances of the rapid development of IT technology, the public security must improve the possibility of informatization application level of all kinds of polices as soon as possible. It is only in this way that the goal of *cracking down upon the crimes by modern technology* can be realized.

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CRIMINAL COMMUNICATION TRACE IN COMPARISON WITH CRIMINAL MATERIAL TRACE AND PSYCHOLOGICAL TRACE

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Abstract: Compared to criminal material traces and psychological traces, criminal communication traces are the impressions and signs left by the offender in the public communication system during the process of committing a crime. Criminal communication trace related to criminal behavior of the offender can be used to analyze the case, collect leads and fix evidence. It is objective, and presents the characteristics intangible in appearance, as well as the tangible ones, duplicable, accurate and vulnerable in essence. The paper offers a scientific classification of criminal communication traces and finally elaborates the applications in scouting and case-investigations in China.

Keywords: criminal communication trace, communication system, crime case investigation.

INTRODUCTION

Traces of crime refer to the impressions and signs which were collected and analyzed by the police and judiciary in solving the case, related to the offender's criminal behavior. Both material traces and psychological traces belong to traces of crime. Criminal material traces formed by the criminal behavior of the offender include fingerprints, footprints, bullet impacts, and so on. The examination of criminal material traces has been developed into a systematic disciplinary system in China, such as the "Trace Inspection Science". Psychological traces mainly refer to reactions of the offenders and their psychological state and personality traits as reflected by the material trace. Based on the Western scholars' investigation of criminal psychological theory, Chinese scholars have achieved a lot in their research related to criminal psychological marks.

With the development of technology and human progress, a criminal communication trace has played an important role in solving the case due to the change of human lifestyle and the escalation of criminal behavior. While the amount of the criminal communication trace researches is insufficient, the research models are not mature. The published papers show lack of systematizations and scientific validity. In this paper, the concept, characteristics, classification and applications of criminal communication traces have been elaborated by being compared to criminal material traces and psychological traces.

CONCEPT OF CRIMINAL COMMUNICATION TRACE

Physical traces in criminal investigations, also referred to as traces in a narrower sense, refer to the objective reflection of contact or segregation interaction between a trace-maker and a trace-carrier induced by the criminal behavior of the offender. The criminal material traces are widely used to make consensus identification that is a judgment on the object through comparison of its consecutive features in the process of criminal examination. Criminal communication traces are different from the criminal material traces and it is difficult to find the trace-maker and the trace-carrier, because of the need to investigate impression reflected on communication behavior related to crime. The criminal communication traces are widely used to find the leads and collect evidence in the process of crime case investigation. Therefore, the concept of criminal communication trace is different to that of material trace. The concept of criminal material trace is difficult to apply to that of criminal communication trace. The criminal communication trace and material trace are logically collateral and parallel to each other.

Psychological traces of crime involve the outcome and reflection of the offender's psychology and behavior. According to the expression of "Encyclopedia of Chinese Public Security", psychological trace is the imprint lift by the offender using his or her words, actions, and expressions in crime scene or in people's mind. The book "Psychological Trace in Crime Scene" by Tao Chen described psychological trace as a psychological attribute of objective things' impression in crime scene or an attribute of the impression of the objective things given by the offender's psychological factors through criminal behavior. Therefore, psychological trace cannot be applied as direct evidence, while it can be used to portray offender's personality, decide nature of case, locate investigative direction, narrow investigative range and correct our judgment. Psychological trace is reflected out indirectly through criminal material trace in crime case. It is objective, and presents the character of abstractness, activity and unconsciousness. From this point, the trace formed by criminal communication behavior also can be thought as an important evidence to analyze psychological characteristics of the offender. The collection and analysis of criminal communication trace is the precondition and basic work of further portraying the criminal psychological trace.

By analyzing the concepts of criminal material trace and psychological trace, we thought that criminal communication trace is the impression and signs left by the offender in the public communication system during the process of committing a crime. These impression and signs related to criminal behavior of the offender can be used to analyze case, collect leads and fix evidence. Therefore, criminal communication trace complements criminal material trace and psychological trace, enriches the types of trace theory and makes criminal psychological trace become more scientific and systematic.

THE CHARACTERISTICS OF CRIMINAL COMMUNICATION TRACE

Intangible in Appearance and Tangible in Nature of Criminal Communication Trace

Material trace is an objective entity that is visible and tangible. It presents many morphological characteristics in physical chemistry and biological respect. While criminal communication trace, which is invisible and intangible, mainly exists in the form of electromagnetic radiation or "0, 1" code. Criminal psychological trace is a potential being, and has the character of abstractness, reflection, and unconsciousness. While criminal communication trace, which is tangible in nature, could exist in the form of telephone bill and base station information in communication system. Therefore, criminal communication trace has the characteristics of intangibility in appearance and tangibility in nature.

Duplicable of Criminal Communication Trace

The tangible existence of criminal material trace is unique and unrecoverable, can be only recorded by the indirect methods such as movie and capture. Criminal psychological trace as a trace of consciousness is the result from inference and judgment, and cannot be duplicated. The electromagnetic and digital form of criminal communication trace determines that the trace related to the criminal communication behavior can be duplicated many times. The communication trace duplication is of equal value and importance compared to the original communication trace.

Accurate of Criminal Communication Trace

Criminal material trace is retrospectively proved by trace inspection technology. Due to the variation of environment, the passage of time and the change of material trace in nature, criminal material trace would show the trait of uncertain during the process of proving the fact of crime case and deducing criminal behavior. Criminal psychological trace is a subjective inference different from objective reality. Criminal communication trace is an objective record of communication

behavior during the process of committing a crime. The behavior reflected by the communication data information has the characteristic of high accuracy. Except for special circumstances, criminal communication trace could not only totally reflect the criminal process, content and relationship of crime case, but also exactly record the time and position of crime case or event related to crime case. Criminal communication trace plays an important role in analyzing crime case and identifying the offender and his relationship.

Vulnerable of Criminal Communication Trace

Once criminal material trace is found and collected, the information reflected by material trace would not be changed and destroyed because of the material characteristic of criminal material trace. Psychological trace is a consciousness trace induced by analysis and judgment, and has a relative stable conclusion. Criminal communication trace that exists in the form of data can be easily tampered, deleted and damaged due to the vulnerable trait of the data information. Therefore, it is necessary for us to improve sense of time, time awareness and establishment of access control and liability regime related to communication system in the process of cracking the crime case.

CLASSIFICATION OF CRIMINAL COMMUNICATION TRACE

Criminal material trace can be divided into fingerprint, footprint and others according to the type of trace-maker. Criminal psychological trace can be divided into two parts in terms of the inner and outer performance status. One part of psychological trace is the outer trace reflecting the psychological trait information of the offender in criminal material trace. In this sense, criminal psychological trace can be viewed as the externalization of criminal material trace. The other part of psychological trace is the trace left by psychological activity related to criminal behavior in the inner psychological state. Criminal communication trace can be divided into radio mobile communication trace, cable fixed communication trace and internetwork communication trace according to the type of public communication system which is used for criminal communication. The operating principle of these three kinds of criminal communication trace is different from each other. These three kinds of criminal communication trace have different objective manifestations so that the application and analysis method of the three kinds of criminal communication trace are different in the process of cracking the crime case.

Criminal radio mobile communication trace is the impression and imprint left by the offender in the public radio communication system during the process of committing a crime. The impression and imprint related to criminal behavior of the offender can be used to analyze case, collect leads and fix evidence. Criminal radio mobile communication trace mainly refers to the trace formed by the involved telephone in communication. There are three radio mobile telecommunication operators in China including China Mobile, China Unicom and China Telecom. Radio mobile communication trace can embody in radio communication billing system (telephone bill), location of base station, special service information and so on. Cable fixed communication trace is the impression and imprint that are related to criminal behavior of the offender in the public communication system and can be used to analyze case, collect leads and fix evidence during the process of committing a crime. Cable fixed communication system can be composed of program-control telephone communication system and integrate circuit (IC) card public telephone communication system. Program-control fixed telephone is one of the commonest communication tools. Residential telephone, business phone and manned public telephone mainly belong to program-control telephone system. The program-control fixed telephone communication trace in the crime case is a communication trace left by the offender or the victim using the program-control fixed telephone within a period of committing a crime. IC card public telephone is a communication tool using IC card as medium to charge and converse. The amount of IC card telephone is reducing with the popularity of mobile phone. While because the IC card public telephone is unattended and widely distributed, the risk of revealing the offender itself is so low that the offender often use it during committing a crime. The IC card public telephone information in the crime case mainly refers to the communication trace left by the offender or the victim in the IC card telephone billing system

within a period of committing a crime. Internetwork communication trace is the impression and imprint that are related to criminal behavior of the offender in the international internetwork system and can be used to analyze case, collect leads and fix evidence during the process of committing a crime. The main manifestation of criminal internetwork communication trace is the criminal communication trace using instant online communication tools such as MSN, Messenger, Skype, Twitter, QQ and more. Except for instant online communication tools, E-mail and forum also belong to the forms of internetwork communication. QQ developed by Tencent Company is the main instant online communication platform and has the great majority of the market share of possession in China. The instant online communication tools are mainly operated based on TCP/IP or UDP signal system. We can identify the offender, lock the position of the offender, investigate the crime case and obtain the evidence of the crime case by collecting and analyzing the internetwork criminal communication trace.

APPLICATIONS OF CRIMINAL COMMUNICATION TRACE

With the development and popularity of technology areas such as communication, office automation and internetwork, criminal communication trace plays more important role in cracking the crime case. The applications of criminal communication trace, material trace and psychological trace have something in common. While the applications of criminal communication trace have some special traits compared to that of criminal material trace and psychological trace.

It can be used to collect the criminal evidence and provide foundation for confirming the crimes through investigating communication process and communication information supported by criminal communication trace. Not only the communication records left by the offender before and after committing a crime such as communication activity, communication time, communication frequency and communication location, but also the behavior traces of criminal conspiracy, committing a crime and covering up crime left by the offender using instant online communication software and Email in internetwork communication system play important roles for the investigator in analyzing and judging the crime scene, examining and judging evidence and identifying the offender.

To Identify the Dead and Find the Movement Path and Social Relationship of the Dead in Homicide Cases

Firstly, criminal communication trace can be used for the investigator to identify the nameless corpse by analyzing and investigating the radio mobile communication trace of the dead. Secondly, radio mobile communication trace of the dead can consecutively record the telephone number of the people who have corresponded with the dead, the communication frequency, the start and end time of communication, the call duration of communication, the calling state (state of phone roaming) and the location of communication. We could deduce the movement path and last communication activity of the deceased, and find the relationship of the dead by analyzing and judging the radio mobile communication trace, which can promote queuing and survey during cracking the crime case.

To Provide Evidence for Analysis and Judgment of Crime Scene

On the one hand, we can deduce the time and position of the crime case using the criminal communication trace. The time of the crime case can be analyzed and deduced by either investigating the communication time recorded in communication tools used by the victim, criminal suspect and the other people involved with the case and in communication billing information related with the case, or analyzing the recorded time when the Email or instant online message was send or received. The position of the crime case could be investigated based on the spatial position of the mobile telephone or fixed communication tools used by the offender or victim when the case occurred, or based on IP address of internetwork communication. On the other hand, criminal

communication trace can help the investigator determine the investigative orientation and narrow investigative range. In order to confirm the offender's concrete information such as the residential area and vocation, the investigator could find out the dialect and idiom and professional language of the offender by questioning the victim who had corresponded with the offender in some crime cases. In some case that the suspect often committed crimes from one place to another, the location of the offender could be confirmed by targeted searching the communication records of the roaming calls on the position where the crime occurred. The active zone and scope of the offender can be found according to the area code of fixed-line phone and to the location where the mobile telephone signal appears. The position of the offender can be locked in terms of the calling frequency between the offender and the victim and the records of instant online communication software.

To Identify the Offender and Lock the Offender's Location

Finding and identifying the offender is a key part in cracking the crime case. It can be directly or indirectly accomplished by searching the criminal communication tools used by the offender or the victim, and analyzing the communication information related to the crime case and IP address of internetwork communication.

To Arrest the Fugitive

The escape route and direction and hiding place of the offender can be judged according to the criminal communication trace information related to the offender and the hostage in kidnapping case. Once the offender had corresponded with his relatives or his partner using the communication tools, the hiding place of the fugitive could be exposed by the communication information and the content of instant online chat. The investigator could arrange a communication between the fugitive and his relatives using telephone or instant online communication tools in order to confirm the location of the fugitive.

CONCLUSION

Criminal communication trace is the impression and print left by the offender in the public communication system in the course of committing a crime. The impression and print related to criminal behavior of the offender can be used to analyze a case, collect leads and fix evidence. The criminal communication trace is objective, and presents the characteristics of being intangible in appearance, but also tangible, duplicable, accurate and vulnerable in essence. Criminal communication traces can be divided into radio mobile communication traces, cable fixed communication traces and internet work communication traces according to the type of public communication system. It can be used to identify the offender, collect the criminal evidence, provide foundation for confirming the crime, obtain the movement path and lock the position of the offender through investigating communication processes and communication information supported by criminal communication traces. With the development of technology and human progress, criminal communication traces will play more important role in the cracking the crime cases due to the change of human lifestyle and the escalation of criminal behavior.

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ANALYSIS ON THE EFFECTIVENESS OF CRIMINAL PROTECTION OF INTELLECTUAL PROPERTY RIGHTS IN CHINA

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Abstract: Under the development of economic globalization and regional integration, intellectual property has become a decisive factor in enhancing international competitiveness of a country. Meanwhile, the level of protection of intellectual property rights has become the concentrated expression of comprehensive national strength and continued development force. In recent years, Chinese government has strived to establish and improve intellectual property regime, launching a special movement on intellectual property protection, and further intensifying the protection of intellectual property rights, achieving remarkable results. However, from the point of view of criminal justice, the higher starting point of criminal acts incidence, identification of the criminal process only by the amounts involved, the higher subjective elements of intellectual property rights crime as well as the imperfect convergence mechanism of administrative law enforcement and criminal justice, still restrict the effectiveness of criminal protection of intellectual property rights. Therefore, we should follow the minimum international standards established by TRIPS, in combination with the judicial practice related to intellectual property infringement crime, to reduce the incidence of criminal acts in an effort to gradually solve the problem of crime rate by classification; to reduce or even cancel the request for the subjective elements of crime establishment through the enactment of justice interpretation. At the same time, we must also strengthen the convergence of administrative enforcement and criminal justice to promote the effective use of law enforcement resources. Finally, we should place the effectiveness of criminal protection of intellectual property rights in China within a manageable range by cracking down on this form of crime by precisely and fully transforming the investigation concept.

Keywords: intellectual property, criminal protection, effectiveness, China.

INTRODUCTION

Under the development of economic globalization and regional integration, intellectual property has become a strategic resource for the protection of national security and development, also become a decisive factor to enhance international competitiveness of a country. Meanwhile, the level of protection of intellectual property rights has become the concentrated expression of comprehensive national strength and continued development force. China released "National intellectual property Strategy" on June 5, 2008, decided to implement the national intellectual property strategy. In recent years, Chinese government continues to establish and improve intellectual property regime, launching special movement on intellectual property protection, and further intensified the protection of intellectual property rights, and achieved remarkable results. Since 2005, Chinese public security organs have been continuously engaged in the "Eagle Action", "Days of Action", the series of crackdown activities against online piracy aimed at the creation of a high pressure situation to crack down on intellectual property infringement crimes. Over the ten-year period from 2001 to 2010, Chinese public security organs cracked a total of 15,000 criminal cases of intellectual property violations, with a total of 9,284 cases occurring from 2006 to 2010, an increase of 60% as compared to the previous five-year period.[1] In 2011, under the unified arrangements of the State Council, China launched six-month special action to combat intellectual property infringement and selling counterfeit and shoddy goods. In this process, Chinese public security organs cracked more than 2000 cases of intellectual property

1 See Ministry of Public Security Economic Crime Investigation Bureau Meng Qingfeng Secretary's speech: "Strengthen the Protection of Intellectual Property Rights", the press conference, the Fourth Session of the 11th National People Delegate Congress held in the News Center on March 13, 2011.

crime, and arrested more than 4,000 suspects involved in the total amount of 2.3 billion Yuan, more than three times in the same period in 2010. These show results achieved by Chinese police in the fight against intellectual property crimes. On the other hand, also show the criminal protection of intellectual property rights sin China need to be further enhanced.

Compared to other types of criminal laws, intellectual property statutes across the world are highly technical and standardized due to the contents of numerous international agreements, including "Trade-related Aspects of Intellectual Property Rights Agreement" (TRIPS). China transplanted most of its intellectual property laws directly from the west.[2] The most recently updated 1997 Chinese Criminal Code adds a section titled "Section 7, Infringement of Intellectual Property Rights" in chapter III to specifically define the basic elements of all intellectual property offenses. The intellectual property rights section defines three trademark offenses, one patent offense, two copyright offenses and one trade secret offense. The Supreme People's Court (SPC) and Supreme People's Procuratorate (SPP) in 2004 also promulgated the "Interpretation of the Issues concerning the Specific Application of Law in Handling Criminal Cases of Infringement of Intellectual Property Rights" and"Interpretation II of the Issues concerning the Specific Application of Law in Handling Criminal Cases of Infringement of Intellectual Property Rights" in 2007. In addition, several articles from SPC's "Interpretation of the Issues concerning the Specific Application of Law in Deciding Cases of Unlawful Business Operation" have been frequently used in handling piracy crimes. The intellectual property rights section in the Chinese Criminal Code is surprisingly brief and vague compared to that of the U.S. criminal Code, and does not define many crucial concepts. Therefore, there have been numerous interpretations, provisions, notices, and opinions passed by the State Council, the SPC, state administrative bureaus and their local departments in an attempt to further define the formal rules. These documents can best be described as summaries of state policies and judicial and administrative experiences, and they are not always consistent with specific provisions of the formal rules.[3]

Dimitrov[4] is the only scholar who has conducted systematic empirical work on the criminal enforcement of intellectual property rights in China. He provides a comparative study of such enforcement of in six countries: Mainland China, Taiwan, Russia, the Czech Republic, France, and the US. He describes and analyzes the statutory basis, police structure, enforcement procedure and enforcement practices and aggregate official enforcement statistics. He also carries out a qualitative study of intellectual property rights enforcement barriers in China (focusing mainly on the administrative enforcement) from aspects of both institutional structure and bureaucratic incentive. He found vague and overlapping agency responsibilities, local protectionism, and corruption as major enforcement barriers. However, due to the rather large comparative terrain covered, Dimitrov's research on criminal intellectual property rights enforcement in China provides less than an in-depth analysis and is now somewhat out of date. Yu[5] have written extensively on intellectual property rights enforcement in China. As law professor, he provides detailed legal analysis and documentary studies rather than broad empirical research, and he does not concentrate much on the criminal protection of intellectual property in China.

Transcending the limited previous research on the topic, this paper will systematically analyze the effectiveness of criminal protection of intellectual property rights in China, focusing on recent trends and developments. First, it will put forward the presupposition of consistent with intellectual property criminal protection and economic development level in China. It will then analyze that from the point of view of criminal justice, the higher starting point of criminal, identified the criminal process only by the amount, the higher subjective elements of intellectual property rights crime

2 Toren, P. (2003). Intellectual property and computer crimes. New York: Law Journal Press, Series: Intellectual property business crimes series.

3 Haiyan Liu(2010). The Criminal Enforcement of Intellectual Property Rights in China: Recent Developments and Implications. Asian Criminology (2010) 5:137–156

4 Dimitrov, M. (2004). Administrative Decentralization, Legal Fragmentation, and the Rule of Law: The Enforcement of Intellectual Property Rights Laws in China, Russia, Taiwan, and the Czech Republic. Unpublished doctoral dissertation, Stanford University, Palo Alto, California.

5 Yu, P. (2007). Intellectual property, economic development, and the China puzzle, in intellectual property, trade and development: Strategies to optimize economic development in a TRIPS plus era. In D. J. Gervais (Ed.), Drake University Law School Occasional Papers in Intellectual Property Law, Vol. 1 (p.173). NY: Oxford University Press.

as well as the imperfect convergence mechanism of administrative law enforcement and criminal justice, would restrict the effectiveness of criminal protection of intellectual property rights. At last, this paper will discuss how to realize the effectiveness of criminal protection of intellectual property rights in China by following the minimum international standards established by TRIPS, in combination with the judicial practice of intellectual property infringement crime.

CONSISTENT INTELLECTUAL PROPERTY CRIMINAL PROTECTION AND ECONOMIC DEVELOPMENT LEVEL IN CHINA

In recent years, Chinese law enforcement efforts to combat the field of intellectual property crimes continue to increase in response to concerns of international community to maintain good image, conform the internal requirements to building an innovative country, enhancing international competitiveness, and achieve the desired purpose. According to the Supreme People's Court statistics, in 2010, the National District Court concluded a total of 3,942 criminal cases involving intellectual property infringement, including 6,000 convictions. Among these, there were 1254 cases of intellectual property infringement crimes, the number of effective judgments was 1966; the production and sale of shoddy goods crime involved 609 cases, and the number of effective judgments was 926; illegal business crime sentenced to 2054 cases, the number of effective judgments is 3068; other criminal cases involving the infringement of intellectual property amounted to 25 cases, and the number of effective judgments was 41. In addition, "2012 Sword Network Action", which is special treatment combating Internet piracy, was launched by the four departments of State Copyright Bureau, Ministry of Public Security, Ministry of Industry, State Internet Information Office in July 2012. The "Sword Network Action", which would continue till the end of October, was the eighth network piracy special treatment action initiated since 2005. The person in charge of State Copyright Bureau said this special action would increase in intensity; the website for the multiple piracy activity and other serious circumstances would be strictly investigated and dealt with, focusing in particular on the increase in the transfer of internet criminal cases, which would be sure to make new breakthroughs in handling major cases.

It should be said that intellectual property has become the main driving force to promote economic growth of a state, and therefore intellectual property infringement crime could become a bottleneck restricting economic development of the country. With the temptation of huge profits, intellectual property criminal cases will continue to show an upward trend. Based on the dual needs - that of international economic and trade relations and national intellectual property strategy - Chinese criminal protection of intellectual property rights over a period of time will continue to strengthen. However, strengthening the criminal protection of intellectual property rights should adhere to the principle that is consistent with economic development stage and national conditions. Studies have shown that strong intellectual property regime is not basic conditions of economic development. The role of intellectual property protection is different in the different levels of economic development. Intellectual property is also weak protection status in many developed countries in early industrialization. On the mature economic development stage, the impact of intellectual property rights on innovation is obviously, the level of protection appears a sharp increase. Keith E. Maskus suggests that patent rights decline as incomes rise from low levels, and then accelerate sharply toward the highest income levels.[6] Therefore, a country's degree of intellectual property protection is a dynamic process, consistent with the level of economic development. Although there is different sound, which developing countries strengthen the protection of intellectual property rights that is conducive to stimulate innovation or substantially harm the welfare, strengthening of intellectual property protection would certainly attract more foreign direct investment. In developing countries whose per capita GDP has reached certain levels, the protection of intellectual property rights would have a positive impact on economic growth. However, the complex situation of imbalance of China's economic development and economic transition period determine that the strength of intellectual property protection

6 Keith E. Maskus. Intellectual Property Rights in the Global Economy Institute for International Economics, P103.

should not be too high. Strengthening the criminal judicial protection of intellectual property rights should not be unreasonably reduced the threshold of intellectual property criminal justice according to the standard of developed countries. So, not only criminal justice functions can not play, but also may not be conducive to the realization of overall effectiveness of intellectual property judicial protection, thereby influence China's position in international economic and trade relations.

In addition, strengthening the criminal justice protection of intellectual property rights should adhere to the principle that it is consistent with innovative function of intellectual property legal system. Objects of intellectual property crime are the order of socialist market economy in China. This reflects the intervention of state power for private rights, but does not affect private nature of intellectual property. The legal system of intellectual property rights stimulate innovation, promote economic growth, promote social progress by protecting innovative technology that brings profits and expected profits. Excessive strong intellectual property protection instead limits the spread of knowledge, and consolidates the monopoly of rights owners, which hinder economic growth and stifle innovation. Therefore, while stressing the necessity of criminal protection, we should take into account both the protection of interests of creators and interests of entire social and scientific and technological progress, balance between rights of man and society public, control strictly criminal protection of intellectual property rights within a manageable scope and extent.

ANALYSIS OF RESTRICTING THE EFFECTIVENESS OF CRIMINAL PROTECTION OF INTELLECTUAL PROPERTY IN CHINA

So, how to play fully the effectiveness of criminal protection of intellectual property in a manageable range in China? TRIPS provisions on criminal sanctions for member states provide one of the most important international standards. According to provisions of Article 61, when member states protect their intellectual property rights in accordance with their law, they should be constrained by two factors: First, such a provision should be consistent with equally serious crime punishment level; second, provisions of criminal sanctions should be enough to deter illegal piracy. It should be noted that, at the same time, TRIPS requires standards of protection provided by member states shall not be less than provisions of the agreement, without limiting member states to provide protection standards beyond the agreement, which also is so-called "minimum standards of protection". Obviously, TRIPS only requires parties to a certain degree of "Criminal Law" protection of copyright and trademark rights. In China, related offenses are comprehensive and penalty is relatively severe. Specifically, Section 7 of Chapter 3 of Chinese "Criminal Law", a one-line "Criminal Law" (National People Congress Standing Committee "on safeguarding Internet security provisions "), a number of subsidiaries of "Criminal Law" (including Article 47 of "Copyright Law ", Article 59 of "Trademark Law", Article 63 of Patent Law and Supreme People's Court, Supreme People's Procurator "on the law interpretation of specific application of intellectual property criminal cases (a), (b)" , Supreme People's Court "on the law interpretation of specific application of criminal cases of illegal publications", etc), these become a rigor law system, and provide more comprehensive protection for intellectual property rights. However, Chinese intellectual property infringement crime legislation mainly takes general legislation. Although judicial interpretations clear the applicable standards of intellectual property infringement crime to some extent, the following existing issues still can not be effective on the criminal protection of intellectual property.

Higher Starting Point of Criminal

The starting point of criminal is a basic judgment point if defendant should be sentenced to penalty. There are a lot of terms in Chinese "Criminal Law", such as "relatively large amount (huge), plot (especially) serious", which generally can be understood as "crime = qualitative + quantitative". That is to say that constitution of crime not only need to identify the existence of social harm illegality and criminal behavior, also need to find that this behavior is a threat to social order or infringe on interests of others must also achieve a certain degree. The case involving the intellectual property

infringement crime, generally require "serious" to constitute a crime, whether circumstances are serious or not, the standard is based on the amount of illegal business, or the amount of illegal income, such as the amount of illegal business of counterfeiting registered trademarks need to reach 50,000 Yuan, or the amount of illegal income is more than 30,000 Yuan. Higher starting point of criminal is consistent with the ladder that shows from legal to illegal, from generally legal to seriously legal, and then to criminal. At same time it is also in line with "Criminal Law" principles, reasonableness, necessity and modesty. Higher starting point of criminal within a certain historical period can prevent excessive penalty for intervening in social life, while saving penal resources and increasing the effectiveness of penalty. However, if the threshold is too high, that would lead to the behavior of a large number of real danger to society rejected outside the gate of criminal, make it the "dark figure of crime", and it is difficult to form a standardized concept. Amount committed, for example, people would regarded as a crime or legitimate behavior based on the criminal standard of judicial interpretation. Therefore, from the perspective of strengthening the deterrent force of "Criminal Law" and general preventive considerations, the starting point of criminal should be lowered from criminal policy of a certain period of time.

Identifying the Criminal Process only on the Basis of the Amount

"Amount" is an important criterion to guide the practice of intellectual property conviction, while the filtration process of identifying infringement is lacking. Amounts or money involved reflect requirements of TRIPS on the element of "commercial scale" to some extent, so it is appropriate as a crime element. But it is inappropriate not to consider the infringement that is the premise of crime only depending on the amount in the process of identifying crime. Adjudicator has not powers and responsibilities vested in the process of preliminary review of cases involving intellectual property, namely, whether the infringer has the rights, as well as a lack of fully consider whether the disclaimer may exist. In a nutshell, as long as the amount reach to the required starting point of judicial interpretation, basically can be convicted. There is such mechanism in the infringement action: the defendant may present evidence to deny the existence of infringement, this mechanism is basically absent in a criminal trial. For example, the defendant of Copyright infringement usually denies the existence of infringement based on following regards: the plaintiff is not the copyright holder; plaintiff claims the object does not constitute works; charged with infringing works is an independent creation; charged works and the same part of work of plaintiff are from the public domain or belong to the material or necessary scene or limited expression or results of implementation standard. The defendant can prove above propositions and overthrow allegations of plaintiff. But in a criminal trial, these paid lacking.

Higher Subjective Elements of Intellectual Property Infringement Crime

Among intellectual property infringement crime in China, the number of charges is expressly required "commercial purposes" to constitute a crime. Even if provisions of "Criminal Law" itself without making requirements, judicial interpretation confirms subjective elements by requirements of the "illegal income" that the amount reaches a certain standard to constitute a crime, judicial practice in this trial which intentionally or unintentionally become considered elements. Legislators' original intention is to narrow the criminal attack by requirements of subjective elements. Of course, it is desirable, but this adds to the difficulty of proof of Public Prosecution Service for commercial purposes, leading to "Criminal Law" cannot effectively combat intellectual property infringement crime. Degree of infringement of legal interests by perpetrator doesn't differ due to different criminal purposes, moreover, subjective purpose of copyright infringement is not only profit. And other purposes will also cause harmful consequences. Especially, in the network environment, nonprofit infringement of intellectual property crime more and more becomes a new challenge. Meanwhile, TRIPS' subjective aspects of behavior must be given criminal sanctions only requires "deliberate", this standard may be understood as "knowingly and pursuit", without criminal purpose or motivation, is far below requirements of "Criminal Law". It is obvious "Criminal Law" does not meet the standard of international obligations in the subject elements of crime establishment.

Imperfect Convergence Mechanism of Administrative Law Enforcement and Criminal Justice

In China, the protection of intellectual property implement administrative law enforcement and judicial enforcement of "two paths, parallel operation" dual protection mode. As above "Criminal Law" and criminal judicial interpretation still lack united rationality, this brought many problems to the convergence of administrative law enforcement and criminal justice of intellectual property rights, resulting in rules of evidence, prosecution standards, as well as transfer program of convergence need to be further improved. This shows that the legal basis of intellectual property administrative law enforcement and criminal justice is still a lack of integration.

Proposal for Achieving the Effectiveness of Criminal Protection of Chinese Intellectual Property Rights

The nature of intellectual property rights are private rights. Disputes with it should be mainly settled by justice. The current administrative-led model highlights policy-oriented of a country during certain period of time. But in the long run, the model should turn to adjustment of justice, including infringement of civil complaints and criminal liability. Administrative sanctions will be significantly compressed. This is a kind of possibility in transferring national intellectual property strategy policy. According to above analysis on restricting the effectiveness, facing with the process of China's economic development and future direction of criminal protection of intellectual property, degree and criminal policy, following the minimum international standards established by TRIPS, this paper puts forward the following suggestions to achieve the effectiveness of criminal protection of intellectual property in the coming period, in combination with judicial practice.

According to the Direction of Reducing the Starting Point of Criminal in efforts to gradually Solve the Problem of Crime Amount by Classification

Gradually reducing the starting point of criminal with full application of TRIPS Agreement, that is commitments made in the implementation of protecting intellectual property rights through criminal proceedings when China joined the WTO. Copyright infringement crime, for example, China currently requires to constitute a crime must meet the amount of illegal gains of more than 30,000 Yuan, illegal business turnover of more than 50,000 Yuan or illegal copies of more than 500 (copies). Compared with legal provisions of TRIPS member states, China is still at a high position in the absolute number of starting point of constituting a crime. The severity of punishment is also incompatible with the corresponding offense. In addition, the priorities of "Criminal Law" protection are not more meticulous than the corresponding foreign law. For example, copyright, works with obvious commercial value, works with special timeliness, works supported by the state, works of great scientific value, which are more vulnerable, so should be protected better than the general works. But these works are "equal" with other general works according to "Criminal law", only there are some provisions from the amount of crime or the number of infringement. It is inadequate not to be careful to protect against object type. Thus, even if the starting point cannot be reduced to the level of commitment immediately, but should distinguish different types of protected objects. And according to it, we may set the amount standard of a crime and pay attention to coordination between the strength of offense punished and the degree of guilt to avoid "one size fits all" model.

Reduce or even Cancel the Request for the Subjective Elements of Crime Establishment through the Enactment of Judicial Interpretation

The status of criminal protection of Chinese intellectual property rights is: on the one hand, the criminal behavior is not easy to be eliminated, serious damage to the order of socialist market economy; on the other hand, criminal cases that can be gone to trial, whether absolute number or relative proportion is very small. The functions and role of criminal protection of intellectual property far do not get to play. This is because there is an important institutional barrier that constitution of appropriate crime too much emphasizes on the subjective purpose in the provisions of "Criminal Law". Traditional "Criminal Law" have often such restrictions as "for the purpose of profit" (in

particular copyright) in setting intellectual property infringement crime, that is set to become the purpose of committing. However, in the current network environment, the use of computer and network technology, make it very easy to copy, disseminate works of others. Cost is increasingly reduced. There may be a large number of criminal acts for the purpose of profit. And in recent years, network intellectual property infringement cases of not-for-profit have more social harm than for-profit. But this behavior is not included in the scope of criminal legislation. At present, constitution of copyright crime does not include the purpose of for-profits in many countries and regions. The regulation 35 of Chapter 15 of "UK Data Protection Act" of 1984 reads as follows: *"Related personal data that computer service operators provide, except with prior permission be served, should not be disclosed to computer clubhouse operator. Any intentional or negligent violation of this provision would constitute a crime"*. These laws do not require the perpetrator must have commercial purposes. And removing restrictions for commercial purposes also become trends of national legislative. [7]In addition, the emphasis on subjective purpose is not conducive to verification of crime in judicial practice. The subjective aspects of elements has always been difficult for prosecution forensics and proven. In judicial practice, there is usually such phenomenon that the evidence of "commercial purposes" material of suspect is difficult to obtain and eventually escape criminal punishment. Some researchers have pointed out, can be applied to constructive to solve this problem of subjective elements, as long as they can prove that "huge amount of illegal gains" or other serious circumstances, the suspect can be constructive to has "commercial purposes". But in practice, suspect generally do not set formal, real financial books, objective elements such as the amount of illegal gains is difficult to prove, even with constructive help can not be a good solution to this problem. Therefore, current requires of the "for-profit" subjective element in China is not conducive to effective protection of intellectual property rights, and also not in harmony with provisions of relevant international conventions and criminal legislative trends of other countries.

Strengthen the Convergence of Administrative Enforcement and Criminal Justice to Promote the Effective Use of Law Enforcement Resources

After administrative law enforcement departments transfer cases to judiciary, legal status of the material formed by administrative enforcement departments exist certain controversy. Therefore, it must be established that evidence material legally acquired by intellectual property administrative enforcement organs transform into criminal evidence material in the form of laws and regulations or judicial interpretation in the current framework of Criminal Procedure Law. Public security organs and prosecution intervene in cases of suspected criminal and participate in a joint investigation before being a criminal case according to the request of administrative law enforcement departments. The records of investigation, verification produced in accordance with the relevant rules of criminal procedure, after the investigation of police departments, should also be used as evidence of criminal proceedings. [8]In addition, The "Early Intervention" or "Joint Strike" can be used to solve the problem of transferring time. "Early Intervention" means that administrative law enforcement departments immediately transfer the case to public security organs, when they receive a report or on-site inspection and find the alleged crime. "Joint Strike" refers that administrative law enforcement authorities immediately notify public security organs to be involved, collect evidence, and investigate with them, when they initiate investigation and handle the alleged crime. Before formally transferring to the police, administrative law enforcement departments are able to make administrative punishment on parties, involvement of public security organs does not preclude them to make the decision of administrative penalty, so that is conducive to mobilize the enthusiasm of administrative law enforcement departments and public security organs.

7 Xie Wangyuan, Zhang Ya. On China Mainland intellectual property criminal law protection [J], Modern Law, 2003, (5): 56-63.

8 Zhao Jie. Suspected Intellectual Property Crime Case Transfer Procedure Analysis [J], Knowledge Economy, 2009, (4).

Within a Manageable Range by Crackdown Precisely and Fully through the Transformation of Investigation Concept

Facing with the industrialization and globalization of intellectual property infringement crimes, we need to rely on intelligence information, judgments, the cooperation between public security organs and administrative law enforcement departments to crack down on criminal activity precisely. This not only requires to destroy its dens of crime, but also to obtain sufficient evidence to convict; not only do we need to capture the perpetrators of the on-site implementation of crime, but also to investigate criminal liability of organizers and commander. According to industrial characteristics of intellectual property infringement crimes, we should carry out cross-border, cross-regional, the whole process of combat from the provider of raw materials, production, storage, transportation, sale, export, funds, printing, infringement identification, and various aspects.[9] All in all, public security organs should change the past mode of handling cases, establish a case management idea, and extend the scope of investigation to upstream and downstream of crime. The public security organs at all levels should actively expand channels to take the initiative to strengthen convergence and cooperation with the relevant administrative law enforcement departments to conduct a joint crackdown on journalism, publishing, culture and entertainment, high-tech industry and other fields, manufacturing concentrated, commodity distribution center and other high incidence of areas. Concrete channels include the establishment of information liaison system, multi-party joint meeting held on a regular basis, administrative law enforcement expert consultation on intellectual property criminal cases, and organizing joint law enforcement action. Not only public security organs widen the horizon for handling cases through the establishment of these channels, but also find effective means for prevention and control this kind of crime.

CONCLUSION

Intellectual property infringement crimes are an international problem. Cracking down on such crimes is a shared responsibility of all countries in the world. Recently, the Chinese police and the U.S. Immigration and Customs Enforcement Bureau cooperated through an international police channel and successfully cracked an extraordinarily serious transnational intellectual property crime activity. The police from China and the United States arrested 73 suspects, seized more than 20,000 counterfeit bags bearing fake Louis Vuitton, Hermes and Coach tags, and destroyed 37 production and sales sites.[10] The gang had sold about 960,000 fake bags worth more than 5 billion Yuan ($801.7 million). The police also seized enough material to produce about 50,000 fake bags, and 91 bank cards and accounts used for receiving and transferring funds. This is another successful joint law enforcement action between China and US law enforcers. From now on, Chinese public security organs should explore more diversified cooperation and ways of exchanging assisstnace in order to combat transnational, cross-border intellectual property infringement crimes with open and pragmatic attitude as usual, in addition to actively carrying out the exchange of clues, communications and intelligence, assisting in the investigation and evidence collection, providing judicial assistance, and in carrying out joint actions.

9 Liu Weiwen. Intellectual Property Infringement Crimes Development Trend and Compact Measures Discussion [J], Public Security Research, 2012 (05): 42.

10 Zhang Yan. Fake-brands crackdown nets 73 counterfeiters. http://www.chinadaily.com.cn/china/2012-11/20/content_15942793.htm

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